

CONFIDENTIAL.

III/48.
16th July, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Draft Glossary or General Introduction into the
British Law concerning Trials of War Criminals
by Military Courts.

The Judge Advocate General's observations on Document III/47.

The following observations have been received from
Colonel R.C.Halse, O.B.E.

- I. As further amendments may be issued to Army Order 81 of 1945, it is suggested that the words "as to 24 of 1946" should be deleted and the words "with amendments" substituted.

Reference should also be made to the Canadian Order in Council.

- IV. 2nd paragraph, 10th line.

Delete "after appointed" and add, "but national observers from all nations interested were invited to attend".

Line 14.

Omit reference in brackets.

- V. Delete and substitute "A Judge Advocate may be deputed to assist a British Military court by the Judge Advocate General of the Forces or in default of such deputation may be appointed by the officer convening the court. The duty of the Judge Advocate is to advise the court on questions of law and procedure and to ensure that the accused does not suffer any disadvantage. In fulfilling his duties he is to maintain an entirely impartial position. The Judge Advocate has no voting powers. The members of the court are judges of law and fact and consequently the Judge Advocate's advice need not be accepted by them".

If no Judge Advocate is appointed the convening officer must appoint at least one officer having legal qualifications as President or as member of the court unless, in his opinion, no such officer is necessary (Rule of Procedure 103 and Regulation 5, paragraph 2 of Army Order 81 of 1945, as amended.)

The Legal member is entitled to vote.

- XI. It is doubtful whether any of the writs referred to in this paragraph would run in respect of military courts. Certainly no applicant for a writ of habeas corpus would be successful if he was an enemy national.

III/49.
19th July, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

re: Law Reporting.

Proposals by the Secretary to Committee III
regarding the procedure during the week ending
27th July, 1946.

- 1) The following cases to be inserted into the first volume of the Law Reports were not considered in the meeting held on 10th July (Minutes No.16/46) and should therefore be examined in the next meeting of Committee III.

Case No.5. Scuttled U-boats case. Gerhart Grumpelt. Trial and Law Reports Series No.21.

Case No.6. The Masuda case. Trial and Law Reports Series No.20.

Case No.9. Trial of Robert Wagner and others. (French case). Trial and Law Reports Series No.22.

- 2) The cases considered by Committee III in its meeting held on 10th July, and in previous meetings, have now been redrafted according to the suggestions made during the discussions and the new text is being circulated to members in a series headed "Manuscripts of War Crime Trial Law Reports", Volume I. It is therefore suggested that final approval should be given to the following reports, as re-drafted:

Case No.1,	Peleus,
" " 2,	Dostler,
" " 3,	Almelo,
" " 4,	Hadamar,
" " 7,	Amberger,
" " 8.	Heyer.

- 3) It is further proposed that the draft glossary of the relevant provisions of British Law (Docs. III/47 and III/48) should be examined.
- 4) Committee III should further continue its consideration of the type of publication proposed by Mr. Hodge.

SECRET

III/50.
23rd July, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

THE QUESTION OF THE JURISDICTION OF THE
UNITED NATIONS WAR CRIMES COMMISSION
OVER CRIMES COMMITTED IN ETHIOPIA DURING THE ITALIAN-ABYSSINIAN WAR.

(Referred to Committee III by the Commission on 19th July, 1946.)

Note by the Secretary to Committee III.

-
- (1) The original terms of reference of the Commission agreed upon at the meeting of the Allied and Dominions representatives, held at the Foreign Office, London, on 20th October, 1943, provided that the Commission should serve two primary purposes:-
- (i) It should investigate and record the evidence of war crimes, identifying where possible the individuals responsible.
 - (ii) It should report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming.

The Lord Chancellor (Lord Simon) proposed that the meeting should take a decision to set up the Commission forthwith but that the question of the possible expansion of the scope of these investigations and functions should be reserved for future consideration. This was unanimously agreed.

During the debate preceeding this decision, the Chinese Ambassador said that, while his government were in full agreement with the proposal to establish the Commission, they wished to make it clear that they reserved the right after the Commission has been set up to raise the question of the period of time which its investigations should cover in so far as war crimes committed in China were concerned. In this connection Dr. Wellington Koo pointed out that China had suffered the consequences of enemy invasion for a longer period than the other Governments represented at the meeting. The meeting took note of this statement.

- (2) From the terms of reference, in connection with the statement by the Chinese Ambassador, which was taken note of, it appears that although the Governments who set up the Commission had, no doubt, in their minds crimes committed during the war, which was then raging, no express limitation to the effect that crimes committed prior to the beginning of the second World War should be excluded from the Commission's jurisdiction was made.

The question appears to be still open for decision by the members of the Commission.

- (3) With regard to Italian crimes committed in Ethiopia in 1935/1936, two questions therefore arise:

- (a) Are the terms of reference of the Commission to be construed to the effect that they only cover war crimes committed during the war which was raging in 1943, the Second World War, or are the terms of reference of the Commission not so restricted?
- (b) In case the terms of reference are restricted to war crimes committed during the Second World War: Is the Italian-Abyssinian War of 1935/36 a war different from the Second World War or does it, like the Japanese-Chinese "incident", form part of the Second World War, having been merged into it?

- (4) The first of the two questions posed in the preceeding paragraph appears to be not a question of law, but of policy. The position as to the period of time which the Commission's investigations should cover, was expressly left over for a later decision by the Commission or its member governments.

- (5) With regard to the second question raised in paragraph 3 of this paper, viz. whether the Italo-Abyssinian war was a war different from the Second World War, this writer has not had an opportunity of examining all the relevant documents for the purpose of this preliminary report. He submits, therefore, as a provisional basis for further discussions by Committee III, the following:

Before 1939, it was generally understood that the Italian-Abyssinian War had been concluded by the debellatio of Ethiopia and by the annexation of Ethiopia by Italy. The question arose at the time whether the Italian Proclamation of Annexation of 9th May 1936 was premature, but, eventually, the Great Powers acquiesced in the conquest of Abyssinia and it was recognised by most governments *de jure* and by all governments *de facto*.

In, say, 1938 or 1939, the question whether the Italian-Abyssinian war had come to an end would unambiguously have had to be answered in the affirmative.

- (6) The question remains whether later events have with retrospective effect, brought about a change in this position.

In the Agreement between the United Kingdom and Ethiopia of 31st January 1942, the government of the United Kingdom recognised that Ethiopia was then a free and independent State. ("Whereas the Government of the United Kingdom recognise that Ethiopia is now a free and independent State and His Majesty the Emperor, Haile Selassie I, is its lawful Ruler, and, the reconquest of Ethiopia being now complete, wish to help His Majesty the Emperor to re-establish His Government and to assist in providing for the immediate needs of the country") (Preamble)

Diplomatic relations between the United Kingdom and Ethiopia were re-established (Art.I), the Emperor of Ethiopia agreed to enact laws against trading with the enemy (Art.VI), he agreed that all prisoners of war shall be handed over to the custody of the British Military Authorities (Art.VII). The Government of the United Kingdom promised to use their best endeavours:

- (a) To secure the return of Ethiopians in Italian hands, and
- (b) To secure the return of artistic works, religious property and the like removed to Italy and belonging to His Majesty the Emperor, the Ethiopian State, or local or religious bodies. (Art.VIII).

Simultaneously, a Military Convention was concluded "to provide for certain matters relating to mutual assistance as Allies in the struggle against the common enemy". In the Military Convention, it was agreed, inter alia, that the appropriate British authority will, on receipt of an application signed by the appropriate official of the Ethiopian Ministry of Justice, surrender any person not being a member of the British Forces who is within any British cantonment or reserved area, and against whom a warrant of arrest has been issued, in respect of any offence triable by an Ethiopian Court. (Art.16 of the Military Convention).

The 1942 Agreement and Military Convention were superseded by an Agreement concluded on 19th December 1944. In this agreement the Ethiopian government agreed to certain provisions "in order as an Ally to contribute to the effective prosecution of the war and without prejudice to their underlying sovereignty". (Art.VII). The contracting parties undertook to collaborate in arrangements for the internment or expulsion of enemy aliens or ex-enemy aliens (Art.X.)

- (7) The quoted provisions of the 1942 and 1944 Agreements between the United Kingdom and Ethiopia did not, in this writer's opinion, amount to a complete and unqualified reversal, with retrospective effect, of the position brought about in 1936. The position at the time prior to 1942 was left where it was and the British Government only recognised that Ethiopia was then, namely in 1942, a free and independent State waging war against "a common enemy".

The 1942 and 1944 Agreements are, therefore, not irreconcilable with the proposition that the 1935/1936 war between Italy and Abyssinia was and has remained a war different from the Second World War.

From the Ethiopian point of view the situation is probably different because the Ethiopian government has not recognised the annexation of Ethiopia by Italy and the Ethiopian Emperor in the Preamble to the 1942 Agreement recites his coronation pledges "not to surrender his sovereignty or the independence of his people".

- (8) It therefore appears that also the second question, (b), contained in paragraph 3 of this paper is not a question of law stricto sensu, but a question governed by a political decision.

It was indicated by a member of the Commission, (Dr.Zivković) in the Commission meeting held on 19th July 1946, that the thesis that the whole war against the "Axis" is one war, has been adopted by the Great Powers in the London Agreement of 8th August 1945, which deals with the prosecution and punishment of the major war criminals of the European Axis. It should be added that the use of the term "Axis" is more a pronouncement of a political view than the laying down of a rule of law. As a legal notion, the "Axis" did not exist in 1935/36. The tripartite pact of Germany, Italy and Japan was formally concluded in 1939. But it must, on the other hand, be admitted, that the use of the term "European Axis" indicates the intention to treat the Axis and the criminal activities of its representatives as one whole, at least as far as the task of retribution is concerned.

- (9) The question dealt with in this paper, namely whether crimes committed by Italians in Abyssinia in 1935/36 fall under the jurisdiction of the Commission may also be approached from a slightly different angle, namely: by analysing the term "war crimes" which is used both in the

terms of reference of the Commission and in a great number of other international documents, e.g. in the Charter of the International Military Tribunal.

In the meeting of the Commission held on 30th January 1946, (M.93), a motion was approved by 9 votes, with 6 abstentions, and accordingly carried, to the effect that crimes against peace and against humanity, as referred to in the Four-Power Agreement of 8th August 1945, are war crimes within the jurisdiction of the Commission. The term "crimes against humanity" (Article 6(c) of the Charter) comprises murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war. From this it follows that crimes against humanity, even if committed before the war, fall within the jurisdiction of the Commission. This does not necessarily mean that crimes against humanity committed during another war are also within the jurisdiction of the Commission, although a conclusion to this effect would not appear to be illogical.

It must be admitted, however, that this line of thought is to a certain extent, artificial. Nor would the consequences be satisfactory. Crimes against humanity committed against the Abyssinian civilian population would be subject to the Commission's jurisdiction, violations of the laws and customs of war, which are not simultaneously crimes against humanity, would remain outside its terms of reference. In other words: war crimes in the narrower sense would be excluded from the Commission's jurisdiction, while war crimes in the wider sense would fall under it.

The practical application would also show unsatisfactory features. The Commission would have to list persons accused of having committed crimes against Abyssinian civilians, but it would have to reject charges regarding similar crimes committed against members of the Abyssinian Armed Forces.

- (10) Finally, attention may be drawn to a provision, issued by the four Great Powers, for the territory of Germany under the jurisdiction of the Allied Control Council. This provision, (Law No.10 published in Military Government Gazette (Germany) No.5.), makes the Moscow Declaration and the Four Power Agreement part of the territorial law of Germany and may certainly be regarded as a document explanatory of the Four Power Agreement. Article II paragraph 5 of this Law provides that in any trial or prosecution for a crime therein referred to (which includes war crimes in the narrower sense, as well as crimes against peace and crimes against humanity) the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30th January 1933 to 1st July 1945. This provision obviously implies that war crimes in the wider sense, including crimes against peace and crimes against humanity, committed even before the 30th January 1933, are within the scope of the retributive action of the Allied Nations.

III/51
23 July 1946

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

re: Law Reporting

The following text of a letter received by the Secretary to Committee III from Mr. James H. Hodge is circulated for the information of members:-

"Dear Dr. Schwelb,

18th July, 1946.

Many thanks for your letter of the 16th inst. I shall be glad to hear from you in due course of the result of the Committee's deliberations and sincerely trust that they will proceed with the publications suggested.

I visited Professor Lauterpacht at Cambridge to ask his guidance as to the best type of person to be entrusted with the editorship of such volumes, and he gave me much useful advice. He is of the opinion that such a series would be useful, instructive, and a valuable record for the future.

It is my view that a general editor should be agreed upon if the project goes forward, as this will materially assist in the correct presentation and evenness of the volumes to be published. In this respect I have asked Professor Lauterpacht, in the event of my firm being entrusted with the publication, whether he would consider acting as such an editor. I feel sure that he would prove eminently suited to such a task should he be able to spare the necessary time; of course, he is extremely occupied at present. If he is too pressed to manage this, he may very likely suggest someone who would prove acceptable to your Commission. I shall let you know what he says.

If your Committee requires any further information I shall be glad to come South to meet them at any time. The last meeting somewhat took me aback as it was on a much larger scale than I had anticipated.

Yours sincerely,

James H. Hodge.

P.S. We treat this series most seriously, and I wish to stress the fact that editors will not be permitted to express views of their own as in the case of 'our normal trials.'

SECRET.

III/52.
24th July, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Publication of Trial Reports by Messrs. Hodge & Co.

Proposals by the Secretary General

to Committee III.

- (1) As a result of the discussions so far conducted both by the Commission and by Committee III, it is suggested that a letter on the lines contained in paragraph 4 of this paper should be sent by the Secretary General to Messrs. Hodge & Co. after a recommendation to this effect has been adopted by Committee III and agreed to by the Commission.
- (2) In addition to approval by the Commission, it is suggested that the concurrence of the appropriate British authorities should be sought before despatching the letter, in view of the fact that they are primarily concerned with this project as mainly British trials will be made available to Hodge for the present.
- (3) It is further suggested that legal advice from a British lawyer conversant with such contracts should be sought before committing the Commission to the undertaking contained in the draft letter.
- (4) The text of the letter might be as follows:

" Dear Sirs,

Reports on Trials of War Criminals.

Referring to our previous correspondence on the above subject, and to our discussions with you at various times, I write to inform you that the United Nations War Crimes Commission has now agreed to a scheme regarding publication of full reports of Trials of War Criminals by your firm and that it is prepared to recommend to its member governments the adoption of the scheme under the following terms:-

- (a) Member Governments who may wish to avail themselves of your services, will place at your disposal the transcripts, records and documents which they want to be made the basis of your publication.
- (b) In cases where additional spare copies of the documents mentioned are not available, the Commission would be prepared to lend you any copy which had been made available to the Commission by its member Governments for official use, provided you undertake the safe return of such copies undamaged.
- (c) The agreement of this Commission with regard to the person or persons to be entrusted with the editing of the individual trials, and the person you may wish to appoint as General Editor for the whole scheme, will be necessary. The Commission's consent to these persons will not be unreasonably withheld.

(d) The drafts of any commentaries and forewords to be included in the publications will be submitted to the Commission for approval and you will undertake to abide by any decisions which the Commission may deem fit to make in this respect.

(e) It will be a matter of a special agreement between the Commission and you where, in which cases and in what manner, reference will be made in the publication itself to the "United Nations War Crimes Commission."

(f) The United Nations War Crimes Commission has the right to transfer its powers under this agreement to any international or national body which should take over its functions, if the Commission should be wound up before the work of publication is concluded.

(g) You will make your own arrangements with the Government or Government department concerned with regard to copyrights, to the payment of fees, if any, for the right to use the documents, and all other questions of financial agreements.

(h) The Commission itself does not undertake any financial responsibility for the publication nor does it desire financial reward for the supervisory function to be exercised by it under the foregoing provisions.

Yours sincerely,

Secretary General. "

III/53.
12th August, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

DRAFT ANNEX ON THE LAW APPLICABLE TO

WAR CRIMES TRIALS CONDUCTED BY

FRENCH MILITARY TRIBUNALS.

By G. Brand.

(The present document is circulated as a basis for drafting Annex III, to be inserted in Volume I of the Law Reports, and, with any suitable modifications, in subsequent Volumes.)

I. The Jurisdiction and Legal Basis of French Permanent Military Tribunals for the Trial of War Criminals

French Military Tribunals for the trial of war criminals are set up by virtue of the Ordinance of August 28th 1944, Concerning the Suppression of War Crimes. It was promulgated in Algiers, and Article 6 states: "The present Ordinance is applicable to Algiers and the colonies. It will be published in the Journal Officiel of the French Republic and shall be put into effect as law". This Article is not, however, to be interpreted in any restrictive sense, since the Ordinance has been used as the basis of numbers of trials held in Metropolitan France.

The first paragraph of Article 1 of the Ordinance runs as follows: "Enemy nationals or agents of other than French nationality who are serving enemy administration or interests and who are guilty of crimes or delicts committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before June 17th, 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies, shall be prosecuted by French military tribunals and shall be tried in accordance with the French laws in force, and according to the provisions set out in the present Ordinance, where such offences, even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war".

It is not specified which type of Military Tribunals are to deal with cases of War Crimes. The Code de Justice Militaire makes provisions, and in some respects different provisions, for several kinds of Military Tribunals, namely Permanent Military Tribunals, and Military Tribunals attached to the armies, in territorial districts in a state of war, in communes or departments in a state of siege, and in besieged or invested war areas. There are also Military Appeal Tribunals (Tribunaux Militaires de Cassation), to which, by definition, a prisoner could not of course be sent in the first instance. All of the trials recorded in documents so far received by the United Nations War Crimes Commission have been held by Permanent Military Tribunals, and it is, therefore, in relation to them that this Annex speaks.

Article 124 of the Code de Justice Militaire states that: "In time of war, there shall be at least one Permanent Military Tribunal in each military region; the seat of this Military Tribunal shall,

in principle, be the chief town of the military region...."

II. The Composition of a French War Crimes Tribunal

Article 5 of the Ordinance runs as follows: "For adjudicating on war crimes, the military tribunal shall be constituted in the manner laid down in the Code de Justice Militaire. The majority of the military judges shall be selected from among officers, non-commissioned officers and other ranks belonging, or having belonged, to the French Forces of the Interior or a Resistance Group."

III. Persons Subject to the Jurisdiction of French Military Tribunals for the Trial of War Crimes

Article 1 of the Ordinance states that the persons liable to prosecution thereunder are: "Enemy nationals or agents of other than French nationality who are serving enemy administration or interests and who are guilty of crimes or delicts committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before 17th June 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies."

Article 4 lays down that "Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates."

In the trial of Wagner and Six Others, both the Acte d'Accusation and the judgment of the Tribunal refer to Articles 59 and 60 of the Code Pénal as being relevant to the charge and to the sentence respectively.

Article 59 of the Code states that "The accomplices to a crime or a delict shall be visited with the same punishment as the authors thereof, excepting where the law makes other provisions".

Article 60 includes the following words: "They shall be punished as accomplices for an act treated as a crime or a delict, who, by gifts, promises, threats, abuse of authority or power, scheming or culpable deceit, have provoked that act, or given orders for its commission."

It is worthy of note that a large proportion of the questions put by the President before the Judges in the Wagner trial enquired whether the accused had been accomplices in the commission of the various acts alleged. The wording of Article 60 is particularly interesting in view of the fact that the Judges were asked whether Wagner had been an accomplice, "in abuse of authority or power", in the passing of the illegal sentences alleged in the case, and in the shooting of the prisoners of war. The Judges were also asked whether Rahn, in like manner, had been an accomplice in the latter crime.

IV. Crimes made Punishable by the Ordinance

The terms "War Crime" and "War Criminal" are left undefined in the Ordinance, but it seems to follow from the wording of Article 1 that the offences to be punished are such infractions of French Law as are not made justifiable by the laws and customs of war.

It will be noted that the scope of the term "War Crime" as thus defined, is not quite the same as that laid down in the British Royal Warrant, where it signifies a violation of the laws and usages of war themselves, committed during any war in which His Majesty has been or may be engaged since 2nd September 1939.

Attention should be drawn to the offences specifically mentioned in the second paragraph of Article 1 and in the whole of Article 2. These passages are as follows:-

"In particular, the offences specified and made punishable under Articles 92, 132, 265 et seq., 295, 296, 301, 302, 303, 304, 309 to 317, 332, 334, 341, 342, 343, 344, 379, 400, 434 to 459 of the Code Pénal and Articles 214, 216, 221 et seq. of the Code de Justice Militaire shall be the subject of prosecution in accordance with the above provisions, if they have been committed in the circumstances described in paragraph 1 of the present Article.

Article 2. - The provisions of the Code Pénal and of the Code de Justice Militaire shall be interpreted as follows:

1. The illegal recruitment of armed forces, as specified in Article 92 of the Code Pénal, shall include all recruitment by the enemy or his agents;
2. Criminal association, as specified in Articles 265 et seq. of the Code Pénal, shall include within its scope organisations or agencies engaged in systematic terrorism;
3. Poisoning, as specified in article 301 of the Code Pénal, shall include the exposure of persons in gas chambers, the poisoning of water or foodstuffs, and the depositing, sprinkling or applying of noxious substances intended to cause death;
4. Premeditated murder, as specified in Article 296 of the Code Pénal, shall include killing as a form of reprisal;
5. Illegal restraint, as specified in Articles 341, 342 and 343 of the Code Pénal shall include forced labour of civilians and deportation for any reason whatever of any detained or interned person against whom no sentence which is in accordance with the laws and customs of war has been pronounced.
6. Illegal restraint, as specified in paragraphs 1 and 2 of Article 344 of the Code Pénal, shall include the employment on war work of prisoners of war or requisitioned civilians;
7. Illegal restraint, as specified in the last paragraph of Article 344 of the Code Pénal, shall include the employment of prisoners of war or civilians in order to protect the enemy;
8. Pillage, as specified in Articles 221 et seq. of the Code de Justice Militaire, shall include the imposition of collective fines, excessive or illegal requisitioning, confiscation or spoliation, the removal or export from French territory by whatever means of property of any kind, including movable property and money."

