

COMITTEE III

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Note. This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE II

Resolution moved by Mr. Pell on 16th March 1944.

'It is clearly understood that the words "crimes against humanity" refer, among others, to crimes committed against stateless persons or against any persons because of their race or religion; such crimes are judiciable by the United Nations or their agencies as war crimes.'

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SECRET

III/4
27 April, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III.

SCOPE OF THE RETRIBUTIVE ACTION OF THE UNITED NATIONS
ACCORDING TO THEIR OFFICIAL DECLARATIONS

(The Problem of "War Crimes" in connection with the second World War)

Rapporteur: Dr. B. Eder

INTRODUCTION

1) The question is what crimes are to be regarded as "war crimes" in the sense that the punishment of them is one "of the major purposes of the war" (Churchill - 25. 10. 1941) on the part of the United Nations. The answer to this question is of practical importance for the whole work of the Commission and of its Committees, especially Committees I and II.

2) The present report attempts to give this answer.

a) In its first part the report deals with the problem of "war crimes" in 1914-1919 in order to give a basis for comparison.

b) In the second part it deals with the facts characterizing the present war and relevant to our problem.

c) The third part of the report interprets the main declarations of the United Nations on the punishment of crimes committed by the Axis and deals with the first practical application of these declarations in Italy and Kharkov.

d) In conclusion the report puts forward a recommendation to the Commission and through the Commission to the Allied Governments.

UNITED NATIONS ARCHIVES

CHAPTER I

War crimes in 1919

During and after the First World War the expression "war crimes" was used very rarely. Even in the official documents of various governments and of the Commission on War Responsibilities of 1919, the expression "war crimes" does not appear at all with one or two exceptions.

1. The task of the Commission on War Responsibilities of 1919

The Central Powers were ruthless but not yet states with gangster régimes. The war was conducted without mercy and very often in a criminal way but not yet as a total war with the admitted aims of exterminating or subjugating foreign races. During the First World War the main elements of a total war waged and conducted by a gangsterism régime, i.e. inhumanity and lawlessness had not yet been developed into a system, cold-bloodedly planned and relentlessly carried out, but they were there to a great extent as a prelude to the actual war. Thus the task of the Commission of 1919 was in some respects similar to ours.

The Commission was faced with the following two questions:

(a) Was the launching of the First World War by the aggression of Belgium and Luxembourg a crime in the sense as it is understood by the criminal law, i.e. a crime for which the authors bear personal penal responsibility and which is judiciable before a criminal court?

(b) What acts committed by the enemy shall and can be punished by the Allies?

The Commission knew the various declarations of the Allied Governments: it knew, for instance, that the trial and punishment of the Kaiser was officially promised; it knew the famous declaration of the Allies of 1918 stipulating that "the Allied and Associated Powers consider that the trial and punishment of those responsible for crimes and inhuman acts committed in connection with the war of aggression ..." This declaration did not use the expression "war crimes" at all, it did not limit the repressive action of the Allies to the war crimes understood as violations of the "laws and customs of war." The declaration mentioned crimes in general and in addition inhuman acts. This distinction was not an accidental one. The memoranda of the various Allied Governments reported on innumerable inhuman acts exceeding the scope of ~~crimes-in-the-sense-of~~ positive-law/ war crimes stricto sensu.

2. The answers of the Commission were as follows:

(a) The first question the Commission answered that the aggression itself did not constitute a crime in the sense as understood by criminal law and that consequently the authors of the aggression could not be tried by a criminal court. Their responsibility was in the opinion of the Commission only of political and moral nature and not of a penal nature. It could be doubted whether this point of view was correct or no even in 1919, thus at the time when even an aggressive war was to all

intents and purposes a legal thing. The Commission felt that its point of view was sharply in contradiction to public opinion and even to public official declarations on the criminal responsibility of the Kaiser. Thus it proposed a special body, a kind of political tribunal to deal with the authors of the First World War "as they deserve."

(b) The second question in its final report to the Peace Conference, the Commission answered as follows:

(a.a.) In chapter II of the report: (the documents submitted by various governments) ... "supply abundant evidence of outrages of every description committed on land, at sea, and in the air, against the laws and customs of war and the laws of humanity. In spite of the explicit regulations, of the established customs, and of the clear dictates of humanity, Germany and her allies have piled outrage upon outrage;"

(b.b) in the conclusions to chapter II of the report (par. 1): "The war was carried on by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity;"

(c.c) in the Conclusion to chapter III of the report: "all persons belonging to the enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution." In the discussion it was pointed out that without the help of the national criminal law of the invaded or otherwise attacked countries the punishment of these crimes would be impossible, the 'laws and customs of war' being in *puncto poena* "lex imperfecta."

3. The preamble to the Hague Convention IV. (1907)

The Commission in their report and the members of the Commission in their discussions, knowing the documents on atrocities submitted to the Commission by individual Allied Governments, referred expressly to the preamble of the Hague Convention of 1907, especially the British delegates Sir Pollock and Massey and the Greek delegate Politis, stressed the importance of the preamble.

The allied declaration of 1918 speaking on inhuman acts besides crimes, was influenced certainly by the preamble as well. Therefore it is useful to recall its text. The relevant passage of the preamble is worded as follows:

"It has not, however, been found possible at present to concert stipulations covering all the circumstances which arise in practice;

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in default of written agreement, be left to the arbitrary opinion of military commanders.

Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of

nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."

The authors of the Hague Convention have foreseen cases of crimes not covered by the particular provisions of the Convention and notwithstanding asked for punishment. Already in 1907 it was understood that the "laws and customs of war," in their particular provisions are not a sufficient basis for the punishment of all crimes committed in connection with war, that a war once launched develops in unforeseen forms and cannot be regulated like a duel.

The preamble has very often been ridiculed: "where are the laws of humanity and the dictates of the public conscience?" was and is a question which the formalist lawyer often asked ironically. It is true that we cannot find a catalogue of the laws of humanity and the dictates of the public conscience" and that we cannot find them in Hansard or in any "Journal Officiel" or in any "Recueil des lois" etc. But this is not a proof that they do not exist. Every judge is able to apply - especially after this war - the "laws of humanity and the dictates of the public conscience."

(a) The value of the preamble for the interpretation of the "laws and customs of war."

The importance of the preamble, even for our actual problem is great. First of all the preamble is of great importance for the right interpretation of the special provisions of the Hague Convention and of all other "laws and customs of war." The signatory States declared in the preamble that Articles 1 and 2 of the Regulations must be understood in the sense of the preamble. It is an authentic general rule of interpretation given by the II. Hague Peace Conference. The judge - either national or international - called upon to try the authors of crimes committed in connection with the actual war is authorised to interpret the protective provisions in an extensive manner and to interpret the provisions justifying the destructive war-operations and measures in a restrictive manner.

, But the preamble is not only a means of interpretation.

(b) The importance of the preamble as a complement to the "laws and customs of war."

The international or the national judge who would be called upon to try the "war criminals" is authorised and obliged by the preamble to apply in cases not covered by particular provisions of the Hague Convention "the laws of humanity and the dictates of the public conscience." In this respect the judge is authorised to complete the insufficient provisions of the Hague Convention and of other "laws and customs of war." He is authorized to declare as crimes acts which are not enumerated as forbidden acts in the various special articles of the Hague Convention but which are contrary to the "laws of humanity" or "to the dictates of the public conscience." In other words: he is authorized to act to some extent as legislator. This function of a judge is nothing new: always when social changes take place so fast that the legislator cannot act with the same speed, the role of a judge is extended to a certain degree.

The laws of various countries anticipate this eventuality and contain the necessary provision. So, for instance, the Swiss Civil Code in the first Article of the preliminary chapter says: "The law must be applied in all cases which come within the letter or the spirit of any of its provisions. Where no provision is applicable the judge shall decide according to the existing customary law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator."

In such a way the preamble helps us to fill the gap between the law and changing circumstances, between the particular provisions and unforeseen eventualities. The preamble saves the law from degeneration and maintains the contact between the law and the needs caused by a new situation.

This function of the judge, his right and even his duty to try and to punish, in extremis, even without written law, has been expressly recognized by the great German classical lawyer Ihering who said in his book concerning the evolution of law, that a monstrous crime not foreseen by the legislator must be punished even if no written law has denounced it as a crime. Ihering defends precisely the same principle as the preamble to the Hague Convention of 1907, as the Swiss Civil Code and as many Codes of the civilized nations and a great number of lawyers.

4. The position of the problem of 1919 summed up

I would like to sum up the position of the problem in 1919, in the following manner: According to the general moral and legal standards of human civilization at the end of the 19th and the beginning of the 20th centuries, acts which a belligerent is forbidden to commit or "war crimes" which the Allies of 1914-1918 promised to punish were the following acts:

- (a) All acts violating a particular protective provision of the "laws and customs of war" especially of the Hague Regulations or other international conventions and at the same time violating provisions of the Criminal Code of the affected country;
- (b) All acts although not expressly forbidden by a particular provision of the "laws and customs of war" but violating the laws of humanity and the dictates of the public conscience. The great majority of the crimes of the second category are also crimes according to the criminal law of each country. We can say that the crimes of the second category are analogous to the first category. The Peace Conference of 1919 rejected the suggestions of the Commission on War Responsibilities as to the second category. It was a step back compared with the Hague Peace Conference of 1907. The question is whether this retrogression of the law should continue.

CHAPTER II

The facts characterizing the second World War and their appreciation in the United Nations' Declarations

It would be useless to elaborate a speculative definition or notion of "war crimes" of the second World War. The task of the report is to draw the attention of the Committee to the relevant facts characterizing the second World War, to their appreciation in the United Nations' Declarations and to try in this empirical way to find what is the will of the United Nations in the matter of "war crimes." I am using for this purpose the collection of general declarations of the United Nations submitted to the Committee on April 17th.

1. Gangster-régimes in the Axis States

There is no exaggeration in this word: gangster-régime. Both in international and in internal relations, in relations between nations and in relations between men, the Axis rulers have succeeded in establishing genuine gangster-régimes with a gangster's moral code. George Schwarzenberger called it "totalitarian lawlessness" ("International Law and Totalitarian Lawlessness," London 1943). But it is worse than lawlessness. It is moral insanity as well. The Axis rulers have not only rejected law as the basis for human relations but also the moral code; they have violated and are violating even "every tenet of the Christian faith" (Roosevelt, October 7th 1942). Their régimes are not only lawless but a genuine "Revolution of nihilism", (Rauschning), without any moral foundations. The Axis rulers reject international law, they violate criminal law in the invaded countries and they reject all principles of humanity and morality.

Their lawlessness and immorality is well and skillfully planned and thought out, it is a system elaborated long before the war. Without realizing this fundamental fact we cannot understand what is happening now. The retributive action of the United Nations would be unsuccessful again from the point of view both of justice and of the security of the world, if they were to ignore this fundamental fact.

The most illustrative declarations in this respect were issued by Hitler himself. I quote only three of them, which, in my opinion, are the most significant:

(a) "I shall shrink from nothing. No so-called international law, no agreements will prevent me from making use of any advantage that offers" (Schwarzenberger "International Law and Totalitarian Lawlessness" London 1943, page 16).

(b) "I am willing to sign anything. I will do anything to facilitate the success of my policy. I am prepared to guarantee all frontiers and to make non-aggression pacts and friendly alliances with anybody. It would be sheer stupidity to refuse to make use of such measures because one might possibly be driven into a position where a solemn promise would have to be broken. There has never been a sworn treaty which has not sooner or later been broken, or become untenable. There is no such thing as an everlasting treaty. Anyone whose conscience is so tender that he

will not sign a treaty unless he can feel sure he can keep it in all and any circumstances is a fool. Why should one not please others and facilitate matters by signing pacts if the others believe that something is thereby accomplished or regulated? Why should I not make an agreement in good faith today and unhesitatingly break it to-morrow if the future of the German people demands it?" (Schwarzenberger, p. 16-17).

(c) "My behaviour in war-time will be no different. The most terrible warfare is the kindest. I shall spread terror by the surprise employment of all my measures. The important thing is the sudden shock of an overwhelming fear of death" (Schwarzenberger, p. 17).

Moreover, this philosophy of lawlessness and of moral insanity is to some extent an old German conception.

In 1876 the German professor Lueder wrote a book against the Geneva Convention of 1864. He pointed out that the only humanitarian warfare is that by the most terrible means, because only merciless warfare leads to the shortening of war.

Hitler took up this "idea" and made of it a system of terrorism not only for war but for the whole activity of the German Reich. The Italian Fascists preceded, and the Japanese militarists followed. So Axis gangsterism came into being.

The United Nations' Declarations have shown clear realisation of this fact. The Soviet Government, in their note of November 27th 1941 declared:

"There have been many recent instances of atrocities which have taken on a specially glaring character, thus once again exposing the German military authorities and the German Government as a gang of cut-throats who ignore all principles of international law and human morality."

The same note underlines the systematic and deliberate character of the crimes committed by the order of the German Government. It calls the German authorities "Hitlerite bandits", accuses the German Government of violations not only of "elementary principles and regulations of international law" but of "the most elementary rules of moral humanity." This distinction between violations of law and of human morality is not a rhetorical meaningless phrase. It is in accordance with declarations of other Allied Governments and statesmen. The Soviet note of November 27th 1941 calling the German Government "criminal Hitlerite Government," and the Soviet note of January 6th 1944 denouncing German crimes against the non-combatants in the invaded parts of the Soviet Union as "not merely the excesses of individual German officers and soldiers, but a definite system previously planned and encouraged by the German Government and the German High Command," are not alone in estimating the gangster character of the German régime.

Roosevelt called the Axis rulers a "gang of outlaws" in his broadcast to the American Nation of December 29th 1940, thus before the Soviet notes. He spoke of the "Fascist gang" on July 28th 1943.

President Beneš in his declaration of June 13th, 1942, charged Adolf Hitler and all members of the German Government with personal penal responsibility for the crimes committed in Czechoslovakia.

The systematic character of the German crimes was stressed in the St. James' Declaration of January 13th 1942, and in some declarations of the Allied Statesmen accompanying the signature of the St. James' Declaration (see statements of Mr. Bech, Srámek, Tsouderos and others).

Finally, this fact was proved at the Kharkov Trial, (15-18, XII 1943). The régimes of Mussolini and of the Japanese militarists are of the same nature.

This fundamental fact, the existence of gangster-régimes ruling great States, is not an absolutely new phenomenon in human history. But in the history of the XXth Century it is a new and relevant fact to be taken into consideration when one is examining the "war crimes" of the second world war.

2. The criminal character of the Axis aggressions

I do not intend to go into the theoretical discussions as to whether or not aggressive war is a crime according to the Briand-Kellog Pact. Personally, I am convinced that it is. I will come to the Pact in another connection. Here I should like to draw the attention of the Committee to the fact that this time we are not facing a simple aggressive war. The second World War was planned, prepared and launched by the Axis rulers and military leaders not only as an aggressive war but as a total one. And this is, from the criminological point of view, a very important fact. A total war as conceived, planned, prepared and launched by the Axis rulers and military leaders in accordance with their gangster- and pirate-philosophy is a criminal war because of its criminal aims and of its criminal means. The purpose is the subjugation and extermination of whole nations and races, that is, mass enslavement or mass murder. The means: the war was planned, prepared and launched intentionally as a series of crimes carefully prepared and ordered in advance, crimes not in the moral sense only but in the sense of the criminal law of the invaded countries. Thus, the launching of a total war is a crime. The order to launch such war is a criminal order because it is an order to commit mass crimes, in the majority, ordinary crimes of the most heinous nature. This second fundamental fact (total war) deriving from the first, mentioned sub 1., is a new fact. The United Nations realize this fact although not with the necessary clarity as the criminal methods of the warfare itself. But it is an important fact as well. Without total war there would not be "war crimes" or "analogous crimes" at all.

The Czechoslovak and the Polish Governments in their common declaration of November 11th, 1940, stress the criminal purpose of the German aggression which is "aiming at the destruction of our two ancient nations." The same fact is stressed in the declaration of the Polish Government of December 20th, 1940. The Soviet Government in the note of April 17th, 1942, enumerates the individual criminal purposes of the German aggression as parts of a general criminal plan, and continues:

"With such villainous plans the German fascist hordes invaded our country."

The note stresses the planned character of the atrocities and denounces the German attack as a criminal attack. Surely not criminal in the sense of "moral crime" which it would be enough for history or posterity to judge.

Such a judgment the German and other Axis gangsters would prefer, of course.

But the Soviet Government is not willing to accept such moral or political criminality of the German aggression. In the note of July 23rd, 1942, in reply to the note handed over by the signatories of the St. James' declaration:

"The Soviet Government once more confirms the universal and deliberate character of the bloody crimes of the Hitlerite invaders, which prove the German Fascist Government and its accomplices, in striving to enslave the peoples of the occupied countries, to destroy their culture and debase their national dignity, have also made it their aim to carry out the direct physical annihilation of a considerable section of the population of the territories captured by them."

Thus the Soviet Government holds the point of view that the aims of this aggressive total war and its methods as well are of a criminal nature: mass murder and other crimes.

It would be difficult to say that such aggression is only a political or moral crime. Murder cannot cease to be murder only because of the fact that the murderer or the man who orders the murder is by chance a chief of State, a Führer and Chancellor of the Reich, or a Duce, and so on.

Mass murder cannot become a "political" or a "moral crime" only because raised to the extermination policy of a state.

Thus, King Haakon of Norway was perfectly right in his proclamation to the Norwegian people of May 7th, 1940, declaring that the German assault on Norway was criminal.

Thus, Marshal Stalin was perfectly right when he declared in his speech of November 6th, 1943:

"Thirdly, it is necessary to take measures against these criminals who are responsible for this war."

Using the expression "criminals" he certainly did not think on moral criminality.

Therefore, the second relevant fact is the fact that this second World War was planned, prepared and launched not as a simple aggressive war, but as a total, thus a criminal war both in purpose and in methods. The launching of such criminal war is a crime. The very fundamental crime without which there would not be "war crimes." The fact is in comparison with 1914-18 a new one.

It has been confirmed by the German accused and witnesses in the Kharkov Trial.

3. Mass criminality exceeding the scope of war

It would be dangerous both for the effectiveness of the Allied retributive action and for the security of the Allied Forces in Europe and of the United Nations themselves to look upon the Axis criminality as a "war criminality" in the sense that it appears and will disappear with the war.

The following main features of this not absolutely but quantitatively and even qualitatively new criminality are:

(a) The crimes began long before the war, in preparation for this war, with the physical extermination of whole classes of their own citizens because of race, religion or political beliefs; and thereby the Axis rulers, and especially the Fascists in Italy and the Nazis in Germany, prepared for the second world war.

These preparatory crimes, committed in peace time under the eyes of the whole world which regarded them as "internal affairs", although they were preparatory actions to the most criminal international affair, the second World War, have been mentioned in some Allied declarations.

These preparatory crimes are not "war crimes" in the sense of "violations of laws and customs of war", of course. They were crimes committed by a Government of a sovereign State, thus they were the internal affair of this State according to the old conception of sovereignty.

One type of these crimes is the extermination of Jews. President Roosevelt in his statement of March 24th 1944, declared: "In one of the blackest crimes of all history - begun by the Nazis in the day of peace and multiplied by them a hundred times in time of war - the wholesale schematic murder of the Jews of Europe goes on unabated every hour."

President Roosevelt rightly underlines that the crimes committed by the Nazis in war time are but a multiplication of their crimes of the same kind as already committed in peace time. That applies not only to the crimes against the Jews. Hundreds of thousands of anti-Nazis have been either murdered or tortured or interned in concentration camps, where they are still held for the same reason: they were obstacles in the way of preparing for the war.

Socialists and Communists, Democrats and Pacifists, Protestants and Catholics. Their proportion to the Nazi infected German population may be not very high, but the crimes committed against them were of the same nature: preparatory actions of the big crime of launching the total war. The same applies to the Fascist Italy. I do not know if and to what extent it applies to Japan.

(b) But the crimes will not finish after this war. Nobody will believe that at the moment when hostilities in the technical sense cease, the Axis fanatics, especially the Germans, will transform themselves into decent, peaceful and peace-loving peoples.

On the contrary, the fury of the defeated beasts will increase. We will face a continuation of this war in the form of an underground Nazi-Fascist terrorism. The "war crimes" will not cease with the end of the war in the military sense.

They are not isolated acts of men unbalanced by war, thus crimes which appear and disappear with the war, as an accompanying phenomenon. Their relation to the war is, this time, the opposite one: the war is not their source but their product. Thus they will continue after the war in the form of underground terrorism and banditry.

The criminal epidemic called Nazism or Fascism will not end with the armistice. The Allied armies in occupation of the Axis countries must be protected against this criminality. And the United Nations, their leaders, representatives and their peoples as well. Without this protection a reconstruction of the world would be difficult, if not impossible. Mr. Pierlot, the Belgian Prime Minister, accompanied his signature of the St. James' declaration by a statement in which he said:

"Exemplary punishment to fit the greatness of the crime is a satisfaction urgently demanded by the conscience of the oppressed people, by their need for justice as well as their desire for security."

And General de Gaulle stated on the same occasion: "but if it is legitimate and necessary to ensure full punishment for crimes committed, it is quite as legitimate and necessary to take the essential measures so that the renewal of such crimes should be made impossible." The measures to be taken are of course predominantly of a different nature, but among them the punishment of crimes prepared even now by the Nazis and Fascists to be committed after their military defeat must be taken into consideration, and made one of the items of the Allied retributive action.

(c) There are Axis crimes committed in the course of the present war which have nothing to do with war in the technical sense of the word, being committed 'en masse' with such bestial atrocity that is unparalleled in history.

As the crimes committed by the Axis criminals during this war are not isolated acts of men unbalanced by the war, but acts of a people infected to a large extent by a criminal epidemic originating in the Nazi and Fascist doctrine, the criminality has necessarily a mass character. This criminality is not a temporary deviation of the Axis peoples especially of the German people, but a scientifically created and skilfully cultivated state of mind which appears to the criminals as a natural one, as a normal state of mind of the higher race.

(d) Finally, big special organisations - voluntary as to membership - have been created and trained to commit the most abominable crimes such as mass murders, extermination, torture, etc. They are state organisations: the S.S., Gestapo, S.A. and similar organisations. They can be denounced as criminal gangs with regard to their purpose and to their activities. This question is the subject of another report of mine.

These main features of Axis criminality are stressed in the Declarations. The Belgian Government in its statement of June 8th, 1940, says: "The truth, however, is that the Germans have conducted the present war with ten times the atrocities of 1914." This statement was issued in the first year of the war. The experiences of the past 4 years, in the fifth year of the war, and especially the experience of the invaded countries, have been not ten times but thousands of times worse than in 1914-1918.

It simply cannot be compared. Innumerable documents have been published. It is impossible to find a word strong enough for expressing the degree of intensity of this criminality. The Declarations use such words and phrases as "monstrous" (Soviet note of January 6th, 1942); "cold-blooded cruelty" and "acts of butchery" (the statement of the Belgian Government of June 8th 1940); "inhuman actions" (Soviet note of November 27th, 1941);

"régime of terror" (St. James' Declaration); "cruelty and moral degradation" (Soviet Note of April 17th, 1942); "unparalleled crimes" (the same); "bestial policy of extermination" (the Allied Declaration on the extermination of the Jews of December 1942); "it is not a war but murder and arson" (King Haakon of Norway on May 7th, 1940); "blackest crimes" (Roosevelt on March 24th, 1944); "butcheries in France" (Churchill on October 25th, 1941). All these words and expressions are too weak and too colourless in comparison with the reality. Probably human language has not the vocabulary capable of rendering the intensity of the crimes and their horror. Words pale when confronted with the acts.

But it is not a question of literature. It is a very serious matter of practical measures to be taken by the Allies. If the Axis criminality, and especially German criminality, is of such nature as has been shown above and confirmed by the Allied declarations and documents, then the methods of the punishment of "war crimes" must be adapted to this character of Axis criminality. It is obvious that we cannot control such criminality by methods successful in the struggle against individual and isolated criminality. It would be the subject matter of my other report to show what consequences must be derived by the United Nations from this now and unparalleled character of the Axis and especially German and Japanese criminality as to the methods of investigation, to the measures of security, to the trial, to the substantial law, etc... Here I should like to underline that justice and the protection of human society cannot capitulate before mass criminality. We have many precedents of the struggle against the mass criminality of fanatics. I will come to this problem in my second report.

4. Crimes against humanity

The fourth fact relevant to the examination and solution of our problem is the fact that certain categories of the Axis crimes are crimes against the whole of humanity. These crimes surpass the conception of the "violations of laws and customs of war."

Their substance, their purpose, their intensity and methods are such that they threaten the very foundations of each human organisation. Some of them are covered by the positive law; some are not covered by the narrow notion of "war crimes," although they are covered by criminal law and its principles. But all are covered by the preamble to the Hague Convention: "laws of humanity and dictates of the public conscience."

It could be objected that it is not necessary to mention them as an especial category of Axis crimes. But it is necessary. And the Declarations do it realizing that all forms of the Axis criminality cannot be seized by the positive laws.

Thus, the Polish Government in its statement of December 20th, 1940, mentions "violations of conscience which is even worse than physical terror." And in the Polish memorandum submitted to the Commission on April 17th, 1944, the cases of moral and psychic tortures are enumerated. Some of them are not incriminated by the positive law, because the legislator of the normal peace time criminal codes could not foresee the sadistic bestiality of the Nazis.

The Soviet Government in its note of November 27th, 1941, stressed that the Germans are acting not only against the principles of international law, but against principles of "human morality." What meaning could have this distinction if the law was covering all German crimes?

The same note denounced the German attitude to the Red Army prisoners as an attitude which violates "the most elementary rules of moral humanity."

The St. James' Declaration is on the same lines, stressing the fact that the Germans are committing crimes which have "nothing common with the conception of an act of war or of a political crime." In the note of April 17th, 1942, the Soviet Government distinguishes "elementary provisions of international law and human morals."

President Roosevelt speaks of "atrocities which have violated every tenet of the Christian faith" (October 7th, 1942), and on the crimes of the Fascist gang "against humanity." (July 28th, 1943). I will come to this point and to the reason for the distinction in the chapter dealing with the interpretation of the declarations and with the conclusions to be drawn from them.

