

"violently with a shod foot," whereby prisoners "were caused pain and some of them injured"; and also by compelling Jewish prisoners to clean prison corridors with a tooth-brush and thereafter "emptying buckets of water over them."

Under a second count the accused was charged with similar offences against the prisoners irrespective of their race or religion. The part taken by the accused from this wider aspect was described as "co-operation in the maintenance of a policy of terrorism and brutality against defenceless arrestees." The charges included physical ill-treatment of the same nature as in the case of the Jews, and also, as a specific offence, denial of "spiritual aid," that is of the attendance of a priest, in the instance of prisoners sentenced to death prior to their execution.

All offences charged were described as having been committed "contrary to the laws and customs of war and to humanity." The accused was held guilty both as actual perpetrator and as a superior who had "permitted the German guards under his command" to commit similar acts.

Finally, the prosecution included, as a separate punishable circumstance, the fact that the accused was a member of "criminal organisations," the Waffen-S.S. and the Sicherheitsdienst (S.D.).

2. Facts and Evidence

The acts charged were substantiated by the testimony of eye-witnesses, who had themselves been prisoners under the accused's guard or who had served as guards under the accused. Their testimony contained the following facts:

On many occasions the accused beat Jewish prisoners with his hands or feet, or with objects such as keys, rubber truncheons and the like. He beat them on the face or the head. Jewish prisoners were ill-treated by him in a far more brutal manner than the other prisoners.

Evidence was also produced to the effect that the offices of a priest had been denied to prisoners sentenced to death.

3. The Case for the Prosecution

The prosecutor asked that the accused be found guilty under the terms of Art. 102 of the Netherlands Penal Code. This Article covers acts of persons "who in time of war lend assistance to the enemy or prejudice the State with respect to the enemy," and carries, in the absence of special circumstances specified in the Article, a maximum penalty of imprisonment for fifteen years. The Prosecutor's plea was made with regard to lesser punishments prescribed for the offence of illegal detention (Art. 282 of the Penal Code) and ill-treatment (Art. 300 of the same code.) In the absence of more serious consequences for the prisoner, such as severe bodily injury or death, illegal detention is punishable by a maximum of seven years and six months' imprisonment. Similarly, ill-treatment unaccompanied by serious consequences for the victim is punishable by a maximum of two years' imprisonment. No such serious consequences would apply in the accused's case.

4. The Defence

The accused pleaded that he had acted upon superior orders and under duress. His contention was that, as a member of the Waffen-S.S., he could not do otherwise than discharge his duties in accordance with orders and methods concerning the custody of prisoners applied by his unit.

5. Findings and Sentence

The accused was found guilty on both counts, that is of taking part in the persecution of Jews by illegally detaining and ill-treating them and of taking part in systematic "terrorism and brutality" by ill-treating prisoners altogether. The above offences were described as war crimes and/or crimes against humanity, as defined in Art. 6 (b) and (c) of the Nuremberg Charter, which constituted at the same time, under Netherlands municipal law, the crime of illegal detention punishable by Art. 282 of the Penal Code, and the crime of ill-treatment punishable under Art. 300 of the same Code.

The Court could not agree with the prosecution that the offences charged fell within the terms of Art. 102 of the Penal Code. If the latter were to be applied it would mean that the defendant, being an enemy, would have "lent assistance" to himself, and this was not the type of case covered by Art. 102⁽¹⁾.

The Court could also not agree that punishment could be imposed for the accused's membership of criminal organisations. The reason given was that the Netherlands metropolitan law had not provided for the punishment of such members and that there was consequently no legal basis for conviction on this ground. In addition, such membership did not add to or substract anything from the criminal nature of the acts committed by the accused against the prisoners.

The accused was acquitted of the specific charge that he was guilty of ill-treating prisoners by denying spiritual assistance to those condemned to death. The Court came to the conclusion that it had not been proved that such denial was contrary to the laws and customs of war. In addition, no evidence was to hand that it was the accused's duty to forward requests for spiritual assistance to the authorities concerned, or that such requests would have succeeded in view of the existing regulations.

The accused was sentenced to 7 years' imprisonment with extenuating circumstances. The circumstances taken into account were that the arrests followed by detentions "did not originate with the accused" and that the latter had "stupidly allowed himself to be carried along with the criminal stream of German terrorism, rather than acted with intent on his own initiative." It was also found that the ill-treatment inflicted was not of a "very serious nature" and that, by ill-treating prisoners, the accused had acted "rather on account of his rough nature than driven by the desire to attack his victims."

⁽¹⁾ The relevant passage of this Article reads as follows: "He who in time of war intentionally lends assistance to the enemy or prejudices the State with respect to the enemy, shall be punished with imprisonment not exceeding fifteen years."

II. PROCEEDINGS BEFORE THE SPECIAL COURT OF CASSATION

1. *Appeal of the Prosecution*

The Prosecutor appealed on two grounds.

While not raising again the issue as to the applicability of Art. 102 of the Netherlands Penal Code, he complained that the punishment imposed under the combined effect of Arts. 282 and 300 of the Penal Code did not correspond to "the gravity of the criminal actions committed by the accused," so that severer penalty should be imposed.

Objection was also raised in regard to the decision of the first court concerning the accused's membership of criminal organisations. The Court had established the fact that the accused belonged to organisations declared criminal by the International Military Tribunal at Nuremberg,⁽¹⁾ and was wrong in holding the view that such membership was not punishable within the jurisdiction of Netherlands Courts. According to Art. 10 of the Nuremberg Charter members of organisations declared criminal by the Nuremberg Tribunal were liable to prosecution by the "competent national authority,"⁽²⁾ which included Netherlands officers competent for the prosecution of war crimes. Membership of a criminal organisation was in itself a war crime, and therefore fell within the jurisdiction of and was punishable by Netherlands courts.

2. *The Accused's Appeal*

The accused appealed on the following grounds:

That, as was admitted by the first Court itself, the illegal detention of prisoners under the accused's guard had not originated from the accused, but from other German authorities. The fact of having been in charge of the prisoners as a guard could not be regarded as complicity in their being illegally detained.

That the punishment was too severe and did not correspond with the gravity of the offences committed.⁽³⁾

3. *The Court's Findings and Sentence*

With respect to the prosecution's appeal the Court concurred with the first Court that the provisions of Netherlands Law applied by it were correctly implemented as to the nature of the offences, and that there was no room for applying Art. 102 of the Penal Code.

It dismissed the plea concerning membership of criminal organisations on the grounds that, in the case tried, such membership was only "a circum-

⁽¹⁾ Both the *Waffen S.S.* and the *Sicherheitsdienst*, of which the accused was a member, were declared criminal organisations by the Nuremberg International Tribunals. See *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, H.M. Stationery Office, 1948, pp. 313-315.

⁽²⁾ Art. 10 of the Nuremberg Charter provides as follows: "In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned."

⁽³⁾ The accused appealed also on the ground that he could not be held responsible on account of his having been an official of the German State. The Netherlands law provides for increase of the penalty wherever the perpetrator of a war crime is an "official." This is an issue of no particular interest from the viewpoint of international law, and is, therefore, not dealt with in this Report.

stance under which the other acts were committed." There was, therefore, no basis for adjudication on this point as a separate offence.⁽¹⁾

The accused was found guilty of the offences as established by the first Court, but in view of the mitigating circumstances and the nature of the offences, his sentence was reduced from 7 to 5 years' imprisonment.

B. NOTES ON THE CASE

1. CRIMINAL NATURE OF VIOLATIONS OF THE LAWS OF WAR AND ITS LEGAL BASIS

In its findings concerning the criminal nature of the acts committed by the accused, the first Court entered into the question of the legal basis on account of which such acts were punishable. On this occasion it gave reasons with which the Court of Cassation, whilst concurring with the first Court as to the fact that the acts concerned were criminal, could not agree.

The first Court came to the conclusion that the acts committed were contrary to the laws and customs of war for the following reasons:

(1) The war between Germany and the Netherlands was "an international crime" on the part of Germany. For this reason "everything done by the Germans as members of the occupying authorities, except

⁽¹⁾ The Court's conclusion was that, for the above reason, solution of "the questions of law raised thereby cannot be obtained in this case." As the Court of Cassation had thus remained silent on the subject, it is appropriate to make the following comments. Art. 10 of the Nuremberg Charter treats membership of an organisation declared criminal by the International Military Tribunal at Nuremberg as a separate offence. For this reason it is possible to hold the view advocated by the Netherlands prosecutor that, on this ground, it is a war crime in itself. The question, however, as to the jurisdiction of Netherlands courts over this particular crime is a separate issue. When in 1946-1947 the Netherlands Special Court of Cassation had considered the question of the jurisdiction of Netherlands Courts over war crimes, it came to the conclusion that, although Netherlands Courts were, generally speaking, competent to implement rules of international law, they could not do so without express municipal provisions to this effect. The Court took the view that, in the specific field of war crimes, such provisions were not present, and recommended the enactment of appropriate legislation. This was done on 10th July, 1947, as a consequence of which the concepts of war crimes and crimes against humanity were formally made part of Netherlands municipal law as they were defined in Art. 6 (b) and (c) of the Nuremberg Charter. In these definitions membership of criminal organisations is not specifically mentioned for the obvious reason that it was given separate treatment in Art. 10 of the Charter. As the Netherlands law had, strictly speaking, confined itself to the definitions of the above Art. 6, the opinion of the first Court that an explicit municipal provision was lacking, has also some grounds. On the other hand, however, the said definitions are not limited to the specific instances there enumerated, so that this leaves room for the inclusion of membership of criminal organisations under the concept of war crimes. The matter is one of legal interpretation and, from the viewpoint of Netherlands law, it lends itself to either solution. Finally, there is also the issue of the competence of Netherlands prosecuting officers to open proceedings in this field. Art. 10 of the Nuremberg Charter gives the right to prosecution to the "competent national authority of any Signatory" of the London Agreement of 8th August, 1945, by which the Nuremberg Charter was brought to life. The Netherlands was not a signatory, but only an "adherent" to the said Agreement and Charter. Some other adhering Powers met this point by making express provision for the punishment of membership of criminal organisations and treating it at the same time as a municipal law offence punishable independently of the Nuremberg Charter and of the proceedings of the Nuremberg Tribunal. Such course was taken, for instance, by France, Czechoslovakia and Poland. This course was not followed up by the Netherlands. For the history and substance of the Netherlands law, see *Annex to Vol. XI of this series*, pp. 89-91, and Notes in the trial of Hans Rauter, pp. 111-113 above. On the issue of the punishment of members of criminal organisations by competent courts, see *History of the United Nations War Crimes Commission, and the Development of the Laws of War*, London, H.M. Stationery Office, 1948, Chapter XI, especially pp. 303 *et seq.*

that which occurred in the normal exercise of the law," was "illegitimate."

(2) Detaining and guarding civilians on account of their race or religion, as well as ill-treating defenceless civilians "were not military operations" and could not, therefore, be justified by the "necessities of war." In virtue of Art. 43 of the Hague Regulations the occupant was, as a rule, under the obligation to respect the laws in force in occupied Holland, and this meant that it was bound to respect the Netherlands Constitution which, in its Art. 4, guarantees protection to persons and property. In virtue of Art. 23 (h) of the Hague Regulations, the occupant was not entitled to suspend the right of the Netherlands population to such protection.

(3) The acts committed were contrary to the laws of humanity, as the latter imposed the duty to "grant aid and protection to the defenceless and needy," whereas the accused's conduct could not be reconciled with this principle.

The Court of Cassation dissented from the first Court's opinion that all acts committed by the Germans against the Netherlands civilian population were criminal because of the war of aggression launched and waged by Germany against Holland. It agreed that the said war was an international crime, and added that on account of this fact the Netherlands "would have been authorised to answer" the aggression "with reprisals, even with regard to the normal operation of the laws of war on land, sea and in the air."⁽¹⁾ However, said the Court, "it is going too far to regard as war crimes all acts committed against the Netherlands or Netherlands by the German forces and other organs during the war, solely on the grounds of the illegal nature of the war launched by the then German Reich." Such acts might be criminal even if the war itself were lawful.

The Court of Cassation dissented also from the reasons given by the first Court under (2) above, and in this connection came to the following conclusions:

The first Court's opinion that the acts committed were criminal because they did not form part of military operations and were thus not justified by the necessities of war, was based upon the erroneous view that the substance of the laws of war was to permit certain acts, whereas it was the opposite which was true: they prohibit certain acts. For this reason the question as to whether or not an act constituted a "military operation" was not decisive for determining whether it represented a war crime or a crime against humanity. This was to be established as an issue in itself in the sense of Art. 6 (b) and (c) of the Nuremberg Charter.

It was also "not reasonable" to make reference to Art. 43 of the Hague Regulations, in conjunction with the Netherlands Constitution. The Court did not elaborate on this point, but presumably meant that the criminal nature of the acts concerned did not depend on whether they were committed in violation of municipal law, either altered or suspended or not, but on whether they were contrary to the laws and customs of war taken in themselves. On the other hand, the Court explicitly dismissed the argument

⁽¹⁾ On the attitude of the Netherlands Courts towards the issue of reprisals in time of war, see *Trial of Hans Rauter*, pp. 129-137 above.

based on Art. 23 (h) of the Hague Regulations, on the grounds that it was meant only to protect rights at civil law and therefore did not apply in this case.

Finally, the Court of Cassation also disagreed with the reason given under (3) above. An act was not a war crime or a crime against humanity because it violated the "moral rule that the defenceless and needy may claim protection and help." It was so on account of its unlawful nature under the laws and customs of war as expressed in Art. 6 (b) and (c) of the Nuremberg Charter.

Subject to these particular differences of opinion the Court of Cassation agreed with the first Court's findings that the acts tried constituted war crimes and/or crimes against humanity and were punishable under the provisions of the Netherlands law applied by the first Court.

2. ILLEGAL DETENTION A CRIME AGAINST HUMANITY

The findings of both Courts show that they had found the accused guilty of complicity in illegal detentions, in so far as this applied to prisoners of the Jewish race.

The relevant passages of the first Court's findings were in the following terms:

"The Court has been convinced and considers legally proved that the accused . . . contrary to the laws and customs of war, . . . :

1. Co-operated in the German policy of humiliation and persecution of the Jews . . . by :

(a) Intentionally assisting in the illegal detention of a number of persons of the Jewish race in that he intentionally kept them illegally confined in the said prisons and guarded them . . ."

The Court of Cassation specified that this fell under the notion of "other inhumane acts committed against any civilian population" before or during the war, as prescribed in the definition of crimes against humanity in Art. 6 (c) of the Nuremberg Charter, and as applicable in Netherlands law according to Art. 27 (A) of the Netherlands Extraordinary Penal Law Decree of 22nd December, 1945.⁽¹⁾

It thus appears that, in this trial, illegal detention was treated as an "inhumane act" on the grounds that it constituted at the same time a case of persecutions on racial or religious grounds, which in itself belongs also to the concept of crimes against humanity as defined in the said Art. 6 (c).