Certain of the Articles mentioned in the second paragraph of Article 1, and not elucidated in Article 2, have been dealt with in the notes to the Wagner Case; it has been seen that Articles 295 and 296 of the Code Pénal define premeditated murder. As this Annex states elsewhere, Article 302 provides the penalty for premeditated murder, patricide and poisoning, and Article 304 provides the penalty for murder. (*)

Of the remainder, Article 132 of the Code Pénal deals with the counterfeiting and altering of French money and the circulation thereof, Articles 205 et seq with conspiracies to commit crimes

(*) See pp:

against persons or property, 303 with torture and acts of barbarity, 309-317 with voluntary wounding and striking, not regarded as murder, and other voluntary crimes and delicts, 332 and 334 with certain sexual offences, 379 with theft, 400 with extortion, and 434-459 with arson and other forms of destruction. Article 214 of the Code de Justice Militaire deals with abuse of authority and 216 with offences against wounded sick and dead soldiers.

V. Provisions Regarding the Defence of Superior Orders

Article 3 of the Ordinance runs as follows: "Laws, decrees or regulations issued by the enemy authorities, orders or permits issued by these authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Article 327 of the Code Pénal, but can only, in certain circumstances, be admitted as extenuating or exculpating circumstances."

Article 327 of the Code Pénal makes the following provision: "No crime or delict is committed when the homicide, wounding or striking was ordered by the law or by legal authority".

VI. Penalties Attaching to War Crimes

Article I of the Ordinance states simply that the persons specified therein shall be "prosecuted by French military tribunals and shall be judged in accordance with the French laws in force."

Apart from making certain special provisions concerning military degradation and loss of rank and prohibition of residence, and apart from providing the penalties attaching to the commission of a delict, Article 192 of the Code de Justice Militaire, the only article appearing under the Chapter heading: "Penalties Applicable" states: "The penalties which can be applied within the military jurisdictions for crimes are those laid down in Articles 7 and 8 of the Code Pénal."

These Articles, together with the preceding one, read as follows:

" 6. The penalties for crimes are either corporal and ignominious, or simply ignominious.

7. The penalties which are corporal and ignominious are:

- (1) death; (2) penal servitude for life; (3) deportation;
- (4) penal servitude for a term; (5) detention; (6) confinement.

8. The ignominious penalties are:

- (1) banishment; (2) civic degradation. "

These articles provide the possible range of punishment under French Criminal Law; Articles providing against individual offences supply the relevant penalties. For instance, in the Wagner trial, Articles 302 and 304 of the Code Pénal were referred to by the Prosecution, and by the Tribunal in its judgment. The former provides that the penalty for premeditated murder, patricide and poisoning shall be death. The latter lays down that simple murder (i.e. voluntary homicide) shall be punished by penal servitude for life, except in two cases, when the death penalty shall be pronounced. The first arises when the murder has been preceded, accompanied or followed by

another crime. The second arises when the murder has had as its object the preparation, facilitation or execution of a delict, or the facilitating of the flight, or assuring of the impunity, of the authors or accomplices of a delict. (1)

VII. The Procedure followed in French War Crimes Trials

The Ordinance makes no special provisions regarding procedure, but simply makes reference to trial "in accordance with the French laws in force". It is useful however, to make a short survey of the procedure applied in French war crime trials, with particular reference to the Wagner case.

After his preliminary investigation of a case, a military Juge d'Instruction decides whether it should go before a Military Tribunal for trial. (2)

Article 68 of the Code de Justice Militaire, to which reference was made by the Tribunal in rejecting the plea made by Gruner's Counsel to the Jurisdiction of the Tribunal, includes the following passage:

"For all acts liable to be punished by sentences of death, deportation, penal servitude, imprisonment or confinement, the case can be sent before a Military Tribunal only by the Court of Indictment (Chambre des mises en accusation) of the Appeal Court for the jurisdictional area within which the Tribunal operates."

In peace time, accordingly, the Juge d'Instruction must refer such cases to the Court of Indictment of the appropriate appeal court, in accordance with Article 66 of the Code, which provides to that effect.

As the Tribunal trying the Wagner Case pointed out, however, Article 68 of the Code de Justice Militaire is not applicable "in time of War". Article 125 bis of that code provides that: "All the rules laid down in the Title I of this Code, concerning Permanent Military Tribunals in time of peace, must be observed also as regards Permanent Military Tribunals in the territorial districts in time of war, the powers of the General commanding the territorial district in time of peace being transferred to the General commanding the military region or the territorial district to the extent of the territory under his authority, provided that:

(2) In time of war, Article 68 shall be inapplicable, and the sending of cases before a Military Tribunal by Order of Committal shall be carried out by a military Juge d'Instruction, as regards both Permanent Military Tribunals and Military Tribunals attached to the armies."

The next step is provided by Article 69 of the Code de Justice Militaire, which lays down that the Public Prosecutor (Commissaire du Gouvernement) shall be charged with taking action against the accused

(1) And see also the penalties provided by the Articles quoted in the notes to the Wagner Trials, pp..... Articles 35 and 37 of the Code Pénal, to which also the Acte d'Accusation (Charge sheet) and the Tribunal referred, make general provisions regarding the cases where civic degradation may, or must, be accompanied by imprisonment, and regarding wartime confiscation for the benefit of the nation of the goods of a condemned person.

(2) Article 42 bis of the Code states that, in cases of delicts, the General commanding the territorial district may, after consulting the Public Prosecutor, decide to follow a different procedure, according to which the preliminary investigation is not conducted by a Juge d'Instruction but by army officers of certain specified ranks.

before the Military Tribunal. He must immediately cause the accused to be notified of the Order of Committal (Ordonnance de Renvoi) whereby the Juge d'Instruction has sent the case before the Military Tribunal. He communicates the same Order to the authority which gave the Order of Enquiry. (3) He sends, to the General commanding the territorial district in which the Military Tribunal sits, a request for its convocation. Finally, he must also draw up an *Note d'Accusation* (Charge Sheet). This document is, in fact, a recital of the facts alleged by the Prosecution.

Article 71 of the Code states that, three days at least before the meeting of the Tribunal, the Public Prosecutor shall communicate to the accused the *Note d'Accusation*, with the text of the law applicable and the names of the witnesses whom he proposes to call. If the accused has not chosen a defending Counsel, a Counsel will be officially provided for him.

Article 72 of the Code provides that trials shall be public, except where the Tribunal decides that this appears dangerous to public order or morals. In any case the judgment must be delivered in public.

Article 119 of the Code, which was mentioned in the Wagner proceedings in connection with the absence of Huber, contains the following passages: "When the accused has been referred to a Military Tribunal for trial and it has not been possible to arrest him, or when he has escaped after being arrested, ... on the receipt of the Decision (4) or Order of Committal, and on the initiative of the Public Prosecutor, the President of the Military Tribunal shall issue an Order, setting out the crime or delict for which proceedings are being taken against the accused, and stating that he will be held bound to present himself within six days, reckoning from the date of execution of the last of the formalities connected with the publication of the said Order.

In wartime, or where the territory in which the offence has been committed is declared to be in a state of siege, the period shall be reduced to five days."

If the accused fails to present himself during the period of grace, Article 120, quoting a Decree-law of 20th May 1940, states that proceedings can be taken against him in his absence or in default (*par contumace ou par défaut*).

The discretionary power of the President regarding the use of evidence, which was referred to in the Wagner trial, arises out of Article 82 of the Code, which includes the following words: "The President shall have a discretionary power in relation to the conduct of the proceedings and the finding of the truth. He shall be able, during the proceedings, to cause to be produced any evidence which seems to him to be of value for the finding of the truth, and to call, even by means of a summons, or to produce, any person to whom it seems necessary that a hearing should be given".

(3) By "Order of Enquiry" is meant the "Order d'Informer" which, in accordance with Article 24 of the Code de Justice Militaire, a General commanding a territorial district must communicate to the appropriate Public Prosecutor if he is satisfied that proceedings should be started before a Military Tribunal against someone amenable to its jurisdiction. The latter then refers the matter to the Juge d'Instruction attached to the Tribunal.

(4) A reference to the decision of a higher court referring a matter to a Military Tribunal for trial. See earlier in these notes on procedure.

After the examination of the witnesses, the accused and the evidence, and after hearing the arguments of Counsel, the accused and his Counsel having the last word, the Tribunal must then, in accordance with Articles 89 - 91 of the Code, retire and vote by secret ballot, answering "yes" or "no" to the questions of fact and law put by the President. By a law of 3rd February 1941, a simple majority is sufficient for decisions on these questions, during war-time. Should the accused be found guilty, the Tribunal must then, by virtue of Article 91 of the Code, decide whether there were extenuating circumstances, and must fix the penalty.

In accordance with Article 93, the President of the Tribunal must then read the judgment in public sitting.

VIII. Provisions Regarding Appeals

Article 125 bis of the Code de Justice Militaire, quoting a Decree of 3rd November 1939, provides that in time of war Permanent Military Appeal Tribunals shall be set up, their number, seat and jurisdiction being fixed by decree. They are to try only persons convicted by Military Tribunals. Article 135 of the Code states that such persons shall have twenty-four hours during which they may appeal to such a court. This period begins to run at the end of the day on which the judgment of the Military Tribunal is read.

Article 134 states that: "Military Appeal Tribunals can annul decisions only in the following cases:

- (1) when the Military Tribunal has not been composed in accordance with the provisions of the Code,
- (2) when the rules of competence have been violated,
- (3) when the penalty laid down by the law has not been applied to the acts declared to be proved by the Military Tribunal or when a penalty has been pronounced which goes beyond the cases stated by the law,
- (4) when there has been a violation or omission of the formalities laid down by law as a condition of validity, and
- (5) when the Military Tribunal has omitted to decide upon a request of the accused, or an application of the Public Prosecutor, which aims at making use of a power or a right accorded by the law."

According to Article 138 which quotes a Decree of 3rd November 1939, "In all cases where a Military Appeal Tribunal has been established, persons sentenced by Military Tribunals cannot appeal to the Court of Appeal (Cour de Cassation) against the decisions of Military Tribunals and of Military Appeal Tribunals."

III/54.
16th August 1946.

UNITED NATIONS WAR CRIMES COMMISSION

DRAFT GLOSSARY OR GENERAL INTRODUCTION

INTO

UNITED STATES LAW CONCERNING TRIALS OF WAR CRIMINALS
BY MILITARY COMMISSIONS AND MILITARY GOVERNMENT COURTS.

By Egon Schwelb, Legal Officer.

The following is a draft of Annex II to Volume I of the Law Reports to be published. The Draft of Annex I containing a general introduction into the British law concerning trials of war criminals by Military Courts was circulated as Document III/47 and agreed upon by Committee III with certain amendments (See also Document III/48). Its final text is being circulated in the "Manuscript series".

A draft of Annex III, containing an introduction into the relevant French provisions has been circulated as Document III/53 and has also with the kind help of the French representative been submitted to the French authorities for checking.

The present paper deals with the appropriate provisions of United States law.

I. The different types of United States Military and Military Government Tribunals.

In United States Law there are three types of Military Tribunals, namely (a) Courts Martial, (b) Military Commissions and (c) Provost Courts. In addition to these Tribunals, based on internal United States law, both common law and statute, there exist in territory occupied by United States forces (d) Military Government Courts. In the present publication, which deals with the trial of war criminals by Allied Courts, we are not concerned with the type of Military Tribunals mentioned under (a) (Courts Martial) because the jurisdiction of Courts Martial is generally restricted to "persons subject to the Articles of War", i.e., roughly speaking, to members of the United States Army. Provost Courts (supra (c)) are tribunals of a summary nature. As there have been no trials of war criminals before United States Provost Courts, this type can also remain outside the scope of this introduction which therefore will be restricted to: Military Commissions (Part I) and to Military Governments Courts (Part II).

Part I: United States Military Commissions.

II. The Basic Provisions.

The United States Military Commissions are an ancient institution going back to the Mexican war in the first half of the nineteenth century. They have been described as the American common law war court.

They were not created by statute, but recognised by statute law. In very recent decisions, (the so-called Saboteur case ex parte Richard Quirin (1942); in re Yamashita (1946) and in re Homma (1946) the Supreme Court of the United States had occasion to consider at length the sources and nature of the authority to create Military Commissions. The Supreme Court stated that Congress and the President, like the courts, possess no power not derived from the Constitution of the United States. But one of the objects of the Constitution, as declared by its preamble, is to "provide for the common defence". As a means to that end the Constitution gives to Congress the power to "provide for the common Defence", "To raise and support Armies", "To provide and maintain a Navy", and "To make Rules for the Government and Regulations of the land and naval Forces". Congress is given authority "to declare War and make Rules concerning Captures on Land and Water", and "To define and punish Piracies and Felonies committed on the high seas and Offences against the Law of Nations". In the exercise of the power conferred upon it by the constitution to "define and punish offences against the law of nations", of which the law of war is a part, the United States Congress has by a statute, the Articles of War, recognised the "Military Commissions" appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offences against the law of war. The Supreme Court pointed out that Congress, by sanctioning the trial of enemy combatants for violations of the law of war by Military commission had not attempted to codify the law of war or to mark its precise boundaries. Instead it had incorporated, by reference, as within the pre-existing jurisdiction of military commissions created by appropriate military command, all offences which are defined as such by the law of war, and which may constitutionally be included within the jurisdiction.

The Constitution confers on the President the "executive Power" and imposes upon him the duty to "take care that the Laws be faithfully executed". It makes him the Commander in Chief of the Army and Navy. The Constitution thus invests the President as Commander in Chief with the power to wage war and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations including those which pertain to the conduct of war.

Finally the Supreme Court held that Congress by sanctioning trials of enemy aliens by military commission for offences against the law of war had recognised the right of the accused to make a defence. It has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial.

Article 38 of the Articles of War provides that the President of the United States may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof in cases before courts-martial, courts of inquiry, military commissions and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognised in the trial of criminal cases in the district courts of the United States, provided that nothing contrary to or inconsistent with the Articles of War shall be so prescribed. From this it follows that the President of the United States as the Commander in Chief of the Armed Forces, and the Commanders in the field deriving their power from the Chief Executive, have the power to appoint Military Commissions and to prescribe the rules and regulations under which they have to operate.

III. Regulations for the trial of war criminals
by Military Commissions.

The British Royal Warrant of 14th June 1945 (see Annex I of this Volume) has made regulations for the trial of war criminals for all British Military Courts in all theatres of operations and in all territories under the jurisdiction of the United Kingdom Government and armed forces.

The United States authorities have made different provisions for different territories. From the decision of the Supreme Court of the United States in ex parte Richard Quirin it appears that the President, as President and Commander in Chief of the Army and Navy, by Order of July 2nd 1942 (7 Federal Register 5103), appointed a Military Commission and directed it to try Richard Quirin and seven other German nationals for offences against the law of war and the Articles of War and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation, (7 Federal Register 5101), the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States through coastal or boundary defences, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the laws of war, shall be subject to the law of war and to the jurisdiction of military tribunals". The Supreme Court of the United States in its decision ex parte Richard Quirin upheld the legality of this procedure by the President.

Similarly by Command of General McNarney, Regulations for the Trial of War Crimes for the Mediterranean theatre of operations were made on the 23rd September 1945 by circular No. 114; these Regulations (in the following pages called the Mediterranean Regulations), formed the basis of the proceedings against General Dostler (see Case 2 of this Volume).

By command of General Eisenhower, a directive regarding Military Commission in European theatre of operations were made by an Order of 25th August 1945 (to be called European directive hereafter). These rules applied, e.g. to the Hadamar trial (case No. 4. of this Volume). For the United States Armed Forces, Pacific, Regulations governing the trial of war criminals were made by General MacArthur on 24th September 1945. These regulations (to be called in this note Pacific Regulations) formed the basis of the trial, inter alia, of the Japanese General Yamashita the proceedings of which were eventually reviewed by the Supreme Court of the United States.

IV.- The Definition of War Crime in the Regulations for the
trial of war criminals in the different United States
theatres of operations.

In the Mediterranean Regulations, "war crime" is defined as meaning a violation of the laws or customs of war. Under the European directive (1a) military commissions are appointed for the trial of persons who are charged with violations of the laws or customs of war, of the law of nations, or of the laws of occupied territory or any part thereof.

In the Pacific Regulations the offence falling under the Jurisdiction of the Military Commissions are described as follows (5):

"murder, torture or ill-treatment of prisoners of war or persons on the seas; killing or ill-treatment of hostages; murder, torture or ill-treatment, or deportation to slave labor or for any other illegal purpose, of civilians of, or in, occupied territory; plunder of public or private property; wanton destruction of cities, towns or villages; devastation, destruction or damage of public or private property not justified by military necessity; planning, preparation, initiation or waging of a war of aggression, or an invasion or war in violation of international law, treaties, agreements or assurances; murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or connection with any offence within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated; and all other offences against the laws or customs of war; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy". The jurisdiction of the Military Commissions operating under the Pacific Regulations, is, therefore, considerably wider than that of the Military Commissions in the Mediterranean theatre, and also wider than those falling under the European directive because, in addition to violations of the laws and customs of war (or war crimes in the narrower sense,) it comprises in a way similar to the International Military Tribunal created by the Four Power Agreement of 8th August 1945, also what is there called crimes against peace and crimes against humanity.

V. Composition of the Military Commissions.

Military Commission shall, under all three Regulations mentioned, be composed of not less than three members. In the European and Mediterranean Theatres of Operations, the members must be officers of the United States Army. The Pacific Regulations, on the other hand, provide also for "international military commissions consisting of representatives of several nations or of each nation concerned, appointed to try cases involving offences against two or more nations or any other offences; and commissions consisting of members of any one branch or of several branches of the army services of one or more nations".(2). The most outstanding instance of an American Military Tribunal consisting of representatives of several nations is the International Military Tribunal for the Far East which was established by Special Proclamation of General Douglas MacArthur of 19th January 1946 (as amended by a subsequent Order of 26th April 1946)"for the just and prompt trial and punishment of major war criminals in the Far East." The Pacific Regulations also provide that persons whose offence have a particular geographical location outside Japan may be returned to the scene of their crimes for trial by competent military or civil tribunals of local jurisdiction, (5b) which is an application of the Moscow Declaration of 30th October 1943 to the Pacific theatre of war.

VI. The Judge Advocate.

In American law the function of the Judge Advocate is entirely different from that of the Judge Advocate in British Military Tribunals. Whereas the British Judge Advocate is an impartial adviser to the Tribunal (see Annex I of this Volume, paragraph) Article 17 of the American Articles of War provides that the trial judge advocate of a general or special court martial shall prosecute in the name of the United States, and shall, under the direction of the Court, prepare the record of its proceedings. The Mediterranean Regulations (3) provide that for each military commission there shall be appointed a judge advocate and a defence counsel with such assistants as may be required, whose duties shall be similar to those of like officers before general courts martial. Similar provisions apply

to the European (1c) and Pacific theatres, in the latter case it being also provided (11) that in prosecutions for offences involving more than one nation, each nation concerned may be represented among the prosecutors.

VII. Rules of Procedure.

The Mediterranean Regulations provide (8) that military commissions shall conduct their proceedings as may be deemed necessary for full and fair trial, having regard for but not being bound by, the rules of procedure prescribed for general courts martial. In the European directive, it is stated (2) that military commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings consistent with the powers of such commissions, and with the rules of procedure set forth in the directive, as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure and evidence prescribed for general courts martial. In the Pacific Regulations it is provided, inter alia, that the commission shall confine each trial strictly to a fair, expeditious hearing on the issues raised by the charges, excluding relevant issues or evidence, and preventing any unnecessary delay or interference (13a). Sessions of the Commission shall be public except when otherwise directed by the Commission (13c). The accused shall be entitled, inter alia, to be represented prior to, and during trial by counsel of his own choice or to conduct his own defence. If the accused fails to designate his counsel, the commission shall appoint competent counsel to represent or advise the accused (14b). The accused shall be entitled to have his counsel present relevant evidence at the trial in support of his defence, and cross-examine each adverse witness who personally appears before the Commission (14c) and to have the charges and specifications, the proceedings and any documentary evidence translated when he is unable otherwise to understand them (14d).

VIII. Rules of Evidence.

The Regulations and the Directive provide that the technical rules of evidence shall not be applied by the military commissions, (paragraph 10 of the European directive, para. 3 of the Mediterranean and para. 16 of the Pacific Regulations). The regulations contain as to evidence, provisions similar to those prescribed in Regulation 8 (1) of the British Royal Warrant (See Annex I of this Volume, p....) For the European theatre it is provided that such evidence shall be admitted before a military commission as, in the opinion of the president of the commission, has probative value to a reasonable man. In the Mediterranean Regulations it is added that without limiting the scope of this rule the following in particular will apply:

- a. If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the president of the commission, unable to attend without undue delay, the commission may receive secondary evidence of statements made by or attributed to such witness.
- b. Any document purporting to have been signed or issued officially by any member of any allied or enemy force or by any official or agency of any allied, neutral or enemy government, shall be admissible as evidence without proof of the issue or signature thereof.
- c. Any report by any person when it appears to the president of the commission that the person in making the report was acting within the scope of his duty may be admitted in evidence.

- d. Any deposition or record of any military tribunal may be admitted in evidence.
- e. Any diary, letter or other document may be received in evidence as to the facts therein stated.
- f. If any original document cannot be produced, or, in the opinion of the president of the commission, cannot be produced without undue delay, a copy or translated copy of such document or other secondary evidence of its contents may be received in evidence. A translation of any document will be presumed to be a correct translation until the contrary is shown.
- g. Photographs, printed and mimeographed matter, and true copies of papers are admissible without proof.
- h. Confessions are admissible without proof of circumstances or that they were voluntarily made. The circumstances surrounding the taking of a confession may be shown by the accused and such showing may be considered in respect of the weight to be accorded it, but not in respect of its admissibility."

Similar but not identical provisions are contained in the Pacific Regulations where it is also provided (16b) that the commission shall take judicial notice of facts of common knowledge official government documents of any nation, and the proceedings records and findings of military or other agencies of any of the United Nations, a provision which corresponds to Article 21 of the Charter of the International Military Tribunal annexed to the Four Power Agreement of 8th August 1945.

IX. Crimes committed by units or groups.

The Pacific Regulations contain also the following provisions (16d):

If the accused is charged with an offense, involving concerted criminal action upon the part of a military or naval unit, or any group or organization, evidence which has been given previously at a trial of any other member of that unit, group or organization, relative to that concerted offense, may be received as prima facie evidence that the accused likewise is guilty of that offense. This provision is similar to that of Regulation 8(2) of the British Royal Warrant (See Annex I of this Volume, p)

The Eastern regulations further provide (16e) that:

"The findings and judgment of a commission in any trial of a unit, group or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial by that or any other commission of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in such unit, group or organization convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein."

