

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

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

Proclamation of the Supreme Commander.

2. The Far Eastern Tribunal was constituted by a Special Proclamation issued on 19th January 1946 by General D. MacArthur in his capacity as Supreme Commander for the Allied Powers.<sup>(1)</sup>

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

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

---

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

(2) Cf. Proclamation, para. 5.

(3) Cf. Proclamation, para. 6.

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

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

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

#### The Charter.

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

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

---

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

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

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

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



Composition of the Far Eastern Tribunal.

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

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

JURISDICTION OF THE FAR EASTERN TRIBUNAL.

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

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

- 
- (1) Originally the Tribunal was to be composed of from 5 - 9 members, the last figure being intended to coincide with the number of States which signed the Instrument of Surrender.
  - (2) The Signatories are: U.S.A., China, Great Britain, U.S.S.R., Australia, Canada, France, Netherlands, New Zealand.
  - (3) The right of these two Nations to nominate candidates was introduced by the said amendments and the maximum number of judges raised from 9 - 11 accordingly.
  - (4) Their names are: Sir William F. Webb (Australia), president of the Tribunal; E. Stuart McDougall (Canada); Ju-Ao-Mei (China); Henri Bernard (France); Bernard Victor A. Rolling (Netherlands); Erima Harvey Northcroft (New Zealand); I. M. Zaryanov (U.S.S.R.); Lord Patrick (United Kingdom); John P. Higgins (U.S.A.)

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

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

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

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

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



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

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

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

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

" Article 5: Jurisdiction over Persons and Offences.

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

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

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

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

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

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan." (1)

---

(1) The provisions of Article 5 were not affected by the amendments to the Charter introduced by General Orders No. 20 of 26th April, 1946.

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

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

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

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

---

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

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



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

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

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

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

While omitting to state that a "declared" war of aggression is in the same way criminal as an "undeclared" war, the Nuremberg Charter nevertheless equally imposes as decisive the fact that a war was "aggressive". From this it follows that any other element linked up with the "aggression", such as the existence or non-existence of a declaration, is to be regarded as incidental and irrelevant for the criminal nature of the aggressive war in itself. In other words, the element of "aggression" is made essential, but at the same time sufficient.

Consequently, all we are confronted with here is a difference in legal technique; in the Far Eastern Charter the irrelevance of a "declaration" of war is made by express reference to it; in the Nuremberg Charter the same result is achieved by way of omission.

In this connection it is convenient to point out that it is precisely in the irrelevance of a declaration of war that lies the main feature of the development of international law as formulated in the two Charters and as established by the Judgment of the Nuremberg Tribunal. Prior to the

signing of the Kellogg-Briand Pact of 1928 and to the interpretation of its meaning in International Law by the Nuremberg Tribunal,<sup>(1)</sup> no violation of international law could be claimed once a war was launched in compliance with the conventions referred to above, however aggressive such a war might have been. Today, the position is in a sense reversed. No compliance with these conventions can confer legality to a war which is aggressive.

Yet, however clear this issue may be, there remains the technical aspect which is not unimportant. Namely, in formulating rules of international law as they develop in an uncodified system with all that such a situation implies, particularly with the co-existence of Treaties which are or which might be regarded as conflicting, it is undoubtedly preferable to proceed by means of express terms rather than by way of implication. In this respect the definition of "crimes against peace" in the Far Eastern Charter is a good instance.

Before closing this paragraph, it can be remarked that the Nuremberg Tribunal did not enter into the question of "declared" and "undeclared" wars, probably for the very good reason that all wars waged by Nazi Germany were in fact both aggressive and launched without declarations. The Tribunal contented itself by ascertaining this fact in each case<sup>(2)</sup> and proceeded directly on the grounds of such concrete circumstances.

---

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

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



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

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

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

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

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

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

---

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

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

Charter would have had no practical purpose. On the other hand, the relevant provision covers the same field as the Nuremberg Charter in regard to the comparatively more important "persecutions on political or racial grounds". In this connection it can be taken that, insofar as persecutions on religious grounds are established and brought forward in the course of the proceedings, they could easily be included within the notion of persecution on political grounds. The example of the persecution of Jews in Nazi Germany, which motivated the express reference to persecution on religious grounds in the Nuremberg Charter, is a case in point. Persecutions of this nature, embracing communities or groups of individuals akin on account of their religion, are always carried out in pursuance of a "political" programme and a definite "political" aim, so that in that general and wide sense they are invariably of a "political" nature.

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

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

---

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



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

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

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

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

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

---

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

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

(Article 6)

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

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

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

They declare equal responsibility of all individuals involved irrespective of:

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

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

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

---

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

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



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

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

- 
- (1) The attempts referred to concern the case of the Kaiser. In its Report of 1919, the Commission on Responsibilities expressed the view that penal liability for violations of the laws and customs of war should include all persons "however high their position may have been, including Chiefs of States". Cf. Doc.III/107, p.14. In this connection the Allied Powers inserted in the Versailles Treaty express provisions declaring the responsibility of the Kaiser for violations of international law and provided for a penal court to try him. (See Art.227 of the Versailles Treaty). As is known these measures never materialised and no jurisprudence has ever been formed on the subject.
- (2) Cf. p.9, footnote 1.
- (3) The uncertainty of international law on this issue is underlined by authoritative writers. Cf., for instance, H.Lauterpacht, The Law of Nations and the Punishment of War Crimes, British Year Book of International Law, 1944, p.69 and following. This situation is connected with wide divergences existing in the municipal law of various countries dealing with laws and customs of war, (Cf. Lauterpacht, loc.cit.) and even within the scope of the municipal law of a single country. A case in point concerns the British Military Manual and the U.S. Rules of Land Warfare. Until 1944, and including the period of 1914-1919, both texts contained express provisions to the effect that military personnel committing violations of the rules of warfare upon superior orders "are not war criminals and cannot therefore be punished by the enemy". In 1919 the Commission on Responsibilities adopted an opposite attitude, and in 1944 the provisions of the British Military Manual and the U.S. Rules of Land Warfare were amended and the rule of impunity reversed to allow punishment. Cf. Mr. Brand's paper. English writers contended before the amendments were made that the Chapter concerned (XIV) of the British Military Manual had no statutory force; that its provisions relating to the plea of superior orders were at variance with the corresponding principles of English criminal and constitutional law; and that it represented an exposition of rules of international law only as understood by one country. Cf. Lauterpacht, op.cit., p.66, n.1, and p.69, n.2.

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

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



ERRATUM.

III/108.

UNITED NATIONS WAR CRIMES COMMISSION.

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

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

UNITED NATIONS WAR CRIMES COMMISSION

HUMAN RIGHTS REPORT: PRELIMINARY PAPERS

THE TOKIO TRIAL

Rapporteur: Dr. R. Zivković

)------

Additional Paragraph in Draft I  
to come after para. 12, p. 15.

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

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

---

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

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

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



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

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

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

III/109.  
1st October, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PRELIMINARY PAPERS

Rapporteur: Dr. R. Zivković

Draft II

THE RIGHTS OF THE VICTIMS.

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

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

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

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



HUMAN RIGHTS VIOLATED BY "WAR CRIMES".

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

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

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

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

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

---

(1) Cf. Count 53.

(2) Cf. Count 54.

(3) Cf. Count 55.

as carried out by their subordinates.<sup>(1)</sup>

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

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

---

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

(2) Cf. Appendix A, Section 2.

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

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



ATTEMPT TO INTRODUCE NEW TYPE OF INTERNATIONAL CRIME.

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

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

Specific charges which were brought forward in this connection include the killing of Admiral Kidd and about 4,000 members of the U.S. Navy and Army on the occasion of the attack on Pearl Harbour on 7th December, 1941 (2); the killing of British officers and soldiers during

(1) So, for instance, in the first Count of this particular section of the Indictment, the prosecutors charged the defendants for having participated in a "plan or conspiracy", the object of which was to "kill and murder the persons described below, by initiating unlawful hostilities ... The persons intended to be killed and murdered were all such persons, both members of the armed forces ... and civilians, as might happen to be in the places at the times of such attacks. The said hostilities and attacks were unlawful because they were breaches of Treaty Article 5 in Appendix B, and the accused and the ... armed forces of Japan could not therefore, acquire the rights of lawful belligerents". Cf. Indictment, Count 37. The Treaty Article referred to is Article I of the Hague Convention relative to the Opening of Hostilities.

(2) Cf. Count 39.

the attack on Kota Bahru, Hong Kong and Shanghai on 8th December 1941<sup>(1)</sup>; the killing of the servicemen of the Philippines whilst invading the Philippines territory on 8th December 1941<sup>(2)</sup>; the killing of servicemen of the U.S.S.R. and Mongolia on the occasion of the aggressions waged against them in the summer of 1939 whilst these two countries were neutral.<sup>(3)</sup>

Jointly with these cases were submitted charges for atrocities against the civilian population and the prisoners of war ("disarmed soldiers")<sup>(4)</sup> committed in the course of similar attacks and aggressions, particularly against China.

All these charges were grouped separately from the section dealing with "conventional war crimes and crimes against humanity", and treated under the heading "Murder". In this section they were described as representing "at the same time Crimes against Peace, Conventional War Crimes, and Crimes against Humanity".<sup>(5)</sup>

Leaving aside the purely technical question whether charges for atrocities perpetrated against "civilians and disarmed soldiers" ought not to have been included in the section dealing with war crimes and crimes against humanity<sup>(6)</sup> rather than in the section headed "Murder", the prosecuting of the loss of lives of combatants during military operations is undoubtedly a novel attempt to develop to all its logical legal consequences the fact that to open hostilities without a declaration of war is a breach of existing Treaties and consequently represents an illegal act in international law.

---

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

(2) Cf. Count 43.

(3) Cf. Counts 51 and 52.

(4) Cf. Counts 45 - 50.

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

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



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

This attempt is so much the more significant that identical acts committed by Germany on the occasion of every aggression launched by the Nazis in Europe, were not prosecuted before the Nuremberg Tribunal.

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

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

Judging upon and within the limits of the concrete instances for which the Japanese war criminals were indicted, the criminal nature of such acts in either case would be restricted only to the period of the opening of hostilities, i.e. to the period during which it is justified to consider that the armed forces of the attacked nation were taken unaware and could not therefore undertake operations required to engage regular combats with the aggressor. The killing of combatants of the



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

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

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

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

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

(a) One of these offences affects the right to health and to life. It concerns the illicit traffic with narcotics, and more particularly with opium. In the description of facts and circumstances relevant to prove inter alia the planning, preparation and waging of

unlawful wars, the prosecutors made reference to the following events:

" During the whole period covered by this Indictment, successive Japanese Governments, through their military and naval commanders and civilian agents in China and other territories which they had occupied or designed to occupy, pursued a systematic policy of weakening the native inhabitants' will to resist... by encouraging increased production and importation of opium and other narcotics and by promoting the sale and consumption of such drugs among such people."<sup>(1)</sup>

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

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

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

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

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

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

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

civil and especially the military police were also used to suppress opposition to the war policy.

The educational systems, civil, military and naval, were used to inculcate a spirit of totalitarianism, aggression, desire for war, cruelty and hatred of potential enemies.<sup>(1)</sup>

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

(c) Finally, the references made by the prosecutors in the Indictment to a number of other breaches of Treaties give a hint of what they apparently intended to develop before the Tribunal in the field of violations of human rights. Such, for instance, is the reference to the already mentioned Article 22 of the Covenant which bound mandatory powers to guarantee in the mandate territories "the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, and the prevention ... of military training of the natives for other than police purposes and the defence of territory..."<sup>(3)</sup> Another instance is a reference made to Article 3 of the Mandate granted by the League of Nations to Japan in 1920, prohibiting slave trade and forced labour in the mandate territories. All these offences are in violation of the "laws of humanity" and could be considered as instances of "crimes against humanity".