The conviction of the accused is an instance of a case in which persons whose part in illegal detentions are purely instrumental are none the less held responsible as accomplices.

3. DENIAL OF SPIRITUAL ASSISTANCE A CRIMINAL OFFENCE

When considering the charge that the accused was guilty of denying the services of a priest to prisoners condemned to death, the first Court came to the conclusion that it had "not been proved" that the accused's refusal was "contrary to the laws and customs of war or to [the laws] of humanity."

⁽¹⁾ See *Annex* to Vol. XI of this series, pp. 90-92.

that which occurred in the normal exercise of the law," was "illegitimate."

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⁽¹⁾ See *Annex* to Vol. XI of this series, pp. 90-92.

The reason given by the Court was that no evidence was to hand to show that it was "the accused's duty to forward requests for spiritual assistance" to the competent authorities, nor that such requests "would not have been rejected in advance on the basis of the existing regulations."

The Court of Cassation acknowledged that it was within the first Court's powers to decide that the accused could not be held personally responsible on the above grounds, but it made it clear that, in its opinion, denial of spiritual assistance constituted a punishable offence. Its views were expressed in the following terms:

"This Court . . . is of the opinion that the refusal to allow spiritual assistance to someone under sentence of death does . . . in itself definitely constitute a crime, both a war crime and a crime against humanity. However, in the present case the Special Court has passed judgment on grounds which are of a *de facto* nature and for which therefore it remains responsible, that in the given circumstances it was not appellant Zuehlke's duty to further requests for spiritual assistance."

4. PLEA OF SUPERIOR ORDERS IN NETHERLANDS LAW

Unlike the course taken by most countries affected by war crimes during the war 1939-1945, in Netherlands metropolitan special war crimes legislation⁽¹⁾ no specific provision was inserted as to the effect of the plea of superior orders on the personal penal liability of the actual perpetrator of a war crime. The Netherlands common penal law contains a general provision,—Art. 43 of the Penal Code—according to which a subordinate is, in principle, not punishable if the offence was committed in execution of an "official order given him by the competent authority." He is, however, liable to punishment if the official order was given "without competence." But even then, his liability is removed if he had considered "in all good faith" that the order was given "competently," and if his obedience to the order was "within his province as a subordinate."

As reported elsewhere,⁽²⁾ when the enactment of metropolitan Netherlands war crimes laws was under study, the Special Court of Cassation recommended the adoption of the rule contained in Art. 8 of the Nuremberg Charter. This provided the following:

"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."

The starting point of the above rule was thus the opposite of the principle expressed in Art. 43 of the Netherlands Penal Code: according to it the subordinate is penally responsible in spite of the orders, and may obtain only mitigation of the punishment according to the merits of the case. Under Art. 43 the subordinate is, on the contrary, not penally responsible, and may be held guilty only in exceptional cases.

When the provisions relating to war crimes were enacted, the above recommendation was not followed up and the rule of Art. 8 of the Nurem-

⁽¹⁾ Besides the legislation in force in Metropolitan Holland, a separate set of rules is in force in the Netherlands East Indies. See *Annex* to Vol. XI of this series.

⁽²⁾ See *Annex* to Vol. XI, pp. 98-100.

berg Charter was not adopted. This made it uncertain as to what was the position created in Dutch municipal law in regard to war crimes committed upon superior orders. There were, among others, two possible interpretations. The omission of a rule similar to that of Art. 8 of the Nuremberg Charter, could have meant that the rule of Art. 43 of the Penal Code was applicable to war crimes in addition to common law offences and, as a rule, had the effect of relieving from penal responsibility the perpetrator acting pursuant to superior orders. Another possible interpretation was that, in the specific instance of war crimes, the rule of Art. 43 was elastic enough to achieve the same ends as those secured under the Nuremberg Charter. Art. 43 made the subordinate punishable if the orders were issued "without competence" and if the subordinate could not be regarded as having followed the orders "in all good faith" as to their "competency." This made it possible to hold the view that no authority or superior was competent to issue criminal orders, and that consequently every such order was given "without competence."

The Zuehlke trial furnished an occasion to Netherlands Courts, including the Court of Cassation, to make known their views on the subject. They ultimately offered a third solution, according to which neither Art. 8 of the Nuremberg Charter nor Art. 43 of the Netherlands Penal Code were binding upon them, but the issue is treated with regard to certain minimum standards of justice which bring about results similar to those expressed in the Charter.

The first Court expressed the opinion that Art. 8 of the Nuremberg Charter, invoked by the prosecution, was not applicable because it did not, as the Court saw it, express a general rule of International Law and could not therefore be implemented as such by Netherlands Courts. The Court's view was that it constituted a special rule limited to the case of the major war criminals with whom the Charter was solely concerned, and consequently did not apply in the case of other, "minor" war criminals, such as the ones tried by Netherlands and other national courts. In this connection the Court took the view that the "exonerating effect" of a superior order was still valid in the sphere of "minor" war criminals and that therefore the accused had a formal legal basis to plead on those grounds. The Court expressed its opinion in the following terms:

"The accused has pleaded that official orders were given him by his superiors.

"The chief Prosecutor does not consider this plea to be admissible, himself referring to Art. 8 of the Charter whereby an official order was declared to be non-exculpatory.

"This provision, however, . . . has no direct application in the present case, but could apply indirectly if it were to be regarded as a rule concerning a special instance of an express general rule of international criminal law.

"It is the opinion of the Court that this is not so, and it cannot be understood why the exonerating effect of an official order, which is recognised in one form or another in practically all national legislations, should not be valid in the sphere of international criminal law.

"It must be assumed that its operation has been excluded with regard to the 'major' criminals, because they were considered *a priori* to have

wanted to take part in the criminal system of Germany and were, therefore, made individually responsible for the crimes they committed in this system.

"Consequently the accused has grounds for his plea."

While recognising in this fashion and for the above reasons the accused's right to plead not guilty on the grounds of superior orders, the first Court came to the conclusion that, in his case, the plea could not exonerate him from the charges. It based its findings in this respect on the opinion that subordinates were under the obligation not to carry out orders relating to "actions forbidden by international law," and that ignorance of the relevant rules did not "carry with it exclusion from penal liability" of the subordinates. The Court was also of the opinion that custody of persons detained on account of their race or religion, as well as ill-treatment of prisoners, did not belong to the "sphere of military subordination"; that the accused must have had "knowledge" of this; and that he was answerable also under German law, according to which subordinates who knew of the criminal nature of the acts ordered remain penally responsible. These views were expressed in the following terms:

"The Court rejects this plea. Indeed . . . there was no need for him [the accused] in the given circumstances to carry out such orders.

"An order to commit actions forbidden by international law may not be carried out, and a mistaken idea as to the validity or existence of such prohibitive provisions does not carry with it exclusion from penal liability.

"The detention in prison of persons who were incarcerated on the grounds of their origin, or the ill-treatment and humiliation of prisoners, does not belong to the sphere of military subordination.

"The accused, who was not only a prison warder by occupation but had also been trained as a non-commissioned officer, must have known this.

"The accused is also punishable according to provisions in force in Germany, which provide that in spite of an official order a subordinate remains criminally responsible if he knows that the order in question aims at the commission of a punishable act."

The Special Court took much the same course, but furnished a more elaborate legal basis for its findings. It discarded Art. 8 of the Nuremberg Charter for the same reason as the first Court, and also Art. 43 of the Netherlands Penal Code. It laid great stress on the relevance of the German law in the accused's specific case, by taking the view that the responsibility of the accused could best be judged in the light of the latter's hierarchical position under the law of his own country. It was held that this was permissible on condition that the German law in this field met the minimum requirements of justice as recognised by civilised nations, and it was found that this was the case with the German rules concerned. It is on this basis that the Court of Cassation reached the same conclusions as the first Court as to the accused's guilt. Its opinion was expressed in the following terms:

"According to Netherlands law the accused has the right to invoke the plea of official orders as a basis for exoneration from penal liability.

"This right could be limited or excluded only by the presence of a higher rule of law, and in the absence of a rule of international customary law in force during the Second World War, alone Art. 8 of the [Nuremberg] Charter can be taken into consideration in this case.

"This Article, however, does not contain anything before which the Netherlands law . . . should give way.

"As appears from the context of the text [of Art. 8] it relates only to the major war criminals for the trial of whom the International Military Tribunal [at Nuremberg] had been set up, and not to the other war criminals, such as is the appellant himself.

"The said Art. 8 is also not the expression of a principle of international law of wide purport, to be applied to all war criminals without exception.

"All the same, as the Special Court [in the first instance] rightly observes, this provision finds its justification in the exceptional case of the major war criminals within the scope of the German criminal policy.

"The judge is therefore called upon to test appellant Zuehlke's plea of official orders under the written and unwritten Netherlands law in force, according to which the trial of the so-called 'localised' crimes committed by 'minor' war criminals takes place pursuant to the Moscow Declaration of 30th October, 1943.⁽¹⁾

"Art. 43 of the [Netherlands] Penal Code, which is also applicable to military men, does not come into consideration for direct application.

"The judgment of this Court is indeed . . . that an appeal to the above Article is justified only if the authority of the superior giving the order to the subordinate obeying it is based upon Netherlands law or an international rule of law binding upon Netherlands law.

"With the reserve mentioned below, this Court gives its preference to a test under the German law, rather than by an analogous application of Art. 43 of the Penal Code.

"Indeed reason requires that penal consequences of hierarchical subordination be judged according to the official framework within which the accused was placed, provided that his national law answers at least the minimum requirements which can be expected of a civilised nation.

"International law, upon which the trial of war criminals eventually rests, does not permit account to be taken if the accused's national law is below this standard.

"The German law in force during the Second World War did, however, satisfy on this point the minimum requirements.

"Art. 47 of the 'Militärstrafgesetzbuch' [German Military Penal Code] of 1872, which was promulgated again—and on this point remained unaltered—by a Decree of the 'Ministerrat für die Reichsverteidigung' [German Ministerial Council for the Defence of the Reich] of 10th October, 1940, . . . reads as follows:

⁽¹⁾ On the text and effect of the Moscow Declaration on the above point, see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, 1948, H.M. Stationery Office, pp. 107-108.

wanted to take part in the criminal system of Germany and were, therefore, made individually responsible for the crimes they committed in this system.

"Consequently the accused has grounds for his plea."

While recognising in this fashion and for the above reasons the accused's right to plead not guilty on the grounds of superior orders, the first Court came to the conclusion that, in his case, the plea could not exonerate him from the charges. It based its findings in this respect on the opinion that subordinates were under the obligation not to carry out orders relating to "actions forbidden by international law," and that ignorance of the relevant rules did not "carry with it exclusion from penal liability" of the subordinates. The Court was also of the opinion that custody of persons detained on account of their race or religion, as well as ill-treatment of prisoners, did not belong to the "sphere of military subordination"; that the accused must have had "knowledge" of this; and that he was answerable also under German law, according to which subordinates who knew of the criminal nature of the acts ordered remain penally responsible. These views were expressed in the following terms:

"The Court rejects this plea. Indeed . . . there was no need for him [the accused] in the given circumstances to carry out such orders.

"An order to commit actions forbidden by international law may not be carried out, and a mistaken idea as to the validity or existence of such prohibitive provisions does not carry with it exclusion from penal liability.

"The detention in prison of persons who were incarcerated on the grounds of their origin, or the ill-treatment and humiliation of prisoners, does not belong to the sphere of military subordination.

"The accused, who was not only a prison warder by occupation but had also been trained as a non-commissioned officer, must have known this.

"The accused is also punishable according to provisions in force in Germany, which provide that in spite of an official order a subordinate remains criminally responsible if he knows that the order in question aims at the commission of a punishable act."

The Special Court took much the same course, but furnished a more elaborate legal basis for its findings. It discarded Art. 8 of the Nuremberg Charter for the same reason as the first Court, and also Art. 43 of the Netherlands Penal Code. It laid great stress on the relevance of the German law in the accused's specific case, by taking the view that the responsibility of the accused could best be judged in the light of the latter's hierarchical position under the law of his own country. It was held that this was permissible on condition that the German law in this field met the minimum requirements of justice as recognised by civilised nations, and it was found that this was the case with the German rules concerned. It is on this basis that the Court of Cassation reached the same conclusions as the first Court as to the accused's guilt. Its opinion was expressed in the following terms:

"According to Netherlands law the accused has the right to invoke the plea of official orders as a basis for exoneration from penal liability.

"This right could be limited or excluded only by the presence of a higher rule of law, and in the absence of a rule of international customary law in force during the Second World War, alone Art. 8 of the [Nuremberg] Charter can be taken into consideration in this case.

"This Article, however, does not contain anything before which the Netherlands law . . . should give way.

"As appears from the context of the text [of Art. 8] it relates only to the major war criminals for the trial of whom the International Military Tribunal [at Nuremberg] had been set up, and not to the other war criminals, such as is the appellant himself.

"The said Art. 8 is also not the expression of a principle of international law of wide purport, to be applied to all war criminals without exception.

"All the same, as the Special Court [in the first instance] rightly observes, this provision finds its justification in the exceptional case of the major war criminals within the scope of the German criminal policy.

"The judge is therefore called upon to test appellant Zuehlke's plea of official orders under the written and unwritten Netherlands law in force, according to which the trial of the so-called 'localised' crimes committed by 'minor' war criminals takes place pursuant to the Moscow Declaration of 30th October, 1943.⁽¹⁾

"Art. 43 of the [Netherlands] Penal Code, which is also applicable to military men, does not come into consideration for direct application.

"The judgment of this Court is indeed . . . that an appeal to the above Article is justified only if the authority of the superior giving the order to the subordinate obeying it is based upon Netherlands law or an international rule of law binding upon Netherlands law.

"With the reserve mentioned below, this Court gives its preference to a test under the German law, rather than by an analogous application of Art. 43 of the Penal Code.

"Indeed reason requires that penal consequences of hierarchical subordination be judged according to the official framework within which the accused was placed, provided that his national law answers at least the minimum requirements which can be expected of a civilised nation.

"International law, upon which the trial of war criminals eventually rests, does not permit account to be taken if the accused's national law is below this standard.

"The German law in force during the Second World War did, however, satisfy on this point the minimum requirements.

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⁽¹⁾ On the text and effect of the Moscow Declaration on the above point, see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, 1948, H.M. Stationery Office, pp. 107-108.

1. If a penal provision is violated in the execution of an official order, the superior giving the order is alone responsible. Nevertheless the subordinate who obeys is liable to punishment as an accomplice:

(1) If he has exceeded the given order;

(2) If he knew that the superior's order concerned an act aimed at the commission of a common or a military crime or offence.

2. If the guilt is small on the part of the subordinate, his punishment can be dispensed with.

"From this it follows that an order given in the circumstances described in para. 1 under (2) above, does not exclude the unlawfulness of the subordinate's action."