Here I should like to stress that this fourth fact must be taken into consideration if we will rightly interpret the will of the United Nations and so the scope of their retributive action.

5. Legal forms of crimes

This fact is not a new one. Legal forms of crimes were used by the Germans in the first World War. What is new is the extent to which this cloak is used to cover Axis and especially German crimes, and also the circumstance that the so-called "legal basis" of administrative measures and of judicial decisions and judgments of the Germans are in themselves clearly crimes. The issue of a decree that the wife and the children must be punished because the father omitted to report a suspected person to the police is a crime in itself. The legal form is a farce. The authors of such decrees and orders "signed their crimes" as M. de Baer pointed out.

Some of the Declarations mention this fact. President Benes in his speech of June 13th, 1942, stated: "I solemnly declare in the name of the Czechoslovak State, Nation and Government, that for all that has happened in our country in these days we consider Adolf Hitler and all members of his Government, without exception, personally responsible."

And he enumerated the categories of the German officials personally responsible for this gangster administration, legislation and jurisdiction.

6. The Briand-Kellog Pact and the Axis crimes

I leave aside the question of whether or not the Briand-Kellog Pact has denounced the aggressive war as a crime. I maintain that the Briand-Kellog Pact imposed an international obligation upon the signatory states.

The violation of each international obligation constitutes a "délit international," the German author Karl Strupp teaches in his book "Das Völkerrechtsdelikt."

Now the question arises, mentioned by Eagleton in a footnote to his article on "Punishment of war crimes" in the American Journal of International Law, July 1943: if the invasion of a foreign country is a "délit international" in violation either of the Briand-Kellogg Pact or of a non-aggression bilateral treaty, can this offence be a basis for acquiring rights such as: confiscation of mobile state of property, imposing taxes and levies, establishing tribunals condemning the inhabitants to death according to the law of the invader etc.? Can an invasion, thus a "délit international" be the basis for rights? Is it not an anti-juridical assumption, to admit that the violation of law could be the source of rights of any kind? Is it not a contradiction in terms to say that the invader, thus, the perpetrator, of an illegal act at least - has the rights enumerated above and others granted to the belligerents by the Hague Convention of 1907, thus at a time when each war, even an aggressive war, was a legal thing?

The declarations do not mention this problem 'expressis verbis'. But the Moscow declaration on atrocities of November 1st, 1943, stresses that the decisive law is the law of the invaded and liberated country. Does it mean the national judge will apply the national criminal law and will not ask if the act is or not covered by the "laws and customs of war"?

It is a very serious matter which deserves to be dealt with in a special report, because the conflict of laws arise before every national tribunal called to try "war criminals" at the moment when the accused would object that his action is covered by the "laws and customs of war," especially by the provisions of international law regulating the duties and the rights of the occupying force.

In conclusion, I should like to sum up:

The United Nations, as the Declarations demonstrate, realise the new criminological situation as manifest in the facts described in the chapter II of this report.

The determination of the United Nations in matters of crimes committed in connection with the second world war has been not only influenced but directly aroused by these facts.

The phrases and words in which the United Nations express their indignation and their will to act - in accordance with the feelings of the oppressed peoples in the occupied countries, and with public opinion in the free countries - must not be considered as only an ethical condemnation, but as constitutive elements of the will of the United Nations to punish, and, through punishment, to satisfy the moral need for justice and the social need for protection.

Thus, the new facts, the new reality as understood, and as set down by the United Nations in their Declarations, will help us to ascertain their will as far as the question is concerned as to what crimes connected with the second World War the United Nations are determined to punish. It is the task of interpreting the declarations in a way corresponding to their real meaning.

CHAPTER III

The interpretation of the Declarations and the conclusions deriving from it.

The whole problem would be much simpler if the United Nations had made one exhaustive, clear and precise declaration concerning the crimes committed by the Axis in connection with the second World War.

It was naturally impossible for one simple reason: the United Nations did not represent a single political community from the beginning of this war, i.e. from the beginning of the Axis atrocities.

Thus, the declarations of such a community developing from 1939 to 1944 through all the vicissitudes of the war, bear all the traces of their origin in language, in the precision or lack of precision of conceptions, aims, legal expressions and phrases, and last but not least in temperament. The Declarations must be read as successive expressions of a general will in statu nascendi.

We have now a great number of declarations made successively in various stages of the war, declarations of various value for our purpose, some of them contradictory to each other.

We have only one declaration published formally and expressly on behalf of all United Nations Governments (Declaration on the extermination of the Jews of 17th December 1942).

But this one really common declaration deals only with one part of our problem, a part which is in some respects not a question of "war crimes" as the doctrine understands them.

Then we have a certain number of collective declarations made by greater or smaller groups of individual United Nations Governments. The most important declaration of this type is the St. James' Declaration of January 13th, 1942. This declaration gained the support of other Allied Governments, so it may consequently be regarded as a declaration expressing the will of all the United Nations, or at least the great majority.

The same applies to the important Moscow Declaration on atrocities of November 1st, 1943, signed by only three Great Powers, but "speaking in the interests of 32 United Nations."

The great majority of the other United Nations publicly and officially agreed, so that this declaration can be regarded as a United Nations declaration.

Other declarations of a group of Governments have not received formal approval by the others but something in the nature of a tacitus consensus, as, for instance, the common declaration of the Czechoslovak and Polish Governments of November 11th, 1940. In this sense, under the condition of tacitus consensus, it might be regarded as a United Nations declaration.

The same applies to the individual declarations and statements of Allied leaders speaking in their representative capacity so that they undoubtedly expressed the policy of their respective nations.

Thus, we have not a precise, exhaustive and clear expression of the will of the United Nations as to the "war crimes," but a collection of declarations like a mosaic in which each stone bears the trace of its own individuality. The whole picture is more impressive but sometimes at the cost of precision.

It is quite natural that such declarations addressed to the peoples, appealing to their ethical sense, cannot be framed in the manner of colourless, dry and unimaginative legal provisions, but on the other hand the time is ripe for a summary of the numerous Declarations in a manner which would make the real work of the United Nations' Justice possible.

If the report wishes to attain such a precise description of the scope of the Allied retributive action on the basis of the existing declaration, it cannot indeed interpret them only in a grammatical manner clinging to the words.

The Declarations must be read and understood in connection with the general aims of the United Nations in this war, which are the destruction of Nazism, Fascism and Japanese militarism.

Further, the declarations must be interpreted in connection with the feelings of the people in the occupied countries and with the public opinion in the free countries. The people both in the occupied and in the free Allied countries agree that the mistake of 1919 must not be repeated because this mistake not only gravely offended their sense of justice, but helped the criminals to prepare for the second world war. The peoples, especially in the occupied countries, feel such a craving for justice that perhaps it is stronger than the desire for food.

Here we have the famous "dictates of the public conscience" mentioned in the preamble to the Hague Convention of 1907. They are important for the reconstruction of the world as well. Thus, we must interpret the declarations of the United Nations in accordance with these "dictates of public conscience" in our respective countries.

Further, we must keep in mind that the purpose of the retributive action of the United Nations is to save human society. Law would lose any 'raison d'être' if it were not able to produce at critical times rules and machinery to prevent the disintegration of the human society.

In this sense we must understand the phrase so often repeated in some declarations especially in those of President Roosevelt and in the Soviet notes: "crimes against humanity" or acts "against the principles of human morality." By stressing these special types of crime the United Nations Governments or leaders do not create entirely new categories of crimes in the system of criminal law. Most of them are covered by the provisions of the existing laws. But the sense of these and similar passages in the Declarations is this: The United Nations have realised in the course of the second world war that certain

crimes committed by the Axis are threatening the very foundations of human organisation and of the whole human society. Thus, the United Nations acting at this moment as representatives of the whole of humanity are determined to punish such crimes, render the authors of such crimes harmless, to destroy the régimes producing such crimes in the interests of the whole of mankind. The forum delicti commissi and the nationality of the victims cannot be an obstacle in the way of punishing such crimes. These crimes are because of their monstrosity genuine universal crimes, malum in se even when not subjected to particular legal provisions.

Taking into the consideration all the elements mentioned above as relevant for a correct interpretation, I come to the following conclusions:

A.) The United Nations, their peoples and their Governments are, according to their Declarations, determined to punish all crimes committed in connection with the preparation, conduct and continuation of the second World War, by the Axis rulers, political or military leaders, their armed forces and paramilitary organisations, the members of the ruling Party of the administrative and judicial apparatus of the State, and by individuals and by their accomplices.

B.) Thus they are determined to punish:

a) the fundamental crime of preparing and launching this second World War as a total war because of its criminal aims and because of its criminal methods previously planned, prepared and employed, and all crimes committed in the preparation of the second world war irrespective of the territory where the preparatory crimes have been committed, including the territory of the Axis states;

b) all crimes committed by the Axis invaders in the invaded or occupied countries and all crimes committed on Allied or Axis territory against the members of the armed forces or civilian citizens of one of the Allied Nations;

c) all crimes against any persons without regard to nationality, stateless persons included, because of race, nationality, religion and political beliefs;

d) all crimes that may be committed in order to prevent the restoration of peace.

C.) The United Nations regard as crimes in the above-mentioned sense all offences against:

a) the criminal laws of the United Nations;

b) the "laws and customs of war";

c) the general principles of criminal and international law, as established by civilized nations;

d) the laws of humanity and the dictates of the public conscience as proclaimed in the preamble to the Hague Convention IV (1907)

This interpretation is in my opinion the right one, expressing the real will of the United Nations Governments and peoples.

It seems to me that the correctness of this interpretation is confirmed:

1.) By the resolution of the I. Commission of the London International Assembly dated 14th February, 1944, and contained in the General report of this Commission, and worded as follows:

War crimes are any grave outrages violating the general principles of criminal law as recognised by civilised nations and committed in war-time or connected with the preparation, the waging or the prosecution of war, or perpetrated with a view to preventing the restoration of peace.

From this point of view the Commission regard as war crimes especially:

a) the preparation and the waging of an aggressive war and all other acts of aggression (referred to in Marshal Stalin's Declaration of November 6th, 1943);

b) violations of laws and customs of war, the list of which is attached hereto;

c) all crimes committed either within an Axis country or outside such country for the extermination of a race, nation or political party (referred to in the United Nations Declaration of December 17th, 1942);

d) crimes perpetrated after the cessation of hostilities with a view to preventing the restoration of peace.

War crimes can be perpetrated, either by direct action, or by participating in the crime, by aiding or abetting, inciting, conspiring or giving the order to commit the crime.

War crimes can be perpetrated, as a principle or an accessory by any person whatever, irrespective of his rank or position, Heads of State included.

2.) By the article 29 of the Armistice concluded between the United Nations and Italy which deals with the surrender of war criminals, and is in the following terms:

"Benito Mussolini, his chief Fascist associates and all persons suspected of having committed war crimes or analogous offences whose names appear on lists to be communicated by the United Nations and who now or in the future are on territory controlled by the Allied military command or by the Italian Government will forthwith be apprehended and surrendered into the hands of the United Nations. Any instructions given by the United Nations to this purpose will be complied with."

The Armistice did not limit the Allied retributive action in Italy to war crimes stricto sensu but extended it to "analogous crimes."

3.) By the Kharkov trial. The three Germans were charged in accordance with the principle laid down by the Moscow Declaration quoted by the Public Prosecutor, with crimes violating the laws of the Soviet Union as war local delicti commisi, and were sentenced according to the Soviet penal law.

But the Public Prosecutor, in the indictment and in his final speech on December 18th, and the Tribunal in the verdict, referred expressly verbiis to the "laws and customs of war." They stressed the fact that the accused violated at the same time by the same acts the Soviet national and the international law. The international law (the "laws and customs of war") was presented in Kharkov as a supplementary basis for the indictment and the verdict.

In the Kharkov cases both laws - the law of the invaded country and the international law - were in harmony. The question what should be done when international law justifies actions which are plainly crimes according to the criminal law of the invaded or occupied country did not arise before the Kharkov Tribunal. But it is a question which deserves to be dealt with in a special report.

4.) Finally, by the practice of the American Judge Advocate's Department in the North African field of operations as explained by Colonel Clark at the meeting on April 5th 1944. The case of the German officer was not a case of a "war criminal," stricto sensu because he has committed crimes on Italians. Thus, it was a crime committed on enemy soil against enemy nationals by an enemy officer. Certainly not a war crime stricto sensu, but certainly at least an "analogous crime," as mentioned in the Armistice.

CHAPTER IV

SUGGESTIONS

For reasons explained in the previous chapters of my report, I make the following suggestions:

A.) I recommend to the United Nations Governments the following:

Declaration of the United Nations on the scope of their retributive action against the authors of crimes committed in connection with the second World War

The United Nations declared on various occasions that the punishment of those who have committed crimes in connection with the second World War is one of the major aims of the war on the part of the United Nations.

Desiring to harmonise and to give precision to their previous declarations, and desiring to express in the present stage of the war when the defeat of the enemy is approaching, clearly their

will and their intentions as regards these crimes and their authors, the United Nations declare that in order to satisfy the craving for justice of the oppressed and attacked peoples, and the need for future security in the world, they have united their effort to bring to justice and to punish as they deserve the rulers of the Axis-Powers, Heads of States included, their political and military leaders and their armed forces and paramilitary organizations, the members of the ruling Party, of the administrative and judicial apparatus of the State, and by Axis individuals and their accomplices, irrespective of their nationality, who have committed:

a.) the monstrous crime of preying and launching this total second World War, criminal in its aims and in its methods, and crimes committed in its preparation, irrespective of the territory where they have been perpetrated;

b.) crimes in the invaded or occupied countries and crimes against the members of the armed forces or against civilian citizens of the United Nations on Axis territory;

c.) crimes against any persons without regard to nationality, stateless persons included, because of race, nationality, religion or political beliefs;

d.) crimes that may be committed in order to prevent the restoration of peace.

The United Nations regard as crimes in the above-mentioned sense all acts violating the criminal laws of the United Nations, the laws and customs of war, the general principles of criminal and international law as established by civilised Nations, the laws of humanity and the dictates of the public conscience proclaimed by the preamble to the Hague IV Convention as supreme rules of the human community.

From this point of view they regard as crimes to be within the scope of their retributive action especially: (an illustrative list of crimes, simpler and more systematic than the list of 1919 should follow).

B.) In order to avoid the delay which would result from diplomatic negotiations, I suggest that each member of the War Crimes Commission should be asked to ask for approval of the definite text by his Government, and that then the definite text of the declaration approved by Governments represented on the Commission should be transmitted to the British Government, with the request to obtain the consent of Governments not represented on the Commission, and afterwards to publish the declaration in an appropriate form on behalf of all United Nations.

Note: This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

III/4 (a)
12th May, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

SCOPE OF THE RETRIBUTIVE ACTION OF THE UNITED NATIONS

ACCORDING TO THEIR OFFICIAL DECLARATIONS.

(The Problem of "War Crimes" in connection with the second World War)

Explanatory and Additional Note by Dr. Eeer to his Report (Doc. III/4)

Introduction

Two preliminary questions should be answered. One was raised by Sir William Malkin in his draft of March 29th of Mr. Pell's motion on crimes motivated by the victim's race or religion. The second was raised by Sir Cecil Hurst at the meeting of our committee on February 28th.

1. The first question is of a formal nature. Does the Commission need special permission from the constituent Governments for the study of the problem and for making recommendation? This question might also arise on other occasions. An answer laying down the applicable principle is necessary. My opinion is in the negative. Reasons for it :
 - (a) From the beginning of our activity the opinion of the overwhelming majority of the members supported the concentration of the whole work concerned with the war crimes - investigation of particular cases and examination of general questions as well - in the Commission.
 - (b) Our Chairman Sir Cecil Hurst pointed out at the meeting of 18th January, that if the Technical Committee was abandoned, the War Crimes Commission would be the sole body representing the United Nations which dealt with War Crimes. And on February 8th at the meeting of the Commission he expressed the correct opinion that, "if the Commission proceeded to advise the Governments to the best of its ability on the problems which arose in regard to war criminals, it need not fear objections on the ground that it was exceeding its competence".
 - (c) Various Governments expressed the same opinion through their representatives in the Commission. I refer for example, to the declarations of the French representative, and of myself on behalf of the Czechoslovak Government, both made at the meeting of the Commission on February 15th.
 - (d) Finally the note of the Foreign Office of February 24th concerning the question says expressly :

" it was agreed that it would be desirable to set up in due course, in addition to the Commission, a technical committee of legal experts to make recommendations to the Governments upon matters of a politico-legal nature relating to the punishment of war criminals.

"His Majesty's Government in the United Kingdom understand that the consensus of opinion among the members of the United Nations Commission now is that the most suitable procedure would be for the Commission itself to consider and make recommendations upon these general questions".

UNITED NATIONS ARCHIVES

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Thus it is clear that the Commission is formally authorized to examine the problem which is the subject-matter of my report because it is a politico-legal problem and a general question as the note of the Foreign Office pointed out, which both now belong to the competence of our Commission. We do not need special permission.

2. The second question was raised by Sir Cecil Hurst at the meeting of Committee III on February 28th. It is a question not of form but of substance. From the beginning of our work several members of the Commission expressed on various occasions the opinion that in view of new facts characterising the present war, it would be impossible to limit the activity of the Commission to the investigation of war crimes stricto sensu as "violations of the laws and customs of war".

At the meeting of Committee III on February 28th Sir Cecil Hurst pointed out that so far we are bound by the declaration of Lord Simon of October 7th, 1942, which was the basis for the invitation sent to the various Allied Governments. By accepting this invitation the Governments accepted the scope of the Commission as described in the invitation and in the speech of the Lord Chancellor.

But Sir Cecil added that this does not mean that the scope could not be enlarged when new facts, and especially cases, submitted by the Governments demonstrated that it would be desirable to recommend to the Allied Governments a more wide and large conception of "war crimes". He pointed out that public opinion, the opinion of the man in the street, and the opinion of experts as well must be taken into consideration.

I think that the conditions which Sir Cecil had in his mind have been reached.

(a) After the speech of the Lord Chancellor of October 7th, 1942, the Allied Governments in various subsequent declarations and documents enlarged the scope of their retributive programme.

(b) New facts subsequent to the speech of the Lord Chancellor have to be taken into account. The Soviet Armies have captured a number of documents proving that the war was planned and prepared as a criminal war with criminal aims and with criminal methods. Some of the orders are quoted in the Molotov notes.

I should like to add here the statement of a German Officer Major Bechler, now a prisoner of war in Russia, was Adjutant of the O.K.W. (of the German High Command) from October 1940 to 1942. On December 27th, 1943 he stated, (Broadcast from Moscow on December 27th, 1943) :

Translation :

"In March 1940 Hitler made a speech at a secret meeting of a group of generals and S.S. leaders. His instruction with regard to the method to be adopted in the fighting, contained the order to the troops to liquidate all members of the Russian Intelligence Service, Burgomasters, Controllers of Commerce, Engineers, Officers, and with this object in view to disregard military law. Major Bechler had personal knowledge that Himmler had shrieked at the S.S. leaders of his Army group because they had not shot a sufficient number of Jews. "Pigs take an example from your colleagues of the Northern Army group. They have shot five times as many as you have".

The Polish Government is in possession of documents proving that the Germans are not only committing war crimes stricto sensu but crimes which are crimes against humanity and without even a remote connection with military necessity. Similar documents are in the hands of the Czechoslovak Government and probably in the hands of other Governments.

/ Evidence

Evidence has been produced that the Germans are reorganising their S.A. troops under the new leadership of Schepmann as terroristic bands in order to commit crimes against the Army of occupation, against all non-Nazis in Germany and against the peoples of the liberated countries, and that they will in such manner continue the war under other forms regardless of the technical cessation of hostilities.

The scope and extension of German crimes led the French and Polish representatives to raise the question of collective responsibility. Whatever may be legal opinion as to this aim, one thing is certain. Certain categories of the Germans, S.S. Gestapo, S.A, some sections of the Army etc. must be taken into preventive custody in order to ensure their punishment for crimes committed and to prevent them from committing further crimes. Thus, at least as a measure of security, the principle of collective responsibility is justified.

(c) The members of our Commission realize that new facts call for new conceptions and new measures. All members of Committee III agreed at the meeting of March 27th, that the crimes mentioned in Mr. Pell's motion must be punished and that the only question which remains to be answered is whether it should be under the heading of "War Crimes" or under another heading. We could choose the heading used by the Italian armistice (analogous crimes), but this is a secondary question of legal technique. The primary question is that it must be done.

The observation made on April 4th by Sir Cecil Hurst on the results of the work of the Commission and on the necessity of new methods and principles is of fundamental importance. He said that he too "was beginning to doubt whether, if the Commission continued to be confined within the limits fixed for it at its creation, it could satisfy the expectations which the speeches of the leading statesmen has caused the public to found on its work".

And this is exactly the purpose of my report.: To adapt the task of the Commission to the Allied declarations and to public opinion which is relying on these declarations.

Thus, I think that the second question as to whether we have reason to revise our work in the light of the Allied declarations especially those issued after October 7th, and in the light of new facts produced since October 7th must be answered affirmatively.

Ad Chapter 1.

On May 1st, we discussed the Hague Convention, some particular provisions of the Hague Regulations and the value of the legal meaning of the Preamble.

I cannot help feeling that there was a great misunderstanding as to the Hague Regulations and as to the Preamble. Thus I feel it my duty to add to my report dealing in Chapter 1 with the Hague Convention some further arguments because I think that the Hague Convention in spite of its age, and especially the Preamble, could very well help us to overcome some technico-legal difficulties and to save the law from an inevitable collapse if it could not meet the new criminological reality. I remember that some members of Committee III, discussing the Polish suggestions, examined whether the cases enumerated in the Polish memorandum were or were not covered by the Hague Regulations, (Article 46) and it seemed to me that they were only inclined to regard the cases as not war crimes, because they are not covered by one or another particular provision of the Hague Regulations. This attitude would be a wrong one. It would mean that acts which are not expressly forbidden in the Hague Regulations are legitimate. But the Hague Convention has never been understood in this manner. Neither the authors of the Convention nor the experts of International Law except the majority of German experts, of course, have conceived the Hague Convention as a body of permissive rules. On the contrary, as Westlake rightly pointed out,

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the provisions are of the nature of prohibitions are not exhaustive.

The ambition of the Hague Conference was not to give a complete code of rules of warfare. The Conference expressly admitted it in the Preamble. But at the same time the Conference declared that this imperfection of the Convention and the Regulations does not mean that acts not expressly forbidden by the Regulations are legitimate acts. In the Preamble to Convention IV, it is declared that cases not provided for are not simply left to "the arbitrary opinion of the military commanders". Rolin. ("Le droit moderne de la Guerre," 1920, Tome I Page 9) stresses the fact that the conference deliberately limited its task and had no pretention, de formuler un code complet du droit moderne de la Guerre. Westlake. International Law, Cambridge 1910, Part 1, P.61, holds the same opinion and says : "The authority of the Hague Regulations is therefore supreme to the extent of their range and their range, wherever it may be found defective, is to be supplemented by approved usages and humanity". Garner. (Recent development in International Law, Tagore lectures, 1922, published by the University of Calcutta 1925) is exactly of the same opinion. And all three authors agree that the fact that an act is not expressly forbidden in the Hague Regulations does not mean that such act is allowed. The question is whether it is or not contrary to the usages of civilised peoples, the laws of humanity, and the dictates of the public conscience, which are the supreme rules of the human community.

The value of the Preamble is immense, especially for our work.

The first question to be answered is whether the Preamble can be regarded as law. Is it only a non-obligatory "monologue of the legislator"? A declaration of moral but not of legal value and not binding the signatory states?.

The overwhelming majority of experts in International Law are unanimous in the opinion that the Preamble is law. As example I quote Rolin page 9, op. cit. :

"La conclusion qui se dégage de ces déclarations formelles (Rolin refers to the Preambles of the Hague Conventions) est nette. Les principes du droit de la guerre, tels qu'ils résultent des usages entre nations, des lois de l'humanité et des exigences de la conscience publique s'imposeront aux belligérents non seulement lorsqu'ils n'auront pas adhéré à la Convention mais comme droit complémentaire dans les cas non réglés par celle-ci".

Il était bon, il était utile de donner une place dans le droit de la guerre aux lois de l'humanité ainsi qu'aux exigences de la conscience publique.

"La conférence de la Paix (Rolin means the Hague Conference 1907, dr.E) déclare quelles exigences (i.e. de la conscience publique, dr.E) et celles des lois de l'humanité ont, en fait, une place importante dans le droit de la guerre".

Westlake as quoted above grants to the laws of humanity the function of supplementary law when the written law is defective. Lord Cave in his article "War Crimes and their punishment" (Transactions of the Grotious Society, Vo.8 1923, p. XXI) designates the laws of humanity and the requirements of the public conscience of the Preamble as "lex non scripta", i.e. as law, and says expressly that this law is to be extracted etc.

Thus the Preamble is a part of International Law. The laws of humanity and the requirements of the public conscience are binding rules for the political rulers, military leaders, and commanders, and all persons representing the State in the conduct of war. In what sense? I said in my report that the Preamble has two functions : to help to interpret the particular provisions of the laws and customs of war and to supplement them when they have gaps. Both functions of the Preamble are recognized by Rolin. On page 260 he quotes Westlake as to the interpretation of the Hague Regulations and says :

/ l'auteur

".... l'auteur (he means Westlake) a simplement voulu expliquer que si tel acte n'est pas expressément interdit par le règlement de la Haye, cet acte n'est pas nécessairement permis. Cette interprétation est virtuellement confirmée par les termes même du préambule de la Convention No. IV....".

Interpolation page 10 : (Rolin regards the Preamble as an important instrument of interpretation not only of the Hague Regulations but of the customs as well. He writes on page 261 op.cit.

"Il y aura donc lieu de rechercher, éventuellement, surtout lorsqu'on se trouve en présence de coutumes divergentes comme il arrive souvent, ce qu'exigent les lois de l'humanité, ce qu'exige la conscience publique..."