This provision is to be read in connection with paragraph 4(b) where it is said that "Any military or naval unit or any official or unofficial group or organization, whether or not still in existence, may be charged with criminal acts or complicity therein and tried by a military commission". It will be seen that these

provisions are based on a principle similar to that expressed in Articles 9 and 10 of the Charter of the (European) International Military Tribunal.

X. The Defence of Superior Order.

The Mediterranean and Pacific Regulations contain also a provision of substantive law on the question to what extent the plea of superior order is a defence. The Mediterranean Regulations provide (9):

" The fact that an accused acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the commission determines that justice so requires".

The corresponding provision of the Pacific Regulations reads as follows (16f):

" The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if the commission determines that justice so requires."

As to the development of the law regarding this plea see the notes on the Peleus and Dostler cases, supra, pages

XI. Punishment of War Crimes.

For the commissions operating in the European theatre it is provided that they may be guided by but are not limited to, the penalties authorised by the Manual for Courts Martial, the laws of the United States, and of the territory in which the offence was committed or the trial is held. The Manual for the Courts Martial and the Articles of War prohibit cruel and unusual punishments of every kind and otherwise provides for different crimes different punishments from fines and imprisonment to the death sentence. The Mediterranean Regulations state (13) that appropriate sentences imposed by a military commission are (a) Death (by hanging or shooting), (b) Confinement for life or a lesser term, (c) Fine. In the Pacific Regulations (20) it is added that the Commission may also impose such other punishment as it shall determine to be proper. The Commission may also order confiscation of any property of the convicted accused, deprive the accused of any stolen property, or order its delivery to the Commander-in-Chief for disposition as he shall find to be proper, or may order restitution with appropriate penalty in cases of default. In all Regulations it is provided that concurrence of at least two thirds of the members of the commission present at the time of voting shall be necessary for the conviction and for the sentence.

XIII. Appeal and Confirmation.

No right of appeal in the ordinary sense of that word exists against the decision of a military commission. The Regulations for the Pacific theatre expressly prescribe that, except as therein provided, the judgment and sentence of a commission shall be final and not subject to review.

No sentence of a military commission must however, be carried into execution until it shall have been approved by the appointing authority. Death sentences must, in addition, be also confirmed by the theatre commander.

XIV. The United States Courts of Law in relation to Military Commissions.

Notwithstanding the absence of a right of appeal military commissions are in United States law, to a certain extent, subject to the control and supervision by the superior American courts. This supervision of proceedings conducted by military commissions exercised through the ordinary courts, takes usually the form of applications for one of the ancient so-called prerogative writs of Anglo-American law, the most famous of which is the writ of habeas corpus. The purpose of the writ of Habeas Corpus is to bring the person seeking the benefit of it before the court or judge to determine whether or not he is legally restrained of his liberty. It is a summary remedy of unlawful restraint of liberty. Where it is decided that the restraint is unlawful, the court orders the release of the applicant, but if the restraint is lawful the writ is dismissed. The Supreme Court of the United States has emphasized in ex parte Quirin and in re Yamashita, that on application for habeas corpus the court is not concerned with the guilt or innocence of the petitioners. The court considers only the lawful power of the commission to try the petitioner for the offence charged. Military Tribunals, including the military commissions are not courts whose rulings and judgments are made subject to review by the Supreme Court. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorised to review their decisions.

There are also other ancient remedies similar to the writ of Habeas Corpus, like the writ of Prohibition and the writ of Certiorari, the details of which are outside the scope of this note. They also enable the ordinary courts of the land to examine the question whether a military commission had or had not jurisdiction to proceed and whether it did not exceed its powers. Actually, the Supreme Court of the United States in the decisions mentioned examined the decisions of the military commissions in the cases ex parte Quirin, in re Yamashita and in re Hotta and upheld the decisions of the military Commission in the Quirin case unanimously, in the two other cases by majority judgments.

XV. The Authority of decisions of Military Commissions.

Like the British Military Courts, the United States Military Commission are not superior courts and what has been said on the authority of British Military Courts in Annex I of this Volume, applies mutatis mutandis to decisions of United States Military Commissions.

The decisions of the Supreme Court of the United States in the three cases mentioned and the decisions of the other courts which have been or may be seized of cases of war criminals, in connection with a writ of habeas corpus or other similar remedies have, of course, that binding authority which attaches to their decisions under the general law of the United States.

PART II: Military Government Courts.

XVI. The Establishment of Military Government Courts.

It has been stated in the first part of this Annex that the United States Forces, European Theatre, have used two separate sets of Tribunals for the trial of war criminals, namely Military Commissions, which have been dealt with in Part I of this Annex, and Military Government Courts. These Tribunals are distinct and have a different origin and a different basis for their jurisdiction. The origin and jurisdiction of Military Commissions has been treated in the first part of this paper. Military Government Courts are generally based upon the occupants' customary and conventional duty to govern occupied territory and to maintain law and order.

Military Government Courts were established for the occupied parts of Germany, by Ordinance No.2. made by General Eisenhower, as Supreme Commander of the Allied Expeditionary Force. The Supreme Commander also issued Rules of Military Government Courts.

When, after the Berlin Declaration of 5th June, 1945, General Eisenhower, in his capacity of Commander-in-Chief of the American Forces in Europe, took over the administration of the American occupation zone, he made a Proclamation stating that, inter alia, all orders by the Military Government, including proclamations, laws, regulations and notices given by the Supreme Commander or on his instructions, remain in force in the American occupation zone unless repealed or altered by the Commander-in-Chief himself. The Military Government Ordinance No.2. and the Rules of Procedure in Military Government Courts are, therefore, the basis of Military Government Courts established in the American zone of occupation.

Additional provisions regulating the trial of war crimes and related cases by United States Military Government Courts were made by a directive of General Eisenhower on 16th July 1945.

XVII. Jurisdiction of Military Government Courts.

Under Ordinance No.2. there are three kinds of Military Government Courts: General Military Courts, Intermediate Military Courts and Summary Military Courts (Article I of Ordinance No.2.) The jurisdiction of these Courts is as follows:

Ratione personae: These Courts have jurisdiction over all persons in the occupied territory except allied military personnel.

Ratione materiae: The Military Government Courts shall, under Article II (2), have jurisdiction over:

- (i) all offences against the laws and usages of war;
- (ii) all offences under any proclamation, law, ordinance, notice, or order issued by or under the authority of the Military Government or of the Allied Forces;
- (iii) all offences under the laws of the occupied territory or of any part thereof.

The Jurisdiction of Military Government Courts is therefore wider than the jurisdiction of Military Commissions in the European Theater of Operations, because offences under the local law are made subject to their jurisdiction in addition to violations of the laws and usages of war and violations of provisions made by the Military Government. The directive of 16th July 1945 provides that as a matter of policy, cases involving offences against laws and usages of war, or laws of the occupied territory, or any part thereof, commonly known as war

crimes, together with such other related cases, within the jurisdiction of Military Government Courts, as may from time to time be determined by the Theater Judge Advocate, committed prior to 9th May 1945, shall be tried before the specially appointed courts provided for in this directive.

XVIII. The Composition of Military Government Courts.

General Military Courts and Intermediate Military Courts consist of not less than five members and not less than three members respectively. Military Government Courts are appointed by Army/Military District Commanders; the Orders appointing the Courts designate one or more Prosecutors or Defence Counsel. At least one officer with legal training is detailed as a member of such Courts.

XIX. Rules of Procedure and Evidence.

A Military Government Court shall in general admit oral, written or physical evidence having bearing on the issues before it, and may exclude any evidence which in its opinion is of no value as proof.

Every accused before a Military Government Court shall be entitled inter alia, to be present at his trial, to give evidence and to examine or cross-examine any witness; but the Court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent or if the accused is believed to be a fugitive from justice.

XX. Powers of Sentence.

General Military Courts may impose any lawful sentence, including death.

XXI. Review of Sentences.

A person convicted by a Military Government Court has the right to petition for review of the finding or sentence. The petition must be filed with the Court within 10 days of conviction.

No sentence of a Military Government Court shall be carried into execution until the case record shall have been examined by an Army/Military District Judge Advocate and the sentence approved by the officer appointing the Court or by the Officer Commanding for the time being. No sentence of death shall be carried into execution until confirmed by higher authority. (Theater Judge Advocate).

The Reviewing authority may, upon review, inter alia:

- confirm or set aside any finding,
- substitute the finding of guilty by an amended charge,
- confirm, suspend, reduce, commute or modify any sentence or order, or
- increase any sentence, where a petition for review which is considered frivolous has been filed and the evidence for the accused warrants such increase.

The reviewing authority may at any time remit or suspend any sentence or part thereof.

The proceedings shall not be invalidated nor any findings or sentences disapproved for any error or omission, technical or otherwise, occurring at any such proceedings, unless in the opinion of the reviewing authority it shall appear that the error or omission has resulted in injustice to the accused.

III/55
28th August, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

Re: Law Reporting.

Proposals by the Secretary to Committee III regarding procedure in the meeting of Committee III to be held on Tuesday, 3rd September, 1946, and report on the present position.

- 1) The following Law Reports to be inserted in Volume I, have already been agreed to by Committee III :

Case No: 1, Peleus,
 2, Dostler,
 3, Almelo,
 4, Hadamard,
 7, Dreierwalde(Amberger)
 8, Heyer.

- 2) The following cases have been re-drafted and will be available in manuscript form for consideration and final approval :

5, Grumpelt,
6, Jalluit Atoll (Masuda).

- 3) The case No:9, (French Trial of Gauleiter Wagner) has been prepared by the Secretariat as a first Draft and circulated in the Trial and Law Reports Series Nos; 22 and 23. With the kind assistance of Professor Gros, these papers have been submitted to the French Ministry of Justice for checking and approval. It is hoped that the reply of the French authorities will be available soon.

- 4) Annex I (Introduction into British Provisions) has been re-drafted according to the decisions of Committee III and circulated in manuscript form.

- 5) The Draft Introductions into the United States Law and into French Law, have been prepared by the Secretariat as Doc. III/53 (French) and Doc. III/54 (U.S.A.). As to Annex III (French III/53), the procedure has been the same as in the case of the report on the Wagner trial (supra 3).

- 6) Lord Wright has been asked to contribute the preface to the publication.

- 7) According to the Committee's decisions, an outline of the contents of each case and an index to the whole volume, have been prepared by the Secretariat.

III/56
18th September 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

The Yugoslav Cases

Nos. 4031, 4032, 4033, 4034, 4035, 4036, 4037

referred to Committee III.

1. On 17th September 1946, the Yugoslav State Commission submitted to the Commission seven charges (Nos. 4031 - 4037) concerning crimes committed on territory which, according to the Peace Treaties concluding the First World War, formed part of Italy. Copies of the seven charges are Annexed to this paper.
2. The cases were considered by Committee I on 18th September 1946. Committee I decided to refer the cases to Committee III for its opinion as to whether or not the alleged crimes should be considered as crimes against humanity and for what reasons.

ANNEX.

Case No. 4031.

Yugoslav Charges against Italian War Criminals. Case No. R/It/189.

Name of the accused, their rank, units
or official positions:

1. Giovanni CORTE, Generale di Divisione, Comandante della Difesa Territoriale, Trieste. (F.1388)
2. Alberto FERRERO, Generale, Comandante del XXIII Corpo di Armata, Fiume(?) (F.1392)
3. Comandante della Divisione Fanteria "NOVARA" Fiume (?) (F.1390)
4. Comandante del 153 Reg. Fanteria (Fiume?) (F.1390)
5. Segretario Politico Fascista di Mattuglie (Fiume) (F.1391)
6. Comandante del 255 Reg. Fanteria (Fiume) (F.1393)

Date and place of commission of alleged crime:

In March 1942, in the Julian March.

Number and Description of crime in war crimes list:

- I. Murder and Massacres - Systematic Terrorism. XVIII Wanton Devastation and Destruction of Property.

References to relevant provisions of national law:

Violations of Articles 23(b), (c), (g) and 46, of the Hague Regulations, 1907, and Article 13 of the Yugoslav Military Courts Act, 1944.

Short Statement of Facts:

In 1942, Italian troops and their commanders were responsible for war crimes committed in the Julian March, such as the killing of people and the setting of houses on fire.

Particulars of alleged crime:

In July, 1942, Carabinieri at Pola arrested 21 men suspected of belonging to the Partisans. They had already imprisoned 44 for the same reason, bringing the total to 65.

2. On July 4th 1942, Carabinieri at Pola, in a report stated that they had discovered in the Julian March a large Yugoslav organisation attached to the Partisan movement and had arrested 9 men and imprisoned them with 35 others previously arrested for the same reason.

3. On July 7th 1942, Carabinieri surrounded the house of Jakob BRAJAN and as they received no reply to their summons, opened fire on the people inside. Two students from Zagreb were wounded and arrested as well as two other men. The Political Commissar from Mattuglio (Fiume) ordered the house to be burned down as a reprisal. This is stated in an Italian official report dated July 9th, 1942.

4. On July 15 1942, an Italian military lorry was attacked by Partisans, four Italian soldiers being killed and eleven wounded. On July 19th, on the orders of the O.C. XXIII Army Corps, 18 year old JOSIP VRH was shot at the back of the Villa del Nevoso (Smeznik) near Fiume "because he confessed that he belonged to the above-named 'Partisans'." According to the official Italian report VRH was shot without trial.

5. On July 18th 1942, near the hill of Sigkleno (Susak), Italian soldiers, during a mopping up action, attacked Partisans and captured three without loss to themselves. They shot all three prisoners without trial.

6. On July 19th 1942, on the orders of the O.C. "NOVARA" Infantry Division, soldiers of the 153 Infantry Regiment, near Fiume (commune Fontana del Conte) set fire to the house of a woman, Antonia LOGAR, who was arrested on suspicion of favouring the Partisans. The O.C. 153 Infantry Regiment is responsible for this crime committed by his troops.

7. On August 2nd 1942, soldiers of 255 Infantry Regiment, near the village of Senozecce (near Trieste) opened fire with their rifles and threw hand grenades at Josip INCANO, a peasant, and Josip PANGARA, mobilized by the 59 Legione CCNN, and killed them as they had not halted at once when challenged. They were out without passes during the curfew. The O.C. 255 Infantry Regiment is responsible for this crime.

On the same day an Italian military patrol at the village of Krusevje (near Trieste) caught Simoni METODI, a painter, without a pass in the curfew zone. On their way to the barracks he "tried to escape" and was shot dead by the Italians.

On the same night they killed Alojz BRALJA in the village of Strane and gravely wounded Josip SEVERIN in the village of Veliko Brdo for the same reason.

8. General Alberto FERRERO in his letter of December 10, 1942, said that during a mopping up action, two armed rebels were captured, and one of them was killed as they alleged he tried to escape.

Particulars of Evidence in Support:

The above particulars were taken from official Italian documents captured by the Yugoslav Army.

Case No. 4032.

Yugoslav Charges against Italian War Criminals. Case No. R/It/204.

Name of accused, his rank and unit,
or official positions:

1. Mignani, from Ferrara, about 40 years old, Major of the
Fascist Militia at Pola. (F.3765).
2. Italian Fascist Garrison at POLA.

Date and place of commission of alleged crime:

On the night 8/9 January, 1944, in the village of BOKARDICA.

Number and description of crime in war crimes list:

1. Murder and Massacres, Systematic Terrorism.
- III. Torture of Civilians.
- VIII. Internment of Civilians under Inhuman Conditions.
- XIII. Pillage. XVIII. Wanton Devastation and
Destruction of Property.

References to relevant provisions of national law:

Violation of Articles 4, 5, 23(b), (c), (g), 46 and 47 of the
Hague Regulations, 1907, and Article 3, para. 3, of the
Law concerning Crimes against the People and the State.

Short Statement of Facts:

On the night of January 8/9, 1944, the Italian garrison at
POLA, under the command of Major MIGNANI, together with
the German garrison, pillaged and set fire to houses in
the village of BOKARDICA, murdered and deported people.

Particulars of Alleged Crime:

On the night of January 8/9, 1944, armed Italian and German
troops from the garrisons at POLA entered the village of BOKARDICA
(in Istria) and, without any provocation from the inhabitants or
from partisan units which were in the neighbourhood, took people
out of their houses and assembled them in groups under strong guard.
Those who did not execute their orders were killed on the spot or
thrown alive into the burning houses. They tortured and killed
many people in the presence of their relatives. Piljan FOSKA had
to witness the torture and death of her two grandsons. The Italians
and Germans looted and set fire to houses, killing 33 people between
the ages of 16 and 70. Others were taken in lorries to POLA
whence they were sent to concentration Camps in Germany. They
threw out of a fast moving lorry and killed a man because he was too
old and unable to work.

MIGNANI led the Italian troops and took part in the above-mentioned
atrocities.

Particulars of Evidence in Support:

Above particulars were given to the Yugoslav State Commission
by reliable witnesses and victims.

Yugoslav Charges against Italian War Criminals. Case No. R/It/206.

Names of accused, their rank or unit,
or official position.

- | | | |
|-----|---|----------|
| 1. | Aldo PEDROTTI, Tenente, Commandante, Milizao Batt.
Cost. IV. Compagnia, at PLAVE ANHOVO. | (F 4322) |
| 2. | PINI, Sottotenente. | (F 4321) |
| 3. | Michele SABA, Sottotente. | (F 4323) |
| 4. | Karel BARDINI, Maresciallo. | (F 4324) |
| 5. | Vincenzo OBLA, Maresciallo. | (F 4325) |
| 6. | VENTORUZZO, Vice Brigadiere. | (F 4326) |
| 7. | CAROSI, Vice Brigadiere. | (F 4327) |
| 8. | DOMENICI, Caporale-maggiore | (F 4328) |
| 9. | Federico BATTISTI, from PULFERIA, Caporale-
maggiore. | (F 4329) |
| 10. | Giorgio MARIOTTI, milite. | (F 4330) |
| 11. | FLOS, Milite. | (F 4331) |
| 12. | CAMPASSI, Milite. | (F 4332) |
| 13. | SCOLARI, Milite. | (F 4333) |
| 14. | SECCHI, Milite. | (F 4334) |
| 15. | CASAGRANDE, Milite. | (F 4335) |
| 16. | FERRARI, Milite. | (F 4336) |
| 17. | CESARINO CAIER, Milite. | (F 4337) |

Date and place of commission of alleged crime:

On February 13 and 23, 1945, at PLAVE-ANHOVO (in Venezia
Giulia, Zone "B").

Number and description of crime in war crimes list:

II. Putting Hostages to Death.

References to relevant provisions of national law:

Violation of Articles 46 and 50 of the Hague Regulations, 1907,
and Article 3, para. 3, of the Law concerning Crimes against
the People and the State, 1945.

Short Statement of Facts:

1. On the orders of PEDROTTI nine hostages were shot on
February 13, 1945, on the road between ANHOVO and
LOZICE.
2. On February 22, 1945, three women were arrested by the
Fascists and the next day shot by the Italian garrison
on the road between ANHOVO and KANAL, on the excuse
that they attempted to escape.

PEDROTTI gave the order for the executions which were
carried out by PINI, SABA, BARDINI and others of
the above-mentioned accused who all participated
in the execution of the hostages. MARIOTTI was
especially brutal on this occasion.

Particulars of Evidence in Support:

The above-mentioned particulars were given to the Yugoslav State
Commission by reliable witnesses.

Yugoslav Charges against Italian War Criminals Case No. R/It/207.

Name of accused, his rank and unit,
or official position:

1. TURCHET, about 30 years old, Sergente Maggiore,
garrisoned at LUPOGLAV in Istria. (F 3763)
2. Italian Fascist garrison and a German garrison
at LUPOGLAV. (F 3761)
3. Italian Fascist garrison at the so-called
"Red House" near the village of BRGUDAC. (F 3762)

Date and place of commission of alleged crime:

In 1943 and 1944, at the village of BRGUDAC in Istria.

Number and description of crime in war crimes list:

1. Murder and Massacres, Systematic Terrorism.
XIII. Pillage.

References to relevant provisions of national law.

Violation of Articles 23(b), (c), 46 and 47 of the Hague
Regulations, 1907, and the Article 3, para. 3, of the
Law concerning Crimes against the People and the State.

Short Statement of Facts:

Italian Fascist and German garrisons at LUPOGLAVA murdered
people and pillaged the village of BRGUDAC.

Particulars of Alleged Crime:

Soldiers of the Italian Fascist and German garrisons at
LUPOGLAVA committed the following crimes in the village of
BRGUDAC:

1. On December 17, 1943, they surrounded the village, assembled
all the males found there, 45 in number, and imprisoned them.
They were then deported to Germany for internment.

2. On March 5, 1944, Germans and Italians carried out a
mopping-up action in the same village. They shot four people
on the spot, arrested a dozen and took them to LUPOGLAVA. One
was hanged and the others released three days later. They also
pillaged the village.

3. People from Istria, and especially captured partisans, were
tortured by the Italian Fascist garrison at the "Red House" near
the village of BRGUDAC. On April 13th, 1944, two partisans
were captured in the forest and taken to the "Red House" where they
stripped and tortured to death. Their heads, according to witnesses,
were terribly mutilated by torture. The Fascists refused to allow
the corpses to be taken to the cemetery by the village priest in
order to cover up their crime.

4. During Easter of 1944 they hanged four men in the village of
BRGUDAC and on this occasion TURCHET took a leading part in the crime.

5. On June 6, 1944, fighting took place between partisans and the
garrison of LUPOGLAVA in which the Italians and Germans were beaten.
As a reprisal they entered the village of BRGUDAC the following day,
firing in all directions. They pillaged the village, set houses on
fire and killed sixteen people, 8 children, 5 women and three old
men, one of them 98 years old and another 89. They were killed
while having dinner. The Germans and Italians stood in front of
the house and called on the people to come out, promising them safety.
When the women with their children appeared they turned machine-guns
on them and threw bombs.

6. In August, 1944, a German patrol killed three people in the same village.

Particulars of Evidence in Support:

The Yugoslav State Commission holds the statements of reliable witnesses.

Case No. 4035.

Yugoslav Charges against Italian War Criminals Case No. R/It/212.