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

---

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

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

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



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

Mutatis mutandis, the same question applies to violations of human rights committed by the suppression of political or civic rights on the part of a State (Government) towards its own citizens. Here the question is amplified by the issue of whether such doings within the borders of a State call for international penal justice, or merely for a concerted international action of a different nature. By the provisions of Art.5(c) and 6(c) of the Tokyo and Nuremberg Charters, respectively, which introduced the legal concept of "crimes against humanity",<sup>(1)</sup> a right for the international community to conduct criminal proceedings for "inhumane acts committed against any civilian population, before or during the war" was recognised only inasmuch as such acts were committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal",<sup>(2)</sup> particularly in execution of or in

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

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

connection with the planning, preparation, initiation or waging of an aggressive war. In its Judgment the Nuremberg Tribunal dismissed the case for such suppressions of the rights of German citizens committed before the war, on account of lack of evidence to support the charge that they were linked up with aggressive wars prepared and waged by the Nazi Government. (1)

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

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

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

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

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

---

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



remained neutral throughout the whole period of the last war and that the Soviet Union entered into a state of war with Japan only on 8th August 1945, just a few days before Japan's capitulation.<sup>(1)</sup> Prior to that date, the Soviet Union and Japan were linked by a Pact of Non-Aggression signed on 13th April 1941, which represented the legal basis of their mutual neutrality in the wars in which they were respectively engaged after that date and until the Soviet Union declared war on Japan.

6. In their charge for war crimes, a part of which was cited above<sup>(2)</sup> the prosecutors indicted the defendants for "breaches of the Laws and Customs of War ... against the armed forces of the countries hereinafter named and against many thousands of prisoners of war and civilians then in the power of Japan belonging to ... the Republic of Portugal and the Union of Soviet Socialist Republics ..."<sup>(3)</sup> Both these countries were named without distinction together with those at war with Japan, none of which entered into a state of war with Japan at a date later than 1941.<sup>(4)</sup>

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

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

---

(1) The readiness of the Japanese Government to accept the terms of surrender as laid down in the Declaration issued at Potsdam on 26th July 1945, was communicated on 10th August 1945. The formal acceptance of these terms was notified on 14th August. For the text of both communications, cf. Department of State Bulletin, Vol. XIII, 1945, No. 320, p. 205, and No. 321, p. 255.

(2) Cf. page 2.

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

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

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



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

The defendants were charged for a threefold criminal activity.

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

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

---

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

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

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

(4) Cf. Indictment, Count 55.

war crimes committed in the field or not.<sup>(1)</sup>

In this connection concrete instances of crimes perpetrated against nationals of several countries which were at war with Japan in the relevant period of time (between 7th December 1941 and 2nd September, 1945) were given, whereas no such cases were produced with regard to Portugal or the Soviet Union. As regards Portugal, the only fact produced was the invasion of the Portuguese portion of the island of Timor on 19th February 1942.<sup>(2)</sup> As to the Soviet Union, reference was made to two military aggressions which both took place before the relevant period of crimes started. One reference concerns the attack at Lake Hassan in Soviet territory proper, which took place in 1938. The other concerns the attack made on the territory of the Mongolian People's Republic in 1939 at the Halkin-Gol River, which lies outside the territory of the Soviet Union, but where members of

---

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

(2) Cf. Appendix A, Section 10.



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

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

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

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

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

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

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

---

(1) Cf. Appendix A, Section 8.



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

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

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

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

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

---

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

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

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

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

---

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

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

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



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

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

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

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

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

---

(1) Cf. p.11.



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

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

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

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

---

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

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

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

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

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

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

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

*Italics are introduced.*

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

*Italics are introduced.*



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

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

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

Thus, the Nuremberg Tribunal established the following distinctions:

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

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

---

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

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

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

On the other hand, there also remains the fact that, however closely intermingled, both categories preserve their individuality both in the text of the law and in the sphere of facts as established by the Nuremberg Judgment, and that they can never reach the point of being entirely absorbed one by the other.

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



III/110.  
13th October, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PRELIMINARY PAPERS.

THE TOKYO TRIAL.

Rapporteur: Dr. R. Zivković.

Draft III.

THE RIGHTS OF THE ACCUSED.

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

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

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

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

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

Before the Trial:

(a) Right to submit applications and motions.

Article 10 of the Charter provides:

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

During the Trial:

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

Article 9(a) of the Charter provides:

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

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

Article 9(b) of the Charter provides:

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

(d) Right to have assistance of Counsel.

Article 9(c) of the Charter provides:

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

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

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

Article 9(d) of the Charter provides:



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

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

(f) Right to produce evidence in defence.

Article 9(c) of the Charter provides:

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

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

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

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

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

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

---

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

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

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

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

These powers and rules are the following:

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

---

(1) Cf. pp

(Ref. report by Dr. Litawski.)

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

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



III/111.  
14th October, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PRELIMINARY PAPERS.

THE TOKYO TRIAL.

Rapporteur: Dr. R. Zivković.

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

Draft IV.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

---

(1) Cf. H. Lauterpacht, The Law of Nations and the Punishment of War Crimes, British Year Book of International Law, 1944, pp. 71-75.

-4-

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

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

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

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

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

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

Accordingly, the Commission came to the general conclusion that:

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

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

---

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

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



special tribunal to try him.<sup>(1)</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

---

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

III/112

20th October, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

HUMAN RIGHTS REPORT: PREPARATORY PAPERS

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

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

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

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

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

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

headed as follows:

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

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



Responsibility of Commanders for Offences

Committed by their Troops

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

(Some examples may be briefly mentioned here).

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

(1) Regulation 10(3) includes the words: "Where there is evidence that a war crime has been the result of concerted action upon the part of a formation, unit, body, or group of persons, evidence given upon any charge relating to that crime against any member of such a formation, unit, body, or group may be received as prima facie evidence of the responsibility of each member of that formation, unit, body, or group for that crime....."

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

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

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

---

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



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

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

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

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

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

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

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

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

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

---

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



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

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

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

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

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

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

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

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



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

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

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

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

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

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



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

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

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

Officer and the Adjutant of the station, and that as a corollary to the reliance which was placed on superior orders in trials of German war criminals the Prosecution was claiming that no German N.C.O.s would dare to take prisoners' lives unless they were satisfied that they had been told that such action would be approved by the Commanding Officer.

The Judge Advocate felt that the Court would be prepared to say without question that it was probably a sound view to take, in regard to the German Army, that the persons who did the killings did not commit these crimes without having some orders from their superiors, but the question was who did give these orders, who were the superiors involved? Apart from Rauer and Scharschmidt, Bottcher and Bopf were also officers. The finding of the Court was that all four officers were guilty of being concerned in the killing of the prisoners on the aerodrome and of the wounded prisoner. The decision of the Court to find Rauer and Scharschmidt not guilty of the first charge, concerning the shootings on the way to the station, may have been influenced by the consideration, which was pointed out in the trial, that it was less reasonable for these officers to believe after the second incident that the prisoners involved were shot while trying to escape than it was after the first, and that measures should have been taken after the first shootings to prevent a repetition.

In the Trial of Kurt Student by a British Military Court at Luneberg, Germany, 6th - 10th May, 1946, the accused was faced with eight charges alleging war crimes committed by him in the kingdom of Greece (according to the last three charges, on the Island of Crete itself) as Commander-in-Chief of the German forces in Crete, at various times during May and June, 1941. The charges alleged respectively that he was "responsible for", first, the use on or about 22nd May of British prisoners of war as a screen for the advance of German troops, when, near Maleme on the Island of Crete, troops under his command drove a party of British prisoners of war before them, resulting in at least six of these British prisoners



of war being killed by the fire of other British troops; secondly, the employment in May of British prisoners of war on prohibited work, when, at Maleme aerodrome on the Island of Crete, troops under his command compelled British prisoners of war to unload arms, ammunition and warlike stores from German aircraft; thirdly, the killing on or about 23rd May of British prisoners of war, when, at Maleme aerodrome on the Island of Crete, troops under his command shot and killed several British prisoners of war for refusing to do prohibited work; fourthly, the bombing on or about 24th May of No. 7 General Hospital when, near Galatos on the Island of Crete, aircraft under his command bombed a hospital which was marked with a Red Cross; fifthly, the use on or about 24th May of British prisoners of war as a screen for the advance of German troops, when, near Galatos on the Island of Crete, troops under his command drove a party of British prisoners of war before them (these British prisoners of war being the Staff and patients of No. 7 General Hospital), resulting in a named Staff Serjeant of the Royal Army Medical Corps and other British prisoners of war being killed by the fire of British troops; sixthly, the killing on or about 27th May, of British prisoners of war, when, near Galatos, troops under his command killed three soldiers of the Welch Regiment who had surrendered to them; seventhly, the killing on or about 27th May, of a British prisoner of war, when, near Galatos, troops under his command wilfully exposed British prisoners of war to the fire of British troops, resulting in the death of a named Private of the Welch Regiment; and finally, the killing in June of British prisoners of war, when, at a prison camp near Maleme, troops under his command shot and killed several British prisoners of war. He pleaded not guilty to all the charges.

The offences alleged all took place in connection with an attack by German parachutists on the Island of Crete under the direction of the accused. The latter, then General Student, was shown to have been at his base in Greece until the morning of 25th May, 1941, and to have been in Crete from that time until the end of June, 1941. Air support was in the control of General von Richthoven, Commander of the 8th Air Corps, though a certain degree of co-operation between the two generals was shown to have existed.

The accused was found not guilty of the first, fourth, fifth, seventh and eighth charges but guilty of the second, third and sixth.

Subject to confirmation by superior military authority, he was sentenced to imprisonment for five years. This sentence was not, however, confirmed.

The eight charges brought against the accused alleged not offences committed by him, but offences for which he was responsible. The Prosecutor pointed out in his closing address: "This case falls really into two parts and there are two separate matters which it will be your duty to decide. First whether these events which you have heard sworn to in the witness box or any of them in fact took place and if you decide that they did take place the second point will arise as to whether this man was responsible for them."

Student was not shown to have ordered any of the offences alleged, and it follows that in finding him guilty on three charges the Court applied the doctrine of the indirect responsibility of a commander for offences committed by his troops. As has been seen, the Confirming Authority differed from the Court in his estimate of Student's responsibility.



The Prosecutor claimed that: "General Student was very keen on the capture of Crete. He had pitted his opinion against the opinion of Hitler and it was up to him to get Crete at all costs and in my submission all these things were done by subordinates with the full knowledge that they would have been supported by their Commander-in-Chief." Defence Counsel, on the other hand, pointed out that: "When a General decides to make a big scale operation on a corps basis he makes his appreciation of the situation and his staff work out the orders regarding details. Any general policy is obviously that General's responsibility but I maintain that the details are not. The orders which have been worked out by his staff are passed on to all commanders at all levels until the small details are arrived at. It is the small tasks such as the attack on a given hill which are planned and carried out by the junior commanders and their troops. Therefore surely is it not the junior commanders who are responsible for any small and isolated incidents happening within their platoons or sections and are not the senior commanders responsible for what happens throughout their command as a whole." The basic principles relating to the extent of the responsibility of a commander for offences committed by his troops, however, were not fully examined in the present case.