As regards the other function of the Preamble, I have quoted already Rolin and Westlake. Both underline the role of the Preamble as droit complémentaire, as supplementary law. Garner regards the Preamble as a means of filling up of the gaps in the positive law, i.e. gaps in particular provisions of the positive law. He sees the importance of the Preamble in its function of covering cases not covered by the particular provisions of the Hague Regulations. I do not think that any other expert in international law has better summed up the importance of the Preamble than Rolin on Page 261 op.cit. I quote this passage because it was written in 1920 as if Rolin had foreseen the situation of 1944 and it finds its full application to the Polish proposal No. 2 (crimes against human dignity)

Rolin says: "Cette déclaration est d'une importance capitale. et c'est motif pour lequel nous la reproduisons encore, avant d'analyser le Règlement et de le confronter avec les usages. On ne pourra donc pas soutenir, par exemple, qu'il est permis de mettre à mort les otages, parce que le Règlement ne l'interdit pas, qu'il est permis de faire souffrir délibérément des innocents pour des coupables lorsqu'on ne parvient pas à découvrir ceux-ci, sous prétexte que le Règlement de la Haye ne défend pas cette abomination; qu'il est permis d'attenter à la liberté des habitants inoffensifs du pays occupé et de les déporter en masse dans le pays de l'Etat occupant avec sujétissement au travail forcé, sous prétexte que l'article 46 du Règlement ne prescrit de respecter que l'honneur et les droits de la famille, la vie des individus et la propriété privée, ainsi que les convictions religieuses et l'exercice des cultes, comme si la liberté n'avait pas le droit, en principe, et sans le cas d'infraction, au même respect que la propriété. Il nous faudra donc, à côté de ces dispositions réglementaires dont l'imperfection et les lacunes ont été signalées par les auteurs mêmes, examiner les usages antérieurs".

And Rolin proves that even before the Hague Regulations the principles of humanity and public conscience were recognized rules for the conduct of war. He quotes on page 50 et sequ. op.cit. the "Manuel de l'Institut du droit international" and says that the article 4 of this Manuel "condamne en outre sans se préoccuper de la question si elle est inutile ou nécessaire toute action contraire à la loyauté, à la justice, ou à l'humanité". He quotes the article 4 of the American Rules of Land Warfare of 1863 (the so-called Lieber Instructions) and says that this article "ordonne de respecter même dans le cas de la loi martiale strictement les principes de justice d'honneur et d'humanité". Professor Sheldon Glueck of the Harvard University agrees entirely with this appreciation of the Preamble. In his report written for the London International Assembly in December 1943 under the heading "The law to be applied in trial of war offenders" he says on page 7 in connection with the question how the relevant conventions are to be interpreted how the gaps are to be filled and ambiguities to be cleared, that the framers of the Hague Convention with commendable foresight inserted in the Preamble a precautionary statement. Sheldon Glueck sees the importance of the Preamble in the two functions mentioned in my report (interpretative and supplementary,

To emphasise his opinion he quotes Phillipson C., "International Law and the Great War", London 1915, page 142 saying: "Even if the entire body of modern international written law were completely obliterated, the common law of nations would still remain - a common law based on enlightened practice and ineradicable conceptions of humanity and justice".

Our task is to apply this "unwritten law" (Lord Cade, op.cit.) When written law is lacking.

Ad Chapter II.

ad par. 1.

It could be objected that the expression Gangster-régime is too strong or not a juridical one. Anyone unable to accept this description of the Nazi-régime could be satisfied perhaps by another expression. Sheldon Glueck in the paper quoted above uses the terms "pathologic system". But these terms involve an element of irresponsibility which I would avoid. By denominating the system as a gangster and not pathologic system I wished to underline the criminal responsibility of the Nazi rulers. Such a system was foreseen by Story in his famous "Conflict of laws" (1872). He speaks in this book, quoted by Glueck, about laws, institutions or customs of one nation which are subversive of the morals, justice or polity of another nation. And Glueck adds with justice, "If it is true of any one nation, it must be true of the family of nations....".

ad par.2.

I left out the question whether a simple aggressive war - conducted within the framework of the "laws and customs of war" - would be a crime. I draw the attention of the Commission to the fact that we are facing a total war, i.e. a war conceived, planned, prepared, launched and conducted as a criminal war in its aims and in its methods.

But it would be useful to keep in mind the following facts which are of importance for the correct interpretation of the Allied declarations and for the understanding of the declaration of Marshal Stalin quoted in my report :

(a) The V.th Assembly of the League of Nations accepted the famous Geneva Protocol of 1924. It is true that this Protocol has not been ratified and thus did not become part of positive International Law. Nevertheless the fact that it has been voted is of great importance. By voting this Protocol the Assembly of the League of Nations expressed the "public opinion" or better the "public conscience" on the most tragic question of human society, the question of war. The Geneva Protocol denounced war as an international crime. Not in a moral or political sense.

The language of the Protocol is clear and leaves no room for sophist misconstruction. In its preamble it says : "Recognizing the solidarity of the members asserting that a war of aggression constitutes a violation of this solidarity and an international crime....".

Is it possible to maintain after this that the words "international crime" only mean "moral crime"? Politis answered this question in his speech to the Assembly of the League of Nations. He declared that a war of aggression "se trouve non seulement condamnée, non seulement considérée comme un crime international, mais encore entourée des sanctions, accompagnée du chatiment nécessaire pour la prévenir et au besoin pour la réprimer". This is the language of criminal law; crime, penalty, prevention, repression. The Assembly of the League of Nations approved this interpretation. Even though the Protocol never formally became international law, war of aggression

/was

was proclaimed a crime by the international legislative body; while before that, at least since 1914, it had been proclaimed a crime by public opinion and the legal conscience of the whole of civilised humanity. This was the historic achievement of the framers of the Protocol.

(b) Professor Lauterpacht in his memorandum to the Cambridge Committee says on pages 3 and 6: "The law of any international society worthy of that name must reject with reprobation the view that between nations there can be no aggression calling for punishment and it must consider the responsibility for the premeditated violation of the General Treaty for the Renunciation of war as lying within the sphere of criminal law". (c) This opinion is supported by the fact that in 1937 the League of Nations voted two conventions against terrorism. The reason was the assassination of King Alexander and the French minister Barthou and the ratio legis was to suppress and prevent terrorism as a crime preparatory to the launching of war. The war 1939/44 proves the correctness of this opinion.

The question is, shall we go back? Is the standard of 1924 in this question too advanced in the light of the experience of 1939/1944? Should we be more reactionary than the League of Nations in 1924 and in 1937? Or in other words, should law go backwards when social changes require progress.

Ad Chapter III

In understanding the interpretation of the Allied declarations we must keep in mind: the *raison d'être* of the allied retributive action is not to punish mere crimes but to punish crimes which have some connection with the war. For the punishment of crimes of other kinds the penal legislative and normal penal jurisdiction of each country, with some modifications, are fully sufficient and a common action of the United Nations is not needed. Commission I of the London International Assembly expressed its opinion in this respect very clearly. It is one of the most progressive and the most practically and theoretically justified juridical decisions of the present time. But the Cambridge Committee also recognized that the problem of the retributive action of the Allied Nations cannot be limited to the "violations of laws and customs of war".

The answers given to the questionnaire drafted by Professor MacNair by the representatives of legal science of various Allied Countries, especially the answers to Parts A and B demonstrate that the conclusions of my report are in accordance with the majority of the answers. I must abstain from quotations. But I should like to draw the attention of the Commission to the fact that the Polish and French answers suggested that January 1933 should be regarded as the beginning of the critical period. Further I should like to underline that crimes against humanity committed because of race, religion and nationality and described in Mr. Pell's motion and my report as the real cause of all the other crimes, as the source of the war, as the malum in se, have been denounced by the French answer to the Cambridge questionnaire.

Ad Chapter IV

I avoided a definition of war crime. It is very difficult to give the definition even of a simple crime. Every author of a textbook on criminal law says usually in the preface that such definition is difficult and demonstrates the difficulty by the fact that there exist perhaps dozens or more general definitions of crime.

The purpose of my report as I understood it was not to find such a definition, but to make suggestions as to the interpretation of the Allied declarations. My report fulfils this task. It suggests a kind of "authentic interpretation" by the legislator. The purpose is to bring into line the work of the Commission and the declarations.

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SECRET

111/5
12 May 1944

UNITED NATIONS WAR CRIMES COMMISSION

Committee 111

Scope of the Retributive action of the United Nations.

Conclusions proposed by the Drafting Committee

The United Nations War Crimes Commission has examined the main allied declarations concerned with the punishment of crimes committed by the enemy, new facts submitted to the Commission and its committees by representatives of various Allied governments and the results of its own work. After this examination, the Commission came to the conclusion that the scope of its work, its methods and principles must be brought into line with the principles expressed in the Allied declaration.

Accordingly the United Nations War Crimes Commission considers it its duty to make suggestions to the United Nations' governments in respect of crimes committed by the enemy and their accomplices in connection with or incidental to the present world war in violation of the criminal laws of the countries invaded or otherwise affected, of the laws and customs of war, of the general principles of criminal law as recognised by civilised nations, or of the laws of humanity and the dictates of the public conscience as provided in the Hague Preamble.

From this general point of view the United Nations War Crimes Commission considers that the following categories of crimes are within the scope of its work :

1. The crimes committed for the purpose of preparing or launching the war, irrespective of the territory where these crimes have been committed;
2. crimes committed in the invaded or occupied countries and crimes committed against members of the armed forces or civilian citizens of the United Nations on enemy territory, in the air or on the sea, whatever may be the rank of the accused;
3. crimes committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief;
4. crimes that may be committed in order to prevent the restoration of peace.

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SECRET

III/6
21 June 1944

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

REQUEST BY THE COMMISSION FOR A LEGAL OPINION

AS TO WHETHER CERTAIN ACTS ARE WAR CRIMES

It is the Commission's desire that the following question should be submitted for advice to Committee III.

At two recent meetings of Committee I cases have been under consideration which concerned the subject of judicial murder.

It is obvious that when a court legally established has imposed a sentence which is regular in form the judges thereof cannot be called to account or be held responsible for any error in the conduct of the case.

But it is possible to conceive:-

- a) - that the institution of the court was itself illegal;
- b) - that the jurisdiction conferred upon the court was illegal (e.g. power to impose punishment on relatives of the accused);
- c) - that the sentence was in excess of the legal maximum, or otherwise illegal;
- d) - that the court was directed to function, or did in fact function, on principles inconsistent with the fundamental rules of justice,

e.g.

that the proceedings did not in fact constitute a trial;
that no proper opportunities for defence were given to the accused;
that the court was not bound by law but applied an arbitrary decision of the judges.

Committee III is asked to advise whether any or all of the above cases should be regarded as war crimes.

SECRET

III/7
31 July 1944

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UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

REQUEST FROM COMMITTEE I FOR A LEGAL OPINION

Committee I asks for an opinion on the following question:

Is the decree No. 7 of 11th January, 1941, signed by Seyss-Inquart, of which a translation appears below, consistent with the laws and customs of war?

A photostatic copy of the decree will be available for inspection when Committee III is considering this question.

Translation of the Decree

Gazette of Ordinances for the Occupied Netherlands Territories

ORDINANCE NO. 7 BY THE REICHSKOMMISSAR FOR THE OCCUPIED
NETHERLANDS TERRITORIES, CONCERNING THE LEVYING OF
CONTRIBUTIONS

In virtue of the powers conferred upon me by paragraph 5 of the Führer's Decree concerning the exercise of governmental powers in the Netherlands, dated May 18th, 1940, (Reich Gazette I p. 778), I decree as follows:

1.

As compensation and expiation (Ersatz und Sühneleistung) for acts which have been committed at any date since May 25th, 1940, or which may hereafter be committed, and which are directed against the interests of the German nation or of the Great German Reich, or are calculated to disturb public order or public life in the Netherlands territories placed under the protection of the German troops, contributions may be levied

1. From persons or associations (Stiftungen) which countenance or encourage the aforesaid acts, or may be presumed to countenance or encourage them;
2. Municipalities in whose areas such acts have been committed.

2.

1. Personal services, money contributions or contributions in kind may be exacted.
2. Where a personal service is required, the party made liable cannot discharge the obligation by a deputy, unless the authority indicated in paragraph 4 approves of this being done.

3.

Where a contribution is imposed upon several persons or associations (Stiftungen) they will be regarded as collectively liable.

4.

Contributions, within the meaning of this Ordinance, will be levied by the Reich Kommissar for the occupied Netherlands territories (General Kommissar for security) by a written demand note.

5.

1. Except where otherwise ordered in particular cases, the demand note shall be executed in conformity with provisions of the Netherlands Regulations for civil procedure; it will for such purposes be regarded as an executable judgment.

2. Should the contribution not be discharged by the due date, its collection will be enforced by arrest.

3. Where a contribution is levied on an association (Stiftungen), the persons who stand in danger of arrest shall be designated in the demand note.

4. The arrest shall be made by the German police.

The Hague,
January 11th 1941.

(Signed) SEYSS INQUART

Reichskommissar for the Occupied
Netherlands Territory.

N.B. This is a preliminary document and is intended exclusively for the personal use of members of the Commission and their substitutes.

SECRET

III/8
28 August, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

REPORT ON THE PLEA OF OBEDIENCE TO SUPERIOR ORDERS

Submitted by Dr. Yuen-li Liang

I. The Practical Purpose for the War Crimes Commission of an Examination of the Problem.

It is generally admitted that the problem whether the plea of obedience to superior orders is sufficient to acquit the person accused of a crime is one of great intricacy. The difficulties are increased when this problem is approached in relation to war crimes, the punishment of which has had few precedents in international history and for which practically no international custom or jurisprudence exists wherefrom to deduce generally agreed rules. During the present war a few attempts have been made by private bodies of publicists and jurists to study the problem, and the results of their studies have thrown a good deal of light on it. Particular mention should be made of the reports submitted by the Cambridge International Commission for Penal Reconstruction and Development and the London International Assembly. These reports, particularly the latter, had however in view the possible establishment of a comprehensive and all-including international tribunal as the principal, if not the exclusive, organ for the trial of war criminals, and took account more or less of the consideration that a rule or a standard would have to be established by agreement of all the United Nations, who would submit their cases exclusively or principally to this tribunal. Since the Moscow Declaration, on the lines of which the War Crimes Commission has been proceeding hitherto in its work, declared in favour of the principle of national jurisdiction of the United Nations, the problem of the plea of obedience to superior orders is somewhat simplified for the purposes of the Commission because the Commission does not have to proclaim an absolute and universal rule, or, in other words, attempt to codify the rule in the face of the divergent legislation and legal provisions and judicial practice in force in the respective United Nations. The Commission does not have to announce to the public in advance to what exact extent the plea of superior orders will be recognized in the punishment of war criminals either in the national courts of each of the United Nations or in the proposed Interallied Tribunal with its limited jurisdiction. Nor is the plea of superior orders of vital importance in the examination of cases by Committee I, since the latter does not so much go into the merits of the case as prepare prima facie charges against alleged offenders, who, in any case, cannot enter the plea of obedience to superior orders at that stage.

It is submitted that it would be futile to attempt to formulate, by means of an agreement among the United Nations, an absolute rule in regard to the plea of superior orders. Some efforts to deal with the problem though of limited scope, have indeed been made by international public bodies. In its report presented to the Preliminary Peace Conference at Paris, the Commission on Responsibilities said: "We desire to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the Court to decide

whether a plea of superior orders is sufficient to acquit the person charged with responsibility". The Commission, while dissociating itself from the views expressed, among others, in the British Military Manual of 1914 and the U.S. Rules of Warfare, further stated that "the Commission did not consider it within its province - or within the reach of agreement among its members - to lay down detailed principles for the guidance of national courts in the matter". Another attempt was made in regard to a specific offence in Article 3 of the Washington Treaty of February 22nd which sought to set aside this defence expressly in regard to acts connected with unrestricted submarine warfare, stating that the penalty was to be applicable whether or not the person accused acted under orders of a superior. The Commission of Jurists charged in 1922 by the Washington Treaty Powers with the revision of the laws of war also suggested in one instance that the use of distress signals and messages as ruses of war should render "the perpetrator personally responsible under international law"; yet in another draft it expressly stipulates that persons acting under orders are exempt from responsibility for offences against the law of war as set out in its report. The difficulty which any international body must experience in formulating an absolute rule is no doubt due not only to the fact that each State has its own legislative and judicial rules on the subject, and that these differ from one another in principle, but also to the inherent impossibility of applying to the international law of war conceptions of criminal law primarily intended to be only of national validity.

It will be advisable for the War Crimes Commission to recommend that the validity of the plea of superior orders be left to be determined by the national courts of the United Nations according to their own views of the merits and limits of the plea. The Commission could, however, recommend some guiding principle which, without trying to reconcile the divergent national practices and to formulate an absolute rule, would represent the consensus of opinion among the United Nations represented on the War Crimes Commission. These two suggestions will be developed further in the paragraphs to follow.

II. Determination of the Effect of the Plea of Superior Orders by National Courts.

There are few who will dispute that international penal law is a new conception and has little or no jurisprudence or body of doctrines behind it. The punishment of war crimes by the joint action of the United Nations breaks new ground in the realm of international law. It is highly questionable how far the principles of criminal law which are intended to guard the paix publique of the particular States can be transplanted to the virgin soil of international penal law. How much more difficult will it be to restate or codify legal principles, such as the plea of superior orders, which even in the national sphere are not free from ambiguities and apparent inconsistencies. Professor Lauterpacht has put the situation very aptly :

"The fact is that the law - even military law - does not reduce the soldier to the status of a mere mechanism. While enjoining upon him obedience to orders, it adds the substantial qualification to the effect that obedience is due only to lawful orders. The law oscillates, with perhaps unavoidable hesitation, between the dictates of absolute discipline and efficiency in what is essentially an instrumentality of power and the equally inescapable subjection of that instrument of power to the authority of the law. The result is that in addition to the natural risks of his calling the soldier has, in theory, to face the dangers of a conflict between his duty of obedience to orders and his duty

to obey the law. We say, "in theory", for in fact the law does not ignore altogether the resulting difficulty. Numerous decisions of courts in the United States recognize that, while, in principle, superior orders are not a valid defence, obedience to an order which is not on the face of it illegal, relieves the soldier of liability. Some State laws go even further in that direction. In England, where the Courts have been loth to depart from the logical rigour of the established rule, it is generally recognized that the exercise of the right of pardon by the Executive is in such cases a proper remedy. As Dicey says: "... a soldier runs no substantial risk of punishment for obedience to orders which a man of common sense may honestly believe to involve no breach of law" (The Law of the Constitution, 8th ed., 1927, p.302). And there are judicial decisions to the effect that the soldier obeying orders which 'are not so manifestly illegal that he must or ought to have known that they were unlawful' will be protected by the courts themselves (Mr. Justice Willos in Keighley v. Ball, 4 F. & F.763) (Cambridge Report, Professor Lauterpacht's Memorandum, p.42-43).

Not only in the rival claims of different legal principles but also in the application to various individuals of such principles are such inconsistencies glaring. Lauterpacht further points out :

"There are indeed some States, in particular France, in which there is, apparently, no qualification to the rule that superior orders are in all circumstances a valid excuse. Writers of authority like Duguit, have defended that rule with vigour on the ground that it is indispensable to the cohesion and to the efficiency of the army. But it has not been asserted that its effect is to relieve French nationals of responsibility when tried before foreign tribunals for the violation of the municipal law of these countries or of international law even if that foreign country itself has adopted an identical rule. For it is, by necessary implication, a rule applicable only to the State's own nationals and only in respect of its own municipal law. In fact no country has more emphatically than France rejected the plea of superior orders when put forward by enemy soldiers and officers accused of war crimes. It is an interesting gloss on the complexity of the problem that in Great Britain and in the United States the plea of superior orders is, on the whole, without decisive effect in internal criminal or constitutional law, although it is apparently treated as a full justification in relation to war crimes, while in France, where the plea of superior orders is an absolute defence in the municipal sphere, it is disregarded in the matter of war crimes". (Cambridge Report, Professor Lauterpacht's Memorandum, p. 43-44.)

Even the ascertainment of the legal effect of the plea of superior orders in a particular country has been found difficult. The so-called and much criticized British Rule of 1914, which owed its existence to Oppenheim, has been stated to possess no statutory force. And according to Lord Cave "it has no statutory or other authority and I much doubt whether in its absolute form it represents our law". (8 Grotius Society Proceedings XXIII). Again, the statement in paragraph 347 of the U.S. Rules of Land Warfare to the effect that individuals of the Armed Forces will not be punished for war crimes in cases where they are committed under orders or sanction of their Government or Commanders has been held by writers to possess only the status of an administrative regulation and incapable of superseding the established legal rule laid down in the case Mitchell vs. Harmony, 1851 in which the Court held that "it can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate, but it cannot justify".

It is also admitted that the effect of the plea is a matter of dispute. The disagreement ranges from considering the plea as a valid excuse or justification to regarding it as merely raising the question whether or not, in the particular case, the Court should regard the fact of having acted under orders as a ground for inflicting a less severe sentence.

There is, it is true, an overwhelming weight of authority among the publicists and international lawyers, with of course the well-known exception of Oppenheim and a few German writers, for the rejection of the idea that obedience to superior orders is an absolute justification for a war crime. It is nevertheless a far cry from the existence of a weight of authority among jurists to the adoption of an absolute rule by States whose attachment to their juridical traditions and to their own view of legal principles has found an emphatic, though incidental, confirmation in the Moscow Declaration.

It has been suggested that even though the national courts, according to the Moscow Declaration, are to assume, in principle, jurisdiction over war crimes committed in the territory of the United Nations, the War Crimes Commission should announce its considered view of the plea of superior orders in order to guide those courts whose judges have been accustomed to apply only municipal law and may fail to realize sufficiently the significance of the punishment of war crimes, and be liable to take too narrow a view. The enunciation of a doctrine on the subject by the War Crimes Commission, would, it is held, serve as a beacon-light to them in their groping for certainty in the field of conflicting practices and doctrines and might have at least some persuasive authority or serve as "subsidiary means for ascertaining the law". There can be no strong objection to the War Crimes Commission making such a recommendation, although it is somewhat doubtful to what extent the national courts would give effect to it and how far the municipal law of particular countries could embody such a recommendation in its own system.

From the foregoing paragraphs it would seem that the War Crimes Commission might do well to decide in principle to leave the determination of the effect of the plea of superior orders to the national courts, both as regards the rule itself and as regards its application to particular cases.

III. Suggestions for Recommendations.

But, for the proposed Interallied Court it seems that the War Crimes Commission will be called upon to formulate some form of rule. It has been suggested that the German rules regarding the plea of superior orders should be applied to German and other Axis offenders as the most fair procedure, and as a matter of policy, particularly as these rules represent intrinsically an acceptable view of the problem. It may be worth while to draw attention to the following German legal provisions and judicial utterances:

(1) Section 47 of the German Military Penal Code, Dec. 1st, 1940, which has the same provisions as the old pre-Nazi Code: "For a crime committed in execution of an order, the superior officer alone is responsible. But the subaltern who carries the order into execution may be punished as a participant: (a) if he has gone beyond the order given to him, or (b) if he knew the order related to an act which aimed at a general military crime or offence". (Quoted from London International Assembly Report, p. 82).

(2) The case Germany vs. Dithmar and Boldt (Leipzig 1921) in which the Court states :

"In estimating the punishment, it has, in the first place, to be borne in mind that the principal guilt rests with Commander Patzig, under whose orders the accused acted. They should certainly have refused to obey the order. This would have required a specially high degree

of resolution. A refusal to obey a commander on a submarine would have been something so unusual, that it is humanly possible to understand that the accused could not bring themselves to disobey. That certainly does not make them innocent, as has been stated above. They had acquired the habit of obedience to military authority and could not rid themselves of it. This justifies the recognition of mitigating circumstances". (Italics by the Rapporteur).

(3) The case The Llandovery Castle (Leipzig) in which the Court states: "The order does not free the accused from guilt:..... if such an order is universally known to be against the law". (c.f. contrary decisions in Germany vs. Neumann and The Dover Castle, in both of which cases the question of reprisal was involved.

(4) Goebbels in his article in the Deutsche Allgemeine Zeitung, May 28th, 1944 threatening to execute British pilots taken prisoner in Germany says: "The pilots cannot claim that they were acting under orders. There is no provision in the Laws of War that a soldier who has committed a disgraceful crime is exempted from punishment by his plea of having acted according to the orders of his superiors, especially when these orders are in glaring contradiction to every notion of human morality and to all customary international rules for the conduct of war". (Translation by the Rapporteur, fuller and more literal than what was reported in the daily press).

It is interesting to compare the wording of Goebbels' Statement and the 1944 amendment to the British Manual of Military Law, 1929, which, discarding the Oppenheim doctrine, concludes: "The question however is governed by the major principle that members of the Armed Forces are bound to obey lawful orders only and that they cannot therefore escape liability if in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity". It is however to be questioned whether Goebbel's utterance can be considered as an authoritative declaration of German law.

The Rapporteur proposes that the War Crimes Commission approve in principle the application of the German rules by the proposed Inter-Allied Court and recommend this decision to the Governments of the United Nations, suggesting that it might be possible for their courts also to apply the German rules in the trial of war crimes. If on the other hand it is preferred that the War Crimes Commission should for the same purposes provide a formula of its own, the Rapporteur suggests, as an alternative, the adoption of Article 30 of the Preuss Draft of the Convention on the Trial and Punishment of War Criminals (Doc. II/11) with amendments if necessary.

The Article in question reads as follows :

Superior Orders

"1. The plea of superior orders shall not constitute a defence against a charge arising under Article 1 if the order was so manifestly contrary to the laws of war that a person of ordinary sense and understanding would know or should know, given his rank or position and the circumstances of the case, that such an order was illegal.

"2. It shall be for the Tribunal and its Divisions to consider to what extent irresistible compulsion shall be a ground for mitigation of the penalty or for acquittal".

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SECRET

III/9
15 September, 1944.

UNITED NATIONS WAR CRIMES COMMISSION

REPORT OF THE SUB-COMMITTEE APPOINTED TO CONSIDER
WHETHER THE PREPARATION AND LAUNCHING OF THE PRESENT
WAR SHOULD BE CONSIDERED "WAR CRIMES"

On 6th June, 1944, the Commission had before it a resolution proposed by Committee III on the subject of the "Scope of the Retributive Action of the United Nations" (Doc. C.20). This resolution contained inter alia the following statement:

"From this general point of view the United Nations War Crimes Commission considers that the following categories of crimes are within the scope of its work:

"1. The crimes committed for the purpose of preparing or launching the war, irrespective of the territory where those crimes have been committed".