The Court then made reference to authoritative German writers and to judgments rendered by German courts, which both concurred with the Court's conclusion. The Court ended its findings by considering the accused's position in the light of the extent to which he was compelled to act under superior orders, that is with regard to the presence or absence of duress:

"If during the Second World War the doctrine 'Befehl ist Befehl' (orders are orders) was sometimes carried out by the German forces to the extreme of its logical consequences for obviously criminal purposes, no longer compatible with the human dignity of the subordinates, there was no legal basis to do so, and an appeal to duress on the part of the subordinate concerned can at the most be admitted if actual requirements concerning such duress were present.

"The appellant Zuehlke's plea of duress . . . is rejected on the sufficient grounds that it does not appear that any pressure was brought to bear upon him.

"When applying the German law the judge enjoys sufficient discretion to measure the extent of independence left in the face of superior orders according to the importance of the position held by the subordinate concerned.

"With his rank of non-commissioned officer and his position of prison guard only a slight degree of freedom of action can be ascribed to appellant.

"Within this framework some of the grounds on which the Special Court [in the first instance] rejected the appellant's plea of superior orders remain in any case in force.

"Therefore the Special Court has correctly decided that, as the acts with which appellant was charged and which were declared proved, were punishable, so was the appellant himself as their perpetrator punishable, since no grounds for exoneration from punishment have appeared with regard to him."

Apart from the manner in which the plea of superior orders was treated and applied in this trial, the main point of interest from the viewpoint of international law is the attitude taken towards the validity of the principle expressed in Art. 8 of the Nuremberg Charter,

This attitude was that the latter could not be regarded, at least for the time being, as a general rule of international law. This would seem to conflict with the development which took place on the occasion of and after the Second World War, and which was apparent at the time of the trial under review. The position is that, in addition to the Nuremberg Charter, other authoritative documents on the present state of international law, as well as rules of a representative number of nations, have followed the lines of the above Art. 8. Such was the case with the Far Eastern Charter, enacted for the trial of the Japanese major war criminals, and with Law No. 10 of the Allied Control Council for Germany which applies to all categories of war criminals other than those belonging to the class of "major" criminals. Such is also the case with the municipal laws or military manuals issued for the guidance of military personnel of Great Britain, United States, France, China, Canada, Norway, Czechoslovakia, Poland,⁽¹⁾ and even the Netherlands East Indies.⁽²⁾ This development is evidence that, in the present stage of the advancement of international law as generally understood and as applied by individual nations, the above principle concerning the effect of superior orders upon penal liability for war crimes represents the wider consensus of opinion.⁽³⁾

The trial under review illustrates that the differences existing between the principles expressed respectively in Art. 43 of the Netherlands Penal Code and Art. 8 of the Nuremberg Charter, are more of a theoretical than of a practical nature. The former is based upon the principle that, *as a rule*, the subordinate is not guilty when acting upon superior orders he is pledged to obey. The latter is based upon the opposite principle that, again *as a rule*, superior orders do not relieve the subordinate from penal liability and that consequently he is, *as a rule*, liable to punishment as if he had acted without orders. Both, however, operate with exceptions which, in the instance of the Netherlands Penal Code and the German Military Penal Code, bring about practical results similar to those contained in the principle of the Nuremberg Charter. Conversely, the latter makes possible mitigation of punishment which may and in practice do result in freeing the accused from penal responsibility. Whatever the principle chosen as a starting point, the outcome is that cases are tried according to their merits and that justice is done with similar results under either of them.

⁽¹⁾ For the state of the relevant rules prior to this development see H. Lauterpacht, "The Law of Nations and the Punishment of War Crimes," *British Year Book of International Law*, pp. 69-73. For the rules now in force see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, 1948, H.M. Stationery Office, pp. 280-286.

⁽²⁾ See Annex to Vol. XI of this series, pp. 98-99.

⁽³⁾ The accounts of the Netherlands law in the above mentioned *History of the United Nations War Crimes Commission and the Development of the Laws of War*, pp. 285-286, and in the Annex to Vol. XI of this series, pp. 98-100, were given at the time when the Netherlands Courts had not yet expressed opinion on the subject. They should therefore be understood in the light of the position as it arises from the trial under review.

ANNEX

CHINESE LAW

CONCERNING TRIALS OF WAR CRIMINALS

I. INTRODUCTORY NOTES

The trial of war criminals before Chinese courts is regulated by a "Law governing the Trial of War Criminals" of 24th October, 1946. The latter deals with questions of both substantive and procedural law. It defines the rules which are applicable to offences tried as war crimes, and lays down provisions as to the jurisdiction of the competent courts over these offences and the individuals liable to prosecution and punishment for their commission.

The legal basis provided is very wide as it includes, simultaneously and in a given order of precedence, international law, special war crimes rules, and provisions of Chinese common penal law.

The Law of 24th October, 1946, is in many respects guided by circumstances which are peculiar to China and the events she has gone through during the last two decades. It reflects in particular great care on the part of the legislator to provide retribution for a wide range of offences, spread over a long period of time during which the Chinese people had been subjected to an uninterrupted series of atrocities and other crimes at the hands of the Japanese invader.

II. SOURCES OF RELEVANT PROVISIONS

Art. I of the Law of 24th October, 1946, lays down the following rule as to the provisions applicable to war crime trials:

"In addition to the Rules of International Law, the present Law is applicable to the trial and punishment of War Criminals. Cases not provided for under the present Law are governed by the Criminal Code of the Republic of China.

"In applying the Criminal Law of the Republic of China, this Law shall first be applied, irrespective of the status of the offender."

In this manner rules of international law were recognised as the primary source for the trial of war criminals. They are supplemented by the special provisions of the Law of 24th October, 1946, which are valid as "additional" to rules of international law. On the other hand and as a subsidiary source, provisions of the Chinese Penal Code are relevant in cases not covered by the Law of 24th October, 1946, or by rules of international law.

III. DEFINITION OF A WAR CRIMINAL AND A WAR CRIME

Article II of the Law of 24th October, 1946, contains a combined definition of individuals treated as war criminals and of offences falling within the notion of war crimes according to Chinese legislation. It reads as follows:

"A person who commits an offence which falls under any one of the following categories shall be considered a war criminal:

1. Alien combatants or non-combatants who, prior to or during

the war, violate an International Treaty, International Convention or International Guarantee by planning, conspiring for, preparing to start or supporting, an aggression against the Republic of China, or doing the same in an unlawful war.

2. Alien combatants, or non-combatants who during the war or a period of hostilities against the Republic of China, violate the Laws and Usages of War by directly or indirectly having recourse to acts of cruelty.

3. Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as (a) killing, starving, massacring, enslaving, or mass deportation of its nationals, (b) stupefying the mind and controlling the thought of its nationals, (c) distributing, spreading, or forcing people to consume, narcotic drugs or forcing them to cultivate plants for making such drugs, (d) forcing people to consume or be inoculated with poison, or destroying their power of procreation, or oppressing and tyrannising them under racial or religious pretext, or treating them inhumanly.

4. Alien combatants or non-combatants who during the war with or a period of hostilities against the Republic of China, commit acts other than those mentioned in the three previous sections but punishable according to Chinese Criminal Law."

Paragraph 1 of the above Article covers the field of offences known as *crimes against peace* under the rules of international law as expressed in the most recent documents embodying such rules: Article 6 (a) of the Charter of the International Military Tribunal at Nuremberg; Article 5 (a) of the Charter of the International Military Tribunal for the Far East; and Article II (1) (a) of Law No. 10 of the Allied Control Council for Germany.⁽¹⁾

Paragraph 2 covers the field of *war crimes* in the narrower sense, that is of violations of the laws and customs of war. The latter are explicitly provided against in Article 6 (b) of the Nuremberg Charter, Article 5 (b) of the Far Eastern Charter, and in Article II (1) (b) of Law No. 10. Following the practice of some other countries,⁽²⁾ the Chinese Law of 24th October, 1946, contains an elaborate list of offences regarded as constituting war crimes in the narrower sense, similar to that which was drawn up by the 1919 "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties." The list is given in Article III of the Law of 24th October, 1946, and runs as follows:

1. Planned slaughter, murder or other terrorist action.
2. Killing Hostages.
3. Malicious killing of non-combatants by starvation.
4. Rape.
5. Kidnapping children.

⁽¹⁾ For the text of the definitions of crime against peace in the above provisions, see *Trial of Takashi Sakai* in this Volume, pp. 3-4.

⁽²⁾ See for instance *Netherlands Law Concerning Trials of War Criminals* in the *Annex* to Vol. XI of this series, pp. 93-94, and the *Annex* concerning Australian war crimes laws in Vol. V, pp. 95-96.

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6. Enforcing collective torture.
7. Deliberate bombing of non-defended areas.
8. Destroying freighters or passenger boats without previous warning and without regard to the safety of passengers and crew.
9. Destroying fishing boats and relief ships.
10. Deliberate bombing of Hospitals.
11. Attack or sinking of Hospital Ships.
12. Use of poison gas or bacteriological warfare.
13. Employment of inhuman weapons.
14. Ordering wholesale slaughter.
15. Putting poison on food or drinking water.
16. Torturing of non-combatants.
17. Kidnapping females and forcing them to become prostitutes.
18. Mass deportation of non-combatants.
19. Internment of non-combatants and inflicting on them inhuman treatment.
20. Forcing non-combatants to engage in military activities with the enemy.
21. Usurpation of the sovereignty of the occupied territory.
22. Conscription by force of inhabitants in the occupied territory.
23. Scheming to enslave the inhabitants of occupied country or to deprive them of their status and rights as nationals of the occupied country.
24. Robbing.
25. Unlawful extortion or demanding of contributions or requisitions.
26. Depreciating the value of currency or issuing unlawful currency notes.
27. Indiscriminate destruction of property.
28. Violating Red Cross regulations.
29. Ill-treating prisoners of war or wounded persons.
30. Forcing prisoners of war to engage in work not allowed by the International Convention.
31. Indiscriminate use of the Armistice Flags.
32. Making indiscriminate mass arrests.
33. Confiscation of property.
34. Destroying religious, charity, educational, historical constructions or memorials.
35. Malicious insults.
36. Taking money or property by force or extortion.
37. Plundering of historical, artistic or other cultural treasures.
38. Other acts violating the law or usages of war, or acts whose cruelty or destructiveness exceeds their military necessity, forcing people to do things beyond their obligation, or acts hampering the exercise of legal rights.

It should be observed that this list is in many respects wider in scope than the terms used in the 1919 list of war crimes.

Offences included in Article II, paragraph 3, of the Chinese Law of 24th October, 1946, correspond in spirit with the concept of *crimes against humanity* as it evolved in the definitions of Article 6 (c) of the Nuremberg Charter, Article 5 (c) of the Far Eastern Charter, and Article II (1) (c) of

Law No. 10. These provisions cover a field of acts which do not or may not constitute war crimes in the narrower sense, but are similar to them on account of their inhumane nature. They are generally understood to be acts committed systematically, repeatedly and on a vast scale against the civilian population, in pursuance of purposes ranging from the forcible denationalisation of the population to its biological extermination. A notable feature of the Chinese definition is the emphasis on and express reference to narcotic drugs and poisons which are of especial importance in Far Eastern countries. Another emphasis is that put on "stupefying the mind and controlling the thought" of the Chinese population. This, in contradistinction to drugs and poisons which are mentioned separately, would seem to include psychological means of action.

Finally, offences provided against in paragraph 4 are those of Chinese common penal law when committed during the war with or a period of hostilities against China and which, at the same time, constitute neither a crime against peace, nor a war crime in the narrower sense, nor a crime against humanity, as covered by the other paragraphs of Art. II.

From the above classification it appears that the Chinese legislation has adopted the concept of war crimes in a wider, non-technical sense, as a common denominator for types of offences which are, otherwise, distinct one from the other within the body of international law.

IV. PERPETRATORS AND RELEVANT PERIODS OF TIME

According to the above-cited Article II individuals liable to punishment for any of the above types of offences are "alien combatants or non-combatants." This is in accord with the legislation of most countries as well as with rules of international law, according to which the notion of a war criminal is in general limited to subjects of a foreign nation. Subjects of the country whose nationals were victimised, if guilty of one of the above offences, are tried as traitors, quislings or ordinary criminals, as the case may be, under the rules of their country's common law.

This difference is, indirectly, stressed in Article VI of the Law of 24th October, 1946. The latter makes the rules of the Law of 24th October, 1946, applicable "also to war criminals who may have regained Chinese citizenship after 25th October, 1945." The effect is that a former Chinese subject, who had become an alien but had regained his original nationality after the said date, is tried according to his previous alien status, and not as a Chinese citizen.

In the paragraphs of Art. II dealing with the various offences stress was laid on different periods of time relevant for holding the perpetrators guilty under the terms of the Law of 24th October, 1946.

For crimes against peace the period mentioned is that running "prior to or during the war." The time preceding a war relates to "planning, conspiring or preparing" a war of aggression and may therefore go far back in the past according to the case. The same is implied in the definitions of crimes against peace contained in the international documents previously referred to.

For war crimes in the narrower sense the relevant period is that running "during the war or a period of hostilities" against China. It should be

noted that the "period of hostilities," as distinct from that of the war, was inserted with regard to and in order to cover the period during which China and Japan were in a state of *de facto* belligerency before the outbreak of World War II. According to Art. IV of the Law of 24th October, 1946, this state started on 18th September, 1931, that is on the invasion of Manchuria by Japan. The same period was made relevant for crimes punishable under the Chinese Penal Code, as provided by Art. II, para. 4, of the Law of 24th October, 1946.

Finally, the period relevant for crimes against humanity is that running "during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances." The latter part of the provision makes crimes against humanity, as covered by Art. II, para. 3, of the above Law, punishable even when committed before 18th September, 1931. Under the terms of Art. IV the same applies to crimes against peace, as acts undertaken with a view to planning, conspiring for, or preparing a war of aggression, which form part of the concept of crimes against peace, do not lend themselves to be circumscribed by any specific date limit preceding the outbreak of actual hostilities. By providing for the punishment of acts constituting crimes against humanity which were committed before the war,—in China before 18th September, 1931,—the Chinese Law of 24th October, 1946, followed the lines of the Nuremberg and Far Eastern Charters. Both Charters explicitly refer to inhumane acts committed against civilian populations "before or during the war." Under both Charters the proviso is that such acts have been committed "in execution of or in connection with" crimes against peace or war crimes. The position would seem to be similar under the terms of Art. II, para. 3 of the Chinese Law of 24th October, 1946. The latter speaks of acts committed by "alien combatants or non-combatants" pursuant to "intentions of enslaving, crippling, or annihilating the Chinese Nation." The context is that this is done "during the war or a period of hostilities" or "prior to the occurrence of such circumstances." There is little doubt that this phraseology describes in fact acts which include crimes against peace.

According to Art. IV of the Law of 24th October, 1946, the end of the war in China is set at 2nd September, 1945. The same Article specifies that all provisions of Art. II are applicable to offences committed between 18th September, 1931, and 2nd September, 1945, with the exception of acts punishable under para. 1 (crimes against peace) and para. 2 (crimes against humanity) which remain subject to prosecution if committed before 18th September, 1931.