Names of accused, their rank and unit,
or official position:

1. Emilio ZULIANNI, Colonello, Comandante del VIII Regg.
"Tagliamento" at Udine. (F 4182)
2. Gianfranco REA, from UDINE, tenente, Commandante
of the Italian Garrison at Dorenberg (F 4183)
3. Olinto SPOLERO, from Campiglio Faedis (Udine)
Maresciallo. (F 4181)
4. Alvaris ANTONIOLLI, from PORDENONE, Via Revedole
51, Caporale maggiore. (F 4184)
5. Raffaele ROSETTI, from UDINE, Via Cesare
Battisti 9, Caporale maggiore. (F 4185)
6. Attilio CECCHINI, from Tolmezzo, sergente. (F 4188)
7. Cesare MOLARO, from UDINE, Stradella, Sergente. (F 4190)
8. Gino TULLIO, from POSTUMLA, sergente. (F 4182)
9. Arcilio MERLINI, from Artegna - Udine, Via
Sotto Castello 129, alpino. (F 4189)
10. Evelino DIANA, from Treviso, alpino. (F 4193)

Date and place of commission of alleged crime:

From the end of 1943 to April 1945 at DORENBERG and neighbouring villages. (Zone B of the Julian March).

Number and description of crime in war crimes list:

- I. Murder and Massacres; Systematic Terrorism.
- III. Torture of Civilians.
- VII. Deportation of Civilians.
- XIII. Pillage.
- XVIII. Wanton Devastation and Destruction of Property.

References to relevant provisions of national law:

Violation of Articles 23 (b), (c), (g), 42, 46 and 47 of the Hague Regulations, 1907, and Article 3, para. 3, of the Law concerning Crimes against the People and the State.

Short Statement of Facts:

After the Italian capitulation in 1943, the TAGLIAMENTO VIII Alpine Regiment, of the Fascist Republican Army, was stationed at UDINE, under the command of Colonel Emilio ZULIANNI.

The 2nd battalion, composed of two companies, was garrisoned at DORENBERG under the command of Tenente REA. This garrison was the most dreaded of all by the Slovene Population of this region. Maresciallo SPOLERO had a special unit called by the people "Banda Spolero" of "death unit." SPOLERO and his unit went through the country terrorising the population, arresting, torturing and murdering people.

Particulars of Alleged Crime:

1. On May 29, 1944, Spolero with his band stopped in a car on the road through PRVACINA and, for no apparent reason, shot a man who was working in his field.
2. On June 27, 1944, the same soldiers arrested a peasant at OSEVLJEK and transferred him to GORIZIA. He has not been heard of since.
3. On July 4, 1944, a patrol led by Spolero shot a man through the window of his house at GRADISCE.

4. On July 16, 1944, they arrested a man on the road between PRVACINA and GRADISCE and imprisoned him at GORICA. (GORIZIA).
5. On August 16, 1944, they arrested a woman on the road between BORNBERG and GORICA and another at PRVACINA. They were imprisoned at GORICA and then deported to forced labour in Germany. Their fate is unknown as they never returned to their homes.
6. On September 16, 1944, near KOZJAK, the Italians met a peasant on his way home. They robbed him and took him along with them. The next day his body was found near DORNBERG. He had been shot.
7. On September 30, 1944, at PRVACINA, SPOLERO'S band shot a woman of 69 through the window. She succumbed to her wounds on October 22.
8. On December 16, 1944, SPOLERO and his band pillaged PRVACINA firing in all directions and wounding a man in the eye as a result of which he lost his eye.
9. On December 31, 1944, SPOLERO'S patrol shot and killed a woman at PRVACINA.
10. On January 2, 1945, SPOLERO with his patrol arrested a man and sent him to prison at GORICA. He was interned in Germany.
11. On January 7, 1945, on SPOLERO'S orders, a woman was arrested at RAVNE, transferred to GORICA and then deported to Germany. She has not been heard of since.
12. On January 29, 1945, a woman was arrested and sent to a concentration Camp in Germany. She has not been heard of since.
13. On February 10, 1945, SPOLERO with his band arrived in PRVACINA to pillage. People in their homes. SPOLERO entered a house where he shot a girl who was peacefully knitting.
14. On February 11, 1945, SPOLERO arrested a man at PRVACINA and imprisoned him at DORNBERG where he was beaten and tortured. MERLINI was particularly brutal in beating and torturing this man whom he beat on the head with a rifle butt.

MERLINI, DIANA, TULION, MOLARO, CECCHINI, ROSETTI and ANTONIOLLI were members of SPOLERO'S band and participated in the crimes described above.

ZULIANI is responsible for the above crimes as he was commandant of these units, and REA as commander of the 2nd battalion which terrorised the Slovene population of this region, is equally responsible.

Particulars of Evidence in Support:

Above particulars were given to the Yugoslav State Commission by victims and reliable witnesses from DORNBERG and the surrounding villages.

August 30, 1946.

Case No. 4036.

Yugoslav Charges against Italian War Criminals Case No. R/It/213.

Name of accused, his rank and unit,
or official position:

FABIANI, 30 - 35 years old, from KOPAR, Tenente fanteria,
Garrison commandant at VALLE (Bale). (F 12072)

Date and place of commission of alleged crime:

On August 25, 1943 and in November, 1943, at the village of
KRMED, Istria (Zone B).

Number and description of crime in war crimes list:

VII Deportation of Civilians.
Illegal arrest.

References to relevant provisions of national law:

Violation of Article 42 of the Hague Regulations, 1907, and
Article 3, para.3, of the Law concerning Crimes against
the people and the State, 1045.

Short Statement of Facts:

FABIANI used to terrorise peaceful people at VALLE. On
August 25, 1943, he entered the village of KRMED with his soldiers
and Carabinieri where twelve people, for no reason, were arrested
on his orders, mostly old men and women. They were taken to the
barracks "KASTEL" and detained for three days without food or water.
They were then transferred to the prison at ROVINJ in order to be
sent eventually, to the concentration camp. Two weeks later they
were freed by partisans in an armed uprising at Istria.

In November, 1943, unknown carabinieri from VALLE arrested two
peaceful peasants at KRMED. They were taken to prison at ROVINJ
and then passed through POLA to forced labour in Germany. They have
not been heard of since.

Particulars of Evidence in Support:

Above particulars were given by the witness Bernard JURKO from
KRMED to the Yugoslav State Commission.

Case No. 4037.

Yugoslav Charges against Italian War Criminals Case No. R/It/214.

Names of accused, their rank and unit,
or official position:

1. A. BERGONZI, Generale di Corpo d'Armata, Comandante della Difesa Territoriale di UDINE. (F 1184)
2. Ferruccio ZICCAVO, Generale di Divisione, Comandante Interinale della Difesa Territoriale di UDINE. (F 1185)
3. Umberto FABRONI, Colonnello, Capo Ufficio S.N. Difesa Territoriale di UDINE. (F 1186)

Date and place of commission of alleged crime:

In 1942 at UDINE and GORIZIA in the Julian March.

Number and description of crime in war crimes list:

1. Murder and Massacres: Systematic Terrorism.
- II. Putting Hostages to Death.
- VII. Deportation of Civilians.
- XIII. Internment of Civilians under Inhuman Conditions.
- XIII. Pillage.
- XVIII. Wanton Devastation and Destruction of Property.

References to relevant provisions of national law:

Violation of Articles 4, 5, 23 (b), (c), (g), 42, 46 and 50 of Hague Regulations, 1907, and Article 13 of the Yugoslav Military Courts Act, 1944.

Short Statement of Facts:

The above-named war criminals led operations against Croat and Slovene partisans, who were Italian subjects, ordered clearing-up operations ("rastrellamenta") during which men were killed, their houses burned down and their inhabitants sent to concentration camps.

Particulars of Alleged Crime:

1. General A. BERGONZI, as Commandant of Territorial Defence at UDINE, led operations against Partisans, who were Italian subjects of Slovene and Croat nationality, living in the Italian frontier area before April 6, 1941. He gave orders for numerous "rastrellamenta" (clearing-up operations during which houses were burned down, many inhabitants killed and hundreds of people taken to concentration camps. He proposed to put into force in the Julian March the measures used against the National Liberation Movement in Slovenia (Province of Ljubljana), i.e., shooting of hostages and P.O.W's., setting houses and villages on fire, mass deportation of the inhabitants to concentration camps, limitation of human freedom and administrative measures against non-Italian people living in Italy.

He committed the crimes of murder and mass deportation, instigated the shooting of hostages and P.O.W's., and pillaged and set villages on fire.

2. Ferruccio ZICCAVO, as temporary Commander of the Territorial Defence at UDINE in 1942, committed the same crimes as BERGONZI.

3. Colonel Umberto FABRONI was Director-General of the G.H.Q. of the Territorial Defence at UDINE and collaborated with General BERGONZI in the crimes committed by him. He signed the documents Nos. 6 to 11 enumerated below which contain the evidence given in this charge.

I

The following are some of the official documents written by the Comando della Difesa Territoriale and sent to Supreme Army HQ:

1. In his report No. 549 of July 20, 1942, BERGONZI informed the Supreme General Staff of the formation of a Partisan group by the native population and proposed applying to the frontier area the regulations in force in the Ljubljana Province.
2. Report of the Comando della Difesa Territoriale Prot. No. 712 of July 27, 1942, General BERGONZI stated that on July 22 during a clearing-up action, a Partisan named Herman FURLAN from GOZZE DI VIPACCO, was arrested. During his interrogation Herman "attempted to escape. The CC. RR. (Carabinieri Reali) fired several rifle shots at the fugitive and killed him."
3. In report No. 1222 of August 17, 1942, the Comando della Difesa Territoriale informed H.Q. that the Partisan units were composed mostly of native Yugoslav elements, which hid arms, disseminated propaganda and carried out acts of sabotage. He recommended the extension of the curfew, the removal of Yugoslav workers from mines and factories, the closing-down of inns, control of the distribution of food which should be concentrated in the principal centres, and the evacuation of Yugoslavs living in isolated groups of houses.
4. In his report No. 1402 of August 24, 1942, General BERGONZI informed H.Q. that SASA, a Partisan chief, had been killed but gave no particulars. He went on to say that the local people were organised in units by chiefs from the other side of the frontier and that intense anti-Italian and pro-Yugoslav propaganda was being disseminated in the Province of GORICA (GORIZIA) by the Partisans. He therefore thought it necessary to extend the curfew to all the regions of GORICA inhabited by Yugoslavs to close all inns, evacuate isolated houses or groups of houses difficult to control which could be used by Partisans as meeting places and for passing on information and supplies.
5. General BERGONZI stated in his report No. 1561 of August 31, 1942, that Partisan units were composed of local native elements who, after carrying out the orders of their chiefs, returned to their in the guise of peaceful farmers. He proposed to organise anti-Partisan units by the P.N.F. (Partito Nazionale Fascista).
6. Report No. 3832 of November 17, 1942, stated that the Partisans acted in agreement with the local native population, supplying them with clothes, ammunition, medicines, etc., and that the attitude of the population of the Valle of VIPORA was particularly hostile to the Italians. He suggested different measures against the population. He reported that on November 12, 1942, during a clearing-up operation, three partisans (rebels) were killed, one a woman, and a wounded Partisan arrested.
7. In report No. 3985 of November 23, 1942, General BERGONZI informed H.Q. that the native Yugoslav population gave refuge and hospitality to the Partisans and that women's societies were formed with the object of collecting food and clothing for Partisans and that the Italian military and political authorities had reacted very energetically to these acts.
8. Report No. 4246 of December 2, 1942, informed H.Q. that numerous clearing-up operations were carried out, especially in the neighbourhood of GORICA (GORIZIA), TOLUMINO and IDRIA.
9. Report No. 4534 of December 10, 1942, informed H.Q. that Partisans had developed intense propaganda. They organised units, especially among the villagers, who appeared peaceful, but were the more dangerous as they were armed and organised.

10. Report No. 4897 of December 29, 1942, informed H.Q. that the number of young people joining the Partisans had increased.

11. Report No. 5146 of December 29, 1942, signed by Colonel FABRONI, informed H.Q. that the Partisan movement was extending as a increasing number of young Yugoslavs were joining the movement.

12. In a report dated July 21, 1942, H.Q. were informed that during fighting in a sector of VIPAVANANOS, seven Partisans were killed and their homes set on fire.

13. A telegram No. 54/5 of December 31, 1942, stated that a mortar company of the Veneto Division searched the home of a family called ZISMONI at Villa Montevocchio, arrested youths and killed an unknown young man who had shouted for communism and the freedom of Slovenia.

14. A report signed by POLITO to H.Q. stated that between September 10 and 15, seven youths from the village of GRANOVO (in GORIZIA) joined the Partisans and that in revenge the "Squadristi" from PODERDO (PIEDICOLLE) on September 15, 1942, set two houses on fire in the village of CORITENZA in the same locality.

15. Report No. 3853 of September 2, 1942, signed by S. POLITO, stated

(i) that early on the morning of September 28, 1942, Italian troops arrested 34 relatives of the 1923 class of men, who had left their homes to join the Partisans in the Commune of SAMBASSO (GORIZIA).

On September 29, 1942, the same troops arrested in the Commune of RANZIANO (G ORIZIA) 33 relatives of young people (1923 Class) who had joined the Partisans.

All these people, 67 in all, were arrested in order to be sent to concentration camps as a reprisal.

(ii) About 6 a.m. on October 1, 1942, in the Commune of Montespino (Gorizia), while Italian soldiers were arresting relatives of young men of the 1923 Class who had joined the Partisans, an armed Partisan, ZISMONDO, with two others, fired several revolver shots at an Italian Carabinieri patrol and then escaped into a forest. The Italians, in revenge, arrested ZISMONDO's parents.

16. Report No. 3894 of October 4, 1942, signed by S. POLITO, informed H.Q. that Italian troops from S. PIETRO (GORIZIA) had arrested, with the purpose of interning them in a concentration camp, 17 relatives of some youths of the 1923 Class who had recently joined the Partisan brigades.

17. Report No. 5164 of December 11, 1942, informed H.Q. that on December 5, 1942, 16 relatives of young people who had joined Partisan armed units had been interned in a concentration camp.

18. Report No. 5296 of December 18, 1942, signed by O. BARREL, informed H.Q. that about 50 people were arrested in the zone of PIEDICOLLE suspected of favouring the Partisans.

II.

1. In his report ("telescritto") No. 1030 of August 9, 1942, General ZICCAVO informed H.Q. that two men responsible for the killing of Maresciallo dei CC. RR. MORRONE, Uatia di Aidussina (Gorizia), were identified and killed while attempting to escape.

Report No. 3299 of September 2, 1942, signed by O. BARREL, Vice-Inspettore Generale, gave further details of the above. As a reprisal the Italian military authorities set fire to all habitations in Ustia, consisting of 81 buildings. 300 people, women and children, were left without homes. They were put into houses in the neighbourhood and all the men were imprisoned at GORIZIA while awaiting transportation to the concentration camp at POGGIO TEZZARMATA.

2. In his report No. 1067 of August 10, 1942, General ZICCAVO proposed to Supreme H.Q. that he should apply to the frontier area the measures in force in the province of Ljubljana, i.e., shooting of hostages and P.O.W's, mass trials of people and P.O.W's, mass internment, pillage and arson.

Particulars of Evidence in Support:

Particulars and evidence of these crimes were found in Italian official military documents captured by the Yugoslav Army.

Secret.

III/57.

26th September, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

ITALIAN CRIMES AGAINST HUMANITY

MEMORANDUM

WITH REGARD TO CRIMES PERPETRATED AGAINST YUGOSLAVS
OF ITALIAN CITIZENSHIP IN THE JULIAN
MARCH AND ISTRIA

Presented in the Meeting of Committee III
on 25th September, 1946.
By Dr. R. Zivkovic.

1. The Yugoslav Delegation has submitted to the United Nations War Crimes Commission a number of charges dealing with very serious crimes committed during the last war (1939-1945) by officials of the Italian Government and/or by members of the Italian armed forces against members of the Yugoslav Army of National Liberation and of the Yugoslav Partisan Units, as well as against members of their families.

In all these cases the victims were Yugoslavs by birth and race who lived in the provinces known as the Julian March and Istria, and were Italian subjects.

In dealing with these cases one should take into account that there were two types or groups of victims:

1) Those who belonged to the ranks of the Yugoslav fighting units;

2) The civilian population, the great majority of whom had their relatives in Group 1.

2. The culpability of the Italians concerned in the crimes they perpetrated against both these groups of victims is fully covered by the relevant Articles of the IVth Hague Convention, by Article 6 of the Charter of the International Military Tribunal and by the terms of reference of the United Nations War Crimes Commission, especially in connection with the Resolution adopted by the United Nations War Crimes Commission at its 93rd Meeting held on 30th January 1946 (see M. 93. p.4.).

3. In connexion with some of the Yugoslav charges presented in this respect (No. 1323 and No. 1339) I already had the opportunity of expressing views and demonstrating that the Italian citizenship of the victims was irrelevant from the legal point of view, namely that it could not affect the listing of the culprits by the United Nations War Crimes Commission (see Document I/30, pp. 4 - 11, particularly pp. 8 - 11, para. 4 - 6).

4. From the recognition of this point it follows that crimes perpetrated against the civilian population of Yugoslav race represent crimes against humanity, as defined in Art. 6 (c) of the Charter of the International Military Tribunal.

5. As to the victims who belonged to the fighting units, in their case it appears that we are confronted with "war crimes" of the normal type.

This derives from the legal status of the fighting men in question, which gives them the right to be treated in accordance with Art. 1 of the Hague Regulations.

In this respect I am able to make the following authoritative statement:

1) From the occupation of Yugoslavia in April 1941, until the Spring of 1943, Yugoslav guerrillas in Yugoslavia and in Istria and the Julian March were organised into regular Partisan Units known as "POJ" (PARTIZANSKI ODREDI JUGOSLAVIJE), which entirely complied with the provisions of Art. 1, Hague Regulations.

2) From the Autumn of 1942 the Yugoslav General Headquarters was able to gradually build up a regular army and form military units of the same type as in other Allied armed forces. These forces also entirely complied with the provisions of Art. II Hague Regulations.

3) Early in 1943 two separate army Corps were formed in Istria and the Julian March: the XI Corps, which operated in Istria, and the IX Corps which operated in the Julian March. These forces were mainly composed of Yugoslavs by birth and race of Italian citizenship with whom pure Italians fought together against the Fascist Italian armed forces and the German Wehrmacht.

4) As soon as these two Corps were formed, British and American liaison officers were officially attached to them by the combined Anglo-American forces operating in Italy.

A list is attached containing names and particulars of a number of such liaison officers.

5) The military operations of the two Corps were in many instances conducted as an integral part of the Anglo-American operational tasks, and they were regularly combined with them.

6. The above facts show clearly that members of these units were recognised as Allied forces, and that they are consequently entitled to be treated as Allies in respect of the crimes committed against them and their relatives on account of their struggle in the ranks of the Allied forces, quite irrespective of their citizenship.

Submitted by the Yugoslav Representative on the United Nations War Crimes Commission on the 25th September, 1946.

ANNEX

LIST OF A NUMBER OF ALLIED LIAISON OFFICERS

ATTACHED TO THE YUGOSLAV IX. and XI. CORPS IN

THE JULIAN MARCH AND ISTRIA FROM 1943 - 1945

In 1943, two additional units of the Yugoslav Army of Liberation were formed in the Italian provinces known as Julian March and Istria.

One was the IX. Corps which operated in the Julian March, that is to say in the area north of the Istrian peninsula, and the second was the XI. Corps which operated in Istria itself. The ranks of these two Yugoslav units were filled by Yugoslavs from these two provinces who were technically Italian citizens.

Very soon after their formation the Allied Commander in the Mediterranean despatched special liaison officers with the two corps and thereby indicated that these two corps were recognised as Allied Military units. Ever since the first contact was established this liaison was maintained constantly until the end of the military operations in the Julian March and Istria.

Here are the names and particulars concerning a number of such Allied liaison officers:

1. Neville DAREWSKI, Major. Head of the British Military Mission to the IX. Corps. Arrived August 1943 and left February 1944.
2. David DAVIES, Captain. Head of the Anglo-American Military Mission with the IX. Corps. Arrived October 1943 and left 19th July, 1944.
3. Peter ALEXANDER, Lieut. -Colonel. Head of special mission known as "Clouder" with the IX. Corps. Arrived 21st January, 1944 and left 4th March 1944.
4. Alfgar CAHUSAC, Squadron-Leader, R. A. F. Assistant to the head of the British Special Mission with the IX. Corps known as "Clouder". Arrived 21st January, 1944 and left 28th May, 1945. Before that, from 3rd December, 1943, was attached to the Yugoslav general headquarters in Bosnia. After his mission with the IX. corps was completed on 28th May, 1945, went to Corinthia as liaison officer with the there operating Yugoslav units.
5. Nigel WATSON, Major. Head of the British Intelligence Service with the IX. Corps. Arrived May 1944. On 5th December, 1944, went to the Yugoslav general headquarters from where he returned to his base in Italy on 7th December 1944.
6. P. WOOD, Major. Head of the British Military Mission with the IX. Corps from 9th June 1944, until September 1944.
7. P. N. M. MOORE, Lieutenant Colonel. Member of the British Military Mission at the Yugoslav general headquarters from October 1943. On 25th May 1944, went on a tour of inspection of the Anglo-American missions in Slovenia and the Julian March, deputising for Brigadier MacLean. On 29th June 1944, arrived at the headquarters of the IX. Corps. On 15th July, 1944, return to the Yugoslav headquarters. From 16th October, 1944, appointed head of all the British missions in Slovenia and the Julian March.
8. George CRIG, Captain. Head of the British Intelligence Service with the IX. Corps from 26th August 1944 - 2nd April, 1945. In November 1944, was acting head of the British Mission with the IX. Corps instead of Major Watson.
9. Joseph SLATTERY, Captain. Liaison officer with the IX. Corps from 31st August 1944 to 31st March 1945.
10. Hugh GIBB, Captain. Assistant to the head of the Anglo-American Mission with the IX. Corps from 31st August 1944 to 16th February 1945.

11. Owen REED, Major. Head of the British Intelligence Service at the Yugoslav general headquarters. Was attached to the 11th Corps from 12th October 1944 to 18th February, 1945.