The Commission referred this statement back to the Committee for further consideration and the Committee invited Dr. Eder, Lieut.-Col. Hodgson, Dr. de Moor, and Sir Arnold McNair (if he were willing to serve) to form a sub-committee to consider whether the crimes mentioned in the above extract, and the preparation and launching of the war itself should be considered as war crimes.

The other members, including Sir Arnold McNair, have met and considered a note which the latter has been good enough to prepare, (Doc. C.43). As the result of their discussions, the members Hodgson and de Moor recommend Committee III to adopt the following conclusions:

- (I) Acts committed by individuals merely for the purpose of preparing for and launching aggressive war and not falling within the next paragraph are, lege lata, not "war crimes".
- (II) Acts committed before the outbreak of war which command or procure the commission of "war crimes" after the outbreak of war, such as a pre-war instruction that no prisoners should be taken, which was followed and resulted in no prisoners being taken after the outbreak of war, are war crimes.
- (III) However, such acts as mentioned sub.(I) and especially the acts and outrages against the principles of the laws of nations and against international good faith perpetrated by the responsible leaders of the axis powers and their satellites in preparing and launching this war are of such gravity that they should be made the subject of a formal condemnation in the peace-treaties.
- (IV) It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.

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SECRET

III/10
18 September, 1944

UNITED NATIONS WAR CRIMES COMMISSION

LEGALITY OF PECUNIARY REPRISALS UNDER SEYSS INQUART
DECREE OF 11TH JANUARY, 1941

Proposed Reply to Committee I's request for a legal opinion (Doc. III/7) prepared by Major Willard B. Cowles.

1. Facts: On 18 May, 1940 Hitler issued a decree concerning the exercise of "governmental powers" in The Netherlands. Pursuant thereto, on 11 January, 1941, Seyss Inquart, Reichskommissar for the Occupied Netherlands Territory, issued Ordinance No. 7, 1941. This ordinance provided that :

1.

"As compensation and expiation (Ersatz und Sühneleistung) for acts which have been committed at any date since May 25th, 1940, or which may hereafter be committed, and which are directed against the interests of the German nation or of the Great German Reich, or are calculated to disturb public order or public life in the Netherlands territories placed under the protection of the German troops, contributions may be levied:

"1. From persons or associations (Stiftungen) which countenance or encourage the aforesaid acts, or may be presumed to countenance or encourage them;

"2. Municipalities in whose areas such acts have been committed."

2.

"1. Personal services, money contributions or contributions in kind may be exacted.

"2. Where a personal service is required, the party made liable cannot discharge the obligation by a deputy, unless the authority indicated in paragraph 4 approves of this being done."

3.

"Where a contribution is imposed upon several persons or associations (Stiftungen) they will be regarded as collectively liable."

4.

"Contributions, within the meaning of this Ordinance, will be levied by the Reich Kommissar for the occupied Netherlands territories (General Kommissar for security) by a written demand note."

5.

"1. Except where otherwise ordered in particular cases, the demand note shall be executed in conformity with provisions of the

Netherlands Regulations for civil procedure; it will for such purposes be regarded as an executable judgment.

"2. Should the contribution not be discharged by the due date, its collection will be enforced by arrest.

"3. Where a contribution is levied on an association (Stiftung), the persons who stand in danger of arrest shall be designated in the demand note.

"4. The arrest shall be made by the German police."

On 25 - 26 February 1941, there were riots in Amsterdam, Hilversum, and Zaandam, followed by strikes. It may be presumed that there were German regulations or ordinances against such riots and strikes. Three days later, on March 1, the German Director General for Public Safety and Police, S.S. Brigadeführer Rauter, informed the mayors of these cities that, on account of the events of 25 - 26 February, he (Rauter) had levied fines on these localities in the following amounts:

Amsterdam ---	15,000,000 guilders
Hilversum ---	2,500,000 guilders
Zaandam ---	500,000 guilders.

The three city governments were required to deposit these respective amounts in the Rotterdamsche Bank at The Hague on the account of the Reichskommissar for Occupied Netherlands Territory -- Seyss Inquart. The terms of the Rauter directive were published the next day (2 March, 1941) in the "Telegraaf" and "Algemeen Handelsblad". The published notification stated that it was made public in accordance with the terms of the Code of Dutch Civil Procedure, and, accordingly, had force as a "provisional decree". It stated further that the directive was issued "by virtue of Art. 1 of the regulation of the Reichskommissar for Occupied Netherlands territory (Seyss Inquart) No. 7/41 of 11.1.1941 and in agreement with the commander of the German forces in the Netherlands."

The directive required that the monies be collected from those inhabitants who, according to latest tax assessments, were assessed as having an income of more than 10,000 florins. The fine was to be treated for collection purposes as an extra assessment on the income tax of such persons. A Dutch Act of 22 May, 1845, apparently dealing with the method of collection of direct taxes, was to be applied by analogy. The published report of the Rauter directive also stated that if the fines were not paid on time "further reprisal measures" might be taken. The nature of the "further" reprisal measures was to double the amount due from individuals who did not pay on time. Provision appears to have been made for the issuance of receipts for money paid.

2. Questions Presented: The following fundamental questions are raised on the foregoing facts :

- a. Was the action taken by Brigadeführer Rauter consistent with the laws and customs of war?
- b. Is the Seyss Inquart decree consistent with the laws and customs of war?

3. These questions, together with related subsidiary questions, will be answered in the order raised. Question 'a' is now treated. On the basis of the facts at hand and on the face of both documents nothing could hardly be clearer than that Article 1 is concerned with penalties and reprisals, not with requisitions or contributions.

"Requisition is the name for the demand for the supply of all kinds of articles necessary for an army, such as provisions for men and horses, clothing, or means of transport." (2 Lauterpacht's Oppenheim, International Law (6th ed. 1940) sec. 147, p. 317). A contribution is a demand for money for the needs of the army, made in lieu of requisitions of supplies. (*Id.* at 319. See also paragraph 423 Ch. XIV, British Manual of Military Law).

4. The controlling international rule is Article 50 of the Hague Regulations which provides that :

"No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which they cannot be regarded as jointly responsible."

This provision permits the imposition of a general pecuniary penalty upon a community, by way of reprisal, for acts of individuals thereof which the town may be presumed to be jointly responsible in not having prevented the acts. Reprisals by an occupying power are legitimate when taken for a breach of the occupant's regulations by individuals within the occupied territory. (Paragraph 344 of the U.S. "Rules of Land Warfare" of 1940 (FM 27-10); paragraph 458 of Ch. XIV of the British Manual of Military Law; Spaight, Land Warfare, p. 408). The intention of Article 50, says Spaight, "is to confine collective punishment to such offences as the community has either committed or has allowed to be committed", and that "the town or village community is in the position of a surety for the behaviour of the residents, and ... each member is regarded by the occupant as a bondsman who is legally, if not morally, responsible for his fellow-citizens' default." (Spaight, Land Warfare, pp. 408-409.) The following statements also make the matter clear beyond doubt :

"This Article (50) impliedly sanctions the infliction of pecuniary penalties, or fines, and other penalties on a community for acts and omissions for which it is clearly answerable. These acts and omissions refer not only to breaches of the laws of war, but also to infringements of the occupying command's proclamations or martial law regulations, as well as to failure to supply legitimate contributions and requisitions. Moreover, where reprisals are permissible collective penalties may be imposed. Occupying commanders have usually held a town or village jointly responsible for damage done to railways, bridges, telegraphs, etc., in the neighbourhood ..." (2 Keith's Wheaton, Int. Law, (7th ed. 1944), p. 261).

Even Nys, who dislikes collective responsibility, states that manifestations of revolt, and the like, by a populace gives rise to the collective responsibility of the community. (Le Droit International, III, p. 429, cited in 2 Garner 158). Though he also dislikes the rule and urges that it be changed, Lauterpacht, in the 6th edition of Oppenheim's International Law (Vol. 2, p. 449, sec. 250) admits that the existing law is as follows :

"There is no doubt that Article 50 of the Hague Regulations ... does not prevent the burning, by way of reprisals, of villages or even towns, for a treacherous attack committed there on enemy soldiers by unknown individuals, and, this being so, a brutal belligerent has his opportunity."

5. Comparing this extreme right with what was done by the Rauter-Seyss Inquart decrees, it may be observed with Spaight that

"Of all the punishments used by war law, fines are the commonest and in many ways the most satisfactory and humane." (Land Warfare, p. 408).

It, therefore, cannot be held, in the present state of the law, that it is a violation of the laws and customs of war for the occupying power to issue a general decree threatening collective penalties as a reprisal measure for breaches of the regulations of the occupant or to carry out such a decree when regulations of the occupying power are broken by the population of an occupied town. Nor is there any positive law restricting the amount of pecuniary reprisal of this character; and, where only persons in the same locality are penalized, it is not forbidden to impose a penalty upon a particular class of persons in a town, such as those who have the capacity to pay the fine.

6. We pass now to the consideration of question 'b'. This fundamental question raises subsidiary ones which will be stated as we proceed. It is basic in considering what follows that there is in the record no allegation of action taken under the remaining articles of the decree (i.e., Articles 2 - 5 inclusive). It may be remarked that violations of international law do not ordinarily take place by the mere issuance of a decree. There must be internationally illegal acts -- here illegal acts done under color of the Seyss Inquart decree. Violations must, therefore, be sought in what was actually done under the Seyss Inquart decree.

The first subsidiary question is as follows: May the following legally be exacted from the populace by a military governor:

- i. Personal services
- ii. Money contributions; or
- iii. "Contributions in kind"?

These questions are raised by Article 2 of the Seyss Inquart decree. Article 2 is distinct from Article 1.

Article 52 of the Hague Regulations is pertinent to the questions presented. It reads as follows:

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions (i.e., what is furnished) in kind shall as far as possible be paid in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

i. Personal Services: Article 52 of the Hague Regulations quoted above provides that requisitions of services may be demanded from inhabitants for the needs of the army of occupation, but requires that such services be "of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country." There is nothing on the face of the Seyss Inquart decree which shows that the personal services referred to are for other than the needs of the army of occupation or that such services would involve the inhabitants in taking part in military operations. There is nothing in the present record showing that Article 2 of the decree has been applied or misapplied. Such a provision is clearly susceptible of abuse in an illegal fashion, but this provision of the decree may not be held illegal as it stands without showing an abuse.

The requirement that where personal services are exacted, the person has no right to discharge the obligation by a deputy is not illegal on its face. Action under it could, however, be illegal. Thus if the personal services of aged men or women were demanded for a type of work which could be done only by strong younger men, this would be illegal. The present record contains no instances of the use of this provision.

ii. Money Contributions: This matter is controlled by Article 49 of the Hague Regulations which provides that if the occupant levies money contributions other than taxes this shall be only for "the needs of the army or of the administration of the territory in question." Proper money contributions can thus legally be exacted by the occupant. There is nothing illegal in the decree on this point. Any illegality must, therefore, be found in the facts of its application, none of which appears in the present record.

iii. "Contributions in Kind:" This translation from the Seyss Inquart decree appears to be inaccurate. The phrase "Contributions in kind" is a contradiction in terms and meaningless in its context. Perhaps the Dutch term of the original decree means "requisitions". The French text "les prestations", used instead of "les contributions", indicates clearly that the sense of the phrase is that "what is furnished" in kind shall as far as possible be paid for in cash (see 2 Westlake 96). The phrase will accordingly be treated as though it read "requisitions". Therefore, the considerations and results set forth under 'i' above are applicable here. Article 52 applies both to requisition in kind and of services.

7. Article 3 of the Seyss Inquart decree raises the subsidiary question: May individuals legally be held collectively liable for a contribution when imposed upon several persons; or upon a corporation (Stiftung) when the individuals connected with the corporation, who are required to assure payment or be held responsible for non-payment, are designated?

There is no rule of international law making such a practice illegal. Even much more arbitrary measures accord with the practice of states (see Spaight, Land Warfare, pp. 405 - 407).

8. The remaining articles (4 - 5 inclusive) relate to procedure. On their faces there is nothing illegal.

9. Accordingly, it is recommended that Committee I be advised that question 'a' must be answered in the affirmative, and that on the present record, question 'b' must likewise be answered in the affirmative, unless a subsidiary question, which is not answered by the record, can be affirmatively established. This question is whether or not Seyss Inquart appropriated to his own use the money paid in. Such a possibility

is suggested by the requirement that the monies be paid into his account, but this fact obviously does not prove, legally, that he appropriated the money. However, if it could be shown that, under the guise of a reprisal, he was in fact enriching himself, his action would constitute such a violation of the laws of war as to constitute a war crime.

NOTE:- This is a preliminary document intended exclusively for the personal use of members of the Commission and their substitutes.

III/11

22nd September 1944.

SECRET.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

REQUEST BY THE COMMISSION FOR A LEGAL
OPINION AS TO WHETHER CERTAIN ACTS ARE
WAR CRIMES.

REPORT by M. de BAER

PRELIMINARY REMARKS

During this war, our enemies have discarded the very principle of independent courts. In Nazi Germany judges are expected to mete out "justice" in conformity, not with their conscience, but with the orders of the Party; if they do not, they are dismissed. Even the ties which bound them to the law have been loosened; and this was done, not to augment their independence, but to make them more subservient still, by putting them under the obligation to disregard the law where such disregard is to the interests of the Party. Ministers of Justice, such as Freister and Thierack, President Rothenburger of the Hanseatic Court of Appeal, and Hitler himself have made this abundantly clear (e.g.: Hitler's speeches and decrees of March 21st, 1942, 25th April, 1942, 27th August, 1942). Even German law is not law as we conceive it, for the Nazis have, when they still troubled to keep up appearances, used law merely to cover, under a cloak of legality, their worst misdeeds; therefore it is impossible to consider Nazi Courts in the same light as we would our own. Nevertheless, notwithstanding the appalling misuse which has been made of the word "Justice" a discrimination should be made between those who can reasonably be made accountable for their judicial acts and those who cannot. In view of the absence of authority which could be of assistance, and of the fact that the whole matter is practically unprecedented, it has not been found convenient to attempt to lay down in this paper many abstract principles. The various sides of each question have been outlined and some solutions tentatively suggested, illustrated when possible by concrete cases which are before Committee I for consideration

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Committee III was asked to advise whether any or all

of the following cases should be regarded as war crimes:

- (a) that the institution of the court was itself illegal;
- (b) that the jurisdiction conferred upon the court was illegal (e.g. power to impose punishment on relatives of the accused);
- (c) that the sentence was in excess of the legal maximum, or otherwise illegal;
- (d) that the court was directed to function, or did in fact function, on principles inconsistent with the fundamental rules of justice,

e.g.

that the proceedings did not in fact constitute a trial;

that no proper opportunities for defence were given to the accused;

that the court was not bound by law but applied an arbitrary decision of the judges.

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A. The institution of the court was illegal.

- (a) If the Court was instituted by a Quisling Government, the court was illegal by national law; the acts which it performed were not sentences at all but arbitrary acts without any legal value. Some Quisling Governments have instituted such courts (e.g. "Volksgerichte" in Czechoslovakia; Czech case No. 116), but, unless their sentences are, at some future date, duly validated, they will remain null and void. Moreover those who have taken part in such acts may incur criminal prosecution if they can be indicted before their national courts, but this is an internal matter which concerns each nation in particular.
- (b) If the court was instituted by the occupier contrary to international law, the answer is not so simple. The Hague Convention IV does not expressly impose upon the occupier an obligation to allow the local courts to continue functioning, but in Article 43 it is stated that the occupier must, unless absolutely prevented, respect the laws in force of the Country.

From what precedes follows:-

- (1) that local courts set up by the occupent under the pretence that they are "national" Courts are without legal existence. The so-called "arbitration courts" which were setup by the Germans in Belgium during the last war fell under this category; the fact that their proceedings were subsequently validated does not preclude that, until such validation took place, all their acts were null and void. It seems that some of the

courts instituted during this war by the Germans in Belgium (the so called administrative Courts: Belgian case No.274) and in the Netherlands come under this category. The same should apply to courts which have been instituted in a country that was annexed to the Reich in violation of international law: Czechoslovakia (case 116), parts of Poland, Luxemburg (case 256: Simon), Alsace-Lorraine (French case 279 against Wagner & Burchel), EupenMalmedy, Danzig, Memel, etc.....

- (2) On the other hand the occupant may be justified in some cases, in setting up, to judge the inhabitants, courts of his own, and namely, if local courts refuse to administer justice, This was done in Belgium in 1918 after the Belgian courts had refused to work. The Supreme Court of Belgium held with much reason that the proceedings of such German Courts were not valid by Belgian law, but many writers on international law are of the opinion that the de facto power of the occupant entitles him to administer justice, and even imposes upon him the duty to administer such justice by virtue of his obligation to ensure public order. In cases such as those the national law and the accepted rules of international law are not in harmony. Furthermore it is generally accepted that, by international law, the occupier may, if the local courts are incapable - or insufficient to - maintain public order, remove the judges and replace them by his own judges. Such action was taken during the last war, in France, in the districts of Longwy and Briey. (N.B. - Here again, the Court of Appeal of Nancy on January 8, 1920, declared the decisions of these judges to be null and void by French law, but it does not necessarily follow that the appointment of the courts constituted a violation of international law.)

It seems therefore that the mere fact of sitting as a judge on a court which was illegally instituted should not be regarded as a war crime.

Should the judgments of such courts be fair and reasonable, it is even possible that the nation concerned may, although a violation of the law has, technically, been committed, waive its right to prosecute. If, however, the sentences have been manifestly unfair, or intended to favour the cause of the enemy, or that they violated the rules of behaviour of courts generally accepted in civilised countries, then the circumstance that the court itself was illegal may serve as an aggravating circumstance for the judges who took part in their business. It seems, for instance, that these persons who served on the S.S. and Police Courts (S.S. und Polizeigerichte) instituted in Norway by Terboven (case 131) should be made to answer for the judicial murders in which they have taken part.

The act of instituting such a court is, in some cases, a usurpation of sovereignty (war crime No.10 in the 1919 list) and it will be for the Commission to decide what will be its attitude in respect of such usurpations in general.

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- B. The jurisdiction conferred upon the court was illegal.
- I. In this respect it seems that the word "illegal" should mean "illegal by the law of nations", which implies that such "illegality" would be of such a gross and flagrant nature that it would revolt any civilised person. If we consider instances which have been published during this war, it seems, from the information which is available that some courts have been given jurisdiction to punish by death:
- (a) accused who are and cannot be otherwise than innocent of the crime for which they are sentenced, such as persons who, at the time when the crime was committed, were in custody in a gaol or interned in a concentration camp (this may apply to the French case No.278 where it seems that 31 so-called terrorists were tried and shot for acts in which they had taken no part):
 - (b) persons whose guilt has not been proved, such as relatives of men who have escaped to join the Allied Forces, or relatives of persons convicted of sabotage, etc...;
 - (c) persons accused of racial offences; e.g. a Pole for having proposed marriage to a German girl ("Justice") - Liberty publications, p.15).

Other, but similar examples are to be found among the cases forwarded to this Commission:-

- (i) German military courts in Luxemburg (Sondergerichte) have been given jurisdiction to sentence to death young Luxemburgers who refused to join the German Army (case 256):
- (ii) the same "Sondergerichte" in Luxemburg seem to have sentenced to death persons who have given shelter to young Luxemburgers who were evading military service in the German Army (case 256);
- (iii) in Czechoslovakia, Frank's decree of May 27, 1942, provided the death penalty for relatives of persons who had given shelter to unregistered Czechs (case 116).

We do not know now if, in all these cases, the punishment has been imposed by a court or by an administrative authority; in the former event it is proposed that all these crimes should be considered as "war crimes", and that they should be charged not only to the person in authority who conferred such outrageous jurisdiction upon the court, but also to the persons who have, as judges, co-operated in the imposition of death penalties.

- II. In the cases mentioned above, the jurisdiction conferred upon the court contrary to the law of nations would also probably be a violation of the local law. But it may happen that such jurisdiction is a violation of local law only.

For example: In a country where going on strike is not punishable, the occupant makes a strike a criminal offence.

Leaving aside for the moment the question whether the penalty provided is excessive or not, it is debatable whether the occupier has the right to create new crimes. Surely the occupant may impose emergency regulations destined to maintain order (curfew, etc.) but creating new crimes when this is not absolutely required for the maintenance of order is quite another matter. The criterium is whether the safety of the public or of the army required a modification of the law. Thus, penalising strikers may be legitimate if the strikers, by their unruliness, endangered public order, but it is certainly not so if it was intended as a means of coercion, to force unwilling labourers to work in industries which were providing Germany with essentials such as war material. The object with which such jurisdictions was conferred should determine whether it is a war crime or not.

In respect of the Dutch case filed under 148, it was obviously unnecessary to provide as drastic a penalty as death for strikers; strikers can be placed in custody, or even interned in camps if necessary, but there is no need of putting them to death.

In Belgium there is a decree signed "REEDER" dated December 10, 1942, also providing the death penalty for strikers; the reason therefor is in this case openly admitted to be that strikers are detrimental to German interests.

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C. The sentence was in excess of the legal maximum, or otherwise illegal.

- (a) Imposing excessive sentences, when the punishment is out of all proportion with the crime and in excess of the legal maximum is, for a judge, when it was done with intent, a crime of the first magnitude; those who have imposed such a sentence should be severely punished.
- (b) During this war, however, there have been many cases of such excessive sentences authorised by Nazi law.

A decree enacted on December 4, 1941, signed by Goering, Frick, and Lemmers and concerning criminal procedure against Poles and Jews in the annexed regions punished with death, among others, the following acts:

- (i) utterances inimical to the Germans;
- (ii) incitement to disobedience;
- (iii) lacerating or defacing official notices;
- (iv) damage to German property;
- (v) lowering the prestige of the German Reich or people (within this section are included the so-called racial offences).

We consider that any judges who have given effect to this decree by sentencing to death persons accused of the above offences have made themselves guilty of a war crime.

The same applies to the order issued by Daluge in Bohemia and Moravia on May 28, 1942 (Czech case 116) providing that any Czech who failed to register should be liable to capital punishment.

It seems that the same should apply also to those judges who have carried out Christiansens decree of February 26, 1941 (Dutch case 148).

Moreover such decrees are criminal in themselves, provided they have been carried out, and the authors thereof should not escape punishment.

Another question which can be considered to come under this section is raised by the British cases 219 to 255. Here Italian Military Courts have imposed sentences which seem excessive, with the aggravating circumstances that, in violation of the Geneva Convention,

- (1) the accused was put on trial without notification to the protecting power;
- (2) the representative of the protecting power was not given an opportunity to attend the hearing of the case;
- (3) the sentence was not communicated to the protecting power;
- (4) judicial proceedings were held whereas only a disciplinary punishment should have been imposed;
- (5) some of the prisoners of war were made to undergo their sentence in penitentiary establishments.

The sentences which were imposed varied between 2 or 3 years and 20 to 30 years imprisonment, as well as the death penalty. Although many of the sentences seem to have been subsequently commuted there seems to be little doubt that the judges of the court imposed excessive penalties. The persons responsible for this state of affairs are not only the officers who sat in the courts but also the prosecutor and the judicial officer who convened the court.

There is another kind of punishment which is manifestly illegal; it is to be found in section XIII, para. 2 in fine of the Decree of November 4, 1941 (Poland) the

sinister meaning of which is clear; "The courts may dispense with punishment and refer the case to the Secret State Police". It is the first duty of a judge to take a decision in cases submitted to him, he must either convict or acquit. Judges who have ordered that the accused be handed over to the Gestapo should be treated in the same way as those who have imposed excessive punishments.

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D. The Court was directed to function, or did in fact function, on principles inconsistent with the fundamental rules of justice.

(a) There was no trial:

In an order signed by General Dazer on January 12, 1943 (French case 181) it is provided that persons found in possession of arms or ammunition can be shot without a trial as well as any persons who have given shelter to them. Likewise, in the Norwegian case No. 131 against Terboven it is stated that Norwegians have been executed without a trial.

It has already been pointed out that it is difficult to know whether such shooting has been ordered by administration action or by a court. Whatever the case may be, the person in authority and the persons who composed the court have committed a judiciary murder.

(b) There was no defence:

We do not know of any specific cases during this war where the accused was deprived of the right of defence but it is probable that, as the liberation of occupied countries proceeds, many such instances will be recorded. During the last war, when on July 27, 1916, Captain Fryatt was tried by a German Feldgericht at Bruges, the United States Ambassador was denied the opportunity to provide him with counsel. At the trial a soldier who appeared for his defence requested that the case be postponed because he ~~neither~~ was familiar with international law nor had any knowledge of seamanship. The refusal of the court to postpone the trial amounted to a denial of defence and this case has - for this and other reasons - been considered as a judicial murder.

(c) The Court was not bound by law:

From information which has appeared in the press it seems that Hitler's decree of August 24, 1942, gave the Germans the power to set aside all written law. This principle seems to have been taken over from another decree enacted on April 26, 1942. In June 1935, para. 2 of the Penal Code had already been altered to make punishable by analogy any action deserving punishment according to the basic intention of the law and the sound feeling of the people ("gesundem Volksempfinden"). In some decrees, enacted in occupied countries, it is specifically stated that courts are allowed to deviate from the law: The Czech case No. 115 quotes art. 2 of Heydrich's decree of September 27, 1941, to this effect, and a somewhat similar provision is to be found in articles 2 and 12 of Goering's decree of December 4, 1941, against Poles and Jews.

In the above cases the persons who imposea punishment assume the whole responsibility thereof; the disregard of the fundamental rules of justice would justify a re-opening of all trials thus conducted and involves criminal responsibility for the persons who have taken part in them. The persons in authority in whom originated a decree authorising such disregard should also be considered as a criminal on the principle that a person who, with intent, provides the instrument without which the misdeed could not have been committed is himself partner in the misdeed.

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The question whether those who have carried out any of the sentences described above can be held guilty of war crimes is one which is linked up with that of superior order; it will be for the Commission to decide to what extent the principles accepted in the latter connection will apply in the former.

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CONCLUSION

It is proposed that:

1. WHEREAS the institution of an illegal court may, in some cases be a war crime, the mere fact of sitting as a judge in such a court should not be considered as a war crime by international law.

2.