In order to give clear guidance for the trial of offences committed after September, 1945, Art. V of the Chinese Law specifies that such offences, when committed by aliens before their being interned but after 3rd September, 1945, are not tried under the rules of the Law of 24th October, 1946, but under those of Chinese Penal Law and before ordinary military tribunals.

V. STATUS OF THE VICTIMS

The offences tried under the terms of the Chinese Law of 24th October, 1946, are those committed against victims of Chinese nationality. Special provision was, however, made to the effect that offences committed against Allied nations or their nationals, or against aliens under the protection of

the Chinese Government, were also subject to prosecution and trial before Chinese courts. Art. VII of the Chinese Law, which contains the above rule, does not say whether such offences need be committed on Chinese territory or on territory under Chinese control, or whether they include as well offences perpetrated outside Chinese territory. In the former case the rule would be an application of the territorial principle which is at the basis of most penal law systems. In the latter case, the competence of Chinese courts would be based on the principle of the universality of jurisdiction of municipal courts in the sphere of war crimes, as practised by courts of certain countries, such as the United States.

VI. CIRCUMSTANCES NOT EXONERATING WAR CRIMINALS

Art. VIII of the Law of 24th October, 1946, lays down the rule that the following circumstances do not in themselves relieve the perpetrator from penal liability for war crimes:

- (1) that crimes were committed by order of superior officers;
- (2) that crimes were committed as a result of official duty;
- (3) that crimes were committed in pursuance of the policy of the offender's government;
- (4) that crimes were committed out of political necessity.

The above rule follows the lines adopted on the subject in the Nuremberg and Far Eastern Charters, and also in Law No. 10 of the Allied Control Council for Germany. So, for instance, the commission of crimes upon superior orders is dealt with in Art. 8 of the Nuremberg Charter, in the following terms:

"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."

A similar rule on superior orders appears in the Far Eastern Charter and in Law No. 10. The wording of the Chinese Law concerning crimes perpetrated pursuant to one's Government's policy would seem to be covered by the above provision of the Nuremberg Charter where it refers to acts undertaken upon governmental orders. It may well be, however, that the Chinese rule has on this point a wider meaning than that expressed in the concept of an order, and that it includes cases where a governmental policy is carried out without specific orders from superiors, upon the offender's own initiative.

The Chinese rule does not specify the effect of the irrelevance of superior orders, and as a consequence does not expressly provide for mitigation of punishment if the court so sees fit. It is, however, safe to assume that Chinese courts have in this sphere powers similar to those of other courts, both international and municipal, and are therefore entitled to pronounce milder sentences according to the merits of each case.

In addition to superior orders and to acts undertaken pursuant to governmental policy, the Chinese rule refers also to crimes committed as a result of "official duty," and to those perpetrated out of "political necessity." The connotation of both these concepts is that an offence was committed by

individuals holding official positions and acting on behalf of the State or Government. The irrelevance of the offender's official position for his penal responsibility for war crimes is also prescribed by rules of international law, such as, for instance, by Art. 7 of the Nuremberg Charter :

"The official position of defendant's whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."

Similar rules are contained in the Far Eastern Charter and in Law No. 10.

VII. RESPONSIBILITY OF PERSONS IN AUTHORITY

Art. IX of the Law of 24th October, 1946, provides the following :

"Persons who occupy a supervisory or commanding position in relation to war criminals and in this capacity have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as accomplices of the war criminals."

The effect of this provision is that not only superiors who issue orders, but also those who tolerate criminal acts of their subordinates without undertaking appropriate measures with a view to preventing such acts from occurring, are held penally responsible in the same manner as the perpetrators themselves. This rule was recognised by the law of other nations as well and applied in a number of important trials.⁽¹⁾

VIII. PUNISHMENT

The Law of 24th October, 1946, prescribes penalties according to the different types or classes of offences covered by its Art. II.

Art. X contains the following rule :

"War criminals who are guilty of offences provided against under paragraph 1 and paragraph 3 of Art. II shall be sentenced to death or life imprisonment."

The offences concerned in this provision are those constituting crimes against peace and crimes against humanity. It will be noticed that in these cases the choice is left only between the two severest punishments in criminal law.

Art. XI prescribes penalties for offences constituting war crimes in the narrower sense. Penalties are laid down according to the list of offences given in Art. III, and are as follows :

(a) The penalties for offences provided against under items 1-15 of Art. III are death or life imprisonment.

(b) The penalties for offences provided against under items 16-24 of Art. III are, alternatively, death, life imprisonment, or imprisonment for a period of 10 years.

(c) Offences provided against under items 25-37 of Art. III are

⁽¹⁾ See *Trial of Tomoyuki Yamashita*, Vol. IV of this series, pp. 83-96; *Trial of Erhard Milch*, Vol. VII of this series, pp. 61-64; *Trial of General Wilhelm List and others*, Vol. VIII of this series, pp. 88-9; *Trial of Wilhelm von Leeb and 13 others (High Command Trial)*, Vol. XII of this series, pp. 105-12.

punishable by life imprisonment or imprisonment for not less than 7 years.

(d) Offences provided against under item 38 of Art. III are punishable by life imprisonment or imprisonment for not less than 7 years, with the proviso that offences of a more serious nature are punishable by death.

Offences covered by paragraph 4 of Art. II, that is those provided against by the Chinese Penal Code, entail the respective punishments of the Code.

IX. RULES CONCERNING PRESCRIPTION AND REDUCTION OF PUNISHMENT

The effect of certain rules of Chinese common penal law was suspended in the case of war crimes.

Under the terms of Art. IV of the Law of 24th October, 1946, the prosecution of war crimes is not subject to prescription as provided by Art. 80 of the Chinese Penal Code. The latter lays down various periods of time, ranging from one to twenty years, after the expiry of which the prosecution of the offences concerned becomes extinct.

On the other hand, a law of 17th June, 1944, provided for the reduction of punishments in certain cases. Art. XIII of the Law of 24th October, 1946, made such reduction inoperative in war crimes cases.

X. COURTS TRYING WAR CRIMINALS

Individuals guilty of offences under Art. II and III of the Law of 24th October, 1946, are tried by special "Military Tribunals for the Trial of War Criminals." These Tribunals are attached to various military organisations by decision of the Chinese Ministry of Defence. The establishment and powers of such Tribunals are determined by the Chinese War Crimes Commission after approval by the Ministry of Defence and the Ministry of Justice.

According to Art. XVII of the Law of 24th October, 1946, a Military Tribunal for the Trial of War Criminals is composed of 5 military judges and 1 to 3 military prosecutors. The number of both may be increased when necessary. According to Art. XVIII three of the five judges are selected from various military organisations. The remaining two are selected by the Ministry of Justice from provincial or municipal higher courts. A similar selection is made of the prosecutors; one comes from military ranks, and one or two are chosen by the Ministry of Justice from the ranks of prosecutors of provincial or municipal higher courts.

Cases are, as a rule, heard in the seat of the Tribunal. Wherever the case so requires, however, the Tribunal may designate three judges and one prosecutor to hold the trial at the place of the crime.

XI. JUDGMENT, CONFIRMATION OF SENTENCE AND RE-TRIAL

When a trial ends with a verdict of "not guilty" or when the prosecutor deems a prosecution unnecessary or unwarranted, the case is submitted to the Ministry of Defence for confirmation within one week of the pronouncement of the judgment or of the decision not to resume the prosecution. If

the case gives rise to doubts, the Ministry may refer the case back for re-trial on further investigation.

Trials ending in conviction are transmitted to the Ministry of Defence for confirmation. Cases involving death sentences or life imprisonment are further submitted by the Ministry to the President of the Republic for a fiat of execution. If the Ministry or the President consider the judgment to be faulty or improper, they may return the case for re-trial. Every case re-tried is subject to the same procedure as above.

The accused is entitled to appeal for a re-trial under the rules of Chinese military penal law, within 10 days of the judgment.

LAW REPORTS OF TRIALS OF WAR CRIMINALS

continued from p. 2 of cover

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One of the aims of this series of Reports has been to relate in summary form the course of the most important of the proceedings taken against persons accused of committing war crimes during the Second World War, apart from the major war criminals tried by the Nuremberg and Tokyo International Military Tribunals, but including those tried by United States Military Tribunals at Nuremberg. Of necessity, the trials reported in these volumes have been examples only, since the trials conducted before the various Allied Courts, of which the United Nations War Crimes Commission has had records, number over 1,600. The trials selected for reporting, however, have been those which were thought to be of the greatest interest legally and in which important points of municipal and international law arose and were settled.

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Finally, each volume has included a Foreword by Lord Wright of Durley, Chairman of the United Nations War Crimes Commission.

continued inside back cover

LAW REPORTS OF TRIALS OF WAR CRIMINALS

LAW REPORTS OF TRIALS OF WAR CRIMINALS
VOLUME XV

Corrigenda

- Page 21, line 1, "jurist" *should read* "jurists"
,, 50, ,, 8, "mentioned" *should read* "mention"
,, 91, Note 1, line 1. The reference is to Article 2 (2) of the French Ordinance in question
,, 155, Note 1, line 6, "918" *should read* "189"
,, 157, Note 2, "155" *should read* "156"
,, 182, Note 1, line 4, "law mission" *should read* "Commission"

LONDON: HIS MAJESTY'S STATIONERY OFFICE: 1949
July 1949

LONDON: PUBLISHED FOR
THE UNITED NATIONS WAR CRIMES COMMISSION
BY HIS MAJESTY'S STATIONERY OFFICE

1949

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FOREWORD

This Foreword might also be called "Epilogue" because the volume marks the completion, in March, 1949, of an undertaking commenced in the summer of 1946, namely the preparation of a collection of reports of representative trials of war criminals in connection with World War II. It has been pointed out that the main object of these Reports is to help to elucidate the law, i.e. that part of International Law which has been called the law of war. A very general idea of what that means can be found in the judgment of that great judge, the late C. J. Stone, in the Supreme Court of the United States, on Yamashita, reported in Volume IV on p. 38. Stone, C. J., said :

"In *Ex parte Quirin*, 317 U.S. 1, we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offences against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, s. 8, Cl. 10 of the Constitution to 'define and punish . . . Offences against the law of Nations . . .', of which the Law of War is a part, had by the Articles of War (10 U.S.C., ss. 1471-1593) recognised the 'military commission' appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offences against the Law of War. Article 15 declares that 'the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offences that by statute or by the Law of War may be triable by such military commissions . . . or other military tribunals.' See a similar provision of the Espionage Act of 1917, 50 U.S.C., s. 38. Article 2 includes among those persons subject to the Articles of War the personnel of our own military establishment. But this, as Article 12 indicates, does not exclude from the class of persons subject to trial by military commissions 'any other person who by the Law of War is subject to trial by military tribunals,' and who, under Article 12, may be tried by court martial, or under Article 15 by military commission.

"We further pointed out that Congress, by sanctioning trial of enemy combatants for violations of the Law of War by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the pre-existing jurisdiction of military commissions created by appropriate military command, all offences which are defined as such by the Law of War, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognised and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis Powers were parties."

I quote this, here at the outset, to explain that the law of war is a system of law different in character from the ordinary municipal laws of the various countries; it is International Law, not the law of any one State. Stone, C. J., is speaking of one type of Court (the Military Court) frequently made use of to administer and declare this law of war. It is, however, clear that it may be administered by the municipal courts of belligerent countries if these courts are specially commissioned for that object, and equipped if need be with special jurisdiction to enable them to discharge the trust.

The cases reported here will illustrate both types. In the Annexes to the different volumes will be found how different allied nations equipped their municipal courts with the necessary jurisdiction beyond or in modification of their normal functions for the administration of their municipal law. But each court when it so acts is deemed to be administering International Law. In the same way the mandate given to a Military Court, such as the International Military Tribunal and the United States Military Tribunals in which were held the Subsequent Proceedings at Nuremberg, is in general governed by International Law and these courts are municipal courts only in so far as their mandate deviates from International Law. Such a court is an international court, regardless of the circumstance that it is convened by and is administered by a national Government. A precise parallel is afforded by a Prize Court. As the law is International Law, it must not be confused with the municipal law of the convening Government. It is the law of nations, which cannot be created by the enactment of any particular national legislature. No doubt a court commissioned to try cases according to International Law may also be governed in part by some other law, because that law is included in the terms of its commission: a court cannot depart from the mandate given by its convening authority. Generally and substantially, however, the jurisdiction conferred on the courts we are concerned with, whatever their convening authority, will be found to be in accordance with International Law. But if the law of the court cannot be found in the acts of the particular national legislature or in the jurisprudence established by the courts of that country, where, it will be asked, is it to be found? Answers to that question will emerge from considering the decisions reported in these volumes. Stone, C. J., in the judgment just referred to, gave a general answer. More detailed explanations may be extracted from other judgments reported in these volumes. All I want to emphasise at the moment is that the law of war is a definite body of jurisprudence, giving a "standard certain", to quote the words of Scott and Lancing in the Minority Report annexed to the Report of the Commission on Responsibilities issued at the end of World War I. When these distinguished lawyers spoke of a "standard certain" they were adopting the standards familiar to common lawyers who start with traditional rules and develop them to meet the demands of justice in view of the particular cases before them. The law of war has a long history. Some day that history will perhaps be written. At the moment what it is sought to indicate here (as it was in the History recently published of the United Nations War Crimes Commission) is the development of the law of war as illustrated by the decisions of courts of competent jurisdiction in and since the war. One characteristic feature of every law of the common law type, is the apparatus of law reports, which, whether regarded as of coercive authority or of merely persuasive authority, as in the case of the

common law or customary law of war, give legal life and substantial definition to what might otherwise be regarded as a mere collection of moral generalisations. Similarly the development of Prize Law can be traced in the authoritative reports of cases decided in the British Court of Admiralty and in the United States Reports.

The Fourth Hague Convention, which was a revised and enlarged version of the similar conventions which preceded it, sought to safeguard the rights in war, not merely as between the actual belligerent forces *inter se*, but also to secure protection to the civilian populations. This Convention, along with the Conventions for the protection of Prisoners of War (the Geneva Conventions) certainly fulfilled a great purpose in giving a legal form and substance to general rules which had been recognised to some extent in practice: particular instances of the enforcement of the law of war had been recorded, such as the execution of Major André as a spy by General Washington, but only after a fair trial, and the execution of the confederate Colonel Wirz during the American Civil War as a war criminal. But as Stone, C. J., points out in *Ex parte Quirin*, these were only two instances out of many of sentences by Military Tribunals over a long period of years, exemplifying offences against the law of war and enforcing the individual responsibility and the punishment of the offender. The object was to vindicate the rule of the law of war.