12. Peter HARRISON, Captain. Member of the British Mission with the 11th Corps from 7th July, 1944. On the 9th November, 1944, was attached to units operating on the western shores of Istria. On 22nd February 1945, went to the Yugoslav general headquarters from where he returned to his base in Italy on 25th February, 1945.

13. LYLE-SMYTHE, Major. Head of the British Intelligence Service of the IX. Corps from 8th March 1945 to 2nd May 1945.

14. Dereck VINSON, Wing-Commander, R. A. F. Head of the British Mission with the IX. Corps from 24th April 1945 to 2nd May, 1945. On this date the British Mission was closed down as a result of the liberation of Trieste.

RESTRICTED

III/58
26th September, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

re: LAW REPORTING

Note on the Report on the French Wagner Case
and on the Glossary of French Law

By the Secretary to Committee III

The French representative on the United Nations War Crimes Commission, Professor Gros, has kindly informed the Secretariat of a communication from le Directeur du Service de Recherche des Crimes de Guerre in the French Ministry of Justice, containing some minor observations on the Draft Glossary, Document III/53. From the communication it appears, however, that the French authorities would prefer to have the Glossary drafted on different lines, in order to provide a complete survey of the organisation of Military Jurisdiction and of the prosecution of war criminals in France. This work would, as is stated in the letter, necessarily take some time to complete.

This Secretary is of the opinion that it would not be proper to insert into the first volume of the publication a Glossary on French Law which would not fully meet the requirements of the French authorities. However reluctantly, he feels therefore compelled to suggest that the report on the Wagner trial and the corresponding Glossary on French Law should not be inserted in the first volume, which is already being printed, and should be held over for the second volume.

This decision, if approved by Committee III, will make it possible for the French authorities to re-draft the Glossary and to give it the shape they want it to have, and simultaneously to re-draft the report on the Wagner case as well. The files regarding the Wagner trial which this Secretariat has received, consist of the indictment on the one hand and of the judgment on the other. No information about what happened between can be gathered from these files, nor can the evidence and the attitude of the defence be described on the basis of these files. The Secretariat will therefore try to get additional information about the proceedings in order to give as complete a picture of the Wagner trial (and of other French trials to be inserted in the series) as it attempts to give of the British and American ones.

Agreement by Committee III is therefore sought:.

- (a) for postponing the publication of the Wagner trial and of the French Glossary to the second volume,
- (b) for inserting in the first volume the report on the poison gas case of Tesch and others (Trial and Law Report Series No. 24), which has already been approved by Committee III in principle. Some observations on this report have been received from the United Kingdom Judge Advocate General's Office, and will be given effect to in the final text of the report on this case.

Secret

III/59

3rd October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

ITALIAN CRIMES AGAINST HUMANITY

SECOND MEMORANDUM

WITH REGARD TO CRIMES PERPETRATED AGAINST YUGOSLAVS
OF ITALIAN CITIZENSHIP IN THE JULIAN MARCH

Presented in the Meeting of Committee III
on 2nd October, 1946,
By Dr. R. Zivkovic.

In addition to the facts presented in the previous memorandum (Doc. III/57), and in order to have a better understanding of the crimes committed by the Italians and, from 1943 onwards by them and the Germans in the Julian March, it is necessary to set forth as briefly as possible what took place in this region in the period between the Two World Wars. This will show that the size and grave nature of the crimes perpetrated in the Julian March both before and during the war were no results of accidental outbreak of temperament of this or that man or unit, but the continuation of a systematically prepared and premeditated persecution of the population for twenty years. We have to deal with a criminal system planned long before the war, a system which, as regards the Yugoslav community, was inherent in Fascism.

The Land and the Population

The name Julian March or Venezia Giulia was given by the Italians to those parts of the Austro-Hungarian Empire which, after the World War I were allotted to Italy by the peace treaty against the wishes of the inhabitants. This new province included the former County of Gorizia, Trieste, parts of Carniola and the whole of Istria with Fiume. At the time of the annexation the population of the Julian March was approximately 900,000, two-thirds of which were Yugoslavs. The rest were Italians living in Trieste town and a few small places on Istria's western coast. The Yugoslavs (Slovenes and Croats) have been living in these parts for some thirteen centuries.

Persecutions between the two wars.

Having occupied the Julian March in 1918, and later annexed it on the basis of the Treaty of Rapallo of November 12, 1920, Italy solemnly declared through her official representatives (King Victor Emmanuel III, Count Sforza, Titoni, Giolitti and others) that the Slovenes and Croats of the Julian March would enjoy all legal rights, liberty and democracy, and that every idea of denationalisation was foreign to her. Italy had therefore recognised even in that way the Yugoslav character of the Julian March.

Meanwhile, the historical facts are quite different. Not only did these solemn Italian declarations remain a dead letter, but even pre-fascist Italy committed the unparalleled crime of forcibly Italianizing the Yugoslav population in the Julian March, using every possible means

for this purpose, paying no heed to the mass resistance of the people, to its Yugoslav character, national feeling and cultural achievements.

Light has been thrown upon these historical facts by the documents found after the liberation of the Julian March in the offices of former Italian institutions.

A series of these documents is enclosed herewith (Documents concerning the denationalization of Yugoslavs in the Julian March, Belgrade, 1946, edition of the Yugoslav Institute of International Studies) which irrefutably prove the following:-

1. That Italy, aware of the fact that the great majority of the population of the Julian March consisted of Slovenes and Croats, endeavoured by all means to change its ethnical structure. She used every possible means to carry out these criminal plans, from the persecution of the politically and nationally most conscious elements down to the forcible displacement of the Yugoslav population, the economic ruin of the population and, finally, physical extermination.
2. That Italy launched this policy immediately after the Julian March was allotted to her, that is to say even before the advent of the fascist regime, which only continued the work already begun.
3. That this criminal policy, which during the second World War assumed the character of mass extermination, met with a united resistance on the part of the conscious and patriotic people of the Julian March, who finally rose in arms against their fascist oppressor.

In other words, these documents give evidence of the fact that the Yugoslavs in the Julian March were subjected to a systematic persecution on racial and/or political grounds.

For the purposes of reference attention is drawn to the following numbers of the Documents or extracts contained in the appendix.

No.1 proves that the policy of assimilating the Slav minority by forcible denationalization was directed from Rome, i.e. from the Italian Ministry of the Interior.

Documents Nos. 3 to 11 inclusive demonstrate that the numerous Yugoslav schools in Venezia Giulia were closed as early as the first years of fascist regime, while Slav teachers were dismissed.

Documents Nos.12 to 18 inclusive illustrate the persecutions suffered by the Yugoslav priests in the Julian March.

The annihilation of the Yugoslav Press in Italy (newspapers, books, printing offices) is apparent in Documents Nos.20, 22 and 26.

Document No.28 is clear evidence that with one stroke of the pen the Minister of the Interior in 1927 suppressed all cultural associations.

It is obvious that military circles followed the same policy. They conceived a plan which would contribute to denationalizing the region.

In pursuance of this policy of racial persecution Italy resorted to acts which no civilised or uncivilised country in the world had ever committed; through legislative acts Italy forcibly changed or Italianised the names and surnames of the entire Yugoslav population of the Julian March. The documents quoted in Section 8 in the series which is enclosed represent only a small part of the ample documentary material discovered and are quoted as an illustration of Italian methods. Document No.50 reveals that the chauvinism of the Italian fanatics was such that they ordered the executive to remove all Slav names and surnames even from

the gravestones in cemeteries and to replace them with Italian ones. This would indeed sound strange to the ears of the deceased, especially to those who had been dead for ages and had never in their lives experienced Italian rule over their native land.

Documents Nos. 52, 57 and 58 serve as evidence of the Italian plan for depriving, through an elaborate system of administrative machinations, the ancient Slav population of their land and property and to replace the rightful owners by Italian settlers to be brought from the interior of Italy.

This special task was allotted to Dr. Italo Sauro, who was an important factor in the Fascist Party, was the "Duce's Counsellor for Slav problems" (A disposizione del Duce per gli Slavi). His correspondence reveals all the unbelievable measures which the Fascists had in store for the Slovenes and Croats of the Julian March long before the outbreak of World War II. Some of the documents to this effect are available in another series under the title "Italian Crimes in Yugoslavia", published by the Yugoslav Information Office, London, 1945, which is also enclosed. (see pp. 19-27 and Fig. 2-10).

As a consequence of this official attitude of the Italian Government towards the entire Slav population of the Julian March, at least twenty per cent of the Slav inhabitants of the Julian March, i.e. more than 100,000 people, were forced during the two decades of Italian rule over the Julian March to emigrate to Yugoslavia or overseas. A good many Slavs had to emigrate in order to escape with their lives.

Those who remained had to undergo ordeals one after the other. Such was the case especially during the Italian campaign in Abyssinia during which practically every able-bodied Yugoslav was thrown into the African campaign to perish in the fight for the glory of Mussolini's Empire.

Persecutions during 1941-1945

Policy

This is the background of the developments which took place after the invasion of Yugoslavia in April 1941, some cases of which have been submitted to the United Nations War Crimes Commission in the charges now under examination by Committee III.

The avowed aim pursued by Fascist Italy in invading Yugoslavia was to annex a very large portion of Yugoslav territory and this actually did take place. The annexation was to be carried out with the ultimate aim of definitely Italianising territories inhabited by Yugoslavs both in the Julian March and in Yugoslavia proper. To this end, after the invasion of Yugoslavia in April, 1941, the Italian Government instructed their officials and officers to undertake appropriate measures within the frame of such a policy.

Practically speaking this resulted in an ever increasing persecution of the Yugoslavs in the Julian March on account of their "alien" race, and in the introduction of systematic terrorism in Yugoslavia. Yugoslavs from both sides were thus, in the eyes of the Italians, doomed either to be "assimilated" and "converted" into Italians, or to perish as an obstacle in the way of Fascist-Italian imperialism. To the fascists there were no "loyal" or "innocent" Yugoslavs. They were all guilty of not being Italians.

As is understandable, the supreme instructions for the carrying out of such racial and political persecutions came from Mussolini himself. At a time when the Yugoslav partisan units in the Julian March were

operating only on a small scale and when these units were formed in self-defence against Fascist terror, in July 1942, Mussolini took advantage of their activities to put the weight of his personal authority in order to have them subdued to his imperialism.

On July 31, 1942, he came to Gorizia, the chief town of a purely Yugoslav area, and delivered a speech in which he openly displayed his policy.

Addressing the Yugoslavs in the Julian March he first said:-

"It is impossible to return to your town without feeling profound emotion. The blood of many generations has been spilt on the banks of the Isonzo and in the valleys of the Carso in order to unite this town with the mother country for all times. This soil is sacred to Italy and will remain such throughout the centuries."

Referring after that to the resistance of the population to his persecutions, he uttered the following significant words:-

"I have given the order to change the method, and you will have noted that for some weeks the methods have been radically changed.

The population should remember that the Roman Law is inflexible. I ordered the application of this law. Those who refuse to lay down their arms and give up their mad dreams should know that they will be completely annihilated and that their property will literally be razed to the ground.

This was always the Law of Rome, be it in the period of the Republic or during the period of the Empire.

Also Caesar whose most generous heart passed into history as the "heart of Caesar" knew how to be inflexible, and after one barbaric tribe had tried to attack the Romans three times, he gave the order to annihilate all the males of that population.

I think and I am sure that these words of mine will reach the ears of those who had the illusion of creating here a kind of second front.

The second front will not be made here nor probably in any other part of the world.

The Axis and Tri-partite have means, men and the will to achieve victory."

These words, though hardly concealing the grim reality, nevertheless need to be translated into their true meaning.

"The change of method" ordered by Mussolini and "the application of the inflexible Roman Law" meant literally what Mussolini himself mentioned on the same occasion as the "annihilation" of Yugoslavs and the "literal razing to the ground" of their homes. His example of Caesar being "inflexible" and giving the order to "annihilate all the males" of a "barbaric tribe", means exactly what was done to the Yugoslavs in the Julian March by Mussolini and his Fascists. The Yugoslavs were actually treated as if they were "a barbaric tribe", and their "Male" inhabitants were persecuted as if they were wild beasts and not human beings.

Mussolini's speech provides in itself the best evidence that all the offences and crimes perpetrated against the Yugoslavs in the Julian March were committed primarily on racial and political grounds, and that they were carried out systematically against the Yugoslav community as a whole.

It also clearly indicates that the crimes perpetrated during the war were merely a more acute form of the same persecution for racial and political reasons to which Yugoslavs from the Julian March had been subjected between the two wars.

Finally, it proves beyond doubt, that all these crimes were the direct result of a highly elaborate Government scheme aiming at uprooting a whole national community by whatever means possible in the various stages of its long-term accomplishment, from the forcible denationalization of names to the killing of inhabitants.

Here are some additional instances, apart from those already presented to the UNWCO (Committee III).

The Crimes

The Fascist Government being conscious that with such treatment they would not expect loyalty on the part of the Yugoslavs, mobilised the maximum in the Julian March and sent them deep into the interior of Italy as soon as the aggression against Yugoslavia was launched. The Yugoslavs, on the other hand, were well aware that their liberation could only be brought about by an Allied victory. Such was their determination that not even the sudden collapse of the old Yugoslavia could make them yield to the Fascist rule. Therefore they were among the first to organise and contribute to the new force of armed resistance in the common struggle against the Fascist aggressors. Their participation was comparatively enormous. Details of their activities are available in the book "The War Effort of the People of the Julian March and Union to Yugoslavia" published by the Yugoslav Ministry of National Defence, Belgrade, 1945, which is enclosed.

During the initial Italian successes in the war, there was comparative tranquility in the Julian March, but when the Italian armed forces in the Balkans found themselves in an ever increasing struggle with the resisting Yugoslav population in Yugoslavia proper, the conflict began to have its repercussions in the Julian March.

Fascist Italy who, by forcibly changing the names and surnames of a whole racial community within her frontiers, gave the world an example of an unique crime, soon afterwards undertook another, equally unprecedented and criminal action against her Slav population. A new regulation for a system of recruitment, applying only to the Yugoslav population, was introduced by the Commandant of the XXIII Corpo d'Armata (at Trieste) on March 3, 1943. According to this regulation (No.01/16923) all men born in 1924, 1925 and 1926 were called up before they were normally due (eligible). This regulation was carried out in an unusual manner known as the "precettazione a domicilio", which consisted of the following : during the night, Slav boys whom the recruiting regulation affected, were suddenly awakened, presented with their calling-up papers and, on the spot, proclaimed soldiers on duty and were immediately taken away in lorries to be driven deep into the interior of Italy where they were drafted into the "Battaglioni speciali" which were actually forced labour units.

This new means of persecution reached its peak with the capitulation of Italy and a direct result thereof was that all the Julian March took part in a general resistance movement against the Italo-Fascist terrorism.

At the same time the number of war crimes increased rapidly continuing until the end, i.e. May 1945, and being perpetrated by those Italians who remained loyal to Mussolini and who operated partly in independent units and partly in connection with different German formations brought to the south in order to retain the newly formed region "Operationszone Adriatisches Kuestenland."

In accordance with methods previously used in Slovenia, Croatia, Dalmatia and Montenegro, i.e. on Yugoslav territory proper, Italian troops and Fascist militia now terrorised "their" region, feeling in all probability, that it was lost to them for ever. As in Yugoslavia earlier, so these troops burned down villages, killed innocent persons without a trial, carried out frequent "restrellamenti" and sent people to concentration camps and forced labour, no longer in Italy, but in Germany where they were handed over to the Germans to be transported to different notorious German camps whence many never returned.

It is worth mentioning that after Badoglio's capitulation, the so-called Fascist Republic of Italy no longer represented the legal authority and cannot be recognised as having had a legal status in International Law. This should be taken into account when considering measures taken by this illegal authority against the people of the Julian March regardless of the fact that the civilian population may or may not have been members of the National Liberation Army. There was no legal basis for any such measures, the Neo-Fascists being rebels to the Italian Government in Rome, and possessing therefore only a de facto and not a lawful authority in Northern Italy.

III/60.
3rd October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

Suggestions regarding the publication of
enactments dealing with war crimes.

By the Secretary to Committee III.

- I. In Document Misc. No.49, a preliminary report has been given on the collection of international and municipal provisions regarding war crimes.

It is the purpose of this paper to submit to Committee III for consideration, and eventually for making appropriate proposals to the Commission, the suggestion to publish a volume containing the texts of international, conventional, municipal and occupational provisions dealing with war crimes. The volume would be a necessary and useful corollary to the Law Reports published by the Commission. It would be a mine of information for the international and for the criminal lawyer, and for the student of international affairs in general.

- II. It is proposed that the publication should be in the English language, and that a French edition should be envisaged for a later date, in the same way as it has been decided, on principle, that the Law Reports should also be eventually produced in French.

- III. The publication should generally be restricted to a reproduction, in English, of the actual texts of the enactments and, where necessary, of the text of other provisions of municipal law which are referred to in the special enactments dealing with war crimes. In cases where, as in the United States of America, the actual executive orders can only be understood in connection with their common law background, a short reference to the latter will probably be unavoidable.

- IV. It is not suggested that the publication should take place in the very near future, but it appears to be necessary to commence the preparatory work without delay.

It will be seen from Doc.Misc.49, that the collection at present available to the Commission is far from complete. In addition to the conventions and enactments enumerated in Doc.Misc.49, there exist to-day similar enactments in other countries, both allied and former enemy.

I am indebted to Commander Mouton for the information that there are in existence similar provisions in the Netherlands East Indies and to Monsieur Stavropoulos for the information that laws have also been enacted in Greece in addition to the law concerning enemy collaborators, which is mentioned in Misc.No.49, Part III, point 8. There are in existence special provisions regarding war criminals in the Soviet Union, in Yugoslavia, in Bulgaria, in Hungary, in Finland and probably also in other countries.

Enactments by the German authorities in the different zones and Länder of Germany fall also within the scope of the proposed publication.

- V. If the suggestion is accepted, on principle, by Committee III, and eventually by the Commission, it will be the task of the Legal Secretariat to try to get the material not yet available, both from Member Governments and from other sources.

III/61.
8th October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

Draft Glossary or General Introduction
into
United States Law
concerning
Trials of War Criminals.

Re: Observations from the War Department, Civil Affairs Division,
Washington, on the Draft Glossary III/54.

Observations from the War Department, Civil Affairs Division, Washington, on the Draft Glossary III/54 have now been received by this Secretariat. Doc. III/54 has been reviewed in the War Crimes Branch of the War Department. The consensus of opinion is that on the whole it is an admirable piece of work and will be of permanent value. Certain specific additions and corrections are proposed, however, the bulk of which is based on new material which has now been made available to this Secretariat, namely:

The Regulations Governing the Trials of Accused War Criminals in the Pacific Theater, 5th December 1945, (the so-called SCAP Rules);

The Regulations Governing the Trial of War Criminals in the China Theater of War, of 21st January, 1946, and

A Directive regarding the Trial of War Crimes Cases in the European Theater, dated 26th June 1946.

A revised and supplemented text of Doc. III/54 will therefore be prepared by the Legal Secretariat with the least possible delay.

1941

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE

IN RESPONSE TO A RESOLUTION OF THE HOUSE OF COMMONS

ADOPTED ON 11th JANUARY 1941

BY THE HOUSE OF COMMONS

IN CONNECTION WITH THE LAND ACT, 1940

FOR THE YEAR 1940-1941

The Commission has the honor to acknowledge the receipt of the resolution of the House of Commons, adopted on 11th January 1941, in connection with the Land Act, 1940. The Commission has the pleasure to inform the House that it has been instructed to prepare a report on the subject of the Land Act, 1940, and to submit the same to the House of Commons.

The Commission has the honor to acknowledge the receipt of the resolution of the House of Commons, adopted on 11th January 1941, in connection with the Land Act, 1940. The Commission has the pleasure to inform the House that it has been instructed to prepare a report on the subject of the Land Act, 1940, and to submit the same to the House of Commons.

The Commission has the honor to acknowledge the receipt of the resolution of the House of Commons, adopted on 11th January 1941, in connection with the Land Act, 1940. The Commission has the pleasure to inform the House that it has been instructed to prepare a report on the subject of the Land Act, 1940, and to submit the same to the House of Commons.

The Commission has the honor to acknowledge the receipt of the resolution of the House of Commons, adopted on 11th January 1941, in connection with the Land Act, 1940. The Commission has the pleasure to inform the House that it has been instructed to prepare a report on the subject of the Land Act, 1940, and to submit the same to the House of Commons.

The Commission has the honor to acknowledge the receipt of the resolution of the House of Commons, adopted on 11th January 1941, in connection with the Land Act, 1940. The Commission has the pleasure to inform the House that it has been instructed to prepare a report on the subject of the Land Act, 1940, and to submit the same to the House of Commons.

III/60.
3rd October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

Suggestions regarding the publication of
enactments dealing with war crimes.

By the Secretary to Committee III.

- I. In Document Misc. No.49, a preliminary report has been given on the collection of international and municipal provisions regarding war crimes.

It is the purpose of this paper to submit to Committee III for consideration, and eventually for making appropriate proposals to the Commission, the suggestion to publish a volume containing the texts of international, conventional, municipal and occupational provisions dealing with war crimes. The volume would be a necessary and useful corollary to the Law Reports published by the Commission. It would be a mine of information for the international and for the criminal lawyer, and for the student of international affairs in general.

- II. It is proposed that the publication should be in the English language, and that a French edition should be envisaged for a later date, in the same way as it has been decided, on principle, that the Law Reports should also be eventually produced in French.

- III. The publication should generally be restricted to a reproduction, in English, of the actual texts of the enactments and, where necessary, of the text of other provisions of municipal law which are referred to in the special enactments dealing with war crimes. In cases where, as in the United States of America, the actual executive orders can only be understood in connection with their common law background, a short reference to the latter will probably be unavoidable.

- IV. It is not suggested that the publication should take place in the very near future, but it appears to be necessary to commence the preparatory work without delay.

It will be seen from Doc.Misc.49, that the collection at present available to the Commission is far from complete. In addition to the conventions and enactments enumerated in Doc.Misc.49, there exist to-day similar enactments in other countries, both allied and former enemy.

I am indebted to Commander Mouton for the information that there are in existence similar provisions in the Netherlands East Indies and to Monsieur Stavropoulos for the information that laws have also been enacted in Greece in addition to the law concerning enemy collaborators, which is mentioned in Misc.No.49, Part III, point 8. There are in existence special provisions regarding war criminals in the Soviet Union, in Yugoslavia, in Bulgaria, in Hungary, in Finland and probably also in other countries.