- (a) sitting in a court upon which jurisdiction has been illegally conferred should be considered as a war crime only when such illegality was of such a gross and flagrant nature that it would revolt the conscience of any civilised person, or when it was conferred with a view to compel inhabitants to perform acts contrary to the accepted laws of war;
- (b) convening such a court for the above said purpose is a war crime;
- (c) prosecuting persons before such a court is a war crime;
- (d) conferring such jurisdiction upon a court is a war crime;

clearly

under existing facts

3. Imposing excessive penalties */* is a war crime in respect of:-

- (a) the judge who has taken part in the sentence;
- (b) the *prosecuting* officer who ~~prosecuted the case~~ *and requested an excessive penalty;*
- (c) the authority who conferred upon the court the power to impose such penalties;
- (d) in some cases; the officer who convened the court.

4. Directing a court to function on principles inconsistent with the fundamental rules of justice is a war crime. Taking part, in any responsible capacity, in the operations of such a court, is also a war crime.

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Committee III therefore recommends that "judicial murder" be added to the list of war crimes.

SECRET

III/12
15th August, 1945.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

ADDITIONAL NOTE ON THE DECISIONS OF THE
POTSDAM CONFERENCE AND THE PROBLEM OF
WAR CRIMINALS

By Mr. E. SCHUELB

Document C.141 was circulated on the day of the publication of the Potsdam decisions in the daily press (August 3rd, 1945). In the meantime the Agreement dated August 8th, 1945, establishing an international military tribunal and the Charter of the tribunal have been made public. ("The Times" of 9th August, 1945).

This calls for the following supplement to the paper C.141.

I.

The Four-Power Agreement is the implementation, inter alia, of that paragraph of the Potsdam report which deals with those major war criminals whose crimes have no particular localization (Doc. C.141, I(2)).

II.

Section 1 of the Agreement and Section 6 of the Charter of the tribunal contain further explanations of the notion of "major war criminal" within the meaning of the Moscow Declaration.

Section 1 of the Agreement stipulates that it makes no difference "whether they (the criminals) be accused individually or in their capacity as members of organizations or groups, or in both capacities." The phrase "whether as individuals or as members of organizations" is repeated in Section 6 of the Charter.

In enumerating the crimes coming within the jurisdiction of the tribunal, the Charter (Section 6), distinguishes between crimes for which there shall be individual responsibility and circumstances which establish what in the discussions of the United Nations War Crimes Commission has been called "collective responsibility".

Individual responsibility exists for the three great categories of crimes against peace (a), war crimes in the narrower sense (b), and crimes against humanity (c).

The principle of collective responsibility is established in the last paragraph of Section 6 which provides that leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

As to the relation between "individual responsibility" and "collective responsibility" we have to distinguish between "crimes against peace" on the one hand, and between "war crimes" and "crimes against humanity" on the other.

Among "crimes against peace", for which there shall be individual responsibility, the Charter mentions, inter alia, "participation in a common plan or conspiracy for the accomplishment of any of the foregoing",

i.e. planning, preparation, initiation or waging of war of aggression etc. Here, i.e. in the province of crimes against peace, the participation in a common plan as such constitutes the crime and fastens upon the participating person individual criminal responsibility. Within the province of war crimes in the narrower sense, and of crimes against humanity, paragraphs (b) and (c) of Section 6 deal with individual responsibility for them under the general principles of traditional criminal law. The last paragraph of Section 6 then extends this liability to all participants in either the formulation, or the execution of a common plan or conspiracy to commit a crime irrespective of who performs acts in persecution of such plan.

III.

In the light of the foregoing it is necessary to add some qualifications to what I said about the categories 2, 3 and 4 enumerated in paragraph II of Doc. C.141.

Category 2 comprises persons who - under traditional notions of criminal law - are guilty of war crimes in the narrower sense, (violations of the laws and customs of war) be it as principals or as accessories before or after the fact.

Within Category 3 fall persons who have participated in planning or carrying out Nazi enterprises involving or resulting either in atrocities or war crimes.

Here it is irrelevant whether, what has been committed, is a war crime or an atrocity which does not constitute a war crime. This category is, therefore, wider than category 2 in two respects :

a) that it is not restricted to war crimes in the technical sense and therefore includes "analogous offences".

b) that it is not restricted to persons responsible as direct perpetrators (principals, or accessories, before or after the fact), but that it includes persons who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes. It is not necessary that the individual defendant has been planning atrocities or war crimes. It is sufficient that he has taken part in planning a "Nazi enterprise" which either involved, or resulted in atrocities or war crimes. It suffices if the mens was directed towards the Nazi enterprise. The defendant will not be heard to say that though he willed the "enterprise" he did not design and want the atrocities involved in it or resulting from it. It will, e.g. be no defence to say that a certain defendant participated in planning the setting up and running of Concentration Camps and in committing people to the camps, but that he did so, say, for "educational purposes" ~~and~~ but that he did not want the inmates of the camps to be tortured, starved, and exterminated.

Roughly speaking, persons who in most cases otherwise would probably be responsible as accessories before the fact, are held responsible as direct perpetrators.

Category 4 comprises Nazi leaders and people in a similar capacity whose participation in concrete war crimes or atrocities cannot be proved. If Nazi leaders, influential Nazi supporters and high officials of Nazi organizations and institutions are guilty either of the direct commission of a crime or atrocity (as principals, or accessories) or if they are guilty of participation in planning Nazi enterprises, involving or resulting in atrocities or war crimes, they fall within categories 2 or 3, as the case may be, and shall be arrested and brought to judgment. Within category 4 only such persons fall, who do not fall within categories 2 or 3 and who therefore are not considered personally responsible for war crimes or atrocities. Such persons will not be punished but only arrested and interned.

IV.

My colleague, Dr. Litavski, has drawn my attention to the fact that paragraph 5, second sentence, of the "Political and Economic Principles" agreed to at Potsdam may also be interpreted differently from the interpretation I placed on it in C.141, III(4).

He thinks that the words "dangerous to the occupation or its objectives" refer not only to "other persons", but also to "Nazi leaders, influential Nazi supporters and high officials of Nazi organizations and institutions", the implication being that the provisions as to internment apply only to persons dangerous to the occupation or its objectives. Be that however it may, the fact remains that the categories 3 and 4 are, to some extent at least, overlapping and I admit that it was not quite precise to identify in Doc. C.141, category 4 with the "key-men" within the meaning of the Commission's Key-men lists Nos. 7 and 9.

I now submit that the lists 7 and 9 comprise both persons falling within category 3 (persons who have participated in planning and carrying out Nazi enterprises involving or resulting in atrocities or war crimes) and persons falling within category 4 (Nazi leaders, influential Nazi supporters and high officials of Nazi organizations and institutions). It remains true that, according to the Potsdam decision, all persons listed by the Commission as key-men, fall in one or the other of the Potsdam categories and are to be arrested in execution of the Potsdam decision.

The practical consequence for the work of the Commission, if it should continue producing "key-men" lists, would seem to be that in future the "key-men" should be divided into two separate groups, corresponding to groups 3 and 4 of the Potsdam decisions as analysed above.

Those against whom from their very position there is a prima facie case that they are responsible for war crimes or Nazi enterprises involving or resulting in atrocities or war crimes and who, under the Potsdam decisions, shall be arrested and brought to judgment, should continue to be listed as war criminals (A). Those against whom there nothing is established but that they were Nazi leaders, influential Nazi supporters and high officials of Nazi organizations and institutions, should be listed on a separate "key-men list" (probably "S") as persons who shall be arrested and interned.

A step in this direction has already been made by Committee I in authorising the preparation of a list of S.S. personnel.

SECRET

III/15
21st August, 1945.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

PRELIMINARY NOTE ON THE LEGAL CONSEQUENCES
OF ADHERENCE TO THE AGREEMENT, ESTABLISHING
THE INTERNATIONAL MILITARY TRIBUNAL.

By Mr. E. Schwelb

At the meeting of Committee III held on 20th August, 1945, I was charged with the preparation of a paper setting out the rights and duties of states adhering to the Agreement of the Four Powers regarding the establishment of an international military tribunal.

I.

This note had to be prepared independently of the investigations decided upon by Committee III with a view to ascertaining the interpretation placed upon the Agreement by the British Foreign Office, by Mr. Justice Jackson and by Professor A. Gros.

The following note is therefore subject to revision if and when the information asked from the British, American and French authorities mentioned will be before the Committee.

II.

Article 5 of the Four Power Agreement reads as follows :

"Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence."

Nowhere in the Agreement and in the attached Charter the rights and duties flowing from the adherence to the Agreement are dealt with expressly. It is therefore necessary to attempt to extract them from the individual provisions scattered all over the two documents.

III.

The documents distinguish between signatories on the one hand and adhering Governments on the other. (See Art. 5 of the Agreement). The following are the rights and duties of the signatories as distinguished from merely adhering Governments :

- a) The duty to take the necessary steps to make detained war criminals available. (Art. 5 of the Agreement.)
- b) The right to terminate the Agreement. (Art. 7 of the Agreement.)
- c) The right to appoint members and alternates of the tribunal. (Art. 2 of the Charter.)
- d) The right to establish other tribunals. (Art. 5 of the Charter.)
- e) The right to bring individuals to trial for membership in criminal groups or organisations and the duty to give appropriate relevance to the decision of the tribunal. (Art. 10 of the Charter.)

- f) The right to charge persons convicted by the tribunal with crimes other than membership in a criminal group or organisation and (possibly) the duty to refrain from proceedings for membership in the criminal organisation. (Art. 11 of the Charter.)
- g) The right to appoint a Chief Prosecutor. (Art. 14 of the Charter.)
- h) The right - through the Chief Prosecutor - to take part in the prosecution at each trial. (Art. 25 of the Charter.)
- i) The duty to charge the expenses of the tribunal and of the trials against the funds allotted for maintenance of the Control Council of Germany. (Art. 30 of the Charter.)

The paramount duty undertaken by the four signatory Powers is, of course, the obligation to appoint the judges, their alternates, and the prosecutors, and to make the whole system work. In addition to that the points (a) and (1) contain obligations of the signatory States and possibly the points (e) and (f) too. The other items represent rights of the signatories.

IV.

None of the rights and obligations enumerated under III will be acquired or imposed upon Governments other than signatories who will adhere to the Agreement. The adherent Governments will particularly not be entitled to appoint members of the tribunal, whose number is restricted to the four members appointed by the signatories, nor to appoint Chief Prosecutors.

There is no provision in the documents to the effect that adherent Governments could, as such, take part either in the preparation of the charges or in the prosecution at the trials.

But this is not to say, that the work of the municipal authorities of the United Nations other than the four signatories will be without relevance in the trial of the major war criminals.

Article 21 of the Charter provides that the tribunals shall take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations. But this very important provision, which belongs to the law of evidence to be applied by the tribunal, is not dependent upon the adherence of the allied state, whose documents are taken judicial notice of, to the Agreement. According to Article 21 of the Charter, the tribunal will have to take judicial notice of acts and documents emanating also from such allied countries as will not have adhered to the Agreement. From this it seems to follow that this kind of participation in the trial of the major war criminals is not dependant upon the adherence to the Agreement by the individual nation.

V.

Article 10 of the Charter gives the signatories the right to bring individual members of criminal organisations to trial. This provision is declaratory with regard to signatories and has no relevance to states who are not signatories because such states do not need a special provision in the international agreement to entitle them to take criminal proceedings against members of criminal organisations who fall under their criminal jurisdiction. The provision of Article 10, second sentence, that in any such case the criminal nature of the group or organisation is considered proved and shall not be questioned seems to imply the obligation on the part of the signatories to adapt their municipal law of evidence and procedure to it. But it does not seem to apply to mere adherents though the findings of the International Tribunal will naturally have great authority in all allied courts irrespective of whether or no they will be adherents to the Agreement. The restriction probably implied

in Article 11, applies also to signatories as distinguished from adherents only and the mere adherence does not prevent a state from charging persons within its jurisdiction with the crime of membership in a criminal organisation.

VI.

The view that the adherence does not even impose on the adhering state a duty to surrender major war criminals which should be in its possession is supported by Article 5 of the Agreement which imposes upon the signatories the obligation to use their best endeavours to make available such of the major war criminals as are not in the territories of any of the signatories. Though this provision covers also the case of neutrals, it also applies to allied states as sovereigns of territory where major war criminals may be found. It implies that there is no legal obligation on the part of third states to hand the criminals over for prosecution before the Tribunal.

VII.

From what has been said above it seems to follow that the only present time legal consequence of an allied state not being one of the four signatories adhering to the Agreements is the following :

In adhering to the Agreement the individual state expresses its consent to the Agreement and the attached Charter and vests in the four signatories and the members of the tribunal and the Chief Prosecutors appointed by them, the jurisdiction to prosecute, try and punish the major war criminals also in its name.

Or, to use language borrowed from Roman law: in establishing the tribunal and in prosecuting the major war criminals the four powers have been acting as negotiorum gestores of the other allied nations. With regard to those nations who eventually will adhere to the Agreement this quasi-contractual relationship will be transformed into a contractual relationship. The negotiorum gestio will be transformed into a mandatum.

The chief importance of the adherence of the allied Powers to the Agreement does, therefore for the present, not lie in the province of law. Any government of the United Nations may adhere to the Agreement. If all or most of the members of the United Nations organisation established in San Francisco will have declared their adherence to the Agreement, the International Military Tribunal and the principles upon which it has been established will have the backing of the authority of the whole allied world. It is this moral and political aspect, which will make the adherence of many nations to the Agreement an important event in international relations.

Taking a longer view, the consequences for the development of International law will by no means be negligible. As Justice Robert H. Jackson has stated, "for the first time, four of the most powerful nations have agreed not only upon the principle of liability of war crimes and crimes of persecution but also upon the principle of individual responsibility for the crime of attacking the international peace."

If many allied nations will adhere to the Agreement, these principles will appear not only as the view of four powerful states, but, practically of the whole international community of nations. In adhering to the Agreement, the individual allied states will be forming and developing the common law of nations.

SECRET

III/15-A.
23rd August, 1945.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

SUPPLEMENT TO THE PRELIMINARY NOTE ON
THE LEGAL CONSEQUENCES OF ADHERENCE TO
THE FOUR POWER AGREEMENT.

(By Mr. E. Schweb)

In preparation of the meeting of Committee III to be held on Friday 24th August, 1945, I had the opportunity of discussing the paper III/15 with the Acting Chairman (Mr. Vold) and with Major Palmström. As a result the following additional remarks are herewith placed before the Committee :

I.

If the Committee should decide that a recommendation to the Governments is to be made to adhere to the Agreement, it would be useful to quote also:

- a) Art. 4 of the Agreement according to which nothing in the Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.
- b) Art. 6 of the Agreement which is to the effect that nothing in the Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.
- c) Art. 15, last paragraph, of the Charter which says that it is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent. This applies, of course, still more, to an adherent Government.

II.

The Preamble to the Agreement which was not available to ^{me} ~~me~~ when I wrote Doc. III/13 (it was not reproduced in The Times) expressly states that the Signatories are "acting in the interests of all the United Nations." This is an express confirmation of the negotiorum gestio construction submitted in paragraph VII of Doc. III/13.

III.

The Preamble also expressly defines the notion "the Signatories" as the four Powers concluding the Agreement, which are, therefore, distinguished from mere adherent Governments.

The word "Signatory" should in accordance with the text contained in the White Paper Cmd. 6668 be throughout the Doc. III/13 spelt with a capital S.

SECRET.

III/14.

3rd September 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

Report on the Measures Connected with the Trial of War
Criminals in Czechoslovakia.

By Mr. E. SCHWELB.

I. On the invitation of the Czechoslovak Minister of Justice and with the kind permission of the United Nations War Crimes Commission, I travelled to Czechoslovakia by air on 24th August 1945 and returned to this country by air on the 1st September 1945. I take this opportunity of expressing my gratitude for making this journey possible to the Chairman and the members of the United Nations War Crimes Commission. I should also like to express my thanks to His Majesty's Air Attaché in Prague for granting me a high priority in arranging my flight back to this country. This priority was granted in view of the great importance attributed to the work of the United Nations War Crimes Commission.

II. While the main purpose of my travel was to have consultations with the competent Czechoslovak authorities on recent international events connected with the problem of war criminals in general, I also took the opportunity of making myself acquainted with the measures taken so far by the Czechoslovak legislative, judicial and executive authorities, with a view to tackle the problem of war criminality.

I had consultations particularly with the Czechoslovak Minister of Justice, Dr. Stránský, with the Permanent Head of the Czechoslovak Ministry of Justice, Mr. Koukal, and with the official in charge of the prosecution of war criminals in the Ministry of Justice, Mr. Cervíček. I reported to the authorities mentioned above on the establishment of Anglo-American Military Government Courts in Germany (Doc.C.132), on the Royal Warrent making Regulations for the trial of war criminals (Doc. C.131), on the provisions of the Potsdam Conference relevant to the problem of war criminals (Doc.C.141) and on the Four-Power-Agreement dated 8th August 1945 (Cmd.6668). I submitted to the Czechoslovak Minister of Justice an analysis of the provisions of the Four-Power-Agreement (Cmd. 6668) expressing my personal opinion that the adherence of the Czechoslovak Republic to this agreement would seem to recommend itself.

III. The legal basis for the prosecution, trial and punishment of war criminals and traitors in Czechoslovakia are:

- (a) the valid provisions of Czechoslovak law, particularly the General Criminal Code and the Protection of the Republic Act of 1923;
- (b) two new enactments made on 19th June 1945,
 - (1) the Decree regarding the punishment of Nazi criminals, traitors and their aiders and abettors, and regarding Extraordinary Peoples Courts (No.16 of 1945) and
 - (2) the decree regarding the Court of the Nation (No.17 of 1945).

In the following paragraphs of this paper those provisions of substantive and adjective law which are of interest for the United Nations War Crimes Commission and which are in close connection with the discussions of the Commission will be summarised.

- IV. (a) Section 2 of the Decree No.16 of 1945 makes it a punishable offence to have been at the time of the enhanced danger of the Republic a member of the following organisations: Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (S.S.), Freiwillige Schutzstaffeln (F.S.), Rodobrana (Slovak fascist organisation) or the Szabadcsapatok (a Hungarian fascist organisation active during the war in the Hungarian occupied part of Czechoslovakia), or of other, not enumerated organisations of a similar kind. Membership of these organisations is punishable by hard labour from 5 - 20 years, under aggravating circumstances by hard labour from 20 years to imprisonment for life. Here, then, the statute has adopted the doctrine of the criminal responsibility of members of "associations de mal-faitours".

The same principle appears also in Section 3, sub-section 2, where a person who, at the time of the enhanced danger of the Republic, was a functionary or commander in one of the following organisations, is punishable by hard labour from 5 - 20 years. The organisations are: The Nazi Party, the Sudetendeutsche Partei (the party led by Henlein), Vlasta, (a Czechoslovak Quisling organisation), Hlinkova Garda (a Slovak Militant Quisling organisation). Here it is not membership as such, that establishes the criminal liability, but only functionaries or commanders in these organisations will be punished.

The "time of the enhanced danger of the Republic" is defined in Section 18 of the Decree as the time between 21st May 1938, the time of the first Czechoslovak mobilisation against the threat of German invasion, and a day which will be appointed by Government decree.

- (b) Section 6 of the Decree No.16 of 1945 makes the ordering of forced labour and the taking part in giving effect to such orders, a criminal offence. The punishment is more severe if forced labour was connected with deportation abroad.

(c) Section 7 of the Decree No.16 of 1945 makes it a criminal offence, punishable by death or lesser penalties, to have caused the loss of liberty or bodily harm in the interests of Germany or her allies. Under the express provision of sub-section 3 of Section 7 this applies also to causing such an effect by means of a court decree or an administrative decision. In close connection with this provision, is the provision of Section 11, which provides sanctions on denunciations effected in the interests of the enemy. If loss of life was the effect of such denunciation, the death penalty may be imposed, otherwise such denunciations are punishable by hard labour from 10 - 20 years, and under aggravating circumstances by life imprisonment.

- (d) Offences against property, cloaked in the form of judicial or official acts, are also punishable (Sections 8 and 9 of Decree 16 of 1945)

(e) Section 10 makes it a punishable offence to have abused, at the time of the enhanced danger of the Republic, the duress caused by national, political or racial persecution, in order to enrich oneself, to the detriment of the State, a corporation or a private person.

(f) Some of the offences are punishable even when committed by a foreigner abroad (Section 12)

(g) About the plea of superior order, the Decree 16 of 1945 contains the following provision (Section 13, sub-section 3): Coercion by superior order cannot be pleaded by a person who voluntarily had become a member of an organisation whose members had the duty to obey every order, even criminal ones.

(h) Condemnation for some of the crimes mentioned in the Decree leads also to the "loss of civil honour" by the prisoner. (Sections 14 and 15). The loss of civil honour has far-reaching consequences for the person, e.g. loss of public offices, of pensions and allowances, of the franchise, of the capacity of being a functionary of some associations, the loss of the capacity of being the owner, publisher or editor of periodicals, the loss of the capacity of being active in educational or artistic institutions, the loss of capacity to exercise a profession or to be a director or manager of companies or associations.

V. The jurisdiction to try crimes mentioned in the decree is vested:

- (a) in the ordinary courts of the land,
- (b) in newly created "extraordinary people's courts",
- (c) in the "Court of the Nation." (Národní soud)

The "Extraordinary People's Courts" consist of one professional judge and four jurors sitting together. The procedure of an extraordinary people's court is regulated by the general provisions applicable to emergency courts. The procedure is oral and public. The prisoner has the right to appoint a counsel or to ask the court to appoint one for him if he is poor. The Extraordinary People's Court is bound by the general rules of evidence applicable to criminal courts. The provisions of the Young Offenders Act of 1931 are expressly maintained in force, also in the case of war criminals and traitors. (Section 32, sub-section 2). The legal force of the decree is limited to a period of one year. (Section 33).

VI. The Court of the Nation, instituted by the Decree No. 17 of 1945, is a special court for the trial of the State President of the so-called Protectorate - in this respect the provision is obsolete, Dr. Hácha having died - the members of the so-called Protectorate Governments and of some other leading personalities of the occupation period. The National Court acts either as a criminal court, in which case it applies the provisions of the Decree 16 of 1945, summarised in the preceding paragraphs of this paper, or as a Court of Honour. In the latter case it deals with the behaviour of persons who have not committed criminal offences, but who did not, after 21st May 1938, behave in such a way as is meet and proper for a faithful and brave Czechoslovak citizen. If a person is found guilty by the Court of the Nation as a Court of Honour, he is deprived of the right to vote and to be elected a member of public representative corporations, the right to summon public meetings and to attend them, to be a member of political associations or organisations and to publish, edit or contribute to, political periodicals and other political publications.

VII. As to the execution of the above mentioned new provisions, the position at the time of my departure from Prague was as follows: it is intended to establish in the historic provinces of Bohemia and Moravia-Silesia 24 Extraordinary People's Courts, 16 in Bohemia and 8

in Moravia-Silesia. The following Extraordinary People's Courts had already been established by 31st August 1945: Prague, C. Budějovice, Hradec Králové, Kutná Hora, Písek, Plzeň (Pilsen), Brno, Moravská Ostrava, Trebič, Uherské Hradiště. The following two courts had already conducted trials prior to 31st August 1945: Brno and Uherské Hradiště. The establishment of the other courts is, I was told, a matter of a few days; the professional chairmen and the jurors have either already been appointed or are their appointments imminent.

The Extraordinary People's Court in Brno had dealt with 72 cases by 31st August 1945. It passed five death sentences, the other prisoners were awarded sentences of hard labour ranging from two years to life imprisonment. The most frequent crime so far dealt with by the people's courts is the crime of denunciation to the occupation authorities. The death sentences have only been passed in such cases where the denunciation had caused the death of Czechoslovak patriots.

The trials before the Extraordinary People's Court in Prague, will, according to the information given to me, start on Wednesday 5th September, 1945. *

There has, so far, been no trial for a war crime in the narrower sense (violations of the laws or customs of war.).

The former German Minister of State, Karl Herman Frank has been handed over to the Czechoslovak judicial authorities by the American military authorities. He is now in the court prison of the Criminal Court in Prague, the warrant for his arrest and for keeping him under arrest until trial having been made by the competent juge d'instruction of the Criminal Court in Prague. All provisions of the prison regulations made for the benefit of prisoners are being applied to him. His trial will not start before October 1945.

* The first trial conducted before the Extraordinary People's Court in Prague was that against Professor PFITZNER, a former follower of Konrad Henlein who, during the German occupation, had been acting mayor of Prague. He was condemned to death and hanged. (The Times, 7th September, 1945.)

III/15.
10th September 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

Note on the Criminality of "Attempts to Denationalise the
Inhabitants of Occupied Territory" (Appendix to Doc.C.I.
No. XII) - Question Referred to Committee III by Committee I.

By Mr. E. Schwelb.

- I. On 29th August, the Yugoslav National Office submitted to the Commission the charge No.1434 against 24 Italian war criminals accused of a large number of common war crimes, e.g. murder, massacres, systematic terrorism, putting hostages to death, etc.

Committee I at its meeting, held on 5th September 1945, decided to put 20 out of the 24 accused persons on A. The cases of 4 of the 24 accused: Bettini (No.6), Inchiostri (7), Ciubelli (9) and Nicoletti (20), were adjourned and Committee I decided to put the question of law, relevant to the case of these four persons, before the Legal Committee (III)

- II. The four persons mentioned are accused of the war crime mentioned in the list of war crimes annexed to Doc. C.I. para XII, "Attempts to Denationalise the Inhabitants of Occupied Territory."

The following particulars are stated in the Yugoslav charge No. 1434 about the four persons: "Apart from killing, deporting and interning innocent persons, the Italians started a policy, on a vast scale, of denationalisation. As a part of such a policy, they started a system of "re-education" of Yugoslav children. This re-education consisted of forbidding children to use the Serbo-Croat language, to sing Yugoslav songs and forcing them to salute in a fascist way, become members of the G.I.L. (Gioventu italiana del Littoria) and spend a certain time in camps for "education." In all these actions aimed at the denationalisation of Yugoslav children, Dr. Binna took a very active part. He brought Italian teachers from Italy and posted them all over the province of ZADAR. Amongst those Italian teachers who insisted on the italianisation of Yugoslav children, BETTINI, Education Inspector and INCHIOSTRI, head-master of a secondary school at SIBENIK took a prominent part. Dr. Tulio NICOLETTI, Trustee for Education at SIBENIK, and Edoardo CIUBELLI, Education Inspector at ZADAR, were also prominently associated with this policy. NICOLETTI organised special courses for teachers to learn Italian and Italian "methods" and he threatened all those who would not attend the courses. Dr. BINNA is also responsible for forbidding the edition of any newspaper printed in the Serbo-Croat language, and for forcing Yugoslavs to hoist Italian flags." It may be added that Prefetto Binna, who is mentioned in the paragraph quoted, is accused of a great number of other crimes, the character of which as war crimes is beyond doubt and he has, therefore, been put on A.