At the end of World War I, as everybody knows, there were admirable declarations that war crimes would be punished, and lists of criminals were prepared by a fact-finding committee, but nothing practical was effected towards identifying, tracing and apprehending accused individuals or putting them on trial, though an excellent report, with lists of war crimes, was prepared by the Commission on Responsibilities already referred to. The whole thing was abandoned after a few unsatisfactory trials, though at least one useful judgment was produced by the Leipzig Court in the Llandovery Castle case, and though the Leipzig cases (as they have been called) showed how hopeless it was to expect justice in these circumstances from the courts of the Reich. Hence it came about that the victorious Allies after World War II decided to try war criminals themselves, adopting either the system of the military courts or that of the national courts. They refused to think that Allied courts could not be impartial. Their decision has been amply justified by the trials that have been held. The International Military Tribunals, held one at Nuremberg and the other at Tokyo, stand as convincing proofs that impartial justice can in this way be administered. This has also been shown by the military and the national courts which have held hundreds of trials, a selection from which is contained in these volumes. The presence of neutral judges has been shown to be not essential to maintain a high standard of impartiality and this was in fact fortunate under the circumstances, because neutral judges were in fact not available. Nor had the accused any legal right to object to being tried by such courts; all the accused were entitled to was a fair trial and that they got. Also, as I have stated, the types of courts employed were those traditionally recognised by International Law as competent for war crime trials. The necessity of a fair trial was universally insisted upon by the Allies, and indeed was traditional in this type of case. In Reports contained in Volumes V and VI will be found instances in which it has been held that the denial of a fair

trial was a war crime. There had been at a certain stage a strong effort in certain Allied quarters to dispense with a trial even in the case of the Major Criminals; it was said that was unnecessary because their crimes were notorious to all the world. It would be enough, so it was said, to have a solemn arraignment, stating their crimes and then ordering their executions. That idea was strongly pressed but was successfully resisted as contrary to International Law. So to proceed would have been to substitute an act of power for the execution of impartial justice demonstrated by an open trial in the face of all the world. Justice was done and was seen to be done. By any other procedure the whole impressiveness of the punishment of war crimes would have been prejudiced and indeed completely lost. Incidentally, the advocates of the theory that would dispense with trials do generally accept that criminals such as the major criminals deserved their punishment and were justly punished. The only objection then was that the trial was unnecessary. They should, it is said, have been put to death without trial. The effect would have been paradoxical.

As to jurisdiction the traditional rule is that a Military Court, whether national or international, derives its jurisdiction over war crimes from the bare fact that the person charged is within the custody of the Court; his nationality, the place where the offence was committed, the nationality of the victims are not generally material. This has been sometimes described as universality of jurisdiction as being contrary to the general rule that courts have a jurisdiction limited to the national territory or to the nationality of the injured person. In certain trials dealt with in these Reports, the accused came from several different nations and so also did the victims, and in some trials the crimes were committed on the High Seas or in allied or enemy countries. Where it was in Allied national courts that war crimes were tried, jurisdiction was defined by the national law under which they proceeded. This will be seen by consulting the constituent documents conferring jurisdiction in the various annexes to the volumes. The rules of evidence and the range of punishments will also be found there. The same may be said of the various Charters, Commissions or Warrants under which the Military Courts acted. By International Law the penalty for a war crime is death, subject however to the court imposing a lesser sentence.

As these volumes are intended to form a Case Book of War Crimes, what needs to be done is to state briefly and succinctly the basic and most general rules of this branch of law so that the reader of a particular Report may have before him the setting, or background, or surrounding circumstances (whichever simile is preferred), of law or procedure of the particular trial. Volume XV, which Mr. Brand has prepared, will, I think, be found to satisfy this requirement.

Certain differences may be noted in the trials reported. In some detailed and reasoned judgments are delivered, in others that feature is absent. Thus in the United States Military Commission trials, the reporter is compelled to extract from what happened at the trial the grounds of law on which the Court proceeded: there is almost invariably no reasoned judgment. The same is largely true of the British Military trials, subject to this difference, that in them a Judge Advocate usually gives his reading of the facts and law to the court. This furnishes some clue to the reasons for the decision. In the national courts the practice varies. In the Norwegian

and Netherlands Courts there are reasoned judgments, and other European Allies also adopt their ordinary forms of declaring their judgments. In the International Military Tribunals at Nuremberg and Tokyo, a very elaborate method of stating the grounds both of fact and law for the decision has been adopted. These latter trials lie outside the general scope of these Reports. The judgments are used by way of persuasive precedents only on specific points. But there is a very important series of trials held in Nuremberg after and as supplementary to the International Military trial, called the Subsequent Proceedings. These trials were initiated and conducted by and under the United States Government which provided administrative machinery, prosecutors and judges: the Tribunals involved were described as United States Military Tribunals. In these trials full judgments on fact and law were delivered. The Reports accordingly are fuller and more detailed than is possible where the reporter can only do the best he can with less satisfactory materials. International lawyers will not hesitate to express their appreciation of the help which these trials, conducted by the United States with General Telford Taylor as Chief Prosecutor, have given in the elucidation of the law. They will be indispensable to the student of this branch of law, even though he may criticise particular passages contained in them.

I may here observe that Mr. George Brand, in his valuable notes on most of the Subsequent Proceedings Cases, among other trials, has sought to elucidate what was decided, without criticising. I apologise for departing from that salutary rule in one case, that of the "Hostages", in which I have ventured to express some criticism of the legality under International Law of the killing of hostages. That was one of the Subsequent Proceedings and I wish to make clear that it in no way detracts from my great respect for the valuable labours in the cause of International Law of the Judges, not only in that one but in all the Subsequent Proceedings.

I must, I think, say something of the sources of the International Law of War. The Common Lawyer will be puzzled by the absence of previous Law Reports in which he finds his precedents, and also by the relative absence of Legislative Acts in which a great deal of his law is found. Perhaps this comparative absence of legislation will seem almost more grievous to the civil lawyer who finds the great part of his law in Codes. It may be that after this last war (I should like to picture it as the "last" in the history of the future but I dare not do so) the decisions and rulings of the law of war recorded in these and other volumes, will provide more material. The Common Lawyer will be able to study and apply the precedents on which he relies so much, and so indeed will those lawyers who practise under a codified system of law, who have generally, I believe, availed themselves of the persuasive help of earlier decisions which they find collected in annotations to the codes. In either case, the law of war will be lifted from an area of generality and be able by analysis and synthesis to formulate more specific rules. This will have been one result of the great campaign of war crime punishment which has followed the war. But even before this happened, there was certain material of a more or less tangible character. Apart from evidence of custom and practice, there were books of authority like Grotius and Vattel in earlier days. These were books of authenticity comparable to Coke or Blackstone in Anglo-American law. There were also certain international agreements, conventions or treaties which approximate

in their importance to Legislative Acts, though of comparatively recent date. Of these the Hague Conventions on the laws of war and the Geneva Conventions on the treatment of prisoners are of supreme importance. It is easy with all the experience of recent years to point to defects in the Hague Conventions but they marked great advance in the humanization of war, both as between the actual military forces and also in the protection of the civilians. The future development of military operations is difficult to forecast to-day. The rules of law embodied in these Conventions have been tested in World War II which is ended. These Conventions may well be supplemented and revised, but their value cannot be overstated. They and the like are the nearest approach to legislation possible in the present state of international relations.

It would be wrong to look at any single document as constituting the source of the laws of war. The development of that branch of international law has had a long history and a great many traditional and customary rules have sprung up and have been followed, more or less, in regard to these questions. The time has, I hope, now come or is approaching, when it will be possible to show a homogeneous and scientific body of law, and that will have to be done without the aid of the legislature until there is a federated parliament of the world. Meantime that want is, to a large extent, filled by the system of international conventions representing all the civilised nations of the world who meet together to draw up a body of rules. These have the force of law in the same way as the law promulgated by a State has within its Courts. Their efficacy and force depends on the fact that they are recognised, accepted and agreed to by the various nations. In the war recently ended, it is striking to observe to what extent a code of law such as the provisions of the Geneva Conventions on Prisoners of War has been respected, at least in principle, though not always in fact. It would be wrong to treat these instruments merely as agreements between the various nations who were represented at the Conferences. For instance, the Hague Convention enables any assenting party to denounce it, but the true force of these Conventions in these days is that they represent a general consensus, in regard to the laws of war and these laws are binding upon belligerents whether they were originally parties or not, and whether, though originally parties, they have or have not denounced it.

The purpose of the Hague Convention can be inferred from the terms of the Convention itself. The Convention contains a number of specific regulations which, as the Convention says, have been inspired by the desire to diminish the evils of war so far as legitimate military requirements permit, and to serve as a general rule of conduct for the belligerents in their mutual relations and their relations with the inhabitants. That latter element, as we now see, has been of supreme importance, and that will be seen in the cases reported in these volumes. The Hague Convention goes on to say that it has not been found possible at present to concert stipulations covering all the circumstances which arose in practice, but on the other hand, the Parties to it do not intend that unforeseen cases should, in default of written agreement, be left to the arbitrary opinion of military commanders. The Convention then proceeds to state a wider principle in the famous language of the Belgian Delegate Mertens :

"Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in

cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."

These provisions are the key note of these particular Regulations. They do not contain a list of war crimes, but they particularise a great many of them, leaving the remainder to the governing effect of that sovereign clause which, I think, does really in a few words state the whole animating and motivating principle of the law of war, and indeed of all law, because the object of all law is to secure as far as possible in the mutual relations of the human beings concerned the rule of law and of justice and of humanity. The language of the clause has sometimes been described as embodying the law of nature or natural law. That expression has been used during so many centuries from the days of the Romans and in so many different connotations and also has been invoked for the purposes of maintaining so many evil and disastrous practices and rules, that its use may perhaps be better abandoned. In truth and in fact, the true view of the law of nature has been the law which aims, however imperfectly, at giving effect to the sense of justice and of right and wrong and which is naturally inherent in all human beings except only the abandoned and vicious. The reader of this volume will not fail to reflect on the number of important principles which still need to be defined. I may note as an instance the question of the legality of the resistance movement on the part of a population unjustly invaded and terrorised by an aggressive nation. Another illustration is afforded by naval warfare.

Before I leave the Preamble to this Code, I may emphasise that the protection of the inhabitants of occupied territory is of primary importance in the modern law of war. It will be seen from the cases in these volumes that a very considerable proportion of the cases protect the interests of the inhabitants of territories which were either occupied or were the scene of belligerent operations. It is impossible to secure that the innocent inhabitants of such places can be entirely removed from the dangers and the destruction and the fatalities which are inevitable in such a situation, but the whole object of this part of the Hague Convention and other similar humanitarian instruments is, as they state, to diminish the evils of war so far as military requirements permit and that may be traced in the present Hague and Geneva Conventions and also in the cases which have been decided by the courts. It may be noted that the Hague Convention in particular had definitely a practical object. It required those who signed it or acceded to it to issue instructions to their armed land forces in conformity with the regulations respecting the laws and customs of war on land, which are annexed to the Convention. The result of the Convention has been that most important military nations have prepared manuals of military law which they have issued to their forces. These manuals are not authoritative sources of law in any sense, and some of the provisions contained in them have been subject to very proper criticism and amendment, but they are useful for purposes of reference and criticism and to some extent they may serve as evidence of the actual practices of nations, which is part of the material on which the customary law of war is based, along with the writings

of qualified authors. The decisions of courts are also of great value in defining the law of war. Hence the importance of these Reports.

The Hague Convention itself does not contain a list of war crimes. Such a list will be found in the Report of the Commission of Responsibilities of 1919, a list which is not comprehensive. Nor did the United Nations War Crimes Commission pretend to formulate a comprehensive list, but they did promulgate a list of war crimes for the purpose of guiding the Commission in its fact-finding activities. That provisional list, if I may call it so, was based on the report and recommendation of the Commission of Responsibilities, a document of very great value, and it was added to by the War Crimes Commission as a result of its experience and of the problems which came before it.

Mr. Brand, the Editor of this series of reports and the author of the present volume, has devoted section VI of the volume to a treatment of the types of offences which have been recognised. A list of these will be found in his table of contents under the heading "Types of Offences". I should like particularly to refer to No. 6 of that list, under sub-heading B, which shows how the category of war crimes has over-flown the limits of offences committed during actual combat or offences committed against prisoners of war. The long list which is to be found in Item 6 are all offences committed against inhabitants of occupied territories, and there is no doubt at all, if one studies the history of war crimes during the last war, of the terrible character of these offences and the enormous scale on which they were committed by the Axis forces. It will be noticed that in some of these offences the object is the terrorism of civilians, their ill-treatment in various ways, often most atrocious, and the exploitation of human labour, often called slave labour, which was forced in the sense that inhabitants were seized and compelled to work for the Axis powers and for that purpose taken away from their homes which, in a vast number of cases, they never saw again. Some categories may seem novel but tragic and terrible experiences justify them.

There are some very striking instances of war crimes for which the reader must be referred to Mr. Brand's Section VI, sub-section B, which is based on actual decisions as reported in previous volumes. It is perhaps now a truism, but when I look at this list, and think of all the instances of each one of these crimes that come into my mind, I cannot help saying that so deliberate and so widespread and atrocious a system of inflicting human misery has never been known in the course of the world. Apart from these particular crimes, there are the crimes which Mr. Brand refers to under sub-headings C and D, crimes against humanity and crimes against peace. Crimes against humanity overlap to some extent war crimes generally, but the scope of the category of crimes against humanity has been limited by the requirements that to be punishable they should be carried out on a widespread scale and under governmental organisation, and apparently that they should have the particular object of political, racial or religious persecution.

Sub-section D contains a further category, crimes against peace. That category is based upon the effect of the Kellogg-Briand Pact, or the Pact of Paris, which was a formal and solemn treaty entered into by practically all

the civilised nations of the world. Its essence is that those who are accused are charged with initiating or bringing about or waging an unjust or aggressive war. That conception has been much attacked but the charge has received effect from the important International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East at Tokyo. Its moral rightness is obvious because there can be no greater crime than the bringing about of a war with all its inevitable evils, unimaginable in extent. It is a crime, however, which deals primarily with initiation and waging of war as a matter of policy, which indeed, is the language of the prohibitive section, and the crime can usually only be committed by those persons who are able to determine the policy which causes the war. A further illustration of the crime has been given since I first wrote these words by the judgment in the Ministries Case, the last of the Nuremberg Subsequent Proceedings.

In the case of the last Great War there was, for a number of reasons, no difficulty in determining who were the policy makers. The material before the courts clearly showed that their purpose was aggression and that the war could not be justified on any legitimate ground such as self defence. That crime, if properly defined, can be charged against those who were called in the two trials I have mentioned, the "major war criminals" and others who, from their position and power were able to commit that particular offence which could not be charged against subordinate agents or instruments.

Membership of criminal organisations is a rather special piece of machinery which is devised to deal with the obvious difficulty of bringing within the range of punishment the various individuals who have taken part in the operations of associations or organisations, the object of which was the commission of war crimes.