Enactments by the German authorities in the different zones and Länder of Germany fall also within the scope of the proposed publication.

- V. If the suggestion is accepted, on principle, by Committee III, and eventually by the Commission, it will be the task of the Legal Secretariat to try to get the material not yet available, both from Member Governments and from other sources.

III/62.
26th October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

REPORT
on the

Bearing of the Nuremberg Judgment on the Interpretation of the term
"Crimes against Humanity",
the work of Committee III connected with this type of crime and its
application in other courts. (Control Council Law No. 10.)

By Egon Schwelb, Legal Officer.

CONTENTS:

I	Introductory.
II	Earlier discussion of the term "crimes against humanity" by Committee III.
III	General attitude of the Tribunal to the Law of the Charter.
IV	The Crime against peace as the supreme war crime.
V	Rejection of the charges for conspiracy to commit war crimes and crimes against humanity.
VI	Killing of "useless eaters" as a crime against humanity.
VII	The persecution of Jews as a crime against humanity.
VIII	War Crimes and Crimes against Humanity in "subjugated territories".
IX	General statement by the Court on the law as to crimes against humanity.
X	The general statement analyzed.
XI	Application of the general statement to the organisations declared criminal.
XII	Application of the general statement to the S.A.
XIII	Germanisation as a war crime and a crime against humanity.
XIV	Pre-1939 activities of the Gestapo and the S.D., concentration camps, Persecution of the Churches and the Jews.
XV	Pre-1939 activities of the S.S. Germanisation. Persecution of the Jews.
XVI	The individual defendants: Goering.
XVII	Ribbentrop.
XVIII	Kaltenbrunner.
XIX	Frick.
XX	Streicher.
XXI	Funk.
XXII	von Schirach.
XXIII	Seyss-Inquart.
XXIV	von Neurath.
XXV	Summary of the judgment respecting crimes against humanity.
XXVI	Comparison of the interpretation by the Tribunal with the "General Propositions" adopted by Committee III (Doc.C.201)
XXVII	The authority of the Nuremberg Judgment.
XXVIII	The Nuremberg decision and the Control Council Law No. 10.
XXIX	The different approach of a Criminal Court on the one hand and of the United Nations War Crimes Commission on the other.

I. Introductory.

In the meeting of Committee III held on 2nd October 1946, (Minutes No.21/46), Committee III charged this writer with preparing a paper analysing the Nuremberg judgment as far as it dealt with crimes against humanity, and to try to set out what bearing the judgment had on the interpretation of the notion of "crimes against humanity", and, consequently, on the charges involving crimes against humanity with which Committee III was dealing.

The present paper is based on the original transcript of pages 16794-17077 of the transcript which was made available to this writer by the British War Crimes Executive. At the time of writing, the part dealing with the sentences on the individual defendants is not yet available.

The numbers in this paper refer to the pages of the official Nuremberg transcript.

II. Earlier discussion of the term "Crimes against Humanity" by Committee III.

The general questions connected with the notion of "crimes against humanity" were discussed by this writer in the paper III/33 of 22nd March 1946. Its conclusions were, with certain amendments, adopted by Committee III in its report Doc.C.201.

As will be seen, the interpretation, by the Nuremberg Tribunal, of the term "crime against humanity", does not fully coincide with the interpretation contained in the papers III/33 and C.201. It will be seen particularly that the International Military Tribunal has interpreted the term in a narrower sense than in the documents quoted. It will also be seen that the International Military Tribunal appears to have attributed more relevance to the Berlin Protocol of 6th October 1945 than this writer did in his note on the Berlin Protocol contained in Doc.C.193.

III. General Attitude of the Tribunal to the Law of the Charter.

The Tribunal has said, (p.16799) that the provisions of Art.6. of the Charter of the International Military Tribunal "are binding upon the Tribunal as the law to be applied to the case".

The Court declared: "The law of the Charter is decisive and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law. " (p.16871.)

On p.16925, the Tribunal says: "The Tribunal is, of course, bound by the Charter in the definition which it gives both of "war crimes" and "crimes against humanity". "

The Tribunal conceived its task to be the interpretation and application of the law as laid down in the Charter. It did not consider itself to be called upon to make new law (judge-made law) on the one hand, or to examine the legality or otherwise of its constituting Charter on the other, although it did express the opinion that the law as laid down by the Charter was in accordance with the existing international law and in conformity with the law of all nations, (e.g. on p.16880).

IV. The crime against peace as the supreme war crime.

In dealing with Count 1 of the Indictment, (Common Plan or Conspiracy), and Count 2, (Aggressive War; Crimes against Peace), the Tribunal stated (p.16819): "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

The first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the Indictment is the war against Poland begun on 1st September 1939. "

The Tribunal further stated with regard to aggression against Austria that: "the facts plainly prove that the methods employed to achieve the object were those of an aggressor" (p.16831). The Tribunal also accepted the proposition of the prosecution as to the aggressive character of the seizure of Czechoslovakia (pp.16832-16837). And it stated, on p.16847: "The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on 1st September 1939 was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity."

V. Rejection of the charges for conspiracy to commit war crimes and crimes against humanity.

In the statement of the law as to the common plan or conspiracy, the Tribunal said: "Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Art.6. of the Charter provides:

" Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war." (p. 16884).

The Tribunal, therefore, dismissed the accusation as far as it charged the defendants with having conspired to commit war crimes and crimes against humanity.

VI. Killing of "useless eaters" as a crime against humanity.

In the part of the Judgment which deals with war crimes and crimes against humanity generally, the Tribunal, after having dealt with the war crime of ordering slave labour, referred to the killing of insane and incurable people as follows: "Reference should also be made to the policy which was in existence in Germany by the summer of 1940, under which all aged, insane, and incurable people, "useless eaters", were transferred to special institutions where they were killed, and their relatives informed that they had died from natural causes. The victims were not confined to German citizens, but included foreign labourers, who were no longer able to work, and were therefore useless to the German war machine. It has been estimated that at least some 275,000 people were killed in this manner in nursing homes, hospital and asylums, which were under the jurisdiction of the defendant Frick, in his capacity as Minister of the Interior. How many foreign workers were included in this total it has been quite impossible to determine." (p.16916/7).

It will be noted that the Tribunal is careful to point out that the victims were not confined to German citizens, but included foreign labourers and that it was quite impossible to determine how many foreign workers were included in the estimated total of people killed.

VII. The persecution of Jews as a crime against humanity.

With respect to the persecution of the Jews, the Tribunal stated that the persecution of the Jews at the hands of the Nazi Government was proved in the greatest detail before the Tribunal. It was a record of consistent and systematic inhumanity on the greatest scale. (p.16917). The Tribunal recalled the anti-Jewish policy as formulated in Point 4 in the Programme of the Nazi Party of 24th February 1920 (p.16918 in connection with p.16801), and continued:

" The Nazi Party preached these doctrines throughout its history. "Der Stuermer" and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders, the Jews were held up to public ridicule and contempt.

With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws were passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organised, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of one billion marks was imposed on the Jews, the seizure of Jewish assets was authorized, and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettos was carried out on an extensive scale, and by an order of the Security Police, Jews were compelled to wear a yellow star to be worn on the breast and back.

It was contended for the Prosecution that certain aspects of this anti-Semitic policy was connected with the plans for aggressive war. The violent measures taken against the Jews in November 1938 was nominally in retaliation for the killing of an official of the German Embassy in Paris. But the decision to seize Austria and Czechoslovakia had been made a year before. The imposition of a fine of one billion marks was made, and the confiscation of the financial holdings of the Jews was decreed, at a time when German armament expenditure had put the German treasury in difficulties, and when the reduction of expenditure on armaments was being considered. These steps were taken,

moreover, with the approval of the defendant Goering, who had been given responsibility for economic matters of this kind, and who was the strongest advocate of an extensive rearmament programme notwithstanding the financial difficulties.

It was further said that the connection of the anti-Semitic policy with aggressive war was not limited to economic matters. "

The court then referred to a German Foreign Office circular of 25th January 1939, entitled: "The Jewish Question as a factor in the German Foreign Policy in the year 1938," and then stated:

" The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories. Originally the policy was similar to that which had been in force inside Germany. Jews were required to register, were forced to live in ghettos, to wear the yellow star, and were used as slave labourers. In the summer of 1941, however, plans were made for the "final solution" of the Jewish question in all of Europe. This "final solution" meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of Section B.4. of the Gestapo, was formed to carry out the policy. "

After describing the atrocities against Jews committed in occupied territories the Court stated on p.16924, the following: "Special groups travelled through Europe to find Jews and subject them to the "final solution". German missions were sent to such satellite countries as Hungary and Bulgaria, to arrange for the shipment of Jews to extermination camps and it is known that by the end of 1944, 400,000 Jews from Hungary had been murdered at Auschwitz. Evidence has also been given of the evacuation of 110,000 Jews from part of Roumania for 'liquidation'. "

VIII. War Crimes and Crimes against Humanity in "subjugated" territories.

In the chapter dealing with the law relating to war crimes and crimes against humanity, the Tribunal quoted the wording of Article 6(b) and (c) of its Charter, (p.16925) and repeated that the Charter does not define as a separate crime any conspiracy except the one set out in Article 6(a) dealing with crimes against peace. (*)

On pp.26926/7, the Tribunal deals with the plea based on the alleged complete subjugation of some of the occupied countries in the following way: "A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war, because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them. "

(*) It may be added that the transcript available to this Secretariat quotes Art.6(c) on page 16925 with the semi-colon between "the war" and "or persecutions" although this semi-colon has, in the English and French texts, been replaced by a comma by the Berlin Protocol of 5th Oct., 1945. On p.16799, on the other hand, the amended text is quoted.

IX. General statement by the Court on the law as to crimes against humanity.

As to crimes against humanity in general, the opinion of the Court was summed up as follows (p.16927): "With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with any such crime. The Tribunal cannot, therefore, make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.

X. The general statement analyzed.

From the statement quoted verbatim in the preceeding paragraph, the following can be seen:

(1) It is clear that the International Military Tribunal does not recognise the distinction between the two types of crimes against humanity which has been suggested by this writer and adopted by Committee III, namely the distinction between crimes against humanity of the murder type and "persecutions". (See Docs. C.201, point 2, (a) and (b).) This is probably due to the interpretation of the Berlin Protocol (C.193), where the semi-colon dividing paragraph (c) of Art.6. of the English and French texts of the Charter has been replaced by a comma. The Berlin Protocol is, however, not quoted in the judgment. The International Military Tribunal appears to have interpreted paragraph (c) (crimes against humanity) as amended in the English and French texts by the Berlin Protocol of 6th October 1945, to the effect that the qualification "in execution of, or in connection with any crime within the jurisdiction of the Tribunal" is applicable not only to what Committee III has been used to call persecutions, but also to crimes of the murder type. In the opinion of the Tribunal all the crimes enumerated in Art.6(c) are crimes against humanity only if they were done in execution of or in connection with a crime against peace or a war crime in the narrower sense. In spite of the positive provision of the Charter that it was irrelevant whether the crimes were committed "before or during the war", the Tribunal declined to make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter.

As will be seen later, this statement does not mean that no crime committed before 1st September 1939 can be a crime against humanity. The Tribunal recognised some crimes committed prior to 1st September 1939 as crimes against humanity in cases where their connection with the crime against peace was established.

(2) The Court stated, on the other hand, that insofar as the inhumane acts charged in the indictment and committed after the beginning of the war did not constitute war crimes, they were all committed in execution of, or in connection with, aggressive war and therefore constitute crimes against humanity.

XI. Application of the general statement to the organisations declared criminal.

The Tribunal drew the conclusion from what had been said in the preceding paragraph, in making its decision on the criminality of the Leadership Corps, the Gestapo and S.D., and the S.S. With regard to the Leadership Corps, the Tribunal stated that the basis of its declaring the group criminal was the participation of the organisation in war crimes and crimes against humanity connected with the war. The group declared criminal could not, therefore, include persons who had ceased to hold the positions prior to the 1st September 1939. (p.16939).

A similar statement is contained in the decision of the Tribunal regarding the criminality of the Gestapo and the S.D. (p.16949) and of the S.S. (p.16950).

XII. Application of the general statement to the S.A.

The opinion of the Court that crimes committed before 1st September 1939 were not crimes against humanity within the meaning of the Charter was also instrumental in the Tribunal's decision regarding the S.A. The Tribunal found (p.16962) that until June 1934, the S.A. was a group composed in a large part of ruffians and bullies who participated in the Nazi outrages of that period. It was not shown, however, that these atrocities were part of a specific plan to wage aggressive war, and the Tribunal therefore could not hold that these activities were criminal under the Charter.

After the purge of 30th June 1934, the S.A. was reduced to the status of a group of unimportant Nazi hangers-on.

Although in specific instances, some units of the S.A. were used, after 1934, for the commission of war crimes and crimes against humanity, it cannot be said that its members generally participated in, or even knew of the criminal acts.

The Tribunal mentioned, however, that S.A. units were among the first in the occupation of Austria in March 1938, that the S.A. supplied many of the men and a large part of the equipment which composed the Sudeten Free Corps of Henlein, although it appeared that the corps was under the jurisdiction of the S.S. during its operation in Czechoslovakia (pp.16961/2). Some S.A. units were used to blow up synagogues in the Jewish pogrom of 10th and 11th November 1938. (p.16962).

XIII. Germanization as a war crime and a crime against humanity.

It may be relevant for the purpose for which this paper is written, to mention that in dealing with the Leadership Corps, the Tribunal, on p.16943, describes the steps taken by the Leadership Corps which relate merely to the consolidation of control of the Nazi Party and which are not criminal under the view of the conspiracy to wage aggressive war and contrasts with them under the heading "criminal activity", actions which are described as follows: "But the Leadership Corps was also used for similar steps in Austria and those parts of Czechoslovakia, Lithuania, Poland, France, Belgium, Luxembourg and Yugoslavia which were incorporated into the Reich and within the Gaus of the Nazi Party. In those territories the machinery of the Leadership Corps was used for their

Germanisation through the elimination of local customs and the detection and arrest of persons who opposed German occupation. This was criminal under Art.6(b) of the Charter in those areas governed by the Hague Rules of Land Warfare and criminal under Art.6(c) of the Charter as to the remainder.

The Leadership Corps played its part in the persecution of the Jews. It was involved in the economic and political discrimination against the Jews, which was put into effect shortly after the Nazis came into power. The Gestapo and SD were instructed to co-ordinate with the Gauleiters and Kreisleiters the measures taken in the pogroms of November 9 and 10 in the year 1938. The Leadership Corps was also used to prevent German public opinion from reacting against the measures taken against the Jews in the East. "

The Germanisation of incorporated territory and persecution of the Jews is also mentioned in the conclusions as to the criminality of the Leadership Corps on p.16938 with the following words: "The Leadership Corps was used for purposes which were criminal under the Charter and involved the Germanisation of incorporated territory, the persecution of the Jews, the administration of the slave labour programme, and the mistreatment of prisoners of war. "

It may also be mentioned that on pp.16942/3, in connection with the Gestapo and the S.D., the Tribunal speaks of "the period with which the Tribunal is primarily concerned", meaning the period after September 1939.

XIV. Pre-1939 activities of the Gestapo and the S.D., Concentration Camps, Persecution of the Churches and the Jews.

Under the heading "Criminal Activity" of the Gestapo and the S.D., the Tribunal mentions also activities before September 1939 in stating, on p.16944: "Originally, one of the primary functions of the Gestapo was the prevention of any political opposition to the Nazi regime, a function which it performed with the assistance of the S.D." The principal weapon used in performing this function was the concentration camp. The Gestapo did not have administrative control over the concentration camps, but, acting through the RSHA, was responsible for the detention of political prisoners in those camps. Gestapo officials were usually responsible for the interrogation of political prisoners at the camps.

The Gestapo and the S.D. also dealt with charges of treason and with questions relating to the press, the Churches and the Jews. As the Nazi programme of Anti-Semitic persecution increased in intensity the role played by these groups became increasingly important. In the early morning of 10 November 1938, Heydrich sent a telegram to all offices of the Gestapo and S.D., giving instructions for the organisation of the pogroms of that date and instructing them to arrest as many Jews as the prisons could hold "especially rich ones," but to be careful that those arrested were healthy and not too old. By 11 November 1938, 20,000 Jews had been arrested and many were sent to concentration camps. On 24 January 1939, Heydrich, the Chief of the Security Police and S.D., was charged with furthering the emigration and evacuation of Jews from Germany, and on 31 July 1941, with bringing about a complete solution of the Jewish problem in German-dominated Europe. A special section of the Gestapo office of the RSHA under Standartenfuhrer Eichmann was set up with responsibility for Jewish matters which employed its own agents to investigate the Jewish problem in occupied territory. Local offices of the Gestapo were used first to supervise the emigration of Jews and later to deport them to the East both from Germany and from the territories occupied during the war. "

The Tribunal also mentioned that a special detachment from Gestapo headquarters in the RSHA was used to arrange for the deportation of Jews from Axis satellites of Germany for the "final solution".

XV. Pre-1939 activities of the S.S., Germanisation, Persecution of the Jews.

In dealing with the criminal activities of the S.S., the Tribunal says, on p.16953, that S.S. units were active participants of the steps leading up to aggressive war. "The Verfuegungstruppe was used in the occupation of the Sudetenland, of Bohemia and Moravia and of Memel. The Henlein Free Corps was under the jurisdiction of the Reich Fuehrer S.S. for operations in the Sudetenland in 1938 and the Volksdeutsche Mittelstelle financed fifth column activities there.

The S.S. was even a more general participant in the commission of War Crimes and Crimes against Humanity. "

With regard to the part played by the S.S. in the Germanisation of occupied territories and in the persecution of Jews, the following is stated on page 16954: "The Race and Settlement Office of the S.S., together with the Volksdeutsche Mittelstelle were active in carrying out schemes for Germanisation of occupied territories according to the racial principles of the Nazi Party and were involved in the deportation of Jews and other foreign nationals. "

It is pointed out that from 1934 onwards, the S.S. was responsible for the guarding and administration of Concentration Camps, (ibid).

In describing the particularly significant rôle played by the S.S. in the persecution of the Jews, the Tribunal says, on p.16955 that the S.S. was directly involved in the demonstrations of 10th November 1938.

XVI. The Individual Defendants: Goering.

In the verdicts of the Tribunal dealing with the guilt or innocence of individual defendants, there are also many references to crimes against humanity.

Respecting Goering, it is said on p.16973, under the heading "War Crimes and Crimes against Humanity"; "Goering persecuted the Jews, particularly after the November 1938 riots, and not only in Germany where he raised the billion mark fine as stated elsewhere, but in the conquered territories as well." Goering is described as "the creator of the oppressive programme against the Jews and other races at home and abroad." It will be observed that the Court stresses, in both connections, that Goering's crimes were committed not only in Germany, but also in conquered territories.

XVII. Ribbentrop.

Ribbentrop, the Tribunal stated on p.16982, was also responsible for war crimes and crimes against humanity because of his activities with respect to occupied countries and Axis satellites. The Tribunal established that, in September 1942, Ribbentrop ordered the German diplomatic representatives accredited to various Axis satellites to hasten the deportation of Jews to the East. On 17th April 1943, he took part in a conference between Hitler and Horthy on the deportation of Jews from Hungary and informed Horthy that the "Jews must either be exterminated or taken to concentration camps. "

Ribbentrop's activities with regard to Jews of satellite countries in general and of Hungary in particular, are a typical example of crimes against humanity which are not simultaneously war crimes because the victims were not allied subjects, but nationals of the Axis satellite countries.

XVIII. Kaltenbrunner.

In the case of Kaltenbrunner, the Tribunal stated on p.16992, that when he was head of the RSHA, special missions of it scoured the occupied territories and the various Axis satellites, arranging for the deportation of Jews to extermination institutions.

XIX. Frick.

The following statement regarding war crimes and crimes against humanity committed by Frick is on p.17005: "Always rabidly anti-Semitic, Frick drafted, signed and administered many laws designed to eliminate Jews from German life and economy. His work formed the basis of the Nurnberg Decrees, and he was active in enforcing them. Responsible for prohibiting Jews from following various professions, and for confiscating their property, he signed a final decree in 1943, after the mass destruction of Jews in the East, which placed them "outside the law" and handed them over to the Gestapo".

On p.17006 the Tribunal states that though Frick actually exercised little control over Himmler and police matters, he signed the law appointing Himmler Chief of the German police as well as the decree establishing the Gestapo jurisdiction over concentration camps and regulating the execution of orders for protective custody.

The Tribunal further established the following facts as to Frick's activities, (p.17007): "Having created a racial register of persons of German extraction, Frick conferred German citizenship on certain categories of citizens of foreign countries. He is responsible for Germanisation in Austria, Sudetenland, Memel, Danzig, Eastern Territories (West Prussia and Posen) and in the territories of Eupen, Malmedy, and Moresnet. He forced on the citizens of these territories, German law, German courts, German education, German police security and compulsory military service.

During the war, nursing homes, hospitals and asylums in which euthanasia was practiced as described elsewhere in this Judgment, came under Frick's jurisdiction. He had knowledge that insane, sick and aged people, "useless eaters", were being systematically put to death. Complaints of these murders reached him, but he did nothing to stop them."

XX. Streicher.

The case of Streicher is particularly relevant to the subject of this paper. The accused Streicher was indicted on Counts 1 and 4, and was found guilty only on the latter.

Under the heading "Crimes against humanity", the Tribunal says, (p.17008):

" For his twenty-five years of speaking, writing and preaching hatred of the Jews, Streicher was widely known as 'Jew-Baiter Number One'. In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution. Each issue of 'Der Stürmer', which reached a circulation of 600,000 in 1935, was filled with such articles, often loud and disgusting.

Streicher had charge of the Jewish boycott of 1 April 1933. He advocated the Nürnberg Decrees of 1935. He was responsible for the demolition on August 10, 1938 of the Synagogue in Nürnberg. And on November 10, 1938, he spoke publicly in support of the Jewish pogrom which was taking place at that time.