- III. The opinion of Committee I both on the principle to be applied in deciding the case of these four persons, and on the application of this principle to the particular facts of the case, was divided. Some members of Committee I expressed doubt whether what these four persons were charged with, constituted war crimes. One member of Committee I pointed out that there must be made a distinction between violations of International law on the one hand and war crimes on the other.

Only such acts should be treated as war crimes as shocked the conscience of humanity. Another member, on the other hand, expressed the opinion that, as the Commission had accepted the attempt to denationalise the inhabitants of occupied territory as a war crime (Appendix to Doc.1. No. XII) it could not be denied that, in the present case, there was prima facie evidence of this crime.

IV. Without expressing an opinion of my own, I venture to place before Committee III some material which might be considered relevant for the decision of the question:

V. In the report of ^{the} sub-committee, as adopted at the second unofficial meeting of the United Nations War Crimes Commission, held on the 2nd December 1943, (Doc C.1.) it was pointed out in paragraph 6 that "in the opinion of the sub-committee it will be better for the Commission not to attempt to draw up any list of war crimes which will tie the hands of the Governments of the United Nations," but it was said in paragraph 7 that "it will be convenient, both to the Commission and to the National Offices which will prepare the individual cases and transmit them to the Commission that there should be a working list, enumerating the various headings under which war crimes should be grouped." The sub-committee went on to recommend that the list framed by the Responsibilities Commission of the 1919 Conference should be adopted by the Commission as the working list for the above purpose. (Paragraph 9) In paragraph 10 of the report, it was pointed out that it would be necessary to add to this list one or two items which seemed to be inadequately covered by the language employed in framing the list. Simultaneously it was said that it would be necessary to disregard certain items - such as No.21 - as these referred to acts which in the present war the forces of the United Nations have themselves been obliged to commit.

According to paragraph 12 of the report, the advantage of working, as far as possible, on the basis of the 1919 list is that of the present Axis powers, Italy and Japan were parties to its preparation and, so far as the sub-committee was aware, Germany had never questioned the inclusion of any particular item in the list. Furthermore it diminishes the risk of criticism on the ground that the United Nations are inventing new war crimes after the acts have been perpetrated. It may be quoted in this connection that, at the meeting of the 2nd December 1943, Lord ATKIN considered the 1919 list of war crimes to be too long; some of the offences contained in it would, in his opinion, have to be dropped. The Commission, however, considered that for present purposes, no change should be made in the list.

From what has been said so far, it follows that the adoption of the 1919 list as the working basis for the activities of this Commission, does not constitute a binding decision on what to consider and what not to consider a war crime, and that, therefore, this Committee and the Commission, in deciding the present case, may proceed entirely unfettered by what was done at the meeting of 2nd December 1943.

VI. The problem raised in this case goes to the root, not only of the jurisdiction of the United Nations War Crimes Commission, but of the fundamental problems of delinquency in International Law in general. The notion of an International Crime or of a crime in International Law has been controversial for a very long time. It is interesting to note that it is particularly the German literature on the subject which holds that every contravention of International Law amounts to an International Crime; not only acts which are shocking from the moral point of view are under this doctrine International Crimes, but also

every breach of contract or agreement. This doctrine is particularly upheld by STRUPP in his book "Das völkerrechtliche Delikt, 1920". He says "Völkerrechtliches Delikt ist eine von einem Staate ausgehende, die Rechte eines anderen Staates verletzende Handlung, die nur dann auf staatliches Verschulden zurückzuführen sein muss, wenn ein staatliches Unterlassen in Frage steht". This definition has not been accepted by other writers. FAUCHILLE distinguishes between "délits internationaux" and the breach of contractual obligations. RIVIER, *Principes du droit des gens*, 1896, says: "Tout acte qui viole un droit essentiel est une infraction au droit des gens, un crime au délit international." It is interesting to note that Rivier speaks of the violation of an essential right as constituting an international crime.

- VII. It is submitted that the fact that acts constituting what corresponds to civilian wrongs (torts) and breach of contract were, by writers on international law, put on the same footing as acts corresponding to crimes in municipal law, was mainly due to the fact that, until very recent times, only States were considered to be subjects of International law. This alleged nature of the Law of Nations excluded the possibility of "punishing" a state for an international delinquency and of considering the latter in the light of a crime and led to the conclusion that the only legal consequences of international delinquency were such as create reparation of the moral and material wrong done. The equation of acts morally shocking with acts constituting merely contraventions of contractual obligations was due to the fact that even atrocious crimes led not to the punishment of the guilty individual, but only to a claim against the State for reparation and damages.

At a stage in the development of International law which has so far culminated in the conclusion of the Four-Power Agreement, dated 8th August 1945, a doctrine which does not distinguish between crimes in the sense of criminal law and mere civil or administrative wrongs must be considered obsolete in International law to the same extent as it has been obsolete in the municipal law of civilised states for hundreds of years. At a time when International Law assumes the responsibility for punishing international crimes, it is necessary to establish a delimitation between crimes in the sense of criminal law and other illegal acts which, without constituting a crime, are mere contraventions of customary or conventional International Law.

- VIII. It may even be that it is necessary to draw this line of delimitation between punishable crimes on the one hand, and what may correspond to civil wrongs and breach of contract on the other, straight across the facts described in the list appended to Doc. C.I. Professor H. LAUTERPACHT in his article "The Law of Nations and the Punishment of War Crimes" (*British Year Book of International Law*, 1944, page 58 and following) has hinted on this necessity of distinguishing between violations of rules of warfare and war crimes. He says, inter alia:

"In particular, does every violation of a rule of warfare constitute a war crime? It appears that, in this matter, textbook writers and, occasionally, military manuals and official pronouncements have erred on the side of comprehensiveness. They make no attempt to distinguish between violations of rules of warfare and war crimes. The Commission on Responsibilities set up by the Paris Conference in 1919 included under the list of charges of war crimes such acts as "usurpation of sovereignty during military occupation", "attempts to denationalize the inhabitants of occupied territory", "confiscation of property", "exaction of illegitimate or exorbitant contributions and requisitions", "Debasement of the currency and issue of spurious currency", "imposition of collective penalties", and "wanton destruction of religious, charitable, educational and historic buildings and monuments." In view of the comprehensiveness of this list it is in the nature of an anti-climax to note that the number of persons whose delivery the Allied States

eventually demanded was inconsiderable. It is possible that one of the reasons for the failure to give effect to the decision to prosecute war criminals after the first World War was the extent of the list of offences as adopted by the Conference and the absence of a distinction between violations of international law and war crimes in the more restricted sense of the term...."

" It must be a matter for serious consideration to what extent an attempt to penalise by criminal prosecution at the hand of the victorious belligerent all and sundry breaches of the law of war may tend to blur the emphasis which must be placed on the punishment of war crimes proper in the limited sense of the term. These may be defined as such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights or property unrelated to reasonably conceived requirements of military necessity. There is room for the view that the punishment of war crimes by the victorious belligerent ought to be limited to offences of this nature - offences which, on any reasonable assumption must be regarded as condemned by the common conscience of mankind...."

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

" Pillage, plunder and arbitrary destruction of private and public property may, in their effects, be no less cruel and deserving of punishment than acts of personal violence. There may, in effect, be little difference between executing a person and condemning him to a slow death of starvation and exposure by depriving him of shelter and means of sustenance. "

IX, It will be noted that Professor Lauterpacht does not purport to lay down existing rules of International law. On the contrary, he proposes, as a matter of policy, to restrict the procedure applied to the punishment of war crimes, to such acts and omissions as are not only illegal but, in addition, shock the conscience of mankind. It is a matter left to the discretion of the United Nations in general and to the Governments represented on the United Nations War Crimes Commission in particular to adopt or to reject Professor Lauterpacht's view, which, as has been pointed out, was also shared by Lord Atkin in December 1943.

If Committee III should see its way towards adopting Professor Lauterpacht's distinction for the purposes of the work of the United Nations War Crimes Commission, the further question would arise, viz, where to draw the line and try to distinguish the mere contravention of rules of International law from war crimes in the narrower sense. The problem becomes particularly acute in such matters as "debasing of currency", (see Doc. I/22) or "attempts to denationalise the population" or "usurpation of sovereignty".

- X. It is submitted that the following considerations would, perhaps, be relevant when attempts are made to distinguish war crimes proper from mere contraventions of rules of International law. (a) First it is necessary to ascertain whether the act in question constitutes, quite apart from all considerations of International law and legitimate warfare, a criminal offence. (b) If the question put under (a) is answered in the negative, the case is at an end. If it is answered in the affirmative, the further question arises, viz, whether the rules of International law afford to the perpetrator of the act immunity from his criminal liability, e.g. whether the act be excused as an act of legitimate warfare, or as an act falling within the lawful authority of a belligerent occupant. If the activities are not covered by the rules of International law as to warfare or belligerent occupation, the case for the criminal liability of the perpetrator is made out.

If, for instance, the authorities of the occupant illegally declare the annexation of certain territory and the inhabitants of the occupied territory are imprisoned or put to death only because of their disobedience to the constitutional situation brought about in this way, we have, applying what has been said in the preceding paragraph, to consider whether the particular imprisonment or shooting as such constitutes an offence, irrespective of questions of International law. The answer to this question is obviously in the affirmative, the acts constitute either false imprisonment or homicide, as the case may be. We then proceed to examine whether international law affords any defence for this behaviour of an accused person, and, finding that the illegal annexation is outside the legitimate scope of the activities of belligerent occupants, we come necessarily to the conclusion that there is *prima facie* evidence that a war crime has been committed.

In the case of "attempts at denationalisation", we have to consider whether acts, such as depriving Yugoslav children of the possibility of being educated in the Serbo-Croat language, or compelling Yugoslav children to receive instruction only in a foreign language, constitute criminal offences. The answer to this question will, in my opinion, mainly depend on the positive municipal law applicable to the case. There are a great many municipal legal orders which protect the population against denationalisation, *inter alia*, by declaring acts aiming at such denationalisation criminal offences. But even in such legal orders as do not contain special criminal sanctions against acts of denationalisation, such activities will more often than not be criminal under general provisions prohibiting and punishing violence, blackmail, menaces, and similar offences.

It is submitted that each case will have to be judged on its own merits. The "denationalisation" may be either effected or accompanied by acts on the part of the occupying authorities, which are criminal per se. There may, on the other hand, exist circumstances which do not let the activities appear criminal, though they, no doubt, are illegal. An example of the latter type of "attempts at denationalisation" may exist where the occupation authorities do not close the existing schools and do not prevent parents from sending their children to them either by actual violence, or by threat, but where they try to bribe parents into sending children to schools instituted by the occupant by offering various advantages, like better school meals, clothing, etc.

- XI. In the present case it would seem necessary to ask the Yugoslav National Office for further particulars both with regard to the actual facts and with regard to the municipal law to be applied. The result will probably be that at least certain acts of denationalisation of inhabitants of occupied territory committed by some of the accused, constitute a criminal offence. This being so, the second question

arises whether the criminality is cancelled by provisions of International law. This question must obviously be answered in the negative, because the Hague Regulations definitely forbid such interference on the part of the occupant.

It is the duty of belligerent occupants to respect, unless absolutely prevented, the laws in force in the country (Art. 43 of the Hague Regulations). Inter alia, family honour and rights and individual life must be respected (Art. 46). The right of a child to be educated in his own native language falls certainly within the rights protected by Article 46 ("individual life"). Under Art. 56, the property of institutions dedicated to education is privileged. If the Hague Regulations afford particular protection to school buildings, it is certainly not too much to say that they thereby also imply protection for what is going to be done within these protected buildings. It would certainly be a mistaken interpretation of the Hague Regulations to suppose that while the use of Yugoslav school buildings for Yugoslav children is safe-guarded, it should be left to the unfettered discretion of the occupant to replace Yugoslav education by Italian education.

It is the rationale of Art. 56 to protect spiritual values. And in order to afford this protection to spiritual values the provision protects the property of institutions dedicated to public worship, charity, education, science and art as a means to a certain end: to make public worship, charity, education, science and art possible even under belligerent occupation. If the belligerent occupant must not confiscate, seize, destroy, or wilfully damage the property of educational institutions, he is the less entitled to interfere with the spiritual and intellectual life of the schools, the only possible legitimate exception being considerations of the safety of the occupying forces.

XII. What has been said so far concerns the problem as a general proposition only. It is a different question to decide to what extent there is in the charge No. 1434 a *prima facie* case against the four persons whose listing is proposed by the Yugoslav National Office.

In the case of Nicoletti (No. 20) who is described as Educational Trustee, it appears that he was a kind of Commissioner in charge of the administration and Italianisation of the schools in the district. In his case it seems to be conceivable to fasten upon him the individual responsibility for the whole Italianisation scheme. The case of the three other persons who were mainly teaching personnel, seems *prima facie* to be different.

III/16.
22nd September 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Report on the Czechoslovak Case No.26 (Sepp Dietz) referred to Committee III.

By the Secretary of Committee III.

On the 22nd February 1944, the Czechoslovak National Office presented to the Commission a charge against Sepp Dietz, SS-Standartenfuhrer and C.O. of the 52nd SS Banner, Krems on the Danube, Austria.

In this charge, Sepp Dietz was accused of having, at the beginning of March 1939, invaded with a group of selected S.S. men, Czechoslovak territory from Austria and having, in the Moravian town of Jihlava, provoked clashes with members of the Czechoslovak State police and with the local Czech population. During these clashes, Czech people as well as members of the Czechoslovak State police were massacred and a number of persons were killed and seriously wounded. It was further stated in the "Particulars of Alleged Crime" that shortly before 15th March 1939, armed raids on Czechoslovak territory were made by German SS forces. The purpose of these raids was to provoke clashes with the Czechoslovak population and with the Czechoslovak police organs. These instances were welcome to the German propaganda service in whose interest they had to be manufactured.

Committee I decided on 1st March 1944 to put the accused on list B 2. On 19th September 1944, the case was again considered by Committee I and it was decided to leave the accused for the present on List B.

In September, 1945, the Czechoslovak National Office presented an addendum to the original charge, pointing out that the principles along which Committee I acts have been modified. Therefore, the reconsideration of this case was proposed. The addendum refers to a declaration by the President of the Czechoslovak Republic to the effect that Czechoslovakia considered herself in a state of war with Germany since September 1938. For this reason, the offences with which Sepp Dietz is charged are deemed to be war crimes. The addendum goes on to cite Article 6 (a) and (c) of the Charter of the International Military Tribunal, which, according to the submission, makes it quite clear that offences of this character fall within the scope of the retributive action of the United Nations. As the major war criminals are to be punished for such offences it may be appropriate to punish subordinate criminals as well.

Committee I considered this charge in its meeting of 12th September 1945 and decided to adjourn it for further consideration until 19th September 1945.

From the enclosed minutes of the meeting held on 19th September (No.31, pages 2 and 3) it will be seen that the opinion of members of Committee I on this case was divided and that it was decided to refer the question to Committee III.

1 Enclosure.

III/17.
24th September 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

Draft Report of Committee III on the Criminality of "Attempts to Denationalise the inhabitants of Occupied Territory."

By the Secretary to Committee III.

Note: The following draft is based on the views expressed by members of Committee III in meetings held on 11th and 19th September 1945. I am also indebted to my colleague, Dr. Litawski for placing at my disposal a list of activities which can be described as attempts to denationalise.

The Chairman of Committee III, Dr. Ecer, has approved the draft.

- I. In connection with the Yugoslav charge No. 1434, accusing, inter alia 4 Italians of the war crime of "Attempts to Denationalise the Inhabitants of Occupied Territory", Committee III was asked for its legal opinion on the question whether, and in which circumstances, acts of denationalisation are war crimes and their perpetrators war criminals.
- II. Attempts to denationalise the inhabitants of occupied territory have been classified as war crimes by the Responsibilities Commission of the Paris Peace Conference of 1919. In accepting the 1919 list as a working basis for its activities, the United Nations War Crimes Commission, in its resolution adopted on the 2nd December 1943 (Doc. C.1.) has also foreseen this type of activity as a criminal offence. In the view of Committee III, both the proposals of the Responsibilities Commission of 1919, and the report adopted by this Commission in 1943, were not mere accidents. The activities usually classed under this heading are, in the opinion of Committee III, serious offences against human liberty and dignity.
- III. Under traditional International law, no distinction has been made between acts constituting mere contraventions of international agreements and acts corresponding to what is usually described as "civilian wrongs" or "torts" on the one hand, and offences corresponding to crimes in municipal law which must be regarded as condemned by the common conscience of mankind and call for individual punishment of the perpetrators, on the other.
- IV. At a stage in the development of International law which has so far culminated in the conclusion of the Four Power Agreement dated 8th August 1945, where the principle of individual criminal responsibility has been unambiguously formulated, the doctrine which does not distinguish between crimes in the sense of criminal law and mere civil or administrative wrongs, must be considered as obsolete in International law to the same extent as it has been obsolete in the municipal law of civilised states for hundreds of years.
- In the view of Committee III, it is, therefore, necessary to draw a line of delimitation between mere contraventions of agreements as acts corresponding to civil wrongs and breach of contract, and offences for which individual punishment is to be awarded.
- V. Committee III agrees with the opinion expressed by a distinguished authority on International law, (Lauterpacht), to the effect that as war crimes should be punished such offences against international law as are criminal in the ordinary accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness,

their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights or property unrelated to reasonably conceived requirements of military necessity.

VI Under denationalisation in the sense of a criminal policy, Committee III understands the policy of a belligerent occupant aiming at the transformation of the inhabitants of the occupied territory into members of the occupying nation by using the de facto power wielded by the occupant. Examples of the application of such criminal policy are: closing of universities, secondary and other schools of the occupied territory and/or their supersession by educational institutions of the occupying nation and language; compulsory education in the language of the occupant; the ban on the using of the national language in schools, streets and public places; the deportation of children to the enemy country for the purpose of educating them in the language and the spiritual atmosphere of the occupant; the ban on the national Press and on the printing and distribution of books in the language of the occupied region; interference with religious services; removal of national symbols and names, e.g. changing the Christian and surnames of inhabitants, changing geographical names of islands, rivers, provinces, towns, villages, harbours, streets, and squares; attempts to disintegrate a nation by abusing regional differences and peculiarities and creating artificial minorities; compulsory or automatic granting of the citizenship of the occupying Power; interference with the methods of education; imposing the duty of swearing the oath of allegiance to the occupant; compulsion to join organisations and associations of the occupying Power. Denationalisation in the wider sense would also comprise such activities as the extermination of the intellectual class, taking people from the professions and sending them to unskilled labour, and the colonisation of the occupied territory by nationals of the occupant.

Many of the activities mentioned here will, of course, fall also under other headings of the list of war crimes, e.g. systematic terrorism, deportation of civilians, usurpation of sovereignty during military occupation, and others.

VII. In the view of Committee III, the criminality of such activities as enumerated in the preceding paragraph is based on the general principles of criminal law accepted by all civilised members of the community of nations, which all, in one form or the other, penalise the illegal application of force from psychological compulsion to physical violence in prohibiting such offences as blackmail, menaces, violence, etc. The general provisions prohibiting false imprisonment, the infliction of grievous bodily harm, and homicide, are, of course, applicable where quasi-penal sanctions are applied by the occupant to inhabitants who disobey the denationalising activities of the occupying Power. In addition, a great many municipal legal orders protect the population against denationalisation by special provisions declaring acts aiming at such denationalisation to be criminal offences.

VIII. The customary and conventional provisions of International law not only do not legalise denationalisation of the inhabitants by applying the force vested in the occupying Power, but in the light of these provisions, their illegal character stands out even more clearly. It is the duty of belligerent occupants to respect, unless absolutely prevented, the laws in force in the country (Art.43 of the Hague Regulations). Inter alia, family honour and rights and individual life must be respected (Art.46). The right of a child to be educated in his own native language, the right of a man to retain his own Christian and surname, the right to use one's own language, fall certainly within the rights protected by Art.46 ("Individual Life.") Article 56 of the Hague Regulations protects the property, inter alia, of institutions dedicated to public worship, charity,

education, science and art, historic monuments and works of science and art. It is the rationale of Art. 56 to protect spiritual values. In affording protection, e.g. to school buildings, the Hague Regulations imply the protection of what is going to be done within these protected buildings. It would certainly be a mistaken interpretation of the Hague Regulations to suppose that while the use of school buildings for children of the inhabitants of occupied territory is safeguarded, it should be left to the unfettered discretion of the occupant to replace the existing education by education of his own choosing. If the belligerent occupant must not confiscate, seize, destroy or wilfully damage the property of educational and scientific institutions, he is the less entitled to apply force in interfering with the spiritual and intellectual life of such institutions, the only possible legitimate exception being considerations of the safety of the occupying force.

IX. The question of the criminal liability of particular individuals charged with taking part in such criminal policy of denationalisation must, of course, be decided in each individual case on its own merits.

III/17 (1)
27th September 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

Draft Report of Committee III on Criminality of Attempts to Denationalise the Inhabitants of Occupied Territory.

(Paragraphs I, III, IV, V and VI of Doc. III/17 redrafted according to the discussion held on 25th September 1945.)

By the Secretary to Committee III.

Paragraph I.

In connection with the Yugoslav charge No. 1434, accusing, inter alia, four Italians of the war crime of "attempts to denationalise the inhabitants of occupied territory", doubt arose in Committee I whether or not to list the four persons as war criminals. Committee I therefore decided to put the question before Committee III and to adjourn the case as far as these four accused were concerned.

Paragraph II.

No Change (see Doc. III/17.)

Paragraph III.

Under traditional International law, no distinction has been made between acts constituting mere contraventions of international agreements and acts corresponding to what is usually described as "civilian wrongs" or "torts" on the one hand, and offences corresponding to crimes in national (municipal) law which must be regarded as condemned by the common conscience of mankind and call for individual punishment of the perpetrators, on the other.

Paragraph IV.

At a stage in the development of International law when the principle of individual responsibility is generally recognised, a doctrine which does not distinguish between crimes in the sense of criminal law, and mere civil or administrative wrongs, must be considered as obsolete in International law to the same extent that it has been obsolete in the municipal law of civilised states for hundreds of years.

In the view of Committee III, it is, therefore, necessary to draw a line of delimitation between mere contraventions of agreements as acts corresponding to civil wrongs and breach of contract, and offences for which individual punishment is to be awarded.

Paragraph V.

Committee III is of the opinion that such offences against International law as are criminal in the ordinary accepted sense of fundamental rules of warfare and of the general principles of criminal law, by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality or their wanton interference with rights or property unrelated to reasonably conceived requirements of military necessity, should be punished as war crimes.

Paragraph VI.

Under denationalisation in the sense of a criminal policy, Committee III understands the policy of an occupant aiming at depriving the inhabitants of the occupied territory of their national characteristics or transforming the ethnological character of the region, particularly by means of:

- closing the universities, secondary and other schools of the occupied territory and/or their supersession by educational institutes of the occupying nation and language; interference with the methods of education; compulsory education in the language of the occupant;
- the deportation of children to the occupying country for the purpose of educating them in the language and the spiritual atmosphere of the occupant;
- the ban on the using of the national language in schools, streets and public places;
- the ban on the national press and on the printing and distributing of books in the language of the occupied region;
- the removal of national symbols and names, both personal and geographical; interference with religious services as far as they have a national peculiarity;
- attempts to disintegrate the nation by abusing regional differences and peculiarities and creating artificial minorities.

Denationalisation in the wider sense would also comprise such activities as:

- the extermination of the intellectual class, taking people from the professions and sending them to unskilled labour;
- compulsory or automatic granting of the citizenship of the occupying Power;
- imposing the duty of swearing the oath of allegiance to the occupant;
- the introduction of the administrative and judicial system of the occupying Power, the imposition of its financial, economic and labour administration, the occupation of administrative offices by nationals of the occupying Power;
- compulsion to join organisations and associations of the occupying Power;
- colonisation of the occupied territory by nationals of the occupant, exploitation and pillage of economic resources, confiscation of economic enterprises, permeation of the economic life through the occupying State or individuals of the nationality of the occupant.

Many of the activities mentioned here will, of course, fall also under other headings of the list of war crimes, e.g. systematic terrorism, deportation of civilians, usurpation of sovereignty during military occupation, pillage, confiscation of property, and others.

Paragraphs VII, VIII and IX.

See Doc. III/17.

III/18.
28th September 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

WAR CRIMES LAW REPORTING.

Notes by the Secretary of Committee III.

The Judge Advocate General's Department has sent to the Research Office of the United Nations War Crimes Commission the transcript of the first three days of the Lüneburg trial and promised to send copies of the transcript from time to time.

I have been studying the transcript so far received. It contains a great deal of information which naturally has not been reported in the daily press. It is particularly questions of international law and of procedure which are of great interest to members of the Commission and to the National Offices which have been dealt with even in the beginning stage of the trial, without being reported in the press. The copying and reworking of the whole transcript does not seem to be technically possible, but on the other hand it would not be adequate if this valuable information remained only in the files of the Commission.

I therefore propose that a report on the Belsen trial (and similar reports on other trials to be conducted in the future, including trials which will take place before the International Military Tribunal) should be issued by Committee III for the information of the Commission and the National Offices.

In case this proposal should be agreeable to Committee III, I should prepare, as a sample for this kind of reporting, a report on the Belsen trial or on that part of it, the transcript of which will be available at the time. In this report I propose to deal mainly with the legal questions involved, leaving the fact finding aspect to a later date.