Certain facts may nevertheless be set out which were considered of some importance in the case, and which may have been taken into account by the Court and by the Confirming Authority in making their respective decisions.

In the first place, it was recognized as more probable that repeated or wide-spread offences were performed under the General's orders than isolated offences. Counsel for the Defence observed that all the charges related to acts done in the Maleme/Cania area, whereas actually troops were dropped at four main points, Maleme, Cania, Returnom and Herakliom. In other words, he claimed, only about half

of the troops concerned in the invasion were in the Maleme/Cania area. It could not, therefore, be said that it was the general policy of the Parachute troops to commit atrocities and to capture Crete at any price. Why, he asked, if the shooting of prisoners of war was General Student's general policy, did not incidents occur at the prison camps at Cania and Skenis similar to those alleged to have happened at the camp near Maleme?

The Prosecutor claimed that three instances had been proved in which captured troops had been forced by German soldiers to advance ahead of them, either to act as a screen to the latter in their attack or to cause the Imperial troops to reveal their positions by firing on the prisoners in mistake for their enemies. The fact that no less than three instances of such behaviour had been proved gave rise to an inference, in the Prosecution's submission, that an instruction had been given that in certain circumstances such action was correct. He pointed out that General Student had said that he was responsible for the whole of the training of the parachute division.

In his summing up the Judge Advocate set out very clearly what had been the Prosecution's position in the case; the Prosecution, he said, "are going to say that, when you look at this list of atrocities deposed to by the ordinary decent type of soldier or airman, you will have to draw the inference that it was calculated; that it was part of the policy and that it would only arise in the well disciplined German forces if those troops and the officers knew that they had been either ordered to do it by their commander or, alternatively, that they had been led to believe that nothing would have been heard about it and it would be condoned and appreciated."

A second important question in connection with the responsibility of the accused was that of his official relationship with General von Richthoven, Commander of the 8th Air Corps. Clearly if the latter was



able to act entirely independently of Student, the accused could not be held responsible for the bombing of the aerodrome. Defence Counsel claimed that during a conference between the accused and General von Richthoven, only general outlines for air support were discussed. The Prosecutor, on the other hand, claimed that the hospital could not have been selected as a target without the knowledge of the accused and his staff. The Judge Advocate's opinion was that the Court would "be satisfied that, in any major operation on that island, there would be no bomb dropped without Student knowing why and ensuring that the parachute troops should not be bombed"; he thought that the Court would accept "that there was, in this German expedition, the closest liaison between the staff of the air force and the staff on the ground."

Nevertheless the accused was found not guilty of the fourth charge.

The physical presence of the accused in Crete at the time of the alleged offences, on the other hand, was not regarded by Counsel as important. The Prosecutor submitted that it was "quite immaterial" whether he was in Athens or in Crete "at the time"; he was supreme commander during the whole operation. The Defence made no particular use of the fact that the accused did not arrive in Crete until May 25th, 1941. The Judge Advocate restricted himself to the observation that: "It is common ground that General Student was not in this area at all before the morning of the 25th May, and therefore any thing that he may be responsible for up to that date would have been done from his base in Greece."

Another interesting British Trial is that held before a British Military Court sitting at Wuppertal, Germany, June 4th - 5th, 1946, of Fritz Hartjenstein and Five Others, who were accused of being concerned in the killing of a British prisoner of war at Struthof/Natzweiler prison camp on or about 30th July, 1944.

Of Hartjenstein's responsibility in the alleged crime, the Judge Advocate in his summing up, said: "The position of Hartjenstein was that he was Kommandant of this camp ..... Obviously you would have no doubt about his implication if you were satisfied that he gave orders for the execution. There is another aspect you will have to consider; to what extent he is liable if he did not give orders for this execution... There is no direct evidence that he authorized this execution. Some implied it because he was the Kommandant of the camp; there is some little vague evidence." He reminded the Court that, according to the Prosecution's case, Hartjenstein "either authorised the execution or was running a camp where authorization was not required". Hartjenstein was sentenced to death and this sentence was confirmed.

The remarks of the Judge Advocate in one other case tend to show that a Commander can in certain circumstances, be held liable for offences which were committed, not on his orders, but as a result of his negligence. A Military Court sitting at Wuppertal on 10th and 11th July, 1946, sentenced General Victor Seeger to imprisonment for three years on a charge of being concerned in the killing of a number of Allied prisoners of war; the Judge Advocate said of this accused: "The point you will have to carefully consider - he is not part of any organisation at all - is: was he concerned in the killing, in the sense that he had a duty and had the power to prevent these people being dealt with in a way which he must inevitably have known would result in their death ..... it is for you with your members, using your military knowledge going into the whole of this evidence to say whether it is right to hold that General Seeger, in this period between, let us say the middle of August or towards the end of August, was holding a military position which required him to do things which he failed to do and which amounted to a war crime in the sense that they were in breach of the Laws and Usages of War."



Of the United States trials which are relevant in this connection easily the most important is the trial by a United States Military Commission at Manila, Philippine Islands, of General Yamashita, Commanding General of the 14th Army Group of the Imperial Japanese Army, which took place between October 1st and December 7th, 1945. The indictment against him alleged that he violated the laws of war in that, between 9th October, 1944, and 2nd September, 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines.

(A brief account of the human rights alleged to have been violated will be inserted here).

The opening statement of the Prosecution contains the following words:

"The charge ..... states that the accused, during a certain period of time while he was Commander of Armed Forces of Japan then at war with the United States of America and its Allies, unlawfully disregarded and failed to discharge his duty as such Commander - unlawfully disregarded and failed to discharge his duty as Commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and its Allies and dependencies, particularly the Philippines; and thereby violated the laws of war. That is the charge, that is the case: Disregarded his duty to control the members of his command, and permitted them to commit violations of the laws of war."

It was not alleged that Yamashita had ordered any of the crimes set forth in the Bills of Particulars presented to the Commission.

(The Bills of Particulars in their opening words showed this and will be quoted).

Counsel for the Defence was mainly concerned to show, not that the atrocities had not been committed, but that the accused neither knew of, condoned, excused or ordered them. One of his sentences is reminiscent of the claim of Rauer's Counsel that Rauer was too overworked and harassed by the approaching Allied forces to be able to exercise proper supervision over the prisoners of war in his hands; Counsel for Yamashita said:

"Can it be seriously contended that a commander, beset and harassed by the enemy, staggering under a successful enemy invasion to the south and expecting at any moment another invasion in the north, that such a commander could in the period of a handful of weeks gather in all the strings of administration?" Other factors on which he relied were the newness of the accused's command and the distance separating him and his troops: "How can the man possibly be held accountable for the action of troops which had passed into his command only one month before, at a time when he was 150 miles away - troops which he had never seen, trained or inspected, whose commanding officers he could not change or designate, and over whose actions he has only the most nominal control?"

The judgment of the Commission included the following passages:

"The crimes alleged to have been permitted by the Accused in violation of the laws of war may be grouped into three categories: (1) Starvation, execution or massacre without trial and mal-administration generally of civilian internees and prisoners of war; (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives; (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offences extended throughout the period



the Accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended throughout the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon. It is "noteworthy that the Accused made no attempt to deny that the crimes were committed, although some deaths were attributed by Defence Counsel to legal execution of armed guerrillas, hazards of battle and action of guerrilla troops favorable to Japan,.....

"The Prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused. Captured orders issued by subordinate officers of the accused were presented as proof that they, at least, ordered certain acts leading directly to exterminations of civilians under the guise of eliminating the activities of guerrillas hostile to Japan. With respect to civilian internees and prisoners of war, the proof offered to the Commission alleged criminal neglect, especially with respect to food and medical supplies, as well as complete failure by the higher echelons of command to detect and prevent cruel and inhuman treatment accorded by local commanders and guards. The Commission considered evidence that the provisions of the Geneva Convention received scant compliance or attention, and that the International Red Cross was unable to render any sustained help. The cruelties and arrogance of the Japanese Military Police, prison camp guards and officials, with like action by local subordinate commanders were presented at length by the prosecution.

"The Defence established the difficulties faced by the accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply with especial reference to food and gasoline, training, communication discipline and morale of his troops. It was alleged that the sudden assignment of Naval and Air Forces to his tactical command presented almost insurmountable difficulties. This situation was followed, the Defence contended, by failure to obey his orders to withdraw troops from Manila, and the subsequent massacre of unarmed civilians, particularly by

Naval forces. Prior to the Luzon Campaign, Naval forces had reported to a separate ministry in the Japanese Government and Naval Commanders may not have been receptive or experienced in this instance with respect to a joint land operation under a single commander who was designated from the Army Service. As to the crimes themselves, complete ignorance that they had occurred was stoutly maintained by the accused, his principal staff officers and subordinate commanders; further, that all such acts, if committed, were directly contrary to the announced policies, wishes and orders of the accused. The Japanese Commanders testified that they did not make personal inspections or independent checks during the Philippine campaign to determine for themselves the established procedures by which their subordinates accomplish their missions. Taken at full face value, the testimony indicates that Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted.....

"This accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army in peace as well as war in Asia, Malaya, Europe, and the Japanese Home Islands. Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nonetheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood. The Rules of Land Warfare, Field Manual 27-10, United States Army, are clear on these points. It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering military justice. The tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character, and training



of his troops are other important factors in such cases. These matters have been the principle considerations of the Commission during its deliberations.....

"General Yamashita: The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances.

Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging."

The case eventually came before the Supreme Court of the United States on an application for leave to file a petition for writs of habeas corpus and prohibition in that Court, and on a petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines, denying the petitioner's application to the court for writs of habeas corpus and prohibition. Judgment was delivered on February 4th, 1946.

In the majority judgment of the Supreme Court, delivered by Chief Justice Stone, the following passage appears:

"The charge, so far as now relevant, is that petitioner, between October 9th, 1944 and September 2nd, 1945, in the Philippine Islands, "while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he ... thereby violated the laws of war".... It is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charges is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command

for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

"It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that ist violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

"This is recognized by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates". Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out". And Article 26 of the Geneva Red Cross Convention 1929 for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles (of the convention) as well as for unforeseen cases". And, finally, Article 43 of the Annex of the Fourth Hague Convention requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and



safety, while respecting, unless absolutely prevented, the laws in force in the country".

"These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognised, and its breach penalized by our own military tribunals".

It will have been noted that Chief Justice Stone delivered the judgment of a majority of the Supreme Court. Mr. Justice Murphy and Mr. Justice Rutledge dissented for this opinion. The two dissenting judges held the opinion, inter alia, that the atrocities proved to have taken place were committed while Yamashita's troops were disorganised largely due to the onslaught of the United States forces, and that since Yamashita had not ordered these offences to be committed and had not even known of their happening he could not be held responsible for their perpetration.

Another relevant United States Trial, is that of Yuicki Sakamoto, held at Yokohama, Japan, on February 13th, 1946. The accused was sentenced to life imprisonment after being found guilty on a charge alleging that he "between 1st January, 1943 and 1st September, 1945, at a prisoner of war camp Fukuoka #1, Fukuoka, Kyushu, Japan did commit cruel and brutal atrocities and failed to discharge his duty as Commanding Officer in that he permitted members of his command to commit cruel and brutal atrocities."