I need not repeat what has so often been emphasised that to construct a system of common or customary law must necessarily involve a system of law reporting. The failure to appreciate the existence, character or scope of the law of war has almost entirely resulted from the absence of adequate reporting of decisions taken regarding acts coming under the law of war. It may be hoped that with the materials now available, it may be possible to evolve a homogeneous, scientific and constructive body of law though there is still no legislature to contribute to that result. That, however, is for the future.

I ought earlier to have observed that the principle of individual responsibility has until recently been regarded as a heresy in some quarters, instead of as being something which was obviously essential to any system of penal law. It has often been noted that the Hague Conventions do not contain any reference to personal responsibility in respect of war crimes, but all the same, as was pointed out by the Supreme Court of the United States, offenders against the laws of war have been punished. The principle of individual responsibility is a necessary condition of the establishment of a system of law; what the law does is to define that responsibility. It is not content with the formulation of moral rules. It postulates personal sanctions. The Hague Convention, though it speaks of the responsibility of nations to make compensation for breaches of the Regulations, does not mention the personal responsibility of those guilty of breaches, but the same answer applies to such an objection, and that is that the punishment of war

criminals for breach of the rules of war has been recognised by the practice of nations and is part of the traditional law. For that, I may again refer to the decisions of the Supreme Court of the United States. The responsibility of fixing responsibility on particular agents is very noticeable.

Of course, I need not observe that that principle runs right through the series of trials which are reported in these volumes. I was, in fact, merely countering the conceivable though gratuitous and unfounded objection that, at least up to the time of the first World War, no such personal or individual responsibility was ever recognised in these matters; it was recognised for instance in the Commission of Responsibilities, and also in the cases mentioned by the Supreme Court of the United States in the Yamashita case which has already been referred to in this Foreword, in particular may be noted cases where the offence was not a common law crime—as most of the war offences are—according to the normal rule of civilised people, but was only a crime in the particular area of military law, for instance the case of spying.

As was made clear at the outset, the trials reported in these volumes have been a selection of those of which records are in the possession of the United Nations War Crimes Commission. Only those of legal interest have been so selected for reporting, though most of those selected have also often been of importance in the history of the war. I may mention here some of the relevant figures relating to this process of selection:

<i>Number of Trial Records Received</i>						<i>Number of Trials Reported Upon</i>
809	United States	..	..	..	..	28
524	British	..	..	..	..	27
256	Australian	..	..	..	..	5
254	French	..	..	..	..	11
30	Netherlands	..	..	..	..	7
24	Polish	..	..	..	..	4
9	Norwegian	..	..	..	..	5
4	Canadian	..	..	..	..	1
1	Chinese	..	..	..	..	1

In addition, further trials which were not reported have been cited in either Volumes I–XIV, or in the present volume:

United States : 29
 British : 17
 Australian : 19
 French : 17
 Netherlands : 5
 Norwegian : 2
 Polish : 1
 Canadian : 1
 Greek : 1

It was never intended to report in these volumes the trials held by the International Military Tribunals in Nuremberg and Tokyo since it was felt that these trials would in any case be thoroughly discussed in the legal press and elsewhere and would form the subject of special reports, this has not, however, excluded reference to the judgments delivered in these trials where a quotation from the judgment has been useful in commenting upon the trials reported in these volumes. It will be freely admitted that the latter trials were not assured of general widespread treatment in the same way as those held before the two International Military Tribunals.

It will be observed that not all the countries whose courts have conducted war crime trials in recent years, nor all members of the Commission, are represented in the selection of trials reported in these volumes. The aim has been to make the series as internationally representative as was possible, but the achievement of this purpose has always depended upon and been limited by the transcripts actually submitted by various governments. All members of the Commission were invited to forward records of their trials, but not all did so for various reasons, and this lack of records explains the absence from these volumes of reports of trials held by the courts of certain countries. It may be added that where a country has not forwarded transcripts of court proceedings but has furnished the Commission with the texts of applicable war crimes laws, quotations from these laws have been included, wherever possible, in the general commentaries contained in previous volumes, and in the present volume.

The aim has been to derive from the records in the possession of the Commission all material containing any guidance for the building up of a jurisprudence of war crimes law, and it is felt that with three exceptions this aim has largely been achieved. The late arrival of the judgment in the Tokyo trial has caused one of these exceptions, and the late delivery of judgment in the Ministries case a second. The third concerns the day-to-day proceedings of the trials held before the United States Military Tribunals in Nuremberg. As is explained on page ix of Volume X, the reports which have been contained in these volumes on the Subsequent Proceedings trials have been based upon a study of the indictments and judgments in the respective trials and the speeches and briefs of prosecuting and defending counsel, but the time limitations, within which the Trust under which the reporting has been carried out has operated, have prevented a complete study of the rulings on procedural matters given in the course of these trials. I understand, however, that a study of these rulings on matters of procedure is contemplated by a United States lawyer who has had personal experience of these trials.

WRIGHT.

London, *March*, 1949.

I

INTRODUCTION

(i) This present Volume does not purport to be a *critical* discussion of international criminal law ; nor does it include a treatment of the history of the development of that law.

The intention of the volume is to summarise in a systematic way and analyse the legal outcome of the trials reported or cited in the previous fourteen volumes of the series, together with some others to which it has not been possible to give previous treatment in the Reports, and of the legal enactments national and international under which the relevant courts acted.

(ii) In general the reader will find that the actual text of the present volume consists of a summary of decisions and legal texts, together with advice of Judge Advocates acting with British and Commonwealth courts.

It will be recalled that the Judge Advocates' recommendations to British and Commonwealth courts, though of high authority, are not necessarily followed by the courts to which they are addressed.⁽¹⁾

Thus, the Judge Advocate acting in the trial of Oscar Hans by a British Military Court in Hamburg, 18th-22nd August, 1948,⁽²⁾ offered to the court the following advice in opening his summing up :

" We arrive at the stage where it is my duty to sum up this case to you, but you will bear in mind that whatever I say, I am here only in an advisory capacity. You are the judges of both law and fact in this matter, and although I am qualified to give you legal advice, you are, in fact, your own judges both of law and of fact."⁽³⁾

Nevertheless the advice of Judge Advocates has been thought of sufficient persuasive authority to be treated along with the actual decisions of courts. Neither the Judge Advocate's advice nor the decisions of courts are, in any case, binding on future courts in the sense of a strictly binding precedent.⁽⁴⁾

⁽¹⁾ See Volume I, pp. 106-107.

⁽²⁾ Not previously treated in these volumes.

⁽³⁾ Two relevant provisions setting out some of the powers and duties of the Judge Advocate in British trials are made by the Rules of Procedure for Field General Courts Martial (regarding the applicability of which see Vol. I, p. 107). Rules 103(e) and (f) provide :

" (e) At the conclusion of the case he will, unless both he and the Court consider it unnecessary, sum up the evidence and advise the court upon the law relating to the case before the court proceed to deliberate upon their findings :

" (f) Upon any point of law or procedure which arises upon the trial which he attends, the court should be guided by his opinion, and not disregard it, except for very weighty reasons. The court are responsible for the legality of their decisions, but they must consider the grave consequences which may result from their disregard of the advice of the Judge-Advocate on any legal point. The Court, in following the opinion of the Judge-Advocate on a legal point, may record that they have decided in consequence of that opinion."

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

⁽⁴⁾ Compare pp. 17-19.

(iii) In the footnotes to the present Volume arguments of counsel and other material of lesser authority are occasionally mentioned, but for such comment having lesser authority than the decisions and Judge Advocates' advice appearing in the text the reader is mainly referred to the notes on the cases which have appeared in Volumes I-XIV. The footnotes to the present Volume provide also cross-references to the relevant parts of earlier volumes where the reader will find set out and discussed at greater length the matters treated in this Volume. One further technical point should be explained here. Where a cross-reference to a previous volume is supplied merely in order to enable the reader to trace where the statement first appeared in the reports, the reference is given as "Vol. p.". Where, however, it is thought that the original text supplements or expands upon the statement made in the present Volume, the following is used: "See Vol. p.".

It has been thought convenient in making footnote cross-references of the second type to make, on some subjects, only such references to the points in previous volumes where these topics have received their major treatment. At these previous points, however, further cross-references will be found, which will enable the reader to make a complete survey of the problem as set out in these volumes if desired. This applies, for instance, to the question of superior orders. This method has been thought preferable to a complete citation of references in this present volume which would not indicate which pages in the previous volumes were the most important to the issue under discussion.

References to pages in previous volumes must be taken therefore to include within their scope any further references contained in those pages.

(iv) In many cases it is not possible to determine with certainty on what ground the Court trying a war criminal came to its decision, since many types of war crime courts do not generally announce their legal or factual reasons for their findings.⁽¹⁾ The discussions of such courts are held in private sitting and usually only the final decision of guilty or not guilty and any sentence are announced. The arguments of Counsel are of interest insofar as they throw light on considerations which the Court may have had in mind during their deliberations but are not of course an infallible guide. In strict law, as has been seen, even the summing up of a Judge Advocate before a British, Canadian or Australian Military Court, when such an officer is appointed, is not a final indication even of the law on which the Court acted.

Nevertheless, while the trials in which some kind of reasoned judgment has been delivered have proved the most fruitful of legal precedent and so the most useful in compiling the present volume, trials of the other type have often proved of value too; for instance, when there has been a simple finding of guilty upon a given charge an examination of that charge will often yield material which has been of use in preparing the section dealing with substantive offences.

Furthermore, as already stated, the advice of the Judge Advocate in British and Commonwealth Courts has been considered sufficiently authoritative to warrant its being treated along with the decisions of courts in the text of this present volume. Arguments of defence and prosecuting

⁽¹⁾ See pp. 19-20.

counsel have not in general been quoted in the present volume for reasons of space but full use thereof has been made in the actual reports and the points at which they have been quoted may be traced, according to subject-matter, by means of the footnote cross-references in this present volume.

(v) It is not the intention to attempt to indicate which of the decisions or pieces of advice by Judge Advocates which are to be set out are of greater authority and which of lesser authority. This would be entirely beyond the function of the present reports even if it would be possible to perform the task accurately. It is left to the student of international law to determine the degree of authority which exists for arriving at the conclusions which are set out in the present volume, and all that the text in this volume does is to indicate the authorities on which any statement is based. Where the authorities are not exhaustively set out in the present volume, they are referred to by footnote cross-references.

(vi) It is not the intention of the present volume to attempt to provide a full analysis of the Judgments delivered by the Nuremberg and Tokyo International Military Tribunals, since it is felt that these two judgments have received or will receive a treatment in the legal and general press much greater than that likely to be given to the trials which are reported in the present series. The limitations as to finance and time laid down by the Trust under which the Law Reporting has been carried out would, in any case, not enable a full treatment of these two judgments to be made. Nevertheless quotation from the two judgments has, from time to time, been made in the present volume where it has been thought useful to do so in connection with various topics discussed, in the same way as the Nuremberg judgment has been quoted in previous volumes. The Tokyo judgment has not been quoted in previous volumes because of the recent date of its delivery.

(vii) The usefulness from the point of view of the development of the international law of the future of the various decisions summarised in the present volume is not always the same. Decisions regarding, for instance, the scope of the various types of war crimes are of immediate importance in the development of international law, whereas, on the other hand, a decision that one type of organisation was to be regarded as a criminal organisation and that another was not could only be said to have an immediate importance since it refers to the possible liability of a limited number of members of certain organisations which have gone out of existence. The long-term importance of decisions such as those regarding the liability for membership in criminal organisations is in fact rather an indirect one. Its importance lies in the underlying basic principle involved rather than in the application of that principle to any specific organisations; that underlying principle is examined briefly later in the present volume.⁽²⁾ The important aspect of a decision from the point of view of the future of international law is not that this or that organisation was declared to be criminal, but that in applying the law relating to membership the courts have apparently made use of the concept of acting in pursuance of a common design to commit acts regarded as criminal.⁽²⁾

⁽¹⁾ See pp. 98-9.

⁽²⁾ Compare pp. 94-9.

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⁽¹⁾ See pp. 98-9.

⁽²⁾ Compare pp. 94-9.

Again, the decisions of the courts regarding crimes against humanity have spoken mainly in terms of crimes committed by Germans against Germans,⁽¹⁾ but it is clear that, from the point of view of international law, the important aspect of this development is rather the fact that offences committed by persons against their fellow nationals have been punished by the courts of other nations. Here again, the basic principle is of more importance, from the point of view of the development of international law, than the application made to individual nations, although it is the application to individual nations which has been of the greatest general interest at the time of the delivery of judgments. Furthermore, it must be admitted that a decision regarding the illegality of handing over prisoners of war to the S.D.⁽²⁾ is of limited value from the point of view of international law except as one indication of the extent of a commander's general responsibility towards prisoners in his care.

⁽¹⁾ See pp. 134-8.

⁽²⁾ See p. 106.

II

THE SOURCES OF INTERNATIONAL CRIMINAL LAW

The Judgment delivered in the *Hostages Trial* included the following statement :

"The sources of International law which are usually enumerated are (1) customs and practices accepted by civilised nations generally, (2) treaties, conventions and other forms of interstate agreements, (3) the decisions of international tribunals, (4) the decisions of national tribunals dealing with international questions, (5) the opinions of qualified text writers, and (6) diplomatic papers."⁽¹⁾

Similarly the Tribunal acting in the *Justice Trial* said :

"International law is not the product of statute. Its content is not static. The absence from the world of any governmental body, authorised to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions.

"It must be conceded that the circumstances which gives to principles of international conduct the dignity and authority of law is their general acceptance as such by civilised nations, which acceptance is manifested by international treaties, conventions, authoritative text-books, practice and judicial decisions." (Hackworth *Digest of International Law*, Vol. 1, pp. 1-4.)"⁽²⁾

These may be accepted as useful definitions of the sources of the international criminal law⁽³⁾ in particular, and the derivation of rules from most of these sources has been amply illustrated in the volumes of this series. The sources themselves, insofar as they have been touched upon in these volumes, are examined briefly in the present section.⁽⁴⁾

1. CUSTOMS AND PRACTICES ACCEPTED BY CIVILISED NATIONS GENERALLY

(i) A rule of international law can be valid without being stated in any international agreement. The statement just quoted from the judgment delivered in the *Justice Trial* was followed by the comment that "It does not, however, follow from the foregoing statements that general acceptance of a rule of international conduct must be manifested by express adoption thereof by all civilised States". The judgment implicitly adopted a passage from Hyde's *International Law* pointing out that a binding rule of

⁽¹⁾ Vol VIII, pp. 49-50.

⁽²⁾ Vol. VI, pp. 34-5.

⁽³⁾ The term "international criminal law" is here used to signify the international law relating to war crimes, crimes against humanity, crimes against peace and membership of criminal organisations.