In order to illustrate the kind of reporting I propose, which, in my view, falls within the jurisdiction of Committee III, I would like to point out that very interesting discussions and incidental decisions of the court have taken place, e.g. with regard to Regulation 8, Paragraph 2 of the "Regulations for the Trial of War Criminals" made by Royal Warrant on the 14th June 1945 (see Doc.C.131) which reads as follows:

" Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for the crime. "

This regulation has been amended by Royal Warrant, dated 4th August 1945, by the addition of the following provision:

" In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court. "

Another interesting legal point raised in the initial stage of the Lüneburg trial was the question of the jurisdiction of the court, particularly the fact that Great Britain has assumed jurisdiction on behalf of all the other allied nations whose nationals have been the victims of the crimes committed in Belsen and Auschwitz.

With regard to this, the public prosecutor has stated, inter alia, that Britain has accepted the responsibility of that trial with the concurrence of the United Nations War Crimes Commission on which all those nationalities are represented and observers have been invited from each of the countries who had nationals in these camps.

III/19.
6th October 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

WAR CRIMES LAW REPORTING
LAW REPORTS SERIES NO.1.

Note by the Secretary to Committee III

In execution of the decision of Committee III taken on 2nd October, I have prepared the report on the legal points which have arisen in that part of the Lüneburg trial, the transcript of which is already available to the Commission (the first seven days).

I am circulating the report to members of Committee III. When agreed to by Committee III, it will be sent, with alterations if necessary, to the members of the Commission and to the National Offices.

LAW REPORTS SERIES

No.1.

5th October 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

THE TRIAL AGAINST KRAMER AND 44 OTHERS.

Part I, covering the first seven days of the trial, September 17th to 24th, 1945, inclusive.

NOTE: The following is the first of a series of reports on trials of War Criminals. This series is concerned, not so much with the actual facts disclosed and found in the trials, but with questions of procedure and substantive law which were discussed and decided. In view of the long duration of many of these trials, and particularly of the one which is the subject of this first report, these notes are being written at a time when the trial is still in progress and when it is not possible to know or to judge which influence, if any, the individual preliminary discussions and decisions will eventually have on the result of the trial. For these reasons it is also not possible to arrange the report systematically. The material of this report is arranged in chronological order, i.e. in the order in which the particular problems arose in the actual procedure. The Law Report Series is not being issued in order to fulfil the Commission's task to produce and publish reports on war crimes, i.e. documented studies incorporating the results of trials. This larger task must wait until the main trials have been concluded and the material is available, though there is no reason why the preparatory work should not start forthwith. The aim of the present series is more modest: it is its purpose to inform the members of the Commission and the National Offices with the least possible delay of the legal points of interest which have arisen during the trials. The report on the Lüneburg trial is based on the transcripts sent to the Research Office of the United Nations War Crimes Commission by the Judge Advocate General's Department.

I. APPLICATION BY THE DEFENCE FOR AN
EXPERT ON INTERNATIONAL LAW.

On the first day of the trial (17th September 1945) one of the defending counsel repeated a request made previously in writing to the effect that the defending officers be allowed to seek the services of a British expert on International Law and also a Belgian expert. The defence applied for Professor Lauterpacht of Cambridge University or, failing him, for Professor Brierley of Oxford University. The spokesman of the defending officers said that they found themselves in a considerable difficulty in that between them they had very slight knowledge of international law. It appeared to them that there were some points of international law which arose in this case and they did not know where they were because they had not sufficient knowledge to apply their minds to the points. The defending officers' point was that they would like to attack the charge sheet but that they could not do it until they had had expert advice.

Under Rule 32 of the Rules of Procedure, 1926, which, under Regulation 3, made by Royal Warrant, A.O.81-1945, also applies in Military Courts for the trial of war criminals (see Doc. C.131) the accused, when required to plead to any charge, may object to the charge on the grounds that it does

not disclose an offence under the Army Act (in this case under the Royal Warrant) or is not in accordance with the Rules of Procedure.

No decision on the application of the defence for an expert on International Law was taken on 17th September. The Judge Advocate summed up to the effect that the business-like way and the fair way of dealing with this matter was for the court to take the evidence and to agree that the right of the defence to make an objection (under Rule of Procedure No. 32) should be preserved and that the defence should be allowed to do it at the close of the case for the prosecution.

The court decided that it was desirable to go on and hear the evidence now and that they would preserve the right of the defence to object to the validity of the charge at some suitable time during the proceedings, when the defence felt competent to deal with the argument in law.

II. APPLICATION BY THE DEFENCE FOR
SEVERING THE TWO CHARGES (BELSEN AND AUSCHWITZ.)

The basis of the trial formed two charges, the one dealing with what happened at Belsen, and the other with what happened at Auschwitz. The defence submitted that the joinder of these two charges was bad. The decision on this application was dependent on the interpretation of a new provision which has been inserted into the Royal Warrant, Army Order 81/1945 by Army Order 127/1945 dated 4th August 1945. The original text of the Royal Warrant contained the following provision of Regulation 8 (II) (see Doc. C.131, Paragraph 9):

"Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime".

On the end of this provision, the following was added by the second Royal Warrant (Army Order 127/1945):

"In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court."

The spokesman for the defending officers submitted that the application to sever the Belsen charge from the Auschwitz charge was not an application for a separate trial and was therefore unaffected by the Regulation made under the second Royal Warrant. It was said for the defence that Belsen and Auschwitz were two entirely different charges, there was no justification in joining them because between Belsen and Auschwitz there was no nexus at all, they had only this in common, that they were both Concentration camps. In the submission of the defence, there was only a very slight surface similarity between the two camps. The main substantial reason adduced by the defence was that those of the accused who had been only in Belsen would be prejudiced by the evidence referring only to Auschwitz. The accused who were only in one of the camps cannot be said to have formed part of a unit or group or to have taken part in any concerted action when in fact they were never in the other camp. In the opinion of the defence, Regulation 8, according to which no application by any of the accused to be tried separately shall be allowed, did not apply to this application.

The prosecutor disagreed, not on the law, but on the facts and said that the charges were identical, word for word, the only difference was in the victims and in many cases there was even no difference in the victims. The allegation of the prosecution was that these two cases were a continuation of a series, insofar as these persons who were first at Auschwitz were concerned. First of all at Auschwitz they ill-treated a body of persons and then went to Belsen where they continued with the ill-treatment. The prosecution said that one offence was precisely the same as the other, the individual methods of ill-treatment sometimes varied because every known method of ill-treatment was used at one or the other of these camps. The same people were acting as concentration camp guards at one and went to the other and acted as concentration camp guards there. They ill-treated people and literally the same people at Belsen as the people they had ill-treated at Auschwitz. Of course, at Belsen they found a lot of new people. All the witnesses with regard to Auschwitz were found at Belsen. The prosecutor said that if the court decided to separate these two charges, he would apply to give the evidence in respect of Auschwitz on the Belsen trial. Some of the accused have indicated their defence in relation to Belsen and that was virtually the defence of accident. Some of the accused had in fact said: We realise that conditions here were appalling but we could not help it. The prosecutor said that he would therefore ask, if necessary, to give evidence that the conditions which these same people created somewhere else, were equally appalling and that they merely carried on with a series of similar offences.

With regard to the question of the joint trial of individual persons, the prosecutor made it quite clear from the outset that the prosecution in this case will allege that this is a joint and collective offence by a group of people. Individual atrocities committed by individual persons are put forward to show that they were taking part in and acquiescing in the system which a group were carrying on. They were a unit acting in common, under a commanding officer, Kramer, who was the commandant of that camp. All the accused were either members of his staff or internees who had been given authority by him. They are definitely a group and indeed, in the sense of this rule, a unit.

After hearing the summary of the Judge Advocate, the court overruled the application for severing the two charges.

III. APPLICATION BY DEFENDING OFFICERS FOR INDIVIDUAL TRIALS AGAINST INDIVIDUAL ACCUSED.

After the application for severing the two charges had been overruled by the court, the defence put forward the further application to the effect that several of the accused should be tried separately. These applications maintained that there was no evidence that the crime had been the result of concerted action, therefore in the view of the defence, the provision introduced by the second Royal Warrant, barring applications for separate trial, did not apply. The defence counsel said that the defence of their particular clients would be embarrassed through the joint trial, particularly by the fact that they would be prevented from calling some of the accused as witnesses for the defence. As to the interpretation of the word "concert", defending counsel quoted "The Little Oxford Dictionary", according to which the word "concert" means: to plan, to premeditate or to contrive, all of which words clearly implied a certain amount of common intention or common action, between the various people. There was, in the submission of the defence, not sufficient evidence for that.

The prosecutor replied that there was prima facie evidence of concerted action, the people concerned all being members of an organisation working under a joint leader each one of the persons in the dock having taken part in these cruelties.

In connection with this application, further difficulties on a point of law arose out of the wording of the two Royal Warrants. The original text quoted above, presupposed that "there is evidence that a war crime has been the result of concerted action". The provision added by the second Royal Warrant deals not with the result of the trial, but with a situation arising at its outset. The proper and only time to make such an application is before any evidence is called before the court, this means at a time when there is no evidence in the technical sense, at all. But there was a substantial amount of agreement between the prosecution and the defence that it must have been intended, viz. by the authors of the second Royal Warrant, that the court should look at the documents before it and if the court thought the accused came within the group or the unit, then the court had no right to hear the application to sever.

The court decided that these are cases which do fall within the Regulation 8 (II) and that they are therefore bound to comply with the regulations. That being so, they must refuse the application for separate trial.

IV. THE OPENING OF THE CASE BY THE PROSECUTION.

In opening the case, the prosecutor stressed the following points relevant from a general legal point of view: each of the charges in this case are that when the accused were members of the staff of one or other of these two Concentration camps, and as such responsible for the wellbeing of the prisoners interned there, in violation of the law and usages of war, they were together concerned as parties to the ill-treatment of certain of the persons interned in the camp, and by that ill-treatment they caused the death of some of them and caused physical suffering to others. As this was the first case of this kind to be tried, the prosecutor thought he should shortly put before the court the grounds on which they claimed jurisdiction to try these charges.

He said: The prosecution bases that claim on international law as set out in the Laws and Usages of War in the "Manual of Military Law". Counsel referred to Chapter XIV, Paragraph 449 of the "British Manual" and to the Royal Warrant Army Order 81/1945. The prosecution said that the acts set out in the charges are undoubtedly war crimes if they are proved because the persons interned in both Auschwitz and Belsen were, amongst others, allied nationals. Counsel expressly pointed out that "We are not, of course, concerned in this trial with atrocities by Germans against Germans". The allied nationals in these camps were either Prisoners of War or persons who had been deported from occupied countries or persons who had been interned in the ordinary way. They were all persons who had been placed there without a trial, either because of their religion, because of their nationality, because of their refusal to work for the enemy, or merely because they were Prisoners of War who it was thought might conveniently be used in such places or exterminated in such places. The laws and usages of war provide for the proper treatment not only of Prisoners of War but of the civilian citizens of the nations who are occupied by a belligerent. So far as the inhabitants of occupied territories are concerned, the prosecutor quoted paragraph 383 of chapter XIV of the "British Manual". He further quoted paragraph 59 f ("treatment of women") and Article 46 of the "Hague Regulations". As to the definition of a war crime the

prosecutor referred to Paragraphs 441 and following of chapter XIV of the "British Manual". The prosecutor further quoted this sentence from an article by Professor Brierley:

" Most of the difficulty disappears if we imagine the sort of question which the court will have to answer. Can this killing which would normally be murder, this injury which would normally be unlawful wounding, this taking of property which would normally be theft, be justified as an act of war? If not, it will be a war crime. "

As to the fact that Britain has assumed jurisdiction, the prosecutor said the following:

" The persons who the Prosecution allege suffered these injuries who were killed, who were ill-treated, came from ten different nationalities. Britain has accepted the responsibility of this trial, because it is quite impossible to form a Court and to carry on a trial if all these nationalities are in fact represented, and as Britain is the country which is controlling this zone of Germany, and which holds these accused, Britain has accepted the responsibility of that trial with the concurrence of the United Nations War Crimes Commission on which all these nationalities are represented, and observers have been invited from each of the countries who have Nationals in this camp. "

It is not proposed to set out here in detail the concrete charges summarised in the prosecutor's opening speech. It may be sufficient to state that the prosecutor announced that he would ask the court to say that the conditions which were found in Belsen and the conditions in Auschwitz were brought about not only by criminal neglect, but that they were caused by deliberate starvation and ill-treatment, with the malicious knowledge that they must cause death and lasting physical injury. In respect of Auschwitz, the prosecution will ask the court to say, in addition, that there was deliberate killing of thousands of people and probably of millions of people, quite deliberate, cold blooded extermination of millions of people in that camp, and that each of the accused who was serving at Auschwitz and is charged in the second charge, had their share in this joint endeavour, in this group of persons who were carrying out this policy of deliberate extermination.

In respect of Belsen there will not be an allegation that there was a gas chamber or that persons were herded by their thousands to their death but there will be the allegation that by the treatment that was given to the men at Belsen every member of the staff at Belsen bore their share in that treatment which they knew was causing and would continue to cause death and injury. The prosecutor would ask the court to view the evidence as a whole and to say that each must bear his responsibility not only for the actions of his own hand, but for the actions of this criminal gang who were working together. Nevertheless, lest there should be the slightest shadow of doubt, no person has been brought before this court against whom the prosecution will not produce some evidence of personal acts of active and deliberate cruelty and, in many cases, of individual murder.

VI. OUTLINE OF THE TRIAL.

The prosecutor proposed the following arrangement of the evidence for the prosecution:

- 1) Witnesses to prove the general state of the camp at Belsen.
- 2) Showing of the film of what was found at Belsen,
- 3) Witnesses to prove the gas chambers at Auschwitz,
- 4) Evidence regarding each individual accused.

VII. RULES OF EVIDENCE.

In this connection it was mentioned that although this trial was by British Military law, under the regulations there have been certain alterations made in the laws of evidence for the obvious reason that if that were not so, many people would be bound to escape justice because of movements of witnesses and therefore affidavits may be put before the court. Therefore the prosecution would call all the witnesses available and then put the affidavits before the court and ask for that evidence to be accepted. (Regulation 8 (1) of the Royal Warrant A.O. 81/1945 provides that at any hearing before a Military Court convened under the Regulations the Court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the Court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a Field General Court-Martial. This general provision appears to cover Affidavits though affidavits are not mentioned among the particular instruments and documents enumerated, without prejudice to the generality of this general provision, under (a) to (f) *ibid.*)

VIII. HEARSAY EVIDENCE IN THE TRIAL.

On the second day, (18th September), Brigadier Hugh Llewellyn Glyn Hughes was examined by the prosecutor and questioned, inter alia, about Red Cross parcels sent by Jewish societies for interned Jews. The witness said that he was merely told how the boxes had got there. He could not give the name of the person who had told him.

The prosecutor said he had deliberately led up to this point. This was the first occasion in this trial where the question of the admission of hearsay evidence arose and before asking the witness to repeat what was told to him, the prosecutor had deliberately paused in order that if there was to be an objection from the defence, it should be made. The next question would be, of course, "What was the Brigadier told?" The Judge Advocate asked whether anybody was going to object and this not being the case, the prosecutor was asked to proceed with the examination.

IX. OBJECTION TO PART OF AN AFFIDAVIT.

On 19th September 1945, the affidavit of Colonel Johnson was put in by the prosecutor. One of the defending officers objected to three paragraphs of the affidavit on the ground that they contained merely comment on points which it was the court's duty to decide. The difficulty consisted in the fact that the court must know what is in the paragraph to decide whether they will admit it or not. The prosecutor pointed out that this was inevitably so in a system of courts martial, by which the court is both judge of law and fact. The court must, in effect, read themselves, or have read to them the paragraphs in order that they may consider the legal point, then they must do the impossible and say "we refuse to allow this to be put before us and in our capacity

of judges of fact, we will ignore them, although in our capacity of judges of law we must consider them first."

One of the paragraphs objected to was left out on the advice of the Judge Advocate who remarked that the man swearing this affidavit was going rather outside his province. As to the two remaining paragraphs, the court decided that the following sentences should not be put in: "In short such orders and the carrying out of such orders was mass murder" and "and his accomplices in mass murder."

X. THE BELSEN FILM AS EVIDENCE.

On 20th September, the film of the scenes which were found at Belsen was shown to the court. Technically the film was an exhibit to an affidavit (made by members of the Army Film and Photographic Unit,) stating that they photographed scenes at the camp, that they had seen the cinematographic film from the negatives of the photographs taken by them, and that the film negatives were copies of the film taken by them. No difficulties from the procedural point of view arose with regard to linking up the film as actually shown, with the affidavit.

XI. THE QUESTION OF TRANSLATIONS.

At the beginning of the interrogation of one of the witnesses for the prosecution, Dr. Ada Binko, the Polish defending officer said that if the witness gave evidence in German, he would not require it to be translated into Polish.

The Judge Advocate felt bound to advise the court that in his view, in this particular kind of court, the accused must hear the evidence in the language which they could understand. Counsel cannot possibly know how to cross-examine except on instruction and his instructions must necessarily be according to evidence. The Judge Advocate advised the court that he did not think that anybody should waive the rights of a person who does not understand the language when serious accusations of fact are being made against an accused. He added that the defending officers were no doubt endeavouring to shorten the proceedings but he thought it would be wrong in law.

The court conferred and decided that the evidence must be translated into Polish so that the Polish accused would understand, excepting in any such case where a particular witness is called to make a specific accusation against one or two of the German accused, where there is no question of that witness raising any point at all against the Polish accused, but in cases where the Polish accused may be implicated by the witness, then the evidence must be translated into Polish.

XII. CROSS EXAMINATION OF THE WITNESS
Dr. ADA BINKO.

The procedure in cross examining witnesses having been much discussed, the following are some examples of the cross examination of the prosecution witness, Dr. Binko:

a) "MAJOR CRAWFIELD: Do you mean to swear that during the fifteen months you were at Auschwitz apart from the gypsies no person other than a Jew was sent to the gas chamber? A. Yes.

Q. I suggest to you that that statement is quite untrue. What do you say to that? A. I have sworn at the very beginning that I shall say nothing but the truth and I am very astonished if I am approached now to be lying."

b)"Q. Will you answer the next question either with "yes" or "no". Is it true that it was almost exactly when Dr. Klein took over as senior doctor that the medical stores were discovered and made available?

A. I cannot answer this question with "yes" or "no" because you must understand the conditions and the reasons why the stores were opened and made available, particularly at that time, as they were.

Q. Will you state whether or not it was at that time that the stores were made available? A. I must repeat once more that I cannot answer this question with "yes" or "no" because anybody in Dr. Klein's place would have made the stores available because the British troops were just arriving, and the whole world should know that at that time these were the reasons why the stores were made available. That is the reason why I cannot answer this question with only "yes" or "no".

Q. I have not asked under what circumstances they were made available. All I have asked is regarding the matter of time. Will you say whether or not it was about that time that the stores were made available?

A. I understood the question at the very first moment, but I cannot answer this question otherwise than I do now.

THE PRESIDENT: I think it is clear to the court that what you are asking the witness is: was it about the time that Dr. Klein took over that the stores were issued or not? - and that the witness is apparently not willing to answer that question and is going off into questions as to the reason why the stores were issued and that sort of thing. I think, as far as I am concerned - and I am sure the rest of the court - it is perfectly clear the point you are making.

THE JUDGE ADVOCATE: As a matter of fact, she has answered the question: "Three or four days before the British came two more rooms were opened and stores of medicine and instruments were produced in such quantities as we did not see or even think of." She put that at about three or four days before the British came. I think that is what you want.

CAPTAIN BROWN: Yes. (To the witness) To your knowledge were any Red Cross parcels distributed to the internees? A. Yes. On the day before the British troops entered the camp the stores were opened and hundreds and hundreds of Red Cross parcels were found, having come from Geneva.

Q. Will you answer my question. It seems to be a perfectly easy question to answer with "yes" or "no". Is it within your knowledge that Red Cross parcels were distributed to the internees? A. It is a perfectly simple question for the defending counsel to answer with "yes" or "no" but not for me, because the Red Cross parcels were in the camp for a long period, but only a few hours, or let us say half a day before the British troops arrived were they in fact distributed.

Q. I put it to you that your statement yesterday regarding Kramer kicking four Russians, or your statement today regarding Kramer kicking and hitting several internees is a complete fabrication. A. I would like to point out that it was me who was present and not the defending counsel during those incidents I described yesterday and today. "

XIII. QUESTIONING WITNESSES AS TO THE REASONS FOR THEIR ARREST.

One of the defending officers objected to the question put by the prosecutor to the witness, Dora Szafran, why she was arrested by the Germans. In the defending officer's submission, it was irrelevant why

the witnesses were arrested. It does not form part of either charge against the accused and it may tend to prejudice the accused.

The Judge Advocate said that the Court may hear evidence that some of these internees were criminal and the court should know if it has to test the credibility or assess the weight to be attached to a witness's evidence, the reason why she was put into a concentration camp. The Judge Advocate, therefore, advised the court that that question was not introduced for the purpose of prejudice, but was properly placed before the Court in order to assist it when taking into account what weight it attaches to the witness's testimony. The president ruled that the prosecutor was perfectly entitled to put that question for the reasons the Judge Advocate had pointed out.

(To Be Continued.)

III/20.
20th October 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

The Czechoslovak Case No.26 (Sepp Dietz) referred to Committee III.

Result of the discussion in Committee III held on 9th October 1945.
Summarized by the Secretary to Committee III.

- I. The Charter of the International Military Tribunal is not only an indictment, but an International agreement "constitutif de droit".
- II. All crimes mentioned in Article 6 of the Charter (including paragraphs (a) and (c) are war crimes in the wider sense.
- III. Crimes against humanity committed against allied nationals or on allied territory are not essentially different from violations of the laws and customs of war. (Proposition by Dr. Mayr-Harting.)

Alternative:

Crimes against humanity are not essentially different from violations of the laws and customs of war. (Proposition by Dr. Zivković)

- IV. Persons charged with such crimes are, therefore, to be listed as war criminals and to be surrendered to the allied State on the territory of which or against the nationals of which they have committed their crimes. (Proposition by Dr. Mayr-Harting.)

Alternative: (In case Dr. Zivković's proposition is adopted)

Persons charged with such crimes are, therefore, to be listed by the United Nations War Crimes Commission. It is for Committee I to make proposals as to the procedure to be applied in such cases.

- V. All war crimes in the wider sense, comprising all three groups mentioned in Article 6, (a), (b) and (c) of the Charter, fall within the terms of reference of the United Nations War Crimes Commission.

Alternative:

The United Nations War Crimes Commission should ask for an extension of their terms of reference to include crimes against humanity. (Alternative suggestion by M. Stavropoulos.)

- VI. The "crimes against humanity" are covered by the Commission's working list of War Crimes. (Doc. C.I.)
- VII. The existing arrangements of the allied military authorities do not provide for the handing over of criminals other than war criminals. Nor are, in cases like that of Sepp Dietz, extradition treaties applicable even if considered as continuing in force towards the Control Council, because the extradition treaties concluded by Czechoslovakia did not provide for the extradition by the contracting parties, of their own citizens. (Proposition by Dr. Mayr-Harting.)

VIII. The crime has been committed by the accused in circumstances corresponding to war (a fight between armed formations of different nations.) (Proposition by Dr. Schram-Nielsen.)

Note by the Secretary to Committee III.

1) The statement that Article 6 of the Charter is "constitutif de droit" implies the assertion that it is a piece of retrospective criminal legislation. It is submitted that it is controversial whether this really is the case. Mr. A.M. Wilding-White in an article "Punishing War Criminals: What is the Applicable Law?" published in the Law Journal of 13th October 1945, comes to the conclusion that Article 6 of the Charter does not make new law. Cf. also the discussion around Sir Arnold McNair's paper C.43 concerning the crime of aggressive war. It could be said that the Agreement of 8th August is either "constitutif de droit" or declaratory of existing law.

2) Committee III should also express its opinion regarding the point raised by Commander MOUTON, that Article 6 is only a provision dealing with the jurisdiction of the International Military Tribunal.

III/21.
29th October 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

Draft Report of Committee III on the Czechoslovak Case No.26.
Concerning a Crime Committed on Czechoslovak Territory at the
Beginning of March, 1939.

By the Secretary to Committee III.

- I. Committee I referred to Committee III the legal questions which had arisen in connection with the Czechoslovak charge No.26 against a German named Sepp Dietz.

The facts of the case were, roughly, that the accused man, (Sepp Dietz) had at the beginning of March, 1939, with a group of S.S. men, invaded Czechoslovak territory, provoked clashes with the police and the population and committed crimes, particularly murder.

At the time when the crimes were committed by the accused, most of the United Nations were not yet involved in the second World War. In 1941 the President of the Czechoslovak Republic made a Declaration according to which Czechoslovakia considered herself in a state of war with Germany from the moment Germany had committed acts of violence against the security, independence and territorial integrity of the Republic. This declaration has not, so far, been endorsed by all the Governments represented on the Commission.

- II. Accordingly it would have been the task of Committee III to which the case had been referred to give its opinion on the following two questions: (a) whether at the beginning of March 1939 a state of war was in existence between Czechoslovakia and Germany and (b) what the position was if the answer to this question was in the negative. The acting Czechoslovak representative declared in the meeting of Committee III held on 9th October 1945 (Minutes No.9/45) that Committee III should not deal with the aspect of the case based on the consideration whether or not Czechoslovakia was at war at the beginning of March 1939, but that Committee III should restrict itself to the question whether crimes against humanity committed against allied subjects or on allied territory should be dealt with in the same way as violations of the laws or customs of war.

Committee III agreed to this proposal and therefore confined its deliberations to the question mentioned sub (b), it being generally understood that this discussion and the conclusion the Committee reached on the question (b) was without prejudice to the attitude of the respective governments and their representatives concerning the question (a).

- III. The question supra (b) is primarily a question of the jurisdiction of the United Nations War Crimes Commission. The Commission was constituted at the meeting of Allied and Dominions representatives held in London on the 20th October 1943. Among the primary purposes of the Commission there was mentioned the task that: (1) "It should investigate and record the evidence of war crimes identifying where possible the individuals responsible". (2) "It should report to the Governments concerned cases in which it appears that adequate evidence might be expected to be forthcoming".

The scope of the Commission's terms of reference was eventually extended by vesting in the Commission also the competence of the originally envisaged Technical Committee of Lawyers, a fact which is not relevant to the present question.