A charge entitled Neglect of Duty in Violation of the Laws and Customs of War was brought against Lt. General Yoshio Tachibana and Major Sueo Matoba of the Imperial Japanese Army and against Vice Admiral Kunizo Mori, Captain Shizuo Yoshii and Lt. Jisuro Suyeyoshi of the Imperial Japanese Navy, in their trial by a United States Military Commission at Guam, Marianas Islands, in August, 1946. The Specifications

appearing under this charge alleged that various of the above accused unlawfully disregarded, neglected and failed to discharge their duty, as Commanding General and other respective ranks, to control members of their commands and others under their control, or properly to protect prisoners of war, in that they permitted the unlawful killing of prisoners of war, or permitted persons under their control unlawfully to prevent the honourable burial of prisoners of war by mutilating their bodies or causing them to be mutilated or by eating flesh from their bodies.

All of the accused mentioned above were found guilty of the charge alleging neglect of duty, and although a sentence of life imprisonment was the highest penalty imposed by the Commission on an accused sentenced on this charge alone, yet the trial does serve as further proof that neglect on the part of a higher officer of a duty to restrain troops and other persons under his control can render the officer himself guilty of a war crime when his omission has lead to the commission of such a crime.

The Prosecution in the Trial of Field Marshall Milch before a United States Military Tribunal in Nuremberg, claimed that a close analogy could be drawn between that case and the Yamashita proceedings. The facts were similar and the opinion of the Supreme Court was "particularly in point in the matter of responsibility for senior officers". The Prosecutor said:

"In the cases of the medical experiments, we have a much less complex situation. There is no question of a senior officer in an occupied country, rather we are faced with a simple direct chain of command problem. Milch - Foberster - Hippke. Had Milch given the order, the experiments would have been terminated, but no order of termination was given - people were murdered and Rascher remained in the Luftwaffe until he was transferred to the S.S. in March of 1943. The defendant had an affirmative duty to know what was going on, and an affirmative duty to act so as to stop the experiments. That he was ignorant of the true state of affairs is



unbelievable in view of the letters and the testimony of those who were below him. Field Marshals are not made as are non-commissioned officers... By holding the office which he held, he had the duty to control the activities of those who were his subordinates, to insure that they conducted themselves as soldiers and not as murderers. He has failed woefully in the task."

The judgment of the Court on Count two, which alleged that the defendant was a principal in, accessory to, ordered, abetted, took a consenting part in and was connected with, plans and enterprises involving medical experiments without the subjects' consent, in the course of which experiments, the defendant, with others, perpetrated murders, burtalities, cruelties, tortures and other inhuman acts, includes the following passage:

"In approaching a judicial solution of the questions involved in this phase of the case, it may be well to set down seriatim the controlling legal questions to be answered by an analysis of the proof:

- (1) Were low-pressure and freezing experiments carried on at Dachau?
- (2) Were they of a character to inflict torture and death on the subjects?

(The answer to these two questions may be said to involve the establishment of the corpus delicti).

- (3) Did the defendant personally participate in them?
- (4) Were they conducted under his direction or command?
- (5) Were they conducted with prior knowledge on his part that they might be excessive or inhuman?
- (6) Did he have the power or opportunity to prevent or stop them?
- (7) If so, did he fail to act, thereby becoming particeps criminis and accessory to them?"

The Court later expressed the following conclusions:

"(3). The prosecution does not claim (and there is no evidence) that the defendant personally participated in the conduct of these experiments.

"(4). There is no evidence that the defendant instituted the experiments or that they were conducted or continued under his specific direction or command.....

was also Field Marshal in the Luftwaffe, 1940 to 1945; Air Quarter Master General, 1941 to 1944; member of the Central Planning Board, 1942 to 1945; and Chief of the Jaegerstab, 1944 to 1945, and also was Generalluftzeugmeister".

Nevertheless, he concurred in the finding of not guilty on the second Count; "All of the testimony and the evidence, both for the Prosecution and the Defence, is to the effect that the defendant Milch did not have such knowledge of the high altitude or low-pressure experiments which were carried out and completed by Luftwaffe physicians at Dachau until after the completion of such experiments. The evidence offered as to the knowledge or responsibility of the defendant Milch was not such a nature as to show guilty knowledge on his part of said experiments.

"As to the cooling or freezing experiments performed at Concentration Camp Dachau, for which the defendant is charged with responsibility, I find as a fact that the defendant ordered experiments to be conducted at the camp for the benefit of the Luftwaffe....

"The defendant admits giving orders for the conduct of certain experiments....but contends that he did not know of, or contemplate, that the experiments would be conducted in an illegal manner or would result in the injury or death of any person. The defendant further asserts that he did not know or have any reason to believe that the experiments were conducted in such manner until after they had been completed. He therefore insists that he was and is not responsible for the unlawful manner in which the experiments were actually conducted by the Luftwaffe officers and that he is not guilty of any crime as a result thereof.

"The Tribunal in its majority opinion has fully considered the decision of the United States Supreme Court in the Judgment in re-Yamashita and has found that said decision is not controlling in the case at bar. In weighing the evidence, the Tribunal was mindful of the fact that the defendant gave the order and directed his subordinates to carry on such experiments, and



that thereafter he failed and neglected to take such measures as were reasonably within his power to protect such subjects from inhumane treatment and deaths as a result of such experiments. Notwithstanding these facts, the Tribunal is of the opinion that the evidence fails to disclose beyond a reasonable doubt that the defendant had any knowledge that the experiments would be conducted in an unlawful manner and that permanent injury, inhumane treatment or deaths would result therefrom.

"Therefore the Tribunal found that the defendant did not have such knowledge as would amount to participation or responsibility on his part and therefore found the defendant not guilty on charges contained in Count No. 2."

The extent to which the Chinese Courts have been willing to go in pinning responsibility of this kind onto commanders was shown by the Trial of Takashi Sakai by the Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking, 27th August, 1946. The accused was sentenced to death after having been found guilty, inter alia, of "inciting or permitting his subordinates to murder prisoners of war, wounded soldiers and non-combatants; to rape, plunder, deport civilians; to indulge in cruel punishment and torture; and to cause destruction of property." The Tribunal expressed the opinion that it was an accepted principle that a field Commander must hold himself responsible for the discipline of his subordinates. It was inconceivable that he should not have been aware of the acts of atrocity committed by his subordinates during the two years when he directed military operations in Kwantung and Hong Kong. This fact had been borne out by the English statement made by a Japanese officer to the effect that the order that all prisoners of war should be killed, was strictly enforced. Even the defendant, during the trial, had admitted a knowledge of murder of prisoners of war in the Stevensons Hospital, Hong Kong. All the evidence, said the Tribunal, went to show that the defendant knew of the atrocities committed by his subordinates and deliberately let loose savagery upon civilians and prisoners of war.

It will be noted that the Tribunal pointed out that the accused must have known of the acts of atrocities committed by his subordinates; the question is therefore, left open whether he would have been held guilty of breach of duty in relation to acts of which he had no knowledge.

X X X

It is clear that the knowledge that he might be made liable for offences committed by his subordinates even if he did not order their perpetration would in most cases act as a spur to a commander who might otherwise permit the continuance of such crimes of which he was aware, or be insufficiently careful to prevent such crimes from being committed. Any rule making a commander to some degree responsible for the offences of his subordinates even in the absence of specific orders must go some way towards preventing the violation of human rights and towards vindicating such rights if they have been infringed.

The relevant material whose collection has so far been possible has been set out at some length above, in view of the importance of the subject and the present state of flux in the law and practice concerning it. The following general remarks may, however, be made.

1. The law on this matter is in a formulative stage and it would be wrong to expect to find hard and fast rules in universal application. In the circumstances it is inevitable that considerable discretion is left in the hands of the Courts to decide how far it is reasonable to hold a commander responsible for such offences of his troops as he did not order.

2. It is clearly established that a responsibility rests in certain cases in the absence of any direct order for the commission of crimes.

3. The material contained in the regulations and the cases relating to such responsibility can be separated into two categories:

- (1) material illustrating how, on proof of certain circumstances, the burden of proof is shifted, so as to place on an accused the task of showing to the satisfaction of the Court that he was not



responsible for the offences committed by his troops,

(ii) material actually defining the extent to which a commander may be held responsible for his troops' offences.

The first type of material relates to a matter of evidence, the second type to a matter of substantive law.

4. Mainly of interest in connection with the shifting of the burden of proof are the Canadian provisions (see page 2) and the Trial of Kurt Meyer (see pages 2 - 6) which was held in pursuance thereof. The arguments quoted on pages 15 - 17 from the Trial of Kurt Student are of the same kind. Of particular importance is the stress placed on the repeated occurrence of offences by troops under one command as prima facie evidence of the responsibility of the commander for those offences (see pages 2 and 15 - 16). The Trial of Rauer (see pages 6 - 12) seems to suggest that responsibility may be inferred from surrounding circumstances, including the prevailing state of discipline in an army.

5. The above mentioned trials throw some light also on the facts which must be proved in order to make a commander responsible for the offences of his troops.

Thus, in the Trial of Student, Counsel and the Judge Advocate spoke in terms of "General Student's general policy", of no bomb being dropped "without Student knowing why" and of the troops believing either that the offences had been ordered by the commander or that their offences would be "condoned and appreciated". It is to be noted that the possibility of Student being made liable in the absence of knowledge, on the grounds that he ought to have found out whether offences were being committed or were likely to be committed, or that he ought to have effectively prevented their occurrence, is not mentioned.

In the Trial of Kurt Meyer, the Judge Advocate stated that anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavour to prevent, the killing

of prisoners, were matters affecting the question of the accused's responsibility.

Here it will be noted that the possibility of a commander being held responsible for offences on the grounds that he ought to have provided against them is not ruled out.

The Judge Advocate in the Trial of Rauer and Others (see page 9) stated that the words, contained in the charge against Rauer, "concerned in the killing" were a direct allegation that he either instigated murder or condoned it. The charge did not envisage negligence.

6. The enactments and cases which relate entirely to substantive law show the same divergence in the matter of the extent to which the commander can be held liable. The French enactment (see page 1) mentions only crimes "organised or tolerated". The accused Milch (see pages 27 - 29) was held not guilty of being implicated in the conducting of illegal experiments because the Tribunal was not satisfied that he knew of their illegal nature; no duty to find out whether they had such a nature is mentioned. While the Chinese enactment (see pages 1 - 2) does not define the extent of commanders' "duty to prevent crimes from being committed by their subordinates", the Tribunal which tried Takashi Sakai (see pages 30 - 31) was careful to point out that the accused must have known of the offence proved to have been committed by his subordinates.

On the other hand, the Supreme Court of the United States (see pages 23 - 25) held that General Yamashita had a duty to "take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population," that is to say to prevent offences against them from being committed. The use of the terms "appropriate in the circumstances" serves to underline the remark made previously, namely that a great discretion is left to the Court to decide exactly where the responsibility of the commander shall cease, since no international agreement or usage lays down what these measures are.



The Judge Advocate in the Trial of General Seeger (see page 18) also made it clear that a commander could be held to have occupied a military position which required him to take certain measures, the failure to take which would amount to a war crime.

The Prosecution in its opening statement in the Trial of Carl Krauch and others (the I.G. Farben Trial<sup>(1)</sup>) seems to have followed the Yamashita doctrine in making the following observation:

"Moreover, even where a defendant may claim lack of actual knowledge of certain details, there can be no doubt that he could have found out had he, in the words of Military Tribunal No. 1 made "the slightest investigation". Each of the defendants, with the possible exception of the four who were not Vorstand members, was in such a position that he either knew what Farben was doing at Leuna, Bitterfeld, Berlin, Auschwitz, and elsewhere, or, if he had no actual knowledge of some particular activity, again in the words of Military Tribunal No. 1, "occupying the position that he did, the duty rested upon him to make some adequate investigation". One can not accept the prerogatives of authority without shouldering responsibility."