⁽⁴⁾ It will be observed that Vol. XV as a whole aims mainly at setting out and analysing the law derived during recent years from the second, third and fourth of the sources mentioned, and from the first insofar as municipal legislation illustrates the practices accepted by civilised nations, on the question of war crimes, crimes against humanity, crimes against peace and membership of criminal organisations.

law could become established even by "the failure of interested States to make appropriate objection to practical applications of it". The *Hostages Trial* judgment stated: "In any event, the practices and usages of war which gradually ripened into recognised customs with which belligerents were bound to comply, recognised the crimes specified herein as crimes subject to punishment. It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognised customs and usages of war, or the general principles of criminal justice common to civilised nations generally."⁽¹⁾

It is mainly through changes in generally recognised customs that international law has developed and displayed that progressive character to which attention has been drawn in the Judgments delivered in the *Justice and Hostages Trials*.⁽²⁾ An illustration of the types of factors which are regarded as contributing to the causes of a change in customary international law is given by the statement of the Tribunal acting in the *Justice Trial* that Control Council Law No. 10 "is not limited to the punishment of persons guilty of violating the laws and customs of war in the narrow sense; furthermore, it can no longer be said that violations of the laws and customs of war are the only offences recognised by common international law. The force of circumstance, the grim fact of world wide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law."⁽³⁾

(ii) The expression "customs and practices accepted by civilised nations generally" could, however, mean either of two things:

(a) practices generally followed by states in their relations with one another (usually referred to as "state practice"); or

(b) practices generally followed by states in their own internal affairs.

The first type of practices are generally accepted as possible sources of international law, and as a much older source than the international conventions to be discussed presently,⁽⁴⁾ but there is also a trend of opinion according to which, if a practice is generally regarded by states in their conduct of internal affairs as representing a principle of justice, it is also enforceable as a rule of customary international law.⁽⁵⁾ This seems to be indicated by the use of the word "or" which has been italicised in the passage from the judgement in the *Hostages Trial* quoted above: the Tribunal also stated that:

"The tendency has been to apply the term 'customs and practices accepted by civilised nations generally', as it is used in International Law, to the laws of war only. But the principle has no such restricted meaning. It applies as well to fundamental principles of justice which

⁽¹⁾ Vol. VIII, p. 53 (Italics inserted).

⁽²⁾ See Vol. VI, pp. 34, 35 and 54 and Vol. VIII, p. 49.

⁽³⁾ See Volume VI, pp. 45-48, where the Tribunal expands upon this statement by setting out a number of authorities showing how world opinion had grown to favour a right of humanitarian intervention.

⁽⁴⁾ See Vol. VI, p. 58.

⁽⁵⁾ See Vol. XI, pp. 72-73.

have been accepted and adopted by civilised nations generally. In determining whether such a fundamental rule of justice is entitled to be declared a principle of International Law, an examination of the municipal laws of states in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of International Law would seem to be fully justified. There is convincing evidence that this not only is but has been the rule. The rules applied in criminal trials regarding burden of proof, presumption of innocence, and the right of a defendant to appear personally to defend himself, are derived from this source. Can it be doubted that such a source of International Law would be applied to an insane defendant? Obviously he would not be subjected to trial during his incompetency. Clearly, such a holding would be based upon a fundamental principle of criminal law accepted by nations generally. If the rights of nations and the rights of individuals who become involved in international relations are to be respected and preserved, fundamental rules of justice and right which have become commonly accepted by nations must be applied. But the yardstick to be used must in all cases be a finding that the principle involved is a fundamental rule of justice which has been adopted or accepted by nations generally as such

"The defendants invoke the defensive plea that the acts charged as crimes were carried out pursuant to orders of superior officers whom they were obliged to obey. This brings into operation the rule just announced. The rule that superior order is not a defence to a criminal act is a rule of fundamental criminal justice that has been adopted by civilised nations extensively. It is not disputed that the municipal law of civilised nations generally sustained the principle at the time the alleged criminal acts were committed. This being true, it properly may be declared as an applicable rule of International Law."⁽¹⁾

Of importations into war crimes proceedings of municipal law concepts there have been no lack in the trials reported in this series. The Tribunal acting in the *Hostages Trial* referred to generally accepted "rules applied in criminal trials regarding, burden of proof, presumption of innocence, and the right of a defendant to appear personally to defend himself", and it will be seen later in this present Volume that even more elaborate sets of rules have been recognised as constituting that fair trial which should have been accorded by German and Japanese accused before meting out punishment to Allied prisoners of war or inhabitants of occupied territories,⁽²⁾ and which have been generally accorded to ex-enemy accused by Allied Courts conducting war crime trials.⁽³⁾

⁽¹⁾ Volume VIII, pp. 49-50 (Italics inserted). It may be thought that the famous passage from the Preamble to the Hague Convention No. IV is sufficiently broad in scope to constitute recognition as sources of international law of both types of practices described in the text:

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

⁽²⁾ See pp. 161-6.

⁽³⁾ See pp. 189-97.

Furthermore, the courts, and Judge Advocates in British and Commonwealth trials, have relied heavily upon municipal laws for their legal terminology and for the definition of such terms as they have so imported from national criminal laws into war crimes proceedings. An example of such introduction of municipal law categories is provided by the *Jaluit Atoll Case*, in which various accused were found guilty of a charge of murder.⁽¹⁾ In two trials by Australian Military Courts, at Rabaul,⁽²⁾ that of Masao Kudo and others on 30th March-1st April, 1946 and that of Daijiro Yamasaki, on 3rd-4th June, 1946, certain accused were charged of *murder* and found guilty of *manslaughter*.

Again in the trial of Arno Heering, by a British Military Court, at Hanover, on 24th-26th January, 1946, where ill-treatment of prisoners of war was charged, the Legal Member of the Court pointed out that certain words complained of were used to the prisoners' guards, not to the prisoners, and that mere words could not constitute an assault. Applying the analogy of the rules and principles applied in the Divorce Court in regard to the question of mental cruelty, he thought that the Prosecutor would have to prove first that there was something in the nature of mental cruelty, and secondly that there was some interference with health or well-being in consequence of it.⁽³⁾

In the *Essen Lynching Case* the Prosecutor pointed out that the charge alleged that the accused were concerned in the killing of three British airmen. That was the wording of the charge, but, the Prosecutor added, for the purpose of this trial he would invite the Court to take the view that this was a charge of murder and of nothing other than murder. The allegation would be that all these seven Germans in the dock were guilty either as an accessory before the fact or as principals in the murder of the three British airmen.

⁽¹⁾ The specification stated that they "did, on or about 10th March, 1944, on the Island of Aineman, Jaluit Atoll, Marshall Islands, at a time when a state of war existed between the United States of America and the Japanese Empire, wilfully, feloniously, with malice aforethought without justifiable cause, and without trial or other due process, assault and kill, by shooting and stabbing to death, three American fliers, then and there attached to the Armed forces of the United States of America, and then and there captured and unarmed prisoners of war in the custody of the said accused". In the course of the trial the Prosecution recalled that the charge against the accused was one of murder and proceeded to analyse in detail the elements of a definition of murder as "the unlawful killing of a human being with malice aforethought." As the notes to this case said, "At first sight it may appear that the introduction of the definition of murder, based on Anglo-Saxon rules of Municipal Law, was not strictly justifiable in a case where breaches of International Law on an island under Japanese mandate were alleged. The intention of the Prosecution, however, was not to charge the accused with breaches of United States law as well as of International Law. The use of the words in the specification, 'all in violation of . . . the International rules of warfare,' as applying to the charge of murder, clearly shows that the introduction of the terms used in United States law was intended merely to amplify and define the specification. In the present state of vagueness prevailing in many branches of the law of nations, even given the fact that there are no binding precedents in International Law, such introduction therein of tested concepts from municipal systems is all to the good, provided that they are recognised to be in amplification of, and not in substitution for, rules of International Law. This is so, even if it involves the use of tautology, inherent in some Common Law definitions, such as is exemplified in the phrase, 'wilfully, feloniously, with malice aforethought without justifiable cause' in the specification." (Volume I, pp. 72 and 80).

For other examples of arguments of Counsel introducing national criminal law concepts and definitions, see Vol. I, pp. 90 and 101, Vol. III, pp. 68-69 Vol. VII, pp. 78-79 and 81, and Vol. XI, pp. 75 and 76-77.

⁽²⁾ Not previously dealt with in this series.

⁽³⁾ Vol. XI, pp. 79-80.

This proposition was not accepted by the Court. The legal member pointed out that this was not a trial under English Law. Murder was the killing of a person under the King's peace. The charge here was not murder and if Counsel spoke of murder he was not using the word in the strict legal sense but in the popular sense. As long as everyone realised what was meant by the word "murder" for the purposes of this trial, the legal member did not think there was any difficulty. As to using words like "accessory before the fact" and so on, which are applicable to English law and to felonies, the legal member again saw no objection to that, as long as all concerned knew exactly what they were talking about. They were using the words almost in inverted commas as analogies to English law.⁽¹⁾

The importation into war crimes proceedings of municipal law analogies on the question of complicity and "necessity" is illustrated elsewhere,⁽²⁾ while the citing in the *I.G. Farben Trial* judgment of United States cases on conspiracy is also interesting here.⁽³⁾

Municipal law categories are imported not only into judgments and into the utterances of Judge Advocates and Legal Members but into the legal instruments under which trials are held.⁽⁴⁾

The importation of municipal law terms and definitions has been particularly marked in war crime trials held before courts of, for instance, France and Norway. The Norwegian legal approach towards the treatment of war criminals has stressed that, before punishment of any individual offender becomes legal, he must be shown to have offended against some specific provision of Norwegian municipal law as well as against the laws and usages of war.⁽⁵⁾ Similarly, when a French Military Tribunal has tried an alleged war criminal, the usual practice has been for the judges to decide first whether a provision of the French Criminal Code has been violated and only secondly, whether this breach was justified by the laws and customs of war.⁽⁶⁾

⁽¹⁾ See also Vol. I, p. 20 and Vol. VII, p. 81.

⁽²⁾ See pp. 49-58 and 170-5, and compare Vol. III, pp. 68-69 and Vol. XI, p. 72.

⁽³⁾ See Vol. X, p. 40.

⁽⁴⁾ See for instance provisions dealing with complicity set out on pp. 52, 55 and 57.

⁽⁵⁾ This point is elaborated in Vol. III, pp. 82-83. See, for instances, Vol. III, pp. 12 and 20-21, Vol. V, pp. 82 and 92.

⁽⁶⁾ This comment is elaborated in Vol. III, pp. 53-54. For instances, see Vol. III, pp. 50-53 and 95-96, Vol. VII, pp. 68-70 and 74-75, Vol. VIII, pp. 26-31, 60-61, 62-65 and 67-74.

For examples of the similar application of provisions of Polish Law in war crime trials, see Vol. VII, pp. 5 and 18, Vol. XIII, pp. 106-107 and Vol. XIV, p. 40. For Netherlands examples see Vol. XIII, pp. 143-144.

By contrast, while it is true that certain instruments having validity in the respective municipal legal systems have always provided in general terms that British Military Courts and United States Military Commissions shall have jurisdiction to try alleged war criminals, the practice of these Courts and Commissions is to stress that a breach of the laws and usages of war must be shown; provisions of municipal law are often quoted, as analogies, by counsel, and in British trials by the Judge Advocate or Legal Members, but the violation of any set of legal rules other than the laws and usages of war need not be shown. For instance the British Royal Warrant of 14th June, 1945 (Army Order 81/45) as amended provides the basis for trials of alleged war criminals by British Courts, but does not define the crimes to be tried beyond saying that the term "war crime" means "a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939". (See Volume I, p. 105).

The Netherlands East Indies legislation took this latter course from the outset, whereas the metropolitan Dutch legislation originally took the first course, but underwent a development at the end of which the original course was still preserved as far as the category of punishment is concerned, whereas rules of international law were made applicable in respect of the nature and substance of the acts punishable by Dutch courts as war crimes or crimes against humanity. (See Volume XI, pp. 87-8).

The result here again has been that the international law of war crimes has been enriched by the importation of concepts and definitions from municipal laws. This has been so for instance where war crimes committed against property rights have been punished by French Military Tribunals.⁽¹⁾

(iii) It would appear that for a practice to become a rule of international law it need not be a universally recognised practice, but only one accepted by civilised nations *in general*. The Judgment in the *Hostages Trial* refers to customs and practices accepted "by civilised nations generally", while the *Justice Trial* Judgment to "general acceptance . . . by civilised nations" of certain principles.⁽²⁾ The judgment in the *High Command Trial* stated that "absolute unanimity among all the states in the family of nations is not required to bring an International Common Law into being".⁽³⁾

Elsewhere the Tribunal pointed out that "under general principles of law, an accused does not exculpate himself from a crime by showing that another [person] committed a similar crime . . .".⁽⁴⁾

It would thus, in strict law, be no defence for an ex-enemy to plead that a certain practice had been departed from by one or more of the Allies themselves, unless such departure were great enough to constitute evidence of a change in usage. The Judgment delivered in the *High Command Trial* included these words: "It is no defence in the view of this Tribunal to assert that international crimes were committed by an adversary, but as evidence given to the interpretation of what constituted accepted use of prisoners of war under international law, such evidence is pertinent."⁽⁵⁾ Elsewhere, the Judgment said that "The fact that the enemy was using prisoners of war for unlawful work as the defendant [Hoth] testified does not make their use by the defendant lawful but may be considered in mitigation of punishment".

2. INTERSTATE AGREEMENTS

(i) The two international conventions upon which reliance has been mainly placed in war crime trials have been the Hague Convention No. IV of 1907 and the Geneva Prisoners of War Convention of 1929, while, in connection with the crime of aggressive war, the Briand-Kellogg Pact of 1928 is regarded as a document of major importance.

The Nuremberg International Military Tribunal was governed by the terms of its Charter, attached to the London Agreement of 8th August, 1945,⁽⁶⁾ and its text and that of Control Council Law No. 10, into which it was incorporated by Article I of the latter,⁽⁷⁾ have bound the United States Military Tribunals which have conducted the "Subsequent Proceedings Trials" in Nuremberg.

⁽¹⁾ See Vol. IX, p. 43. Compare also Vol. VII, p. 73.

⁽²⁾ See p. 5.

⁽³⁾ Vol. XII, p. 68 and 69-70.

⁽⁴⁾ See Vol. XII, p. 64.

⁽⁵⁾ Volume XII, p. 88.

⁽⁶⁾ "Treaty Series No. 27 (1946)" British Command Paper Cmd. 6903.

⁽⁷⁾ Article I of Law No. 10 reads:

"The Moscow Declaration of 30th October, 1943, 'Concerning Responsibility of Hitlerites for Committed Atrocities' and the London Agreement of 8th August, 1945, 'Concerning Prosecution and Punishment of Major War Criminals of the European Axis' are made integral parts of this Law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such Nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany."