But it was not only in Germany that this defendant advocated his doctrines. As early as 1938 he began to call for the annihilation of the Jewish race. Twenty-three different articles of "Der Stürmer" between 1938 and 1941 were produced in evidence, in which extermination "root and branch" was preached. Typical of his teachings was a leading article in September 1938 which termed the Jew as a germ and a pest, not a human being, but "a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind". Other articles urged that only when world Jewry had been annihilated would the Jewish problem have been solved, and predicted that fifty years hence the Jewish graves "will proclaim that this people of murderers and criminals has after all met its deserved fate." Streicher, in February 1940, published a letter from one of "Der Stürmer's" readers which compared Jews with swarms of locusts which must be exterminated completely. Such was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination. A leading article of "Der Stürmer" in May 1939, shows clearly his aim:

" A punitive expedition must come against the Jews in Russia.
A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch. "

As the war in the early stages proved successful in acquiring more and more territory for the Reich, Streicher even intensified his efforts to incite the Germans against the Jews. In the record are twenty-six articles from "Der Stürmer", published between August 1941 and September 1944, twelve by Streicher's own hand, which demanded annihilation and extermination in unequivocal terms. He wrote and published on December 25, 1941:

" If the danger of the reproduction of that curse of God in the Jewish blood is to finally come to an end, then there is only one way -- the extermination of that people whose father is the devil. "

And in February 1944, his own article stated:

" Whoever does what a Jew does is a scoundrel, a criminal. And he who repeats and wishes to copy him deserves the same fate, annihilation, death. "

With knowledge of the extermination of the Jews in the occupied Eastern Territory, this defendant continued to write and publish his propaganda of death. Testifying in this trial, he vehemently denied any knowledge of mass executions of Jews. But the evidence makes it clear that he continually received current information on the progress of the "final solution". His press photographer was sent to visit the ghettos of the East in the spring of 1943, the time of the destruction of the Warsaw Ghetto. The Jewish newspaper, "Israelitisches Wochenblatt" which Streicher received and read, carried in each issue accounts of Jewish atrocities in the East, and gave figures on the number of Jews who had been reported and killed. For example, issues appearing in the

summer and fall of 1942 reported the death of 72,729 Jews in Warsaw, 17,542 in Lodz, 18,000 in Croatia, 125,000 in Roumania, 14,000 in Latvia, 85,000 in Yugoslavia, 700,000 in all of Poland. In November 1943 Streicher quoted verbatim an article from the "Israelitisches Wochenblatt", which stated that the Jews had virtually disappeared from Europe, and commented "This is not a Jewish lie". In December 1942, referring to an article in the "London Times", about the atrocities, aiming at extermination, Streicher said that Hitler had given warning that the second World War should lead to the destruction of Jewry. In January 1943 he wrote and published an article which said that Hitler's prophecy was being fulfilled, that world Jewry was being extirpated, and that it was wonderful to know that Hitler was freeing the world of its Jewish tormentors.

In the face of the evidence before the Tribunal it is idle for Streicher to suggest that the solution of the Jewish problem which he favoured was strictly limited to the classification of Jews as aliens, and the passing of discriminatory legislation such as the Nuremberg Laws, supplemented if possible by international agreement on the creation of a Jewish State somewhere in the world, to which all Jews should emigrate.

Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes, as defined by the Charter, and constitutes a crime against humanity."

It appears that in the case of Streicher, the Tribunal included among his activities considered criminal, his speaking, writing and preaching hatred of the Jews for 25 years. It therefore went back to the year 1920. The Tribunal enumerated among his crimes, his part in the Jewish boycott of 1st April 1933, in the advocating of the Nuremberg Laws in 1935, in the demolition of the Nuremberg synagogue in August 1938, and his part in the Jewish pogrom of November, 1938. This would appear to indicate that here the Tribunal included within the notion of crimes against humanity these pre-1939 activities. The Tribunal was, however, careful to point out that it was not only in Germany that this defendant advocated his doctrines and the Tribunal stated that with knowledge of the extermination of the Jews in the occupied Eastern territory, Streicher continued to write and publish his propaganda of death.

This leaves open an interpretation of the Judgment to the effect that only acts committed in connection with crimes against peace or war crimes are crimes against humanity within the meaning of the Charter and that Streicher had been found guilty of Count 4 not for his activities within Germany but for his extension of their scope to the occupied territories and for his call for the annihilation of the Jewish race throughout the world.

The reply by the Tribunal to Streicher's defence that the solution of the Jewish problem which he favoured was strictly limited to the classification of Jews as aliens and the passing of the discriminatory legislation, such as the Nuremberg Laws, also indicates that the Tribunal did not consider Streicher's part, e.g. in the passing of the discriminatory legislation as such to constitute a crime against humanity, but only his incitement to murder and extermination at the time when the Jews in the East were being killed under the most horrible conditions. This incitement to murder and extermination of Jews, the Tribunal declared to be persecution on political and racial grounds in connection with war crimes.

XXI. Funk.

In the case of the defendant Funk, the Judgment states, on p.17014, that Funk, in his capacity as Under-Secretary in the Ministry of Propaganda and Vice-Chairman of the Reich Chamber of Culture, had participated in the early Nazi programme of economic discrimination against Jews. The Judgment continues: "On 12 November 1938, after the pogroms of November, he attended a meeting held under the chairmanship of Goering to discuss the solution of the Jewish problem and proposed a decree providing for the banning of Jews from all business activities, which Goering issued the same day under the authority of the Four Year Plan. Funk has testified that he was shocked at the outbreaks of November 10, but on November 15, he made a speech describing these outbreaks as a "violent explosion of the disgust of the German people, because of the criminal Jewish attack against the German people", and saying that the elimination of the Jews from economic life followed logically their elimination from political life."

The Judgment then proceeded in describing Funk's criminal activities in and after 1942.

The wording of the Judgment indicated that Funk's pre-1939 activities were also considered criminal.

It may be mentioned in this connection, that it is stated on p.17015 that Funk was responsible for the seizure of the gold reserves of the Czechoslovak National Bank. This seizure took place some months before September 1939.

XXII. Von Schirach.

The defendant von Schirach was found guilty only of crimes against humanity. The Tribunal stated on p.17037: "As has already been seen, Austria was occupied pursuant to a common plan of aggression. Its occupation is, therefore, a "crime within the jurisdiction of the Tribunal" as that term is used in Art.6(c) of the Charter. As a result, "murder, extermination, enslavement, deportation and other inhumane acts" and "persecutions on political, racial or religious grounds" in connection with this occupation constitute a Crime against Humanity under that Article.

As Gauleiter of Vienna, von Schirach came under the Sauckel decree dated April 6, 1942, making the Gauleiters Sauckel's plenipotentiaries for manpower with authority to supervise the utilization and treatment of manpower within their Gaus. Sauckel's directives provided that the forced labourers were to be fed, sheltered and treated so as to exploit them to the highest possible degree at the lowest possible expense.

When von Schirach became Gauleiter of Vienna the deportation of the Jews had already been begun, and only 60,000 out of Vienna's original 190,000 Jews remained. On 2 October 1940, he attended a conference at Hitler's office and told Frank that he had 50,000 Jews in Vienna which the General Government would have to take over from him. On 3 December 1940, von Schirach received a letter from Lammers stating that after the receipt of the reports made by von Schirach, Hitler had decided to deport the 60,000 Jews still remaining in Vienna to the General Government because of the housing shortage in Vienna. The deportation of the Jews from Vienna was then begun and continued until the early fall of 1942. On 15 September 1942, von Schirach made a speech in which he defended his action in having driven "tens of thousands upon tens of thousands of Jews into the Ghetto of the East" as "contributing to European culture".

While the Jews were being deported from Vienna reports, addressed to him in his official capacity, were received in von Schirach's office from the office of the Chief of the Security Police and S.D. which contained a description of the activities of Einsatzgruppen in exterminating Jews. Many of these reports were initialed by one of von Schirach's principal deputies. On 30 June 1944, von Schirach's office also received a letter from Kaltenbrunner informing him that a shipment of 12,000 Jews was on its way to Vienna for essential war work and that all those who were incapable of work would have to be kept in readiness for "special action".

The Tribunal finds that von Schirach, while he did not originate the policy of deporting Jews from Vienna, participated in this deportation after he had become Gauleiter of Vienna. He knew that the best the Jews could hope for was a miserable existence in the Ghettoes of the East. Bulletins describing the Jewish extermination were in his office. "

Schirach was in this connection charged only with crimes committed during the war against persons who were not allied nationals. (Austrian Jews). The crimes for which he was sentenced are therefore also clear examples of crimes against humanity which are not simultaneously war crimes in the narrower sense.

XXIII Seyss-Inquart.

In giving the reasons for its Judgment on Seyss-Inquart, the Tribunal distinguished between his "activities in Austria" (p.17052) and his "criminal activities in Poland and the Netherlands" (p.17053). Under the first heading, ("Activities in Austria"), the Tribunal said: "As Reichs Governor of Austria, Seyss-Inquart instituted a programme of confiscating Jewish property. Under his regime Jews were forced to emigrate, were sent to concentration camps and were subject to pogroms. At the end of his regime he co-operated with the Security Police and S.D. in the deportation of Jews from Austria to the East. While he was Governor of Austria, political opponents of the Nazis were sent to concentration camps by the Gestapo, mistreated and often killed."

The insertion of this paragraph under the heading "Activities in Austria" as distinguished from "criminal activities", seems to indicate that the Tribunal was of the opinion that the acts committed by Seyss-Inquart, while in Austria, were not criminal from the point of view of crimes against humanity, under Art.6(c) of the Charter. This interpretation would, however, not be in line with the attitude taken by the Tribunal in the case of von Schirach, where, as stated in the preceding paragraph of this paper, the Tribunal described the occupation of Austria as a crime within the jurisdiction of the Tribunal and persecutions on political, racial or religious grounds committed in connection with this occupation as constituting a crime against humanity under the Article. Under the heading "Activities in Austria", the Tribunal described also Seyss-Inquart's part in the German aggression against Austria, and the part taken by him in the dismemberment of Czechoslovakia, both of which lead to his being found guilty also on Count 2, (Crimes against Peace), and were, therefore, certainly considered by the Tribunal to be criminal. Not too much reliance can, therefore, be placed on the omission of the word "criminal" in the heading of the appropriate paragraph dealing with Seyss-Inquart's activities in Austria.

The case of Seyss-Inquart's activities in Austria can, of course, be distinguished from the case of von Schirach in that the latter became Reichsgauleiter in Austria after September 1939, while Seyss-Inquart left Austria at the beginning of the war for Poland and the Netherlands.

XXIV. von Neurath.

In the case of von Neurath, the Tribunal, under the heading "Criminal Activities in Czechoslovakia", stated, inter alia, the following, (p.17064): "As Reichs Protector, von Neurath instituted an administration in Bohemia and Moravia similar to that in effect in Germany. The free press, political parties and trade unions were abolished. All groups which might serve as opposition were outlawed. Czechoslovakian industry was worked into the structure of German war production, and exploited for the German war effort. Nazi anti-Semitic policies and laws were also introduced. Jews were barred from leading positions in Government and business.

In August 1939, von Neurath issued a proclamation warning against any acts of sabotage and stating that "the responsibility for all acts of sabotage is attributed not only to individual perpetrators but to the entire Czech population."

This indicates that acts committed before 1st September, 1939, in Czechoslovakia, were considered criminal as war crimes and/or crimes against humanity.

XXV. Summary of the judgment respecting crimes against humanity.

The International Military Tribunal, in interpreting the notion of crimes against humanity, lays particular stress on the provision of its Charter, according to which an act in order to come within the notion of a crime against humanity, must have been committed in execution of or in connection with any crime within the jurisdiction of the Tribunal which means that it must be closely connected either with a crime against peace or a war crime in the narrower sense. Therefore the Tribunal has declined (supra IX) to make a general declaration that acts committed before 1939 were crimes against humanity within the meaning of the Charter.

In applying this general principle, the Tribunal is particularly reluctant to acknowledge as crimes against humanity acts committed in Germany against Germans before 1st September 1939.

This represents, however, only the general view of the Tribunal and did not prevent it from treating as crimes against humanity acts committed by individual defendants against German nationals before 1st September 1939, if the particular circumstances of the case appeared to warrant this attitude. The case of the defendant Streicher is here in point, but even in his case the causal nexus between his activities and the crimes committed on occupied allied territory and against non-German nationals has been pointed out and the most that can be said of him is that he was found guilty also of crimes against humanity committed before 1st September 1939 in Germany against German nationals.

In the case of none of the defendants was the position such as would have lead to his conviction only of crimes committed in Germany against Germans before 1st September 1939.

The restrictive interpretation placed on the term "crimes against humanity" as far as German nationals as victims were concerned, was not applied by the Tribunal in the case of victims of other than German nationality. With respect to crimes committed before 1st September 1939, against Austrian nationals, the Tribunal established their connection with the annexation of Austria, which is a crime against peace, and came therefore to the conclusion that they were within the terms of Art.6(c) of the Charter. This is particularly shown by the above quoted reasoning in the case of Baldur von Schirach and, with less precision, in the case of the defendant Seyss-Inquart.

With regard to inhumane acts charged in the indictment and committed after 1st September 1939, the Tribunal made the far reaching statement quoted supra IX, from p.16927, that insofar as they did not constitute war crimes they were all committed in execution of, or in connection with, aggressive war and therefore constituted crimes against humanity.

This is particularly illustrated in the case of the defendant Ribbentrop and his activities with respect to Axis satellites.

From the statement on p.16943, quoted supra XIII, it will be seen that the Tribunal treats the notion of crimes against humanity as a kind of subsidiary provision to be applied when a particular area where a crime was committed, is not governed by the Hague Rules of Land Warfare. Germanisation is, therefore, considered as criminal under Art.6(b) in those areas governed by the Hague Regulations and a crime under Art.6(c) as to the remainder.

In general, the following may be said with respect to the interpretation of the term "crime against humanity" by the Tribunal: Before the promulgation of the decision it was assumed in many quarters that a crime against humanity was a novel type of international crime and that the provisions containing sanctions against it were equally applicable in times of war and of peace, that they protected the human rights of inhabitants of all countries, "of any civilian population", against anybody, including their own states and governments, and that the notion expressed the superiority of International Law over domestic or municipal law. According to the interpretation given to the term by the International Military Tribunal, this is not so.

As interpreted in the Nuremberg Judgment, the term has a considerably narrower connotation. It is, as it were, a kind of by-product of war, applicable only in time of war or in connection with war and destined primarily, if not exclusively, to protect the inhabitants of foreign countries against crimes committed, in connection with an aggressive war, by the authorities and organs of the aggressor state. It serves to cover cases not covered by norms belonging to the traditional "laws and customs of war". It is nothing but a particular type of war crime, a kind of clausula generalis, the purpose of which it is to make sure that inhumane acts violating general principles of the laws of all civilised nations committed in connection with war, should not go unpunished.

XXVI. Comparison of the interpretation by the Tribunal with the "General Propositions" adopted by Committee III (Doc.C.201).

(1) Paragraph 1 of the "General Propositions" has been endorsed by the Tribunal. The Tribunal is also of the opinion that one and the same act may constitute both a war crime in the narrower sense and a crime against humanity; the Tribunal is, however, also conscious of the fact that this overlapping of the two terms does not make the application of the law easier and in the sentence dealing with Germanisation, quoted from p.16943, in paragraphs XIII and XXV of this paper, the term crime against humanity was interpreted as a term covering criminal denationalisation in areas to which the laws and customs of war did not apply. Reference is made to the footnote on page 2 of Doc.C.201, where Committee III also expressed its opinion that in a purely scientific system, violations of the laws and customs of war should not be included in the term "crimes against humanity", which should be restricted to such offences as do not fall under the term of "Violations of the Laws and Customs of War."

- (2) The Tribunal has not acted upon the division of crimes against humanity into the two types of: (1) crimes of the murder type and (2) persecutions. It recognises only one notion of crimes against humanity and applies to all acts falling under this notion the qualification that the act must have been committed in execution of or in connection with a crime against peace or a war crime in the narrower sense.
- (3) No modification of point 3 of Doc.C.201 appears necessary.
- (4) From the fact that the Tribunal does not distinguish between crimes of the murder type and persecutions, it follows that crimes against members of belligerent forces are entirely outside the scope of crimes against humanity.
- (5) The condition that the acts be in execution of or in connection with any crime within the jurisdiction of the International Military Tribunal applies according to the Nuremberg judgment to all kinds of crimes against humanity, and is not restricted to what Committee III called "persecutions". The Tribunal does not seem to admit the possibility that one set of facts may constitute a crime against humanity because of its connection with another crime against humanity.
- (6) The decision of the Nuremberg Tribunal has no bearing at all either by way of confirmation or by way of repudiation on the limitations of the term "crimes against humanity" attempted by Committee III to the following effect:
- " Isolated offences do not fall within the notion. As a rule systematic mass action, particularly if it can be shown to be authoritative, will be necessary to transform a common crime, punishable merely under municipal law, into a crime against humanity which thus becomes also the concern of International Law. Only crimes which either by their magnitude and savagery or by their great number or by the fact that a similar pattern is applied at different times and places, endanger the international community or shock the conscience of mankind, warrant intervention by States other than that on whose territory the crimes have been committed, or whose subjects have been their victims. "
- In the case of the Nuremberg defendants, it was the basic assumption that their acts were not isolated offences, but that they were the organisers of crimes against humanity in very great numbers. The correctness or otherwise of the definition suggested by Committee III will therefore have to be decided in the trials of persons, not major war criminals, accused of committing crimes against humanity before municipal (occupation, military) courts.
- (7) The statement contained in Doc.C.201 that it is irrelevant whether a crime against humanity has been committed before or during the war, though based on the express provision to the same effect contained in the Charter, must be considerably qualified in view of the Nuremberg judgment; although in theory it remains irrelevant whether a crime against humanity was committed before or during the war, in practice it is difficult to establish connection between what is alleged to be a crime against humanity and a crime within the jurisdiction of the Tribunal if the act was committed before the war.
- (8) Committee III has stated that the nationality of the victim is irrelevant. This assumption was based on the words of the Charter "committed against any civilian population". Here again, the proposition remains true in theory, but must, according to the view of the Nuremberg Tribunal, be considerably qualified with regard to acts committed before

the war in Germany against German nationals. Even with regard to revolting and horrible crimes, the connection with the aggression or with war crimes must be proved and where proof is not satisfactory, they are not considered by the International Military Tribunal as crimes against humanity within the meaning of the Charter.

(9) The problem of lesser perpetrators was outside the proceedings before the International Military Tribunal.

(10) The irrelevance of the lex loci has been confirmed by the Tribunal.

(11) The proposition that a crime against humanity can be committed by enacting legislation which orders or permits crimes against humanity, has been endorsed by the Tribunal, as is particularly shown in the cases of the defendants Frick and Neurath.

XXVII. The Authority of the Nuremberg Judgment.

The problem arises whether the attitude of the International Military Tribunal with regard to the notion of crimes against humanity (and for that matter, its interpretation of the law in general) is binding for the decision of other cases to be tried either before the International Military Tribunal itself, (if such subsequent trials should take place, which, I understand, seems hardly probable at present), or by other courts be it the International Military Tribunal for the Far East, or municipal, occupational or military tribunals of other United Nations or Axis Powers.

The Tribunal has expressed its opinion that the making of the Charter was an exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; the undoubted right of these countries to legislate for the occupied territories has now been recognised by the civilised world, (p.16871). From this it appears that the Tribunal considers itself to be not an organ of the international community at large, as, e.g., the Permanent Court of Arbitration, the Permanent Court of International Justice or the International Court of Justice. The Tribunal allots to itself a considerably lesser standing, namely the standing of an occupational court having jurisdiction over Germany and German nationals. This classification of the International Military Tribunal not as a court of the international community of nations, but as a local court for Germany, is, generally speaking, in accordance with some of the provisions of the Four-Power Agreement of 8th August 1945, and of the Charter annexed to it.

Article 1 of the Agreement provides for the establishment of an International Military Tribunal "after consultation with the Control Council for Germany."

Art.22 of the Charter provides, inter alia, that the first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany.

Art.28 of the Charter provides that the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Art.29 of the Charter provides for the sentences to be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. Under Art.29, the Control Council for Germany has also the right to contact the Committee of Prosecutors with a view to a re-trial of defendants on the discovery of fresh evidence.

Under Art. 30 of the Charter, the expenses of the Tribunal and of the trials shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

These provisions in their totality point in the direction of considering the International Military Tribunal as an organ of the present government of the territory of Germany as a condominium of the four Powers, which is called upon to apply law flowing from the Control Council for Germany, as the organ in which supreme authority over Germany and the Germans is vested at the present time.

There are, on the other hand, features in the Four-Power Agreement and in the Charter annexed to it, according to the International Military Tribunal a higher status, transcending the boundaries of Germany and of the local legal order of one country. These features are:

- (a) The provision of Art. 6 of the Charter, according to which the jurisdiction of the Tribunal is not restricted to German major war criminals, but, in theory at least, comprises also the right to try and punish the major war criminals of all the European Axis Countries.
- (b) The provision of Art. 5 of the Agreement giving any Government of the United Nations the right to adhere to the Agreement, a right of which the following 19 States have availed themselves: Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxemburg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay.

If the opinion is correct that the International Military Tribunal is a municipal (occupational) court for Germany, it is clear that its decision cannot possibly lay down law binding on the courts of other countries, whether or not the laws of these countries are based on the system of binding precedent, and the decision is therefore for other courts only of persuasive authority, which means that any other courts may follow the Nuremberg interpretation, if it considers it correct, and may disagree with it, if it considers it incorrect.

The position would not be otherwise if the Tribunal were a court of the international community, as, e.g., an International Court of Justice under its San Francisco Statute. In Art. 59 of the Statute of the International Court of Justice, it is laid down (as it was in Art. 59 of the Statute of the Permanent Court of International Justice), that the decision of the court has no binding force except between the parties in respect of that particular case.

This general rule applies, of course, only to the extent to which there is no express provision to the contrary in the Charter. The latter is the case with respect to decisions of the Tribunal with regard to criminal organisations; in such cases

the criminal nature of the group or organisation is, under Art. 10 of the Charter, considered proved and shall not be questioned in national, military or occupational courts of any Signatory, (Great Britain, France, the United States of America and the U.S.S.R.). Apart from this particular aspect, the decision of the International Military Tribunal ius facit inter partes only.