---

(1) Not yet completed.

Superior Orders, Duress and Coercion

The plea of superior orders has been raised by the Defence in war crime trials more frequently than any other. The most common form of the plea consists in the argument that the accused was ordered to commit the offence by a military superior and that under military discipline orders must be obeyed. A closely related argument is that which claims that had the accused not obeyed he would have been shot or otherwise punished; it is sometimes also maintained in court that reprisals would have been taken against his family. It has to be admitted that a serious conflict must inevitably exist in the mind of a soldier in particular, when faced with the choice between the probability of immediate punishment for insubordination, and the possibility of ultimate punishment as a war criminal should his country be defeated. Nevertheless, the rights of the unfortunate victim of the crime must equally be kept in mind.

Municipal enactments regarding the punishment of war crimes have shown a great reluctance to regard the plea of superior orders as a complete defence, and have preferred in most cases to admit that the fact that a war crime was committed under orders may constitute a mitigating circumstance and to leave to the court the power to consider each case on its merits.

Thus, the United States Mediterranean Regulations provide in Regulation 9:

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

The corresponding provisions of Regulation 16 (f) of the Pacific Regulations of September 1945, of Regulation 5 (d) (6) of the Pacific Regulations of December, 1945, of Regulation 16 (f) of the China Regulations provide as follows:

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



punishment if the commission determines that justice so requires."

Similarly Article 5 of the Norwegian Law of December 13th, 1946, on the Punishment of Foreign War Criminals provides that:

"Necessity and superior order cannot be pleaded in exculpation of any crime referred to in § 1 of the present law. The court may, however, take the circumstances into account and may impose a sentence less than the minimum laid down for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted."

Other provisions of a like nature are the following:

"The fact that an accused acted pursuant to the order of a superior or of his government shall not constitute an absolute defence to any charge under these Regulations; it may, however, be considered either as a defence or in mitigation of punishment if the military court before which the charge is tried determines that justice so requires." (Article 15 of the Canadian War Crimes Act of 31st August, 1946).

"The fact that the criminal deed was performed by a person acting under orders or in a subordinate capacity does not exempt the criminal from responsibility, but may be taken into consideration as an extenuating circumstance, and in specially extenuating circumstances the punishment may be waived altogether." (Article 4 of the Danish Act on the Punishment of War Crimes of July 12th, 1946).

"In the case of trials instituted under the provisions of Article 2 of the present law, the fact that the accused acted in accordance with the provisions of enemy laws or regulations, or at the orders of a superior officer cannot be regarded as a reason for justification, within the meaning of Article 70 of the Criminal Code, when the act committed constituted a flagrant violation of the laws and customs of war, or the laws of humanity. The plea may be taken into consideration as an extenuating circumstance." (Article 3 of the Belgian Law of 20th June relating to the Competence of Military Tribunals in the Matter of War Crimes).

"Laws decrees or regulation issued by the enemy authorities, orders or permits issued by these authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Article 327 of the penal code, but can only, in certain circumstances, be admitted as extenuating or exculpating circumstances." (Article 3 of the French Ordinance of August 28th, 1944, Concerning the Prosecution of War Criminals).

Article VIII (in paragraphs 1 - 2) of the Chinese Law of October 24th, 1946, simply provides that:

"The following circumstance under which offences have been committed shall not exonerate war criminals:

1. the fact that crimes were committed by order of Superior Officers.
2. the fact that crimes were committed as result of official duty."

The British Royal Warrant contains no provisions regarding the admissibility of the defence of Superior Orders, and there has been considerable discussion during trials before British Military Courts of the admissibility of this plea.

Chapter XIV of the British Manual of Military Law has often been quoted by Counsel as authority on this point. It must be stated at the outset that Chapter XIV (The Laws and Usages of War on Land) of the British Manual of Military Law is intended as a guide for the use of the military forces. It has not therefore the authority as a statement of International Law which attaches to an international treaty. Such publications, prepared for the benefit of the armed forces of various nations, are frequently used in argument in the same way as other interpretations of International Law, and, in so far as their provisions are acted upon, they mould state practice, which is itself a source of International Law. The British Manual of Military Law is not a legislative instrument; it is not a source of law like a statutory or prerogative order or a decision of a court, but is only a publication setting out the law. It has, therefore, itself no formal binding power,



but has to be either accepted or rejected on its merits, i.e. according to whether or not in the opinion of the Court it states the law correctly.

Until April, 1944, Chapter XIV of the British Manual of Military Law contained the much discussed statement (para. 443) that "members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or by their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to other means of obtaining redress ....."

This statement was based on the 5th edition of Oppenheim's International Law, Volume II, page 454. Considerable doubts were cast on the correctness of this statement by most writers upon the subject and it was replaced in the 6th edition of Oppenheim by its learned editor, Professor Lauterpacht, by a statement to the effect that the fact that a rule of warfare has been violated in pursuance of an order of a belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime.

The fallacy of the opinion expressed in the pre-1944 text (para. 443) of Chapter XIV) of the British Manual and the corresponding rule of the United States Rules of Land Warfare (para. 347 of the 1940 text), was demonstrated in an article by Professor Alexander N. Sack in the Law Quarterly Review (Vol. 60, January, 1944, p. 63). The relevance of plea of superior orders became also the subject of research and critical examination by official and semi-official international bodies which dealt with problems of war crimes during the second world war (United Nations War Crimes Commission; London International Assembly, etc.).

In April, 1944, the British Manual was altered, the sentences just quoted being replaced by the following statement of the law:

"The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a

war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. 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."

A similar though not identical alteration of the American Field Manual has been brought about by "Change No. 1 to the Rules of Land Warfare" dated 15th November, 1944.<sup>(1)</sup>

In the course of the Pelius Trial,<sup>(2)</sup> an objection was raised to the application of the law as stated in the amendment to the British Manual of Military Law and the decision of the British Privy Council in the Zamora case was invoked, where it had been stated that a British Prize Court administers International Law and not Municipal Law and although it may be bound by executive orders of the King in Council. If that be so, then it was said, a fortiori, the Court is not bound by an amendment published by the War Office.

This objection was not referred to by the Judge Advocate in his summing up, but it was implied in his direction to the Court that the plea of Superior Orders was not well founded.

The Judge Advocate accepted the law as stated in the 1944 amendment to the British Manual and advised the Court accordingly.

Counsel for the Defence, asked by the Judge Advocate whether he challenged the accuracy of the statement that the question was governed by the major principle that members of armed forces are bound to obey lawful orders only, stated that he was not prepared to challenge that.

The Court rejected the plea of superior orders.

A further discussion of the question arose during the Belsen Trial.<sup>(3)</sup> Colonel Smith, in delivering a closing argument in defence of the accused

---

(1) See p. 41.

(2) See Law Reports of Trials of War Criminals, Vol. I, pp. 1-21.

(3) See Vol. II of the same series, especially pp. 69-78 and 104-110.



as a whole, submitted that the original text of paragraph 443 was correct in law and that the amended version was incorrect and he repeated that the Court was its own judge of law and was not bound to take it from the War Office, the Privy Council or any other authority.<sup>(1)</sup> The original text<sup>was</sup> in accordance with the ordinary experience of the necessities of military discipline and was, moreover, in precise agreement with the American Manual.<sup>(2)</sup> It would surely be most unfortunate if the Court were to condemn people, in cases where the defence of superior orders was pleaded, by virtue of an amendment to a British Manual, the text<sup>of which</sup> was at variance with the American and other official manuals, as a result of a change introduced in April 1944, whereas the dates in the Charge Sheet began in October, 1942.

Replying to Colonel Smith's arguments, the Prosecutor in the Belsen Trial claimed that the amendment to the Manual was made, however, to bring it in line with almost every writer on the subject, including Professor Lauterpacht and Professor Brierly. It was in fact made in consultation with the American Judge Advocate General, and it was in line with the American law as set forth in American, as opposed to the American Manual, which had not yet been amended.

It must be added, that, if a statement contained in the Manual was, as is stated in the footnote to the British Amendment No. 34, "inconsistent with the view of most writers upon the subject and also with the decision of the German Supreme Court in the case of the Llandovery Castle," there was no obstacle, constitutional, legal or otherwise, to correcting the mistake in the statement of law on the one hand, and to proceeding on the basis of the law, as it had thus been elucidated, on the other.

A second authority on which great reliance has been placed by Counsel, and which has been quoted as stating correct law by Judge Advocates,

---

(1) Like the Defence in the Peleus Trial, Colonel Smith also pointed to the parallel between a war crimes court and a prize court, in arguing that the Manual was not binding on the Court.

(2) Which was then unamended; See p. 41.

in British Trials<sup>(1)</sup> has been the celebrated work, International Law (Oppenheim-Lauterpacht), of which Volume II (6th Edition) contains, on pp 452/3 a passage which is identical with the amended version of paragraph 443.<sup>(2)</sup>

The Judge Advocate acting in the Trial of Karl Buck and Ten Others by a British Military Court at Wuppertal, Germany, 6th - 10th May, 1946, after quoting this passage, added that an accused would be guilty if he committed a war crime in pursuance of an order, first if the order was obviously unlawful, secondly if the accused knew that the order was unlawful, or thirdly if he ought to have known it to be unlawful had he considered the circumstances in which it was given.

Despite the fact that most of the regulations governing trials by United States Military Commissions have included provisions defining the applicability of the plea of Superior Orders, reference has often been made, during trials before such Commissions, to the United States Basic Field Manual F.M. 27-10 (Rules of Land Warfare) which is similar in scope and purpose to the British Manual of Military Law.

Until November 15th, 1944, paragraph 347 of the United States Basic Field Manual provided that individuals of the Armed Forces would not be punished for war crimes if they were committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they were committed by their troops, might be punished by the belligerent into whose hands they fell. It will be appreciated that this provision of paragraph 347 of the American Rules of Land Warfare corresponds exactly to the original text of paragraph 443 of Chapter XIV of the British Manual of Military Law.

By Change No. 1 to the Rules of Land Warfare dated 15th November, 1944 the sentences quoted above from paragraph 347 of the Rules of Land Warfare have been omitted and the following provisions have been added to paragraph 345:-

- 
- (1) For instance the Judge Advocate in the Belsen Trial advised the court to follow the law laid down in this text on the question of Superior Orders.
- (2) Page 452 of this work sets out the literature on the subject.



"Individuals and organisations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished."

It will be seen that the statement of the law contained in the new text of the American Basic Field Manual differs somewhat from the 1944 text of the British Manual, though both abandon the sweeping statements contained in the former text regarding the plea of superior orders. The new British text appears to exclude an unlawful order as a defence, and it is interesting to compare both with Article 8 of the Charter of the International Military Tribunal of 8th August, 1945, under which superior orders were not to free a defendant from responsibility, but might be considered in mitigation of punishment.

The statement contained in the new text of paragraph 345 of the American Basic Field Manual makes it possible to consider superior orders or Government sanction in determining culpability, either by way of defence or in mitigation of punishment.