These terms of reference, and particularly the expression "war crimes" used therein must, in the view of Committee III, be interpreted in the light of the present state of International Law, particularly as laid down in the Four Power Agreement dated 8th August 1945.

IV. The United Nations War Crimes Commission has already, in its Doc.C.144, expressed the view that the Agreement and the Charter "are documents which give effect to far-reaching principles which have been long and fully discussed in the Commission and have been embodied in recommendations made by it or have obtained the assent of a number of its member Governments." The Commission has emphasized that the Charter embodies important principles of law. The members of Committee III do not, therefore, share the view that the Agreement was an indictment; they are of the opinion that the Charter is an International document declaratory of existing law and/or creating new law ("constitutif de droit").

V. The Agreement dated 8th August 1945 is called an "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis". Under Article 1 of the Agreement there shall be established an International Military Tribunal for the trial of war criminals, etc.

Throughout, (Articles 3, 4, 6 and Preamble) the document speaks of "war criminals". The same expression, "war criminals", is used in the Charter of the International Military Tribunal (Article 1, Article 6, paragraph 1 and Article 14).

Article 6 of the Charter, dealing with the jurisdiction of the tribunal, enumerates the acts which are crimes, coming within the jurisdiction of the tribunal, and distinguishes (a) crimes against peace, (b) war crimes and (c) crimes against humanity. From this it follows that the Agreement and the Charter use the expression "war crime" in a narrower and in a wider sense.

In the Preamble, in Articles 3, 4, and 6 of the Agreement and in Articles 1, 6 (paragraph 1) and 14 of the Charter the expression "war crime" is used in the wider sense and comprises not only violations of the laws or customs of war, but also "crimes against peace" and "crimes against humanity".

In Article 6, paragraph 2, lit (c) the word is used in the narrower sense and is there confined to violations of the laws or customs of war.

VI. This double meaning of the term "war crime" is not restricted to the Four Power Agreement of 8th August, 1945. Article 29 of the "Terms of Surrender" accepted by the Italian government speaks of Benito Mussolini, his chief fascist associates and all persons suspected of having committed war crimes or analogous offences.

Article 11 (a) of the Declaration regarding the defeat of Germany dated 5th June 1945, uses the expressions "the principal Nazi leaders and all persons suspected of having committed, ordered or abetted war crimes or analogous offences."

In these two documents the term "war crime" is used in the narrower sense, "crimes against peace" are covered by the references to Mussolini's "chief fascist associated" and to the "principal Nazi leaders", "crimes against humanity" by the term "analogous offences". The Potsdam Declaration too, distinguishes between "war crimes" in the narrower sense and "atrocities".

The armistices with Rumania (Art.14) Finland (Art.13), Bulgaria (Art.6) and Hungary (Art.14) on the other hand, speak only of the comprehension and trial of persons accused of war crimes.

There, obviously, the term "war crime" is used in the wider sense, comprising also crimes against peace and crimes against humanity. It is not conceivable that it could have been the intention of the Allied Powers to leave unpunished Rumanians, Bulgarians and Hungarians who were guilty of crimes against humanity or of crimes against peace. Such an interpretation would be entirely refuted by the actual policy practiced in these countries after their conquest.

- VII. If the United Nations War Crimes Commission had been formed at a time when the state of International law would have been what it is today no doubt could possibly have arisen about the necessity to interpret the term "war crime" in the wider sense as including crimes against peace and crimes against humanity and the Commission's actual practice has, from the beginning, been based on the assumption that what in the Charter is called "crimes against peace" falls within its jurisdiction. The Commission has consistently listed "major war criminals" on its lists.

In the present situation, it is, in the view of Committee III appropriate for the Commission, not to construe its terms of reference narrowly and to accept the wider interpretation of the expression "war crime".

- VIII. What has been said in the preceding paragraph is particularly true of crimes against humanity committed against allied nationals or on allied territory. These are, both in substance and in procedure, not essentially different from violations of the laws and customs of war. No new machinery or procedure is needed in order to deal with them, if they are treated in the same way as violations of the laws or customs of war. Neither a new procedure of the Commission nor new arrangements regarding surrender and trial are necessary. All war crimes in the wider sense are covered by the Commission's working list of war crimes. (Doc.C.1.)

- IX. As to crimes committed on enemy or neutral territory or against enemy or neutral nationals - a problem which is not involved in the present case - additional arrangements would appear to be necessary and it was advocated in Committee III that arrangements should be made by the United Nations War Crimes Commission to list those criminals against humanity which are not covered by the conclusions stated below, which have been raised by the Czechoslovak case No.26.

- X. If the procedure of the United Nations War Crimes Commission were not made available for the listing of persons accused of crimes against humanity committed against allied nationals or on allied territory, no machinery for detaining them would be in existence. The arrangements made by the allied military authorities do not provide for the handing over of criminals other than war criminals. Nor are, in cases like that of Sepp Dietz, extradition treaties applicable even if considered as continuing in force towards the Control Council, because the extradition treaties concluded by Czechoslovakia did not provide for the extradition by the contracting parties, of their own citizens.

- XI. Committee III has, therefore, arrived at the following

CONCLUSIONS:

- 1) Crimes against peace and crimes against humanity as defined in paragraphs (a) and (c) of Article 6 of the Charter of the International Military Tribunal should be considered as war crimes in the same way as violations of the laws and customs of war, as defined in paragraph (b) of that article.

- 2) Persons charged with crimes against humanity committed against allied nationals or on allied territory should be listed by the United Nations War Crimes Commission and surrendered to the Allied Government concerned.
- 3) Committee III recommends that Sepp Dietz be listed as a war criminal, provided the facts are considered sufficient to establish a prima facie case, which is a question for Committee I to decide.

III/21 (1)
9th November 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

Draft Report of Committee III on the Czechoslovak
Case No.26 concerning a Crime Committed on Czecho-
slovak Territory at the Beginning of March, 1939.

Redrafted according to the decisions of Committee
III of 30th October and 6th November, 1945.

Committee I referred to Committee III the legal questions which had arisen in connection with the Czechoslovak charge No.26 against a German named Sepp Dietz.

After discussion, Committee III decided to recommend that, provided Committee I are satisfied as to the facts stated in the charge, Sepp Dietz be listed as a war criminal because he has committed a crime against humanity as defined in Article 6, paragraph 2(c) of the Charter of the International Military Tribunal.

The following are the reasons for this recommendation by Committee I:

- I. The facts of the case were, roughly, that the accused man, (Sepp Dietz) had, at the beginning of March 1939, with a group of S.S. men invaded Czechoslovak territory, provoked clashes with the police and the population and committed crimes, particularly murder.

In 1941 the President of the Czechoslovak Republic made a declaration according to which Czechoslovakia considered herself in a state of war with Germany from the moment Germany had committed acts of violence against the security, independence and territorial integrity of the Republic.

- II. Accordingly it would have been the task of Committee III to which the case had been referred to give its opinion on the following two questions: (a) whether at the beginning of March 1939 a state of war was in existence between Czechoslovakia and Germany and (b) what the position was if the answer to this question was in the negative. The acting Czechoslovak representative declared in the meeting of Committee III held on 9th October 1945 (Minutes No.9/45) that Committee III should not deal with the aspect of the case based on the consideration whether or not Czechoslovakia was at war at the beginning of March 1939, but that Committee III should restrict itself to the question whether crimes against humanity committed against allied subjects or on allied territory should be dealt with in the same way as violations of the laws or customs of war.

Committee III agreed to this proposal and therefore confined its deliberations to the question mentioned sub (b), it being generally understood that this discussion and the conclusion the Committee reached on the question (b) was without prejudice to the attitude of the respective governments and their representatives concerning the question (a)

- III. The question supra (b) is primarily a question of the jurisdiction of the United Nations War Crimes Commission. The Commission was constituted at the meeting of Allied and Dominions representatives held in London on the 20th October 1943. Among the primary purposes of the Commission there was mentioned the task that: (1) "It should investigate and record the evidence of war crimes identifying where possible the individuals responsible." (2) "It should report to the Governments concerned cases in

which it appears that adequate evidence might be expected to be forthcoming."

The scope of the Commission's terms of reference was eventually extended by vesting in the Commission also the competence of the originally envisaged Technical Committee of Lawyers, a fact which is not relevant to the present question.

These terms of reference, and particularly the expression "war crimes" used therein should, in the view of Committee III be interpreted in the light of the present state of International Law, particularly as expounded in the Four Power Agreement dated 8th August 1945.

- IV. The United Nations War Crimes Commission has already, in its Doc. C.144, expressed the view that the Agreement and the Charter "are documents which give effect to far reaching principles which have been long and fully discussed in the Commission and have been embodied in recommendations made by it or have obtained the assent of a number of its member Governments". The Commission has emphasised that the Charter embodies important principles of law.

The members of Committee III are therefore of the opinion that the Charter is an important document in the formulation of International Law, whether declaratory of existing law or creating new law.

- V. The important international documents agreed upon during and on the conclusion of the second world war, used the term "war crime" sometimes in a narrower sense which is restricted to violations of the laws or customs of war, sometimes in a wider sense comprising also "crimes against peace" and "crimes against humanity". The narrower meaning is attributed to the term "war crime" in Article 29 of the Italian Terms of Surrender, in Article 11(a) of the Declaration regarding the Defeat of Germany dated 5th June 1945, in the Potsdam Declaration and in Article 6, paragraph 2, lit (c) of the Charter of the International Military Tribunal. In the wider sense, comprising also crimes against peace and crimes against humanity, the term is used in the Armistices with Rumania (Art.14), Finland (Art.13), Bulgaria (Art.6) and Hungary (Art.14), in the Preamble and in Articles 3, 4 and 6 of the Agreement for the Prosecution and punishment of the Major War Criminals of the European Axis, dated 8th August 1945, and in Articles 1, 6 (para.1) and 14 of the Charter of the International Military Tribunal.

The actual practice of the United Nations War Crimes Commission, has, from the beginning, been based on the assumption that what in the Charter of the International Military Tribunal is called "crimes against peace" falls within its jurisdiction. The Commission has consistently listed "major war criminals" on its lists.

For the purpose of listing criminals, it is necessary to understand the term "war crime" in the wider sense indicated by the foregoing examples.

- VI. The acts of which Sepp Dietz is accused, fall, in the opinion of Committee III, under "crimes against humanity", namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war. He acted, according to the charge, in the interests of the European Axis countries. His crimes were committed on allied territory and against allied nationals.

VII. What has been said in paragraphs IV and V. is particularly true of crimes against humanity committed, like the crimes dealt with in the present case, against allied nationals or on allied territory. These are, both in substance and in procedure, not essentially different from violations of the laws and customs of war. No new machinery or procedure is needed in order to deal with them, if they are treated in the same way as violations of the laws or customs of war. Neither a new procedure of the Commission nor new arrangements regarding surrender and trial are necessary. All war crimes in the wider sense are covered by the Commission's working list of war crimes. (Doc.C.1.)

VIII. If the procedure of the United Nations War Crimes Commission were not made available for the listing of persons accused of crimes against humanity committed against allied nationals or on allied territory, no machinery for detaining them would be in existence. The arrangements made by the allied military authorities do not provide for the handing over of criminals other than war criminals. Nor are, in cases like that of Sepp Dietz, extradition treaties applicable even if considered as continuing in force towards the Control Council for Germany, because the extradition treaties concluded, e.g. by Czechoslovakia did not provide for the extradition by the contracting parties, of their own citizens.

IX. Crimes against humanity, as defined in paragraph (c) of the Article 6 of the Charter of the International Military Tribunal, should be considered as war crimes in the same way as violations of the laws and customs of war, as defined in paragraph (b) of that article.

Persons charged with crimes against humanity committed against allied nationals or on allied territory should be listed by the United Nations War Crimes Commission and surrendered to the Allied Government concerned.

III/22.
26th November 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Survey of European Armistice Conventions and Surrender Documents.

Provisions concerning War Criminals.

Compiled by the Secretary to Committee III.

1. GERMANY.

- a) Unconditional Surrender of German and Italian Forces at Caserta, 2nd May 1945. Communiqué of Allied Force Headquarters, Mediterranean. American Journal of International Law, Vol.39, Supplement page 168.
- b) Unconditional Surrender of German Forces at Rheims, 8th May 1945. *ibid*, page 169.
- c) Unconditional Surrender of German Force at Berlin, 9th May 1945, *ibid*, page 170.
- d) Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany. 5th June 1945. (Germany No.1 (1945) Cmd.6648, (H.M.Stationery Office). Department of State Bulletin, Vol.XII, No.311. Reprinted in American Journal of International Law, *ibid*, page 171.)

Article 11:

(a) The Principal Nazi leaders as specified by the Allied Representatives, and all persons from time to time named or designated by rank, office or employment by the Allied Representatives as being suspected of having committed, ordered or abetted war crimes or analogous offences, will be apprehended and surrendered to the Allied Representatives.

(b) The same will apply in the case of any national of any of the United Nations who is alleged to have committed an offence against his national law, and who may at any time be named or designated by rank, office or employment by the Allied Representatives.

(c) The German authorities and people will comply with any instructions given by the Allied Representatives for the apprehension and surrender of such persons.

2. ITALY.

- a) Conditions of Armistice signed on 3rd September 1943. (Italy No.1 (1945) Cmd. 6693. H.M.Stationery Office.)
- b) Additional Conditions signed on 29th September 1943, at Malta. Instrument of Surrender of Italy, *ibid*, No.2.

Article 29:

Benito Mussolini, his chief Fascist associates and all persons suspected of having committed war crimes or analogous offences whose names appear on lists to be communicated by the United Nations will forthwith be apprehended and surrendered into the hands of the United Nations. Any instructions given by the United Nations for this purpose will be complied with.

- c) Protocol signed at Brindisi on 9th November 1943, amending the Additional Conditions.

(ibid No.4.)

The title of the document signed at Malta on the 29th September 1943 (supra b.) changed to "additional conditions of Armistice with Italy."

Article 29 amended to read as follows:

Benito Mussolini, his chief Fascist associates, and all persons suspected of having committed war crimes or analogous offences whose names appear on lists to be communicated by the United Nations and who now or in the future are on territory controlled by the Allied Military Command or by the Italian Government, will forthwith be apprehended and surrendered into the hands of the United Nations. Any instructions given by the United Nations to this purpose will be complied with.

3. ROMANIA.

Conditions of an Armistice with Roumania, signed at Moscow, 12th September, 1944.

(Miscellaneous No.1. (1945) Cmd.6585. H.M.Stationery Office. Department of State Bulletin, Vol. XI, No.273, (17 September 1944, Reprinted in American Journal of International Law, Vol.39, Supplement p.88.)

Article 14:

The Roumanian Government and High Command undertake to collaborate with the Allied (Soviet) High Command in the apprehension and trial of persons accused of war crimes.

4. FINLAND.

Conditions of an Armistice with Finland, signed at Moscow, 19th September 1944).

(Miscellaneous No.2. (1945) Cmd.6586. H.M.Stationery Office. Reprinted in American Journal, ibid page 85.)

Article 13:

Finland undertakes to collaborate with the Allied Powers in the apprehension of persons accused of war crimes and in their trial.

5. BULGARIA.

Conditions of an Armistice with Bulgaria, signed at Moscow, 28th October 1944.

(Miscellaneous No.3. (1945) Cmd. 6587, H.M.Stationery Office.

Department of State Bulletin, Vol.XI. No.279 (29 October 1944)
Reprinted in American Journal, ibid p.93.)

Article 6:

The Government of Bulgaria will co-operate in the apprehension and trial of persons accused of war crimes.

6. HUNGARY.

Armistice with Hungary, signed at Moscow, 20 January 1945.
(Department of State Bulletin, Vol.XII, No.291 (21 January 1945)
p. 83.
Reprinted in American Journal, ibid, p. 97.)

Article XIV.

Hungary will co-operate in the apprehension and trial, as well as the surrender to the Governments concerned, of persons accused of war crimes.

III/23
6th December, 1945

UNITED NATIONS WAR CRIMES COMMISSION

Report on the Czechoslovak Case No. 1962
(Reinhold Boecker) referred to Committee III

By the Secretary to Committee III

- I. On November 28th, 1945, the Czechoslovak National Office presented to the Commission a charge against Reinhold Boecker, Captain of the Waffen S.S., concerning crimes committed in 1944 - 1945 in Podbrezová (Slovakia). The accused is charged on three counts:-

1. Attempts to denationalise the inhabitants of occupied territory.
2. Torture of civilians.
3. Wanton destruction of private property.

The short statement of facts contained in the charge reads as follows:-

"The accused participated in the criminal Nazi system of Germanisation. He tortured civilians. He wantonly burned down the administrative building of a factory."

The particulars of the alleged crime state that:-

"The accused was appointed by the German Wehrmacht's Security Agent in the Podbrezová Iron Works, at Podbrezová (Slovakia). He participated in the criminal Nazi policy of Germanisation, he especially forced on the management of the Podbrezová Iron Works German employees and workers by systematically removing employees and workers of Slovak or Czech nationality.

He denounced and handed over to the Gestapo and the S.D. (Security Service) Czechoslovak employees and workers.

He participated in the investigation and "interrogation" of imprisoned members of the Underground Movement and of partisans and personally took part in the ill-treatment and torture of the prisoners.

In complicity with four Germans he burned down the management's administrative building of the Podbrezová Iron Works, containing important documentary material, and caused thus a damage of more than two million pre-war crowns to the Iron Works."

- II. In its meeting held on December 6th, 1945, Committee I decided to put the accused Reinhold Boecker on List A on the second and third counts mentioned above.

With regard to the first count, Committee I adjourned the case and referred it to Committee III, asking for its opinion,

- a) whether count 1 of the charge No. 1962 is covered by Document C. 149, and
- b) whether the facts under count 1 of the charge constitute a war crime.

14/45.
11th December 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Notes of the Meeting of Committee III held on 11th December 1945 at

3.0 p.m.

There were present:

Major Dr. Fanderlik,	}	Czechoslovakia,
Dr. Mayr-Harting,		Denmark,
Dr. Schram-Nielsen,		Netherlands.
Commander Mouton,		

The Committee having eight members and only three being present, it was decided to adjourn the meeting till Tuesday 18th December 1945 at 3.0 p.m.

The members present at the meeting were unanimous in the view that to have a quorum it would be necessary for at least a majority of the members of Committee III to be present, that is at least five members. The following is a list of the countries at present represented on Committee III:

China,
Czechoslovakia,
Denmark,
Greece,
Netherlands,
Norway,
Poland,
Yugoslavia.

III/24.
12th December 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Bibliography of Legal Literature on the Law of War Crimes and
Belligerent Occupation in the Second World War.

Compiled by the Secretary to Committee III.

NOTE: The following is circulated as a nucleus for the compilation of a bibliography on the law of War Crimes and Belligerent Occupation, published during the second World War and after its conclusion.

This draft is necessarily incomplete. The literature published outside Great Britain and the United States is, with a few exceptions, so far inaccessible; the same applies to many American legal periodicals.

It would be very much appreciated if Members and National Offices would examine this paper and point out gaps existing in the list.

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C.K.A.(probably Allen).	Nuremberg: Before and After.	"Truth". 23rd Nov. 1945.
American Society of International Law.	Proceedings of the;	1943.
Anderson, C.Arnold,	"The Utility of the Proposed Trial and Punishment of Enemy Leaders."	American Pol.Sci. Rev. Vol.37(1943) pp.1081, 1098-9.
Barrister-at-Law:	The Trial of the Nazis	Fortnightly Review, 1945.
Bentwich, Norman,	"The Law of War" in "International Law".	Royal Institute of International Affairs.(Pamphlet) 1945.
Bentwich, Norman,	Nuremberg Issues.	The Spectator, 16th November 1945.
Bentwich, Norman,	The Belsen Trial,	The Law Journal, Vol.XCV,24.11.45.
Betts, E.C.	The Law of Military Occupation.	Washington, 1941.
Bower, Francis,	"Genocide".	The Nineteenth Century,1945.p.235.
Brierly, Professor	The Nature of War Crimes Jurisdiction.	2 The Norseman, No.3. May-June, 1944.

Cecil, Viscount.	The War and After.	Contemporary Review. December, 1942.
Chorley, R.S.T. (now Lord)	Military Occupation and the Rule of Law.	Modern Law Review, Vol. 8, No. 3. (July 1945)
Cohn, E.	The Problem of War Crimes To-day.	Transactions of the Grotius Society, London 1941, p. 125.
Cowles, Willard B.	"Universality of Jurisdiction over War Crimes".	California Law Review, Vol. 33, (1945), p. 177.
Cowles, Willard B.	Trial of War Criminals by Military Tribunals.	American Bar Associa- tion Journal, June, 1944.
Creel George, Dickinson, E.D.	War Criminals and Punishment,	London, 1945. Proc. Am. Soc. Int. Law. 1943, p. 46.
E.	The British Court for War Criminals.	The Law Journal, 15th Sept., 1945.
Eagleton Clyde.	"Punishment of War Criminals by the United Nations".	American Journal of International Law, Vol. XXXVII (1943) p. 495.
Eßer, B.	The Lessons of the Kharkov Trials.	London, 1943.
Feilchenfeld, E.	The International Economic Law of Belligerent Occupation.	Washington, 1942.
Finch, George.	"Retribution for War Crimes".	American Journal of International Law, Vol. 37 (1943) p. 81.
Fraenkel, Ernst,	Military Occupation and the Rule of Law.	New York, 1944.
Friedmann, W.	International Law and the Present War.	Transactions of the Grotius Society, 1941, p. 221.
Glueck, Sheldon	By What Tribunal shall War Offenders be Tried?	(1943) 56 Harvard Law Review, p. 1059.
Glueck, Sheldon,	"War Crimes, Their Prosecution and Punishment."	New York, 1944.
Glueck, Sheldon,	"Trial of Axis War Criminals"	Free World, Vol. IV (1942), p. 138.
Glueck, Sheldon,	War Criminals. Their prosecu- tion and Punishment. The Record of History.	Lawyers Guild Review, Vol. V, No. 1. Jan-Feb, 1945.

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|------------------------------------|---|---|
| Goodhart, A.L. | Rules and Procedure to Govern
The Case of Crimes Against
International Public Order. | The Canadian Bar
Review, 1942. p.231. |
| Goodhart, A.L. | What Acts of War are Justifiable. | Oxford, 1940. |
| Hammer, Ellen and
Salvin Marina | The Taking of Hostages in
Theory and Practice. | American Journal of
International Law,
Vol.38(1944) p.20. |
| Hyde, Charles Cheney | Aspects of the Saboteur Cases. | American Journal of
International Law,
Vol.37(1943) p.88. |
| Hyde, Charles Cheney, | Punishment of War Criminals. | Proc.Am.Soc.Int.Law.
1943. p. 39. |
| Jackson, Justice
Robert H. | Report to the President from
Justice Robert H. Jackson,
Chief of Counsel for the
United States in the Prosecu-
tion of Axis War Criminals.
June 7th, 1945. | American Journal of
International Law,
Vol.39,
Supplement p.178. |
| Jackson, Justice
Robert H. | Worst Crime of All. | The New York Times
Magazine.
9th Sept.1945, p.45. |
| Jamieson, Harvey M. | Some Aspects of the Law of
Belligerent Occupation. | The Juridical
Review, Vol.LVII
(1945), p.6. |
| Jessup, Philip C. | A Belligerent Occupant's
Powers over Property. | American Journal of
International Law,
Vol.38 (1944) p.457. |
| Kelsen, Hans, | | Californian Law
Review, 1943. p.534. |
| Kelsen, Hans, | The Legal Status of Germany
According to the Declaration
of Berlin. | American Journal of
International Law,
Vol.39 (1945) p.518. |
| Krasnodar and Kharkov
Trials. | The People's Verdict. A Full
Report of the Proceedings at
the Krasnodar and Kharkov
German Atrocity Trials.
English Text. | London, 1944. |
| Kuhn, Arthur K. | The Execution of Hostages, | American Journal of
International Law.
Vol.36 (1942)p.271. |
| Lachs, Manfred, | History or Law. Letter to the
Editor of the Manchester Guardian. | December 1st, 1945. |
| Lachs, Manfred, | War Crimes. An Attempt to
Define the Issues. | London, 1945. |

Lachs, Manfred.	The Unwritten Laws of Warfare.	Tulane Law Review. New Orleans, October, 1945.
Lachs, Manfred.	Crimes de Guerre - Délits Politiques.	Revue de Droit International. Geneva, Jan-June, 1945
Lachs, Manfred.	War Crimes and Political Offences.	Juridical Review, Edinburgh. 1944.
Lauterpacht, H.	"Punishment of War Crimes".	Oppenheim-Lauterpacht "International Law" Vol. II, p. 450, paras. 251 et seq. of the 6th Edition, Revised 1944.
Lauterpacht, H.	The Law of Nations and the Punishment of War Crimes.	The British Year Book of International Law. 1944, p. 58.
Lawyer.	War Crimes and International Law.	The Fortnightly Review November, 1945.
Lemkin, Raphaël	Axis Rule in Occupied Europe.	Washington, 1944.
McNair, Arnold D.	Municipal Effects of Belligerent Occupation.	The Law Quarterly Review. Vol. 57 (1941) p. 33.
McNair, Arnold, Sir.	Legal Effects of War. 2nd Edition.	London, 1944.
Manner, George.	The Legal Nature and Punishment of Criminal Acts of Violence contrary to the Laws of War.	American Journal of International Law. Vol. 37 (1943) pp. 407 435.
Namier, L.B. Professor.	The Nuremberg Trial.	Manchester Guardian, 19th-20th Nov., 1945.
National Lawyers Guild.	The Punishment of War Criminals A Statement of the National Lawyers Guild.	Lawyers Guild Review Vol. IV. No. 6. (Nov-Dec. 1944).
Popper, Martin.	Statement of Martin Popper, National Executive Secretary of The National Lawyers Guild on The Punishment of War Criminals, Before the House Foreign Affairs Committee, 26th March, 1945.	16 East 41 Street, New York, N.Y.
Rowson, S.W.D.	Punishment of War Criminals.	The Law Quarterly Review. Vol. 60 (1944) p. 225.
Sack, Prof. Alexander N.	Punishment of War Criminals and the Defence of Superior Order.	Law Quarterly Review Vol. 60 (1944) p. 63 et seq. See also Lawyers Guild Review, Vol. V, No. 1. (1945).