This is not to say that the decision of the Tribunal is not bound to influence any Court throughout the world, which will be faced with similar facts. He would be a bold judge of any national, occupational or military court who would decline to be guided by the reasoned judgment of a court composed of four eminent members of the legal profession of the four Great Powers, arrived at after a trial, unique in history,

backed by the authority not only of the four Signatories, but also of nineteen "adherent" states, always provided that the facts - and the law to be applied - are the same. That the latter is not the case as far as crimes against humanity to be tried under the Control Council Law No.10 are concerned, will be shown in the following paragraph XXVII of this paper.

XXVII. The Nuremberg decision and the Control Council Law No.10.

The Control Council Law No.10, published in the Official Gazette of the Control Council for Germany, No.3., p.50, (see also Military Government Gazette, Germany, British Zone of Control, No.5. p.46; Documents Series of the Research Office No.15 bis, and this writer's commentary in Doc.Misc.No.9.), has been promulgated by the Control Council "in order to give effect to the terms of the Moscow Declaration of 30th October 1943, the London Agreement of 8th August 1945, and the Charter issued pursuant thereto."

Art.I. of the Law No.10 ordains that, inter alia, the London Agreement is made an integral part of this law. Art.II provides that each of the following acts is recognised as a crime and enumerates under (a), crimes against peace, under (b) war crimes, under (c), crimes against humanity, and under (d), membership in a category of a criminal group or organisation declared criminal by the International Military Tribunal.

We are here concerned with crimes against humanity. The respective provision of Law No.10 reads as follows:

" (c) Crimes against Humanity: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated. "

If we compare the definition of "Crimes against Humanity" under Law No.10 with the definition of crimes against humanity in the Charter, we find the following differences:

- (1) The definition of Law No.10 begins with the words "Atrocities and offences, including but not limited to" These words are not contained in the Charter. This means that the enumeration in the Charter is exhaustive, in Law No.10 exemplative. This difference does not amount to too much, because the words used in the Charter, "or other inhumane acts", are so wide that the enumeration is, in practice, also only exemplative.
- (2) Among the acts enumerated in Law No.10 are the following, which are not enumerated in the Charter, namely: "imprisonment, torture and rape".
- (3) The word "and" before "other inhumane acts" is replaced in Law No.10 by the word "or". This again indicates that the intention of the makers of Law No.10 was to give it a wider scope, although the practical effect of this alteration should not be too great.
- (4) The words "before or during the war" are omitted in Law No.10. It is submitted that this alteration has no practical importance because from other provisions of Law No.10 it is quite clear that Law No.10 too applies to crimes committed both before and during the war. One of the provisions bearing this out is Art.II(5) of Law No.10

regarding the Statutes of Limitation. (See para.XI of Doc.Misc.9).

The omission of the words "before or during the war" may have the reason that the legislators intended that the provisions should cover not only acts committed before and during the war, but also acts committed after the war.

(5) Law No.10 does not contain the words "in execution of or in connection with any crime within the jurisdiction of the Tribunal". This, of course, is the most fundamental and most striking difference between the Charter and Law No.10, particularly in view of the great importance attributed by the International Military Tribunal to these very words. From this difference between the text of the Charter and the text of Law No.10, it follows that this important qualification of the term "Crime against Humanity", as understood by the International Military Tribunal, is entirely inapplicable in proceedings under Law No.10. Contrary to what was said by the International Military Tribunal with regard to the law to be applied by the International Military Tribunal on p.16927 (quoted supra D), it is not necessary under Law No.10 to prove that acts, to fall under the notion of crime against humanity within the meaning of Law No.10, must have been in execution of, or in connection with a crime against peace or a war crime in the narrower sense.

The effect of this fundamental difference between the Charter on the one hand, and Law No.10 on the other, makes the whole jurisprudence evolved by the International Military Tribunal with a view to restricting crimes against humanity to those closely connected with the war, irrelevant for the courts which are dealing or will be dealing with crimes against humanity under Law No.10.

It seems, on first sight, to be rather startling that the law applied to the major war criminals who were tried under the Charter, should be less comprehensive and therefore less severe than the law applied to not-so-high-ranking perpetrators. To this objection it may be replied:

(a) That it is only a theoretical and doctrinal one, because the major war criminals were caught in the net of the law in spite of the qualification contained in Art.6(c) of the Charter.

(b) That the striking difference in the texts of the Charter on the one hand, and of Law No.10 on the other, does not permit of any other interpretation. / There remains one difficulty in the interpretation of Law No.10. Art.I makes the London Charter an integral part of the Law. Art.II contains, as shown, provisions respecting, inter alia, crimes against humanity, which differ from the London Charter. Which provision is to prevail? I submit that Art.II is the operative provision, the quoted part of Article I only incorporating the provisions regarding major war criminals in the local law of Germany. The guilt, or innocence of persons other than the major war criminals, is, in my view, governed by Article II.

I understand that a Carrying-out-Law to the Control Council Law No. 10 has been prepared by the British authorities for the British zone. It may be that the statement of the law, as contained in this paragraph will have to be supplemented or qualified when the text of the Carrying-out-Law for the British zone is available.

XXIX. The different approach of a Criminal Court on the one hand and of the United Nations War Crimes Commission on the other.

In considering the judgment of the International Military Tribunal in its bearing on the activities of the Commission, it should be borne in mind that the approach of the International Military Tribunal and, for that matter, of any other court administering penal law, to certain facts and their legal relevance, must necessarily be different from the approach to the same facts by the United Nations War Crimes Commission. While the International Military Tribunal as a court of law has had to establish, and did actually establish, whether a certain fact is proved "beyond reasonable doubt" (cf. the acquittal of Schacht, (p.17022) and the acquittal of Papen (p.17051)), the Commission has only to decide whether there is a prima facie case against a certain person or a group of persons.

The Commission has further to consider that the law to be applied to "crimes against humanity" by national, occupational or military courts need not necessarily be the same as the law which was applied by the Nuremberg Tribunal. With regard to Germany, it has been shown in paragraph XXVIII supra that the law laid down by the Control Council differs from the law of the Charter.

III/63
29th October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III

Yugoslav-Italian charges of Crimes against
Humanity referred to Committee III by
Committee I.

Draft Report by Committee III.

By the Secretary to Committee III.

- I. Committee I has been examining a considerable number of charges brought by the Yugoslav National office against certain Italian nationals. These charges include Charges Nos. 1323, 1462, 3296, 4031, 4032, 4033, 4034, 4035, 4036, 4037. Of these charges, the Charges Nos. 1462 and 4037 deal with the same facts.
- The charges mentioned were referred to Committee III by Committee I, the terms of reference being that Committee III should give its opinion as to whether or not the alleged crimes should be considered as Crimes Against Humanity, and for what reasons.
- II. The facts of the cases referred to Committee III are reproduced in Docs. III/32, III/45 and III/56. The Yugoslav representative on the United Nations War Crimes Commission, Dr. R. ZIVKOVIC, supplemented the charges by two memoranda, which are contained in Docs. III/57 and III/59.
- III. In the meeting of Committee III held on 2nd October, 1946, (Committee III Minutes 21/46) Dr. ZIVKOVIC proposed that the consideration of the case No. 1323 (annex to Doc. III/32) should be adjourned, because it was not directly connected with the other cases enumerated above. This was agreed to by Committee III and this report deals accordingly with all the cases mentioned in para I of this paper, with the exception of the Charge No. 1323, on which a special report will be prepared in due course.
- IV. From the following report, it will be seen that the individual charges brought by the Yugoslav National Office, and dealt with in this report, deal in some cases with a considerable number of different sets of facts. On some of such sets of facts, or "counts", the information so far produced by the Yugoslav National Office was not considered sufficient and the decision on some counts, has accordingly also been adjourned until additional information is forthcoming.
- V. In presenting this report, Committee III states:
1. That it is not concerned with the question whether the persons charged by the Yugoslav government should be listed by the Commission at the instance of the Yugoslav government.
 2. That it is not concerned with the question whether the persons should be extradited or handed over to the Yugoslav government.
 3. That it is not concerned with the guilt of each individual accused.

The only question on which Committee III has to give its opinion is whether the facts set out in the Yugoslav charges constitute crimes against humanity and if so, to give the reasons. The task of Committee

III is therefore restricted to a reply to this theoretical legal question only.

Considering the charges referred to it from this restricted angle, Committee III makes the observations contained in the following paragraphs of this paper.

VI.

Case No:3296(Doc.III/45)

This charge contains eight different counts, with which Committee III dealt as follows:-

Count 1.

The decision was adjourned until the Yugoslav National Office could supply further information.

Counts 2 and 3.

There the accused is charged that his troops, in a terror raid, pillaged the property of three people, and that a unit of his troops beat and tortured a man, threatening him with death and looting his belongings.

In the course of the discussion of these charges, the question was raised whether crimes against property could be considered as crimes against humanity, and it was pointed out by some speakers that the acts occurred when rebellion against the Italian authorities was in progress. It was also pointed out that it was relevant whether or not the acts were committed in the course of operations against partisans, and if this was not the case, whether they were committed according to a pattern, the object of which was the persecution of the civilian population for political or racial grounds. The Yugoslav representative, on the other hand, drew the Committee's attention to the fact that the crimes described in Counts 2 and 3 (and for that matter, all crimes charged in case No. 3296) had been committed after the Italian armistice and that, accordingly, the accused were rebels in relation to their own government, which had capitulated to the Allies. They had, in the Yugoslav representative's submission, no claim to the status of a belligerent force. Other members replied that the "Fascist-Republican" forces *via facti* had been treated by the Allies as combatant belligerent units. The Committee came to the conclusion that the facts as alleged in counts 2 and 3 were crimes and that it will decide whether they fall under the notion of crimes against humanity, when considering the whole of the cases submitted.

Count 4.

This count deals with two different sets of facts. In its first paragraph, one of the accused is charged that a unit under his command arrested an inhabitant and deported him to a concentration camp in Germany. As to this, the Committee came to the same conclusion as with regard to counts 2 and 3, namely that a *prima facie* case for a crime having been committed has been made out, and that the question of its classification as a crime against humanity would be considered when the whole of the charges will have been under review.

The second paragraph of Count 4 (regarding the killing of Kamilo Stepanovic) was adjourned until the Yugoslav National Office will have had supplied information regarding the question why the victim had been killed.

Counts 5, 6 and 7.

These three counts all deal with pillage. The decision of Committee III was to the same effect as in the above-quoted counts two and three.

Count 8.

This count contains a charge that a Commander of the Partisan Brigade was taken to a house, where he was tied to the staircase for two days, beaten and tortured. He was then taken to the River Isonzo and shot without trial. The Committee decided that the torture and the shooting without trial constituted a crime, the qualification of which would be considered in connection with the whole of the charges submitted.

VII. Case No. 4031.

Counts 1 and 2.

are, according to the statement by Dr. Zivkovic, important as illustrations of a pattern, but were not charges in themselves.

Count 3.

This count deals with opening fire on people in a house, the wounding of two Yugoslav students who were inside and who were arrested together with two other men. The house was burnt down, allegedly as a reprisal. The Committee came to the conclusion that a crime had been committed and its qualification as a crime against humanity would be considered in connection with the other charges. The Committee did not, however, regard the mere arrest of two students and two other men in itself as a crime.

Counts 4 and 5.

These two counts refer to shooting of captured partisans without trial. The Committee is of the opinion that the facts establish a prima facie case of a crime, the qualification of which will be considered in connection with other charges submitted.

Count 6.

This case refers to the wanton destruction by fire of a house. Here again, the Committee is of the opinion that a prima facie case of a crime has been established.

Count 7.

This count consists of three different sets of facts described in three paragraphs.

Paragraphs 1 and 3 of count 7 were adjourned.

As to paragraph 2, which contains the charge of shooting civilians arrested for violation of a curfew while allegedly trying to escape, the Committee considers that there is a reasonable suspicion of a crime having been committed, the qualification of which will be considered in connection with the whole scheme.

Count 8.

This count concerns the shooting of a captured partisan while allegedly trying to escape. The Committee considers this charge as a prima facie case of a crime.

VIII. Case No. 4032.

This charge concerns the pillaging of villages, setting fire to houses and the murder and deportation of persons. The committee decided that a prima facie case of a crime had been made out.

IX. Case No. 4033.

The Committee arrived at the same decision with regard to this case, count 1 of which concerns the shooting of nine hostages, and the second the shooting of three women under the pretence that they attempted to escape.

X.

Case No. 4034.
Counts 1 to 5 of this
charge refer to:-

Count 1.

Imprisonment of 45 men and deportation to concentration camps in Germany.

Count 2.

A so-called "mopping up" action, in the course of which persons were arrested, one of them hanged, the others released, and the village pillaged. The hanging took place without trial.

Count 3.

The torture and capture of partisans, taking some of them to a house, stripping some of them and torturing them to death.

Count 4.

The hanging of four men without trial.

Count 5.

The pillaging of a village, setting houses on fire, killing people, including women and children.

The Committee considered that with regard to all five counts, a prima facie case of a crime had been made out.

The charge preferred in Count 6 of the same case was abandoned by Dr. Zivkovic.

XI.

Case No. 4035.

Count 1.

The Yugoslav representative pointed out that the offences alleged to have been committed under count 1 (and also counts 7, 8, 9 and 13) were committed arbitrarily. The Committee came to the conclusion that the shooting alleged under Count 1 constitutes a prima facie case of a crime.

Count 2.

The Yugoslav representative abandoned this count.

Count 3.

Here the Committee came to the same conclusion as in respect of count 1.

Count 4.

The Yugoslav representative abandoned count 4.

Count 5.

The Committee adjourned this count on the suggestion of the Yugoslav representative.

Count 6.

This count was abandoned by the Yugoslav representative as far as the alleged robbery was concerned. The shooting however constitutes, in the Committee's opinion, a prima facie case of a crime.

Counts 7, 8 and 9.

The same applies to the shooting alleged under counts 7, 8 and 9.

Count 10.

The Yugoslav representative explained that by internment in Germany, internment in a concentration camp was meant. The Committee came therefore to the conclusion that as far as deportations to concentration camps were concerned, a prima facie case of a crime had been made out.

Counts 11 and 12. As far as the deportations to Concentration camps alleged under these counts are concerned, the Committee found a prima facie case of a crime.

Count 13. The same applies to the facts alleged under count 13 as far as the shooting of the victim is concerned.

Count 14.

With regard to the alleged beating and torture of the victim, the committee finds a prima facie case of a crime.

XII.

Case No. 4036.

The Yugoslav representative abandoned the charge of wrongful arrest. As regards the detaining without food and the order that victims be sent to concentration camps, the Committee find a prima facie case of a crime to be established.

The case was adjourned as far as the committing of a crime by ordering forced labour was alleged.

XIII.

Case No. 4037.

Here the Committee dealt with the counts reproduced in paragraph I on page 11 of Doc. III/56 in the following way:-

Count 1.

The Committee adjourned the consideration of this case and asked the Yugoslav National office, to furnish the text of the regulations which were in force in the occupied Yugoslav region of Ljubljana.

Count 2.

Here the Committee arrived at the opinion that the shooting of the prisoner Furlan during an alleged attempt to escape constituted a crime.

Counts 3, 4 and 5.

The Yugoslav representative explained that apart from the charge of killing a partisan, the facts described under these counts were brought forward to illustrate the general atmosphere and did not purport to allege that they were crimes in themselves.

The decision on the charge in count 4, regarding the killing of a partisan named Sasa, was adjourned, to enable the Yugoslav National office to furnish further information on the circumstances of the killing.

Count 6.

The consideration of this count was adjourned, the Yugoslav National office promising to give further information respecting the circumstances of the killing of the three partisans.

Counts 7, 8, 9, 10 and 11.

The Yugoslav representative declared that the facts contained in these points were recorded only for illustration of the general atmosphere.

Count 12.

The Yugoslav representative supplemented the charge by stating that the homes of the killed partisans had been set on fire deliberately and without military necessity and certainly not in the course of fighting. Thereupon the Committee decided that this wanton destruction of property constitutes a crime, the opinion on the qualification of which will be expressed in connection with the other alleged facts.

Count 13.

The Committee came to the conclusion that the shooting of a young man for shouting communist slogans, and slogans advocating the freedom of Slovenia, made out a prima facie case of a crime, both in the event of his having been shot without trial, and in the event of a trial having been held, because the punishment would in any case have been excessive.

Count 14.

The Committee came to the conclusion that a prima facie case of a crime committed by the wanton destruction of two houses had been made out.

Count 15.

sub-para 1. - The Committee decided that the sending of the relatives to concentration camps constituted a crime.

sub-paragraph 2. - This case was adjourned until further information would be forthcoming.

Counts 16 and 17.

The Committee arrived at the opinion that the facts described there (internment of relatives of young people in concentration camps) constituted a crime.

Count 18.

The decision on this count was adjourned.

With regard to the counts contained in case No. 4037 (Doc. III/56 under II) the opinion of the Committee is as follows:-

Count 1.

The killing of a man while allegedly attempting to escape constitutes a crime. The same applies to the wanton destruction of 81 buildings dealt with under the same count.

Count 2.

This case was adjourned for the same reasons as count 1 of paragraph I and the Yugoslav National Office was asked to provide the text of the provisions valid in Ljubljana province.

XIV.

The Committee took note of the two papers III/57 and III/59 presented by the Yugoslav representative, particularly of the speech made by Mussolini in Gorizia on 31st July, 1942, where Mussolini, in words, the bearing of which is unambiguous, announced that he had given the order to change the methods of dealing with Italian citizens of the Yugoslav race radically. Mussolini spoke of the "inflexibility of the Roman law", from which allegedly followed that those who refuse to give up their mad dreams should know that they will be completely annihilated and that their property will literally be razed to the ground. Mussolini referred to an alleged fact that after one barbaric tribe had tried to attack the Romans three times, Caesar gave the order to annihilate all the males of that population. It goes without saying that under the "barbaric tribe", the population of Yugoslav origin, living in the Julian March, was meant.

The Committee considers Mussolini's speech particularly relevant, because of the opinion which it has expressed in its preliminary report containing "General Propositions" defining the term crimes against humanity (Doc. C. 201).

In this paper, Committee III has stated that in its opinion, isolated cases do not fall within the notion of crimes against humanity. As a rule, systematic mass action, particularly if it can be shown to be authoritative, will be necessary to transform a common crime, punishable merely under municipal law, into a crime against humanity, which thus becomes also the concern of International Law (para 6 of Doc.C.201). The authoritative character of the crimes alleged by the Yugoslav National office could not be established more clearly than by the admission by the then Dictator of Italy that all the crimes, not only against the life and liberty of Italian citizens of Yugoslav race, but also against their property, have been ordered and instigated by him.

- XV. From the individual Yugoslav charges, as analysed above, in connection with the speech by Mussolini, it appears that a great number of examples of crimes have been established, including acts of murder, extermination, enslavement, deportation and other inhumane acts committed against the civilian population, and persecutions on political and racial grounds. The Committee particularly points out that *prima facie* cases have been made out:

shooting of prisoners while allegedly trying to escape are contained in charge 4031, counts 7(para.2) and 8; in charge 4033, count 2; in charge 4037; paragraph I count 2 and paragraph II count 1(1);

shooting of hostages, case 4033, count 1;

internment under inhumane conditions, case No;4036, count 1(1);

torture - case No.3296, counts 3 & 8; case 4034, count 3; case 4035, count 14;

deportation to concentration camps - case 3296, count 4(1); case 4034, count 1; case 4035, counts 10,11,12; case 4037, counts 15(1) and 16;

murder and attempted murder, case 3296, count 8; 4035, counts 1,3,6,7,8,9,13; case 4037, count 13;

wanton destruction of property, case 4031, counts 3(2) and 6; case 4037, counts 12 and 14; case 4037(I), counts 12 and 14 and (II) count 1;

execution without trial, case 4031, counts 4 & 5; and case 4034, counts 2 and 4;

pillage, case 3296, counts 2,3(2 para 4) 5,6,7.

different other inhumane acts, case 4032; case 4034 count 5.

- XVI. The International Military Tribunal at Nuremberg, in its judgment against the major German war criminals, stated on page 16,927 of the official transcript(quoted in Doc.III/62,para IX,page 6) the following:-

"To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with any such crime. The Tribunal cannot, therefore, make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939, war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity."

This distinction made by the International Military Tribunal is based on the words in Article 6(c) of the Charter of the International Military Tribunal "in execution of or in connection with any crime within the jurisdiction of the Tribunal". In the present case, it is not necessary to examine the question whether this restriction on the notion of a crime against humanity, which is indicated in the Charter of the International Military Tribunal, applies also to cases like those now under consideration by Committee III, because the crimes alleged in the Yugoslav charges were committed during the war and were therefore all committed in execution of or in connection with the aggressive war which Italy joined in 1940, and started waging against Yugoslavia in 1941, so that it follows that the crimes described in the foregoing paragraphs of this paper fall within the notion of "crimes against humanity". This statement refers, of course, only to these charges and counts which are discussed in this paper, and at present, not to those which have been adjourned.

III/64.
31st October, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III

The Criminal Organisations in the Nuremberg Judgment.

By Egon Schwelb, Legal Officer.

The Legal Secretariat proposes to circulate, in due course, papers examining and analysing those parts of the Nuremberg Judgment which appear to be of practical importance for the Commission and for its Third and First Committees.

The present paper is the second of this series.

The first, dealing with the notion of crimes against humanity, as interpreted by the International Military Tribunal, was circulated as Document III/62.

C O N T E N T S.

- I. The Provisions of the Charter regarding Criminal Organisations.
- II. The Binding Character of the Tribunal's Declaration.
- III. Illustration by the Control Council Law No.10.
- IV. The Novelty of the Procedure.
- V. Judicial Discretion in the Application of Article 9.
- VI. Knowledge of Criminal Purposes as the Test for Personal Guilt.
- VII. The Provisions, as interpreted by the Tribunal, are not contrary to Settled Legal Principles.
- VIII. Analysis of the Tribunal's General Ruling.
- IX. General Recommendations by the Tribunal de lege ferenda.
- X. The Accused Organisations.
- XI. The Leadership Corps of the Nazi Party.
- XII. The Gestapo and SD.
- XIII. The SS.
- XIV. The SA.
- XV. The Reich Cabinet (Majority Decision).
- XVI. The Reich Cabinet. (Dissenting Opinion of Major General Nikitchenko.)
- XVII. The General Staff and High Command. (Majority Decision).
- XVIII. The General Staff and High Command. (Dissenting Opinion of Major General Nikitchenko.)