The provisions of the Field Manual on this point were quoted for instance by the Defence in the Trial of General Anton Dostler, by a United States Military Commission in Rome (8th - 12th October, 1945);<sup>(1)</sup> although this trial was held under the Regulations for the Trial of War Crimes issued for the Mediterranean Theatre of Operations on 23rd September, 1945, (see p.35), the provisions contained therein relating to the defence of superior orders were not referred to.

Sheldon Glueck, on pages 155 - 6 of his authoritative work, War Criminals, Their Prosecution and Punishment, also provides some guidance in the matter. Glueck, seeking to reconcile the dilemma in which a subordinate is placed by an order manifestly unlawful, compliance with which may later subject him to trial for a war crime, and refusal to comply with which may immediately subject him to disciplinary action,

---

(1) Law Reports of Trials of War Criminals, Vol.I, pp.22-34.

perhaps death, suggests that the following rule be applied: "An unlawful act of a soldier or officer in obedience to an order of his government or his military superior is not justifiable if when he committed it he actually knew, or, considering the circumstances, he had reasonable grounds for knowing that the act ordered is unlawful under (a) the laws and customs of warfare, or (b) the principles of criminal law generally prevailing in civilized nations, or (c) the law of his own country. In applying this rule, whenever the three legal systems clash, the last shall be subordinate."

Interesting material relating to the defence of superior orders is to be derived from a study of the Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy, before a United States Military Commission, United States Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, on 7th - 13th, December, 1945.

Masuda, who committed suicide before the trial, had ordered three subordinates in the Imperial Japanese Navy to shoot to death three United States airmen, who had become unarmed prisoners of war, and a fourth, who had custody of the prisoners, to hand them to the three executioners. These four were brought to trial for the part which they had played in the killing of the airmen.

The accused pleaded not guilty. They admitted their part in the execution of the American Prisoners of War, but claimed as a defence that, as military men of the Japanese Empire, they were acting under orders of a superior authority, which they were bound to obey.

One of the defending Counsel, himself a Lieutenant-Commander in the Imperial Japanese Navy, described the absolute discipline and obedience which was expected from the Japanese forces, and quoted an Imperial Rescript which included the words: "Subordinates should have the idea that the orders from their superiors are nothing but the orders personally from His Majesty the Emperor." The Japanese forces were exceptional



among the world's armed forces in this respect and, therefore, he claimed, it was impossible to apply therein "the liberal and individualistic ideas which rule usual societies unmodified to this totalistic and absolutistic military society." The strategic situation was so critical in early 1944 that the characteristic referred to was displayed in the Jaluit unit to an exceptional degree. Furthermore the order was given direct by a Rear-Admiral to "mere Warrant Officers and Petty Officers." If they had refused to obey it, "everyone would have fallen upon them."

As the accused had no criminal intent, it was clear that they had committed no crime.

The other defending Counsel pointed out that the executioners each requested that they should not be assigned the task of carrying out the killing, but when emphatically ordered by Masuda, a man of strong character, they had obeyed, in accordance with their training. Their actions were not of their own volition; they were the will of another.

Tasaki, the custodian of the prisoners of war, who arranged their handing over to the executioners, also merely acted in accordance with the orders of the Rear-Admiral. Certainly the latter had told him why he was to surrender the prisoners, but this fact in no way placed him in the position of a participant in the commission of a crime.

In presenting the case for the Prosecution, one of the two Judge Advocates quoted three authorities with the intention of securing the rejection by the Commission of the plea of superior orders. The Judge Advocate General, he said, had made reference, in Court Martial Orders 212-1919, to the following dictum in U.S. v. Carr (25 Fed. Cases 307): "Soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor by his oath to do it. So far from such an order being a justification it makes the party giving the order an accomplice in the crime."

In another case, involving the killing of a Nicaraguan citizen by a member of the United States forces, the Judge Advocate stated: "An order illegal in itself and not justified by the rules and usages of war, or in its substance clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that it was illegal, will afford no protection for a homicide, provided the act with which he may be charged has all the ingredients in it which may be necessary to constitute the same crime in law" (CMO 4-1929).

In the opinion of the Judge Advocate, however, the statement of the law most clearly in point was contained in "the rules promulgated by the Supreme Command of the Allied Powers for use in war crime cases. This body of international law, briefly known as the SCAP rules and adopted by the Commission at the direction of the Judge Advocate General of the Navy, has the following provision applicable to the defence raised by the accused, quoting sub-paragraph (f) of paragraph 16:

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

Two problems arise from the above arguments. In the first place the question may be asked what is meant, in three passages quoted by the Judge Advocate in securing the rejection of the defence of superior orders, and elsewhere in the literature on the subject, by the statement that a soldier is entitled under International Law to obey only commands which are lawful? Must these commands be lawful under the Municipal Law governing the soldier, or under International Law? The extract from the judgment in U.S. v. Carr leaves the point in doubt. So, strictly speaking, does the dictum taken from the Nicaraguan case since it is not clear whether the passage "and not justified by the rules of usages of war" is intended to amplify, or to be in addition to, the words "illegal in itself". If it were the latter, the word "illegal" could be taken to mean illegal "under Municipal Law".



The question is one of great importance. If an order is legal under International Law, it is difficult to see how an act committed in obedience to it could be illegal under that system. If the act were thus legal in itself there would be no need for an accused to have recourse to the defence of superior orders. On the other hand, if the order need only be legal under Municipal Law, it would be possible for the head of an authoritarian state to order the execution of all prisoners of war and for all his armed subordinates to carry out such an order and remain entirely innocent of any war criminality.

Secondly, if the plea of superior orders is to be recognised as a defence, or even only an argument in mitigation of sentence, some principle must be evolved which would determine the limits of its validity. Four possible criteria were touched upon during the trial:

- (1) The degree of military discipline governing the accused at the time of the commission of the alleged offence.

Defending counsel laid great stress on the exceptionally strict obedience to orders which was expected from a Japanese soldier. In so far as the plea of superior orders derives what strength it may have from the presence of conflicting loyalties in the mind of the accused, this argument is perfectly valid. On the other hand, in view of the fact that the Allied Powers included among their war aims the overthrow of the dictatorial system of government, it is not likely that the prevailing opinion would allow a person accused of war crimes to plead in defence the very disease against which the war was fought. Furthermore, general agreement will probably be given to the Judge Advocate's opinion that: "The Japanese Army must observe the same rules that the United States fighting man, the man from Russia and the man from Great Britain must observe. The law is no respecter of individual nations. If it is to be an effective law, it must govern the actions of all nations."

(ii) The relative positions in the military hierarchy of the person who gave and the person who received the order.

Counsel for the defence pointed out that the order was given by a Rear-Admiral, to "mere Warrant Officers and Petty Officers". Legally perhaps, such commands should bind the subordinate no more and no less than those of an immediate superior, yet it has to be recognised that, since the whole defence is based on a psychological condition, the state of mind of the accused, the argument of the defence has some weight.

(iii) The military situation at the time when the alleged offence was committed.

The defence pointed out that discipline at Jaluit was the stricter because of the nearness of the United States forces. This defence is not the same as that based on military necessity, when using which the accused pleads that, irrespective of any superior orders, he acted as he did because the military situation made it necessary for him to do so.

If this argument were to be admitted, it would be for the defence to prove that the situation had actually altered the accused's attitude towards his superiors so as to make him feel that his obligation to obey them had become stricter.

(iv) The degree to which "a man of ordinary sense and understanding", (quoting the Judge Advocate in the Nicaraguan case) would see that the order given was illegal.

This test is valid, whether legality under Municipal Law or under International Law is meant. For Anglo-Saxon lawyers its use would be reminiscent of the frequent references to the hypothetical "average reasonable man", and of a passage of Dicey's in reference to the analogous conflict between a soldier's duty to obey orders and his allegiance to the general law of the land: "...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 edition, p. 302, quoted by Professor Lauterpacht in British Yearbook of International Law, 1944, p. 72)



The first three of these suggested criteria demonstrate an awareness of the heavy pressure under which an accused may be acting in obeying an order. The International Military Tribunal at Nuremberg, commenting in its judgment on Article 8 of its Charter apparently had the same consideration in mind when it said: "The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible".(1)

Some instances in which the plea has been successful and some in which it has failed are now to be quoted in order to illustrate the extent of recognition given thereto.

The Judge Advocate in the Masuda trial, quoting the "SCAP" rules, admitted that the plea might be effective in mitigation of sentence. The custodian of the prisoners, in his evidence, stated: "I had no intent to kill them as well as no malice. All I did was to relay the order mechanically and let the flyers be released." The plea was effective in reducing his sentence to one of imprisonment for ten years.

Sitting from 23rd April to 3rd May, 1946, the French Permanent Military Tribunal of Strasbourg tried ex-Gauleiter Wagner and certain of his underlings for offences committed by them in Alsace during the German occupation. One of the accused, Ludwig Luger, formerly Public Prosecutor at the Sondergericht of Strasbourg, was charged with having been an accomplice in murder. The charge was made in the Indictment that, during the trial of a group of 13 Alsations accused of murdering a frontier guard during an attempted escape to Switzerland, Luger acknowledged that there was no evidence of the guard having been killed by any of the accused yet demanded the death sentence, which was passed on all 13 accused. Nevertheless Luger was acquitted, the Permanent Military Tribunal finding that he had acted under pressure from Wagner, then Gauleiter and Reich Governor of Alsace (The Indictment alleged that it

---

(1) British Command Paper, Cmd. 6964, p. 42.

was Wagner's normal routine to examine an Indictment before a trial was held before the Sondergericht, and to communicate to Luger his orders concerning the penalty which the latter was to demand).

This French case is interesting also because it represents an instance in which the defence of superior order was pleaded, and successfully, not by a member of the armed forces but by a civilian, a member of the German administration of an occupied territory.

The Supreme Court of Norway provides the next example. Hauptsturmführer Wilhelm Artur Konstantin Wagner was charged before the Lagmannsrett (District Court) at Eidsivating with having committed war crimes in that he, in violation of the laws of humanity, was concerned in the deportation and death of 521 Norwegian Jews. The Lagmannsrett found him guilty and sentenced him to death. He appealed to the Supreme Court on the grounds, inter alia, that the punishment decided by the Lagmannsrett was too severe, the majority of the judges having failed to consider that he had acted on superior orders and that in his capacity of a subordinate he could not have prevented the carrying out of the decision of the German and Quisling Governments.

When discussing the severity of the punishment decided upon by the Lagmannsrett, the President of the Court agreed with the minority of that Court that it had been established that the defendant held a very unimportant position in the Gestapo and that there was nothing to show that he had taken any initiative in the action. His part had been to pass on the orders from Berlin to the Chief of the State Police and to execute the orders of his superiors. He was sure that if the defendant had refused to obey orders, he would have had to pay for the refusal with his life.

On the other hand, it had been ascertained that the defendant, when superintending the embarkation of the Jews, had personally gone to see to it that more provisions were handed out to them.



He therefore suggested to fix the punishment to 20 years penal servitude. The sentence was carried by a majority of three to two.

Two more examples of trials in which the Court considered the circumstance that an accused acted under superior orders may be quoted, each relating to trials by United States Military Commissions. On January 24th, 1946, a General Military Government Court sitting at Ludwigsburg found two German civilians, Johann Melchior and Walter Hirschelmann guilty of aiding, abetting and participating in the killing of two prisoners of war by shooting them, but sentenced them to life imprisonment; the records make it clear that the death sentence was not inflicted because the accused had acted under the orders of a Kreisleiter. Karl Neuber was found guilty on April 26th, 1946, by a General Military Government Court at Ludwigsburg, of aiding, abetting and participating in the killing of prisoners of war. He had acted on the orders of Criminal Commissar Weger, in whose office he was a filing clerk. The sentence passed was one of imprisonment for seven years, and an examination of the record shows that the Court, in fixing the sentence, bore in mind the fact that Neuber acted under pressure of superior orders.

Trials in which the defence of superior orders, duress or coercion, has been unsuccessfully pleaded abound. In a number of these, reliance was placed by the Defence on either the so-called Führerbefehl of October 18th, 1942, or upon alleged orders that "terror flyers" were no longer to be granted the protection accorded to prisoners of war.

In Articles 3, 4 and 5 of the former, (1) Hitler addressed the following orders to all officers in the German army:

"3. Therefore I command that: Henceforth all enemy troops encountered by German troops during so-called commando operations, in Europe or in Africa, though they appear to be soldiers in uniform or demolition groups, armed or unarmed, are to be exterminated to the last man, either in combat or in pursuit. It matters not in the least whether they have been landed by ships or planes or dropped by parachute.

---

(1) According to the text produced by the Defence in the Trial of General Anton Dostler (see p.51).

If such men appear to be about to surrender, no quarter should be given them on general principle. A detailed report on this point is to be addressed in each case to the OKW for inclusion in the Wehrmacht communiqué.

4. If members of such commando units, acting as agents, saboteurs, etc., fall into the hands of the Wehrmacht through different channels (for example, through the police in occupied territories), they are to be handed over to the Sicherheitsdienst without delay. It is formally forbidden to keep them, even temporarily, under military supervision (for example, in P/W camps, etc.).

5. These provisions do not apply to enemy soldiers who surrender or are captured in actual combat within the limits of normal combat activities (offensives, large-scale air or seaborne landings). Nor do they apply to enemy troops captured during naval engagements, nor to aviators who have baled out to save lives, during aerial combat."

Unsuccessful reliance was placed upon these orders by the Defence in the Dostler Trial,<sup>(1)</sup> and upon similar orders (or perhaps the same orders,<sup>a</sup> slightly different account of them being given in evidence) in the Trial of Karl Buck and Ten Others by a British Military Court in Wuppertal, Germany, May 6th - 10th, 1946, in the Trial of Karl Adam Golkel and Thirteen Others by a British Military Court, also in Wuppertal, May 15th - 21st, 1946, and in other trials.

---

(1) See War Crime Trial Law Reports, Volume I, pp. 22 - 34.



In a trial before a United States Military Commission at Freising, Germany, Bury, ex-police chief of Langenselbod, Kreis Hanau, Germany, and Hafner, ex-policeman in the same place, were accused of unlawfully killing a United States prisoner of war. It was alleged that the former accused delivered the prisoner to the latter, with instructions to kill him, and that Hafner carried out these orders. The airman was taken to a secluded spot and shot. Bury stated that he had orders that "terror flyers" were no longer to be granted the protection of prisoners of war and were to be killed by lynching or beating and that the police were not to protect "terror flyers" if the populace lynched them. Both accused were sentenced to death by hanging and the sentences were confirmed.

The plea of superior orders was raised on behalf of both accused, but the Commission rejected it.

It is worthy of note that his own testimony showed that Bury had some latitude in determining whether or not any specific flyer should be killed. He received no explicit order with respect to the victim, and there was nothing to show that the haste and callousness with which the American flyer was dispatched was made necessary by the circumstances. Hafner is not recorded as having made any protest against the order. When he reported to Bury that the job was done, Bury replied, "It is right so".

X        X        X

As was suggested at the beginning of this section,<sup>(1)</sup> the argument that a soldier cannot, under conditions of military discipline, lightly disobey an order is not without some weight, and the plea based on argument by Defence counsel in the Masuda Trial has often been repeated elsewhere. A variation is to be found in the argument of Counsel for Dr. Klein, one of the accused in the Bolsen Trial;<sup>(2)</sup> Counsel claimed that if a British soldier refused to obey an order he would face a Court Martial, where he would be able to contest the lawfulness of the order, whereas Dr. Klein had no such protection.

Nevertheless the rights of the unfortunate victim must also be kept

---

(1) See p.35.

(2) See War Crime Trial Law Reports, Volume II, p.79.

constantly in mind.

The material comprising this section has been of two kinds:

i) Material setting out the circumstances in which the plea may be or has been successfully put forward. Quotations from the various authorities which make the illegality, or the recognition of the illegality, or otherwise, of the order in some way or other the criterion fall into this category, as do also the descriptions of such trials as the Wagner Trial<sup>(1)</sup> and the Masuda Trial<sup>(2)</sup> in which the plea had some effect.

It is difficult to say at present how far such criteria as those set out on pages 46 - 48 are followed by Courts and how far they constitute suggestions de lege ferenda, but indications of a realisation that all cases cannot be treated alike are not lacking. The Prosecution in its opening statement in the Trial of Wilhelm List and others,<sup>(3)</sup> in discussing the controversy which had arisen over the trial of high-ranking ex-enemy commanders, said:

"Others and quite different doubts have been raised by some who, with a blurred vision of military discipline, suppose that military men are a sort of race apart, who are not responsible for their actions because they are expected to obey orders. But the law and code of the German Army itself says that it is the duty of every soldier to refuse to obey orders that he knows to be criminal. This may be hard for the ordinary soldier acting under pistol-point orders from his lieutenant. It is far less difficult for high-ranking commanders such as the men in the dock."<sup>(4)</sup>

ii) Material defining the legal effect of the plea when successfully put forward. The enactments and other authorities set out above make it clear that, while the Defence can never claim that superior orders represent an absolute defence which would remove the legal guilt of the prisoner (as

---

(1) See p. 48 - 9.

(2) See p. 48.

(3) By a United States Military Tribunal in Nuremberg. The trial has not yet been completed.

(4) Italics inserted.



would, for instance, a successful plea of insanity), the Court may consider the fact that an offence was committed under orders as a mitigating circumstance and may therefore inflict a lighter penalty than would have been imposed, or may impose no penalty at all.

The following translated extract from pages 243 - 5 of Professor Michel de Juglart's work, Répertoire Methodique de la Jurisprudence Militaire is reproduced here since it sums up, not only the problem involved in the admissibility or otherwise of the plea of superior orders, but also the various possible approaches to the question, and, in its conclusion, the solution generally adopted:

"Will it be necessary to punish without discrimination those who, in obedience to Superior Orders, have struck prisoners, shot hostages and pillaged property? A distinction has always been made in this connection between civilians and soldiers. Civilians are assumed to have an opportunity for consideration, for discussing the orders they received from their superiors, and one therefore considers in general that they commit an offence if they carry out an order which they regard as illegal ... On this question, the rules of (French) substantive law were in consequence sufficiently flexible and sufficiently precise to permit of the punishment of the many offences committed during the war against Frenchmen by German civilians in Germany or in France.

"For soldiers on the other hand the demands of hierarchical authority and of discipline profoundly alter the situation. But is it necessary to admit that a soldier shall escape all criminal consequences under the pretext that he was bound to obey the one who gave him illegal orders? This question occupied the minds of French penologists to a great extent during the war of 1914 to 1918, when the application of Municipal Law to acts of war in violation of International Law was being discussed by the Société des prisons. The majority agreed to recognise that **military** discipline was absolutely indispensable, that one could not admit that soldiers, non-commissioned officers, or even commissioned officers should discuss the orders which were given them, it being admitted that they

cannot in general estimate the legality of these orders. The exculpating circumstances described in Article 327<sup>(1)</sup> was thus in large part admitted. Consequently the extent of the application of punishment to acts of war was considerably reduced and there only remained, as a last shift, the possibility of the resort to reprisals, dangerous though it was for a people such as ours to make use of such a method.

" It was on this question that the legislator in 1944 was led to make a new departure. In amending the legal texts he had the choice between three alternatives. He could first conceive of legislation in which the circumstances set out in Article 327 would always have been excluded not only as a complete defence but also as an extenuating circumstance or an excuse from the moment he found himself faced with an offence committed by a civilian or a soldier during war. This was the solution which M. Huguonoy seems to approve, in a much more general way it is true, for orders given to officers, and he quoted the example of a colonel who received from his superior orders to make his troops intervene to support a coup d'état.<sup>(2)</sup> It is not so much the manifest illegality of the order received as the very situation in which the accused is placed which explains this solution. For others it would seem best to examine in detail each particular case in order to find whether a criminal element is involved. Was he who committed the offence acting on specific orders? Was he, for example, a member of an execution squad? Then one should not condemn him because he could do no other; on the other hand was he relying on a kind of general order or a general authorisation which stated: "You may kill", and did he perform the killing in virtue of an order of this nature? He has committed a crime for which he is fully responsible.<sup>(3)</sup> It is this approach which Judge Jackson seems to support in his report to President Truman, in which he writes:

---

(1) Article 327 of the French Code Pénal provides: "No crime or delict is committed when the homicide, wounding or striking was ordered by the law or by legal authority."

(2) Huguonoy, Traité de droit pénal militaire, p.398.

(3) Normand, Société des prisons, 16th June 1915: Revue pénitentiaire, 1915, p.470.



" 'There exists a province in which obedience to superior orders shall prevail as a defence; if a soldier is placed in an execution squad he must not be made responsible for validity of the sentence. But the question is very different when a person, by reason of his rank or of the latitude of the orders which he has received has full liberty of action. Superior orders as a means of defence could not apply in the case of voluntary anticipation in an organisation of criminals or conspirators like the Gestapo or the S.S.' "

" There exists an intermediary approach which the legislators of the Ordinance of 1944 have adopted; it consists in excluding in general the command of the law or the orders of legitimate authority as a justifying circumstance, while retaining them as an extenuating factor or excuse. The criminal character of the act therefore always remains, but an individualisation of the penalty, imposed more or less severely according to the case, permits a modification of the consequences. It is by this system that the draftsmen of the Code Pénal and the Code de Justice Militaire have sometimes been inspired. It is thus that in the circumstance described in Article 441 of the Code Pénal and Article 221 paragraph 3 of the Code de Justice Militaire, a lessening of the penalty is provided for in the case of certain persons prosecuted for pillage in gangs, or destruction; for if these persons prove that they had with them persons who instigated or provoked the offence they may (by the first provision) or must (by the second) benefit from a lessening of the penalty. An examination of these texts shows that the legislator has two ways at his disposal of securing in this connection an individualisation of the penalty; he can in the first place impose a lessening of the penalty, and this is what he has done in Article 221 paragraph 3 of the Code de Justice Militaire, but he can also leave it to the Judge to apply where desirable (s'il y a lieu) a less severe penalty (Article 441 of the Code Pénal), or even to impose no penalty. It is the latter course which the Ordinance of the 28th October, 1944, had adopted....."

RIGHT OF THE ACCUSED TO A FAIR TRIAL

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

1. Right of Accused to know the Substance of the Charge

Paragraph (a) of Article 16 of the Charter of the Nuremberg International Military Tribunal, which falls under the heading: IV-Fair Trial for Defendants, provides that:

"The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial."

Similarly, Article 9 (a) of Section III - Fair Trial for Accused - of the Tokyo International Military Tribunal runs as follows:

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

The Pacific September and December Regulations and the China Regulations for trials by United States Military Commissions all provide that: "The accused shall be entitled: 'a. To have in advance of trial a copy of the charges and specifications, so worded as clearly to apprise the accused of each offence charged'."



The equivalent provision governing trials by British Military Courts is Rule of Procedure 15, which states that: "15 (A). The accused, before he is arraigned, shall be informed by an officer of every charge on which he is to be tried....the interval between his being so informed and his arraignment should not be less than twenty-four hours. (B). The officer, at the time of so informing the accused, shall give the accused a copy of the charge-sheet, and where the accused is a soldier, should, if necessary, explain the charge-sheet and charges to him, and should also, if he is illiterate, read the charges to him."

2. Right of Accused to be Present at Trial and to give

Evidence.

Article 16 (e) of the Charter of the Nuremberg International Military Tribunal provides that:

"A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution."

Article 9 (d) of the Charter of the International Military Tribunal for the Far East runs as follows:

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

Rule of Procedure 40 makes the following provision relating to trials by British Military Courts:

"40 (A). At the close of the evidence for the prosecution the accused shall be told by the court that he may, if he wishes, give evidence as a witness, but that if he gives evidence he will subject himself to cross-examination."

The practice is for the Judge Advocate or, if there is none, the President of the Court, to tell the accused that he has three alternatives: to give evidence on oath, to make a statement not on oath or to remain silent, and to explain to him his position along the lines set out in the following footnote to Rule of Procedure 40 (A): "The Judge Advocate or, if there is none, the president must explain in simple language to the accused, especially if he is not represented by counsel or defending officer, that he need not give evidence on oath unless he wishes to do so. He must also be told that if he gives sworn evidence he is liable to be cross-examined by the prosecutor and questioned by the court and judge advocate. He should also be informed that evidence upon oath will naturally carry more weight with the court than a mere statement not upon oath."

The right of an accused to appear at his own trial and to give evidence if he pleases is also safeguarded, either explicitly or implicitly, by the regulations governing trials by United States Military Commissions.

3. Right of Accused to have the aid of Counsel

Article 16 (d) of the Charter of the International Military Tribunal provides that:

"(d). A Defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel."

Article 9 (c) of the Charter of the International Military Tribunal for the Far East seems to go even further, in view of its final sentence:

"(c). Counsel for Accused. Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request



the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial."

Regulation 7 of the Royal Warrant provides that Counsel may appear on behalf of the Prosecutor and accused in like manner as if the Military Court were a General Court Martial. The appropriate provisions of the Rules of Procedure, 1926, apply accordingly. In practice accused persons tried as war criminals are defended either by advocates of their own nationality or by British serving officers appointed by the Convening Officer, who may or may not be lawyers.

The relevant United States provision assure a similar right to the accused. The following provision is contained in Article 5 b of the Pacific December Regulations:

"The accused shall be entitled: .....To be represented, prior to and during trial, by counsel appointed by the convening authority or counsel of his own choice, or to conduct his own defence.

To testify in his own behalf and have his counsel present relevant evidence at the trial in support of his defence, and cross-examine each adverse witness who personally appeared before the commission."

The corresponding wording in the China Regulations (Article 14 (b)), even contains a mandatory element:

"The accused shall be entitled: .....To be represented prior to and during trial by counsel of his own choice, or to conduct his own defence. If the accused fails to designate his counsel, the commission shall appoint competent counsel to represent or advise the accused."

4. The Right of the Accused to have the Proceedings  
made Intelligible to him by Interpretation

Most persons accused of war crimes do not speak the same language as the members of the court, or of most of the witnesses (particularly those called by the Prosecution) or of counsel. Consequently the

question of making the proceedings intelligible to the accused usually arises.

Article 16 (c) of the Charter of the International Military Tribunals states that: "A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands".

Article 9 (b) of the Charter of the International Military Tribunal for the Far East provides as follows:

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

In Article 9, the United States European Directive lays down that:

"The accused shall have the right to have the proceedings of the commission interpreted into his own language if he so desires."

The Pacific September Regulations in Article 14 (d), provide that the accused shall be entitled:

"To have the charges and specifications, the proceedings and any documentary evidence translated when he is unable otherwise to understand them."

The China and Pacific December Regulations contain the same rule, except that the latter makes reference to "the substance of the charges and specifications" instead of "the charges and specification."

An examination of the records of war crime trials indicates that this right of the accused has been well preserved.

Thus, in the Belsen Trial, immediately before the hearing of the evidence of the Prosecution witness Dr. Ada Bimko, Lieutenant Jędrzejowicz, Defence Counsel to the Polish accused, 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 could not possibly know



how to cross-examine except on instructions from the accused whom he represented and his instructions must necessarily be determined by the evidence. The Judge Advocate advised the Court that he did not think that anybody should waive the rights of a person who did not understand a language when serious accusations of fact were being made. The Defending Officers were no doubt endeavouring to shorten the proceedings but he thought that the suggestion would be wrong in law.

The Court decided that the evidence must be translated into Polish so that the Polish accused would understand it, except in any case where a particular witness was called to make a specific accusation against one or two of the German accused and there was no question of that witness raising any point against the Polish accused. In cases where the Polish accused might be implicated by the witness, however, the evidence must be translated into Polish.

Again, in the trial of Erich Killinger and four others by a British Military Court, Wuppertal, November 26th - December 3rd, 1945, presumably since they were ex-members of an interrogation centre the accused all had a knowledge of English. The Court, after receiving a reassurance on the point from the Defence, permitted the non-translation of the oral evidence from English into German, while at the same time stating that a translation would be provided should any accused ask for it.

Some indication of the limits beyond which the courts would not be prepared to go in this matter is provided, however, by the Trial of Oberleutnant Gerhard Grumpelt by a British Military Court held at Hamburg, Germany, on 12th and 13th February, 1946.<sup>(1)</sup> At the very outset of the proceedings, defending Counsel applied for the whole of the proceedings to be translated to the accused. Counsel stated that he would himself address the Court and speak during the whole trial in German.

---

(1) The Scuttled U-Boats Case, see War Crime Trial Law Reports, Vol. I, pp. 55 - 70.

The Judge Advocate thereupon explained the position as follows:

"The language of the Court is English, and it is quite unusual for the Court to be addressed in German. What we normally do is to translate all the evidence so that the accused understands it, but it is quite unusual to translate everything the defending Counsel says."

After ascertaining that Counsel had some knowledge of English, the Judge Advocate requested that Counsel should do his best to address the Court in English, and so far as the evidence was concerned, that would be translated to the accused. The defending Counsel's reply was as follows:

"I must insist upon it that all the most important parts which will be decisive for the judges to judge Gerhard Grumpelt must be in the German language, and I must insist that the German language should be acknowledged here as having the same rights as the English language. I am quite satisfied that things which are not important need not be translated so that the proceedings should not be unduly interrupted, but my opening and closing speech, which are decisive, I shall give in German."

After the Court had conferred, the Judge Advocate provisionally ruled that all the evidence would be translated, but that the Prosecutor's opening address should not be translated in the ordinary way. Counsel stated that this was agreeable to him and added that he understood enough English to follow the Prosecutor, but not enough to deal with the witnesses when in the witness box or in his addresses to the Court. In fact, the defending Counsel's short opening address was made in German and translated at once, and the German text <sup>his</sup> final address, written by himself, was attached to the proceedings.

The interests of the accused in this case were fully safeguarded by the fact that two, and later on, during the evidence for the defence, a further three, officers and soldiers were detailed to act as interpreters.



It is to be noted that the rules of procedure as specified in the Royal Warrant do not contain any express provision either as to the language of the Military Courts trying war crimes cases, or as to the rights of the accused and duties of the defending Counsel as to the language in which they should address the court.

The rules of procedure followed in war crimes trials by British Military Courts are with certain exceptions those followed in English civil courts. It seems beyond doubt that an English Court would have a right to insist on Counsel addressing it in English. The English law on the rights of a non-English speaking accused is at present contained in an obiter dictum of Lord Reading, C.J., in R. v. Lee Kun (1916) 1 K.B. 337, to the following effect: When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence, and is not defended by Counsel, the evidence given at the trial must be translated to him, and compliance with this rule cannot be waived by prisoner. If he is defended by Counsel, the evidence must be translated to him unless he or his Counsel express a wish to dispense with the translation and the judge thinks fit to permit the omission, but the judge should not permit it unless he is of opinion that the accused substantially understands the nature of the evidence which is going to be given against him.

The action of the Court in the Grumpelt trial could in any case be fully explained by reference to two relevant provisions. Regulation 13 of the Royal Warrant states that "In any case not provided for in these Regulations such course will be adopted as appears best calculated to do justice." The same is provided by Rule 132 of the Rules of Procedure made under the authority of the Army Act.

##### 5. Rules Regarding Appeal and Confirmation

An accused may be further preserved from any kind of summary treatment by provisions relating to appeal and confirmation.

While Article 26 of the Charter of the International Military Tribunal states that: "The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review," Article 29 provides for possible intervention by a higher agency in the determination of sentence: "In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof...."

While the question of appeal is not specifically mentioned in the Article, various of those sentenced at Nuremberg did in fact appeal to the Control Council for Germany, though without success.

Similarly Article 17 of the Charter of the International Military Tribunal for the Far East contains the following passage:

"Judgment and Review. The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action. Sentence will be carried out in accordance with the Order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity."

No right of appeal in the ordinary sense of that word exists against the decision of a British Military Court. The accused may, however, within 48 hours of the termination of proceedings in Court, give notice of his intention to submit a petition to the Confirming Officer against the finding or the sentence or both, and the petition must be submitted within 14 days. If it is against the finding it must be referred by the Confirming Officer to the Judge Advocate General or to his deputy.<sup>(1)</sup>

Confirmation by higher military authority is in any case necessary. The finding and any sentence which the Court had jurisdiction to pass, if confirmed, are valid, notwithstanding any deviation from the Regulations or

---

(1) Regulation 10 of the Royal Warrant.



the Rules of Procedure or any defect or objection, technical or other.

An exception exists only in the case where "it appears that a substantial miscarriage of justice has actually occurred." (1)

Similarly, the sentence of a United States Military Commission must not be carried into execution until it has been approved by the appointing authority. Death sentences must, in addition, be confirmed also by the Theatre Commander. The approving and confirming authorities have before them, in acting, a review and recommendation by the appropriate Judge Advocate. Thus, while no "appeal" as that term is used in judicial proceedings is provided for, every record of trial is scrutinised as to the facts and points of law, and the Commanding General has trained legal advice as to the right course to take.

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

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

The reviewing authority may, upon review, inter alia:

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

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

The proceedings shall not be invalidated nor any findings or sentences disapproved for any error or omission, technical or otherwise, occurring at any such proceedings, unless in the opinion of the reviewing authority it

---

(1) Regulation 11 of the Royal Warrant.

shall appear that the error or omission has resulted in injustice to the accused.

A war criminal sentenced by a Norwegian Lagmannsrett has the right to appeal to the Supreme Court of Norway on points of Law or on the question of the severity of sentence, but not on the facts.

French Law makes provisions regarding appeals from French Military Tribunals of which persons condemned by the Permanent Military Tribunals can avail themselves.

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

This appeal to a Permanent Military Appeal Tribunal is the only one possible in war time against a decision of a Permanent Military Tribunal. The former, in accordance with Article 133 of the Code de Justice Militaire is not concerned with reviewing the whole trial conducted by the inferior tribunal, but only with finding whether the judgment delivered thereby constituted a correct application of the law.<sup>(1)</sup>

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

- (1) when the Military Tribunal has not been composed in accordance with the provisions of the Code,
- (2) when the rules of competence have been violated,

---

(1) The Permanent Military Appeal Tribunal does not, therefore, enquire into mere questions of fact.