(ii) It was pointed out by the Defence in the *Krupp Trial* that no references to direct individual responsibility under international law were made in the Hague and Geneva Conventions or in the Briand-Kellogg Pact.⁽¹⁾ Article 3 of the actual text of the Hague Convention No. IV only provides, for instance, that: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Article 41 of the Regulations attached to the Convention provides merely that: "A violation of the terms of the armistice by individuals acting on their own initiative only entitled the injured party to demand the punishment of the offenders and, if there is occasion for it, compensation for the losses sustained." The responsibility for breach of the Convention, according to the text, rests only on the States which are parties to it.⁽²⁾

The trend of opinion and the practice followed by the Courts,⁽³⁾ however, has been to make the individual responsible for his acts in breach of international conventions, and this trend was illustrated on a high level by the decision pronounced by the International Military Tribunal at Nuremberg, that certain accused had made themselves criminals by waging war in breach of the terms of an inter-governmental agreement renouncing war undertaken as an instrument of national policy, the Briand-Kellogg Pact.⁽⁴⁾ Indeed, the International Military Tribunal made use of the fact that the Hague Convention No. IV of 1907 had been enforced personally against its violaters. The judgment on this point runs:—

"But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention."⁽⁵⁾

⁽¹⁾ Volume X, pp. 168-169.

⁽²⁾ Compare Vol. II, pp. 72, 76-77 and 149.

⁽³⁾ See for instance Vol. X, p. 133.

⁽⁴⁾ "Treaty Series, No. 29 (1929)" British Command Paper Cmd. 3410.

⁽⁵⁾ British Command Paper Cmd. 6964, p. 40. This reference to the Hague Regulations was relied upon by the Tribunal acting in the *Hostages Trial* when it pointed out that the fact that an international agreement did not set up courts or lay down penalties did not signify that that agreement did not lay down punishable crimes (Vol. VIII, pp. 53-54).

It cannot be said that every possible breach of the Hague and Geneva Conventions constitutes a war crime, because not every such breach has come before the Courts; it is quite certain, however, that individual responsibility has been laid down in many cases on the basis of the terms of these Conventions and it may be taken that any breach thereof which causes appreciable injury to the persons protected would constitute a war crime.⁽¹⁾

(iii) Furthermore, the dominant attitude taken by war crime courts has been to regard the Hague and the 1929 Prisoners of War Conventions as having by 1939 become mere codifications of existing customary law, at least insofar as their general principles are concerned. It has thus been possible for the courts to treat as irrelevant the "general participation" clause contained in the Hague Convention and to apply the general principles of that and of the Prisoners of War Convention to non-signatories thereof. The nature of the problem insofar as it relates to the Hague Convention, and the attitude of the Nuremberg International Military Tribunal is indicated by the following words from its judgment:

"But it is argued that the Hague Convention does not apply in this case, because of the 'general participation' clause in Article 2 of the Hague Convention of 1907. That clause provided:

"The provisions contained in the regulations (Rules of Land Warfare) referred to in Article 1 as well as in the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention."

"Several of the belligerents in the recent war were not parties to this Convention.

"In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter . . .

"Although Czechoslovakia was not a party to the Hague Convention of 1907, the rules of land warfare expressed in this Convention are declaratory of existing international law and hence are applicable."⁽²⁾

The International Military Tribunal for the Far East expressed the following opinion:

"The effectiveness of some of the Conventions signed at The Hague on 18th October, 1907, as direct treaty obligations was considerably impaired by the incorporation of a so-called 'general participation clause' in them, providing that the Convention would be binding only if all the belligerents were parties to it. The effect of this clause is, in strict law, to deprive some of the Conventions of their binding force as direct treaty obligations, either from the very beginning of a war

⁽¹⁾ On this point see further Volume XIII, p. 148.

⁽²⁾ British Command Paper Cmd. 6964, pp. 64-65 and 125.

or in the course of it as soon as a non-signatory Power, however insignificant, joins the ranks of the Belligerents. Although the obligation to observe the provisions of the Convention as a binding treaty may be swept away by operation of the 'general participation clause', or otherwise, the Convention remains as good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation."⁽¹⁾

The Tribunal acting in the *High Command Trial* substantially adopted the opinion of the Nuremberg International Military Tribunal that the Hague Convention No. IV of 1907 had by 1939 become recognised as being merely declaratory of existing international law, and that its provisions bound all belligerents irrespective of signature and despite the "general participation" clause.⁽²⁾ The Tribunal conducting the *Krupp Trial* fully concurred in the opinion of the International Military Tribunal.⁽³⁾

Any attempt to make an identical approach to the Prisoners of War Convention of 1929 ⁽⁴⁾ meets, however, with the possible objection, which was recognised,⁽⁵⁾ that it contained "certain detailed provisions pertaining to the care and treatment of prisoners of war", which can hardly be regarded as merely expressing accepted usages and customs of war. The Tribunal, in the *High Command Trial*, faced with this problem, was not content to declare, as it did, that the Convention was binding insofar as it was "in substance an expression of international law as accepted by the civilised nations of the world",⁽⁶⁾ but went further and cited a number of articles therefrom⁽⁷⁾ which it regarded as definitely being "an expression of the accepted views of civilised nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia".⁽⁸⁾

It will be seen that most of the provisions of the Geneva Convention which the Tribunal regarded as being merely declaratory of customary international law in fact provided against acts of obvious ill-treatment or neglect of prisoners of war. In rather a special category is Article 50, relating to the lenient punishment of prisoners of war for attempting to

⁽¹⁾ Official Transcript of the *Judgment of the International Military Tribunal for the Far East*, p. 65.

⁽²⁾ See Vol. XII, pp. 86-7.

⁽³⁾ Vol. X, p. 133.

⁽⁴⁾ The problem here is one of applicability of the provisions of the Convention to non-signatories, no "general participation" clause being involved.

⁽⁵⁾ Vol. XII, p. 89.

⁽⁶⁾ See Vol. XII, p. 88.

⁽⁷⁾ And from the Hague Convention, indicating that the Tribunal did not regard the latter as being *completely* a codification of recognised usages.

⁽⁸⁾ See Vol. XII, pp. 90-1. Regarding the position of Russia in relation to the Geneva Prisoner of War Convention. See also Vol. VI, pp. 119-120 and Vol. VII, pp. 43-44 and 58-61.

escape, which in effect recognised that prisoners of war must necessarily desire escape and feel under a duty to attempt it, if the opportunity presents itself.⁽¹⁾

(iv) Certain points are worth noting regarding the extent of application of the Hague Regulations :

(a) Article 42 of the Hague Regulations provides the following :

" Territory is considered occupied when *actually* placed under the authority of the hostile army.

" The occupation extends only to the territory where such authority *has been established* and is in a position to assert itself."⁽²⁾

The setting up and maintenance of an actual and effective occupying administration makes the difference between occupation and mere invasion, and it thus appears that, when the occupant withdraws from a territory or is driven out of it, the occupation ceases to exist.⁽³⁾

The question whether an occupation exists is a question of fact. As the judgment delivered in the *Hostages Trial* states : " The question of criminality in many cases may well hinge on whether an invasion was in progress or an occupation accomplished. Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organised resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied."⁽⁴⁾

⁽¹⁾ In the trial of Lieutenant Shigeru Sawada and Three Others and the trial of General Tanaka Hisakazu and Five Others, by United States Military Commissions, Shanghai, 27th February, 1946—15th April, 1946 and 13th August—3rd September, 1946, the Prosecution put in evidence that Japan had agreed to abide by the provisions of the Geneva Prisoners of War Convention ; this evidence took the form of a copy of a letter from the United States Legation in Berne, Switzerland, to the United States Secretary of State saying that, according to a telegraph message from the Swiss Minister in Tokyo, the Japanese Government had informed that Minister, first, that Japan was strictly observing the Geneva Red Cross Convention as a signatory State, and secondly, that " although not bound by the Convention relative treatment prisoners of war Japan will apply *mutatis mutandis* provisions of that Convention to American prisoners of war in its power." (Vol. V, p. 71.) In the *Jaluit Atoll Trial* it was also said : " Although Japan has not ratified or formally adhered to the Prisoners of War Convention, it has, through the Swiss Government agreed to apply the provisions thereof to prisoners of war under its control, and also, so far as practicable, to interned civilians." (Vol. I, p. 80). This step by the Prosecutions was not, strictly speaking, necessary, in view of the tendency described above to regard the main principles of the Convention as being declaratory. The Netherlands Temporary Court-Martial at Macassar which tried Tanabe Koshiro decided that the Geneva Convention of 1929, concerning the treatment of prisoners of war, which Japan only signed but did not ratify, " must be regarded as containing generally accepted laws of war " to which " Japan is also bound, even without ratification." In this respect stress was laid on the fact that the Convention contained " a confirmation of general and already existing conceptions of international law " and was the " prevailing international law " accepted by other nations. (Vol. XI, p. 4).

The Judgment of the International Military Tribunal for the Far East contains (on pp. 73-74 of the official transcript) the following interpretation of the Japanese undertaking to apply the Geneva Convention *mutatis mutandis* :

" Under this assurance Japan was bound to comply with the Convention save where its provisions could not be literally complied with owing to special conditions known to the parties to exist at the time the assurance was given, in which case Japan was obliged to apply the nearest possible equivalent to literal compliance."

⁽²⁾ Italics inserted.

⁽³⁾ Compare the discussions in Vol. VIII, pp. 16-19.

⁽⁴⁾ Vol. VIII, pp. 55-56.

The Tribunal added : " It is clear that the German Armed Forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant."⁽¹⁾

These findings, claimed the Tribunal, were consistent with Article 42 of the Hague Regulations of 1907, quote above.⁽²⁾

(b) The Judgment delivered in the *High Command Trial* said that an invasion of one state by another is the implementation of the national policy of the invading state by force even though the invaded state, due to fear or a sense of the futility of resistance in the face of superior force, adopts a policy of non-resistance and thus prevents the occurrence of any actual combat.⁽³⁾

The Tribunal was here discussing crimes against peace, however, and did not need to decide whether an unresisted invasion would lead to an occupancy to which the Hague Regulations would apply, and, on the other hand, the Tribunal acting in the *I.G. Farben Trial* ruled that, whatever were the moral rights involved, it had no jurisdiction to try offences against property committed in Austria (or the Sudetenland) ; such acts " would not constitute war crimes, as the incidents occurred in territory not under the belligerent occupation of Germany, as a state of actual warfare had not been shown to exist as to Austria, incorporated into Germany by the Anschluss."⁽⁴⁾

While not stating its reasons for so deciding, the Tribunal which conducted the *Krupp Trial* held that it had no jurisdiction to try an alleged offence involved in the acquisition of the Berndorfer plant in Austria by the Krupp firm.⁽⁵⁾ A dissenting opinion by Judge Wilkins took the opposite view on the ground that the act, if proved, would constitute a war crime ; the International Military Tribunal had held that " the invasion of Austria was a premeditated aggressive step " and had found that the laws and customs of war were applicable to Bohemia and Moravia which, according to Judge Wilkins, were occupied by the Germans in a manner sufficiently similar to that used in Austria to make the same laws and customs applicable to that country.⁽⁶⁾

⁽¹⁾ Vol. VIII, p. 56.

⁽²⁾ This may be a convenient place to refer to the finding of certain courts regarding the status under International law of the Vichy authorities and of the Croat " government " ; these courts rejected pleas claiming that the bodies in question had agreed to conscript or to deport to Germany civilian workers or had agreed to the illegal use of prisoners of war in the German armament industry, and rejected the thesis that they were to be regarded as sovereign bodies under international law. (See Vol. VII, pp. 56-57 ; Vol. VIII, pp. 72-74 ; Vol. X, p. 141).

⁽³⁾ Vol. XII, p. 66.

⁽⁴⁾ See Vol. X, p. 42. The Tribunal must be taken to be discussing alleged offences against Austrian nationals. Offences against *Allied nationals committed in Austria* have certainly been regarded as war crimes ; see for instance Vol. XIV, p. 86. In the trial of Eduard Erb by a United States Military Government Court at Dachau, 25th March—2nd April, 1947 (not previously treated in these volumes), the Court rejected a defence plea that an offence committed against an Allied national in what had since become the Russian Zone of Austria was outside the jurisdiction of the court.

⁽⁵⁾ See Vol. X, p. 140.

⁽⁶⁾ See Vol. X, pp. 151-153. See also p. 18, note 3, of the present volume.

(c) The Convention is regarded as being in force in all occupied territories, however, as long as fighting is still in progress between the occupying power and either the government of the occupied country or its allies, and the protection of the Hague Convention is not taken away from the inhabitants of occupied territory by any mere declaration on the part of the occupying power that a certain territory is to be regarded as annexed to the territory of the occupier. In practice such claims were made by Germany in respect of Alsace and parts of Poland. The attitude taken by the Courts⁽¹⁾, as well as the legal significance of the question, has been summed up by the passage in the judgment of the International Military Tribunal at Nuremberg where it was stated :

"A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September, 1939."⁽²⁾

One outcome of this legal fact is that inhabitants of territory so declared "annexed" cannot be treated as subjects of the occupying state and punished for "treason".⁽³⁾

(v) It need perhaps hardly be said that the Hague and Geneva Conventions do not purport to be exhaustive declarations of the laws and usages of war. Indeed the passage already quoted from the Preamble to the Hague Convention No. IV⁽⁴⁾ makes this clear insofar as that Convention is concerned. The Judgment delivered in the *Krupp Trial* includes the following words :

"It must also be pointed out that in the preamble to the Hague Convention No. IV it is made abundantly clear that in cases not included in the Regulations, the inhabitants and the belligerents remain under the protection and the rule of the principles of the Laws of Nations, as they result from the usages established among civilised peoples, from the laws of humanity, and dictates of the public conscience.

"As the records of the Hague Peace Conference of 1899 which enacted the Hague Regulations show, great emphasis was placed by the participants on the protection of invaded territories, and the preamble just cited, also known as 'Mertens Clause', was inserted at the request of the Belgian delegate, Mertens, who was, as were others, not satisfied with the protection specifically guaranteed to belligerently occupied

⁽¹⁾ See Vol. II, p. 75-76 and 151, Vol. III, pp. 36-37 and 45, Vol. VI, pp. 29-32, 52-53, 62, 63, note 1, and pp. 91-93, Vol. X, p. 48; Vol. XIII, pp. 67-68 and 110-12.

⁽²⁾ British Command Paper Cmd. 6964, p. 65.

⁽³⁾ See Vol. VI, pp. 52-53 and 75.

⁽⁴⁾ See p. 7, note 1.

territory. Hence, not only the wording (which specifically mentions the 'inhabitants' before it mentions the 'belligerents'), but also the discussions which took place at the time make it clear that it refers specifically to belligerently occupied country. The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilised nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare."⁽¹⁾

It must in fact be acknowledged that there are some important branches of law which are not touched upon by international agreements, or at least by no such agreement prior to the Charter of the International Military Tribunal. Thus the Hague Convention contains no word about the general right to punish war criminals and war traitors⁽²⁾ on capture, or about the particular doctrine of the universality of jurisdiction over war crimes,⁽³⁾ and the question of the killing of hostages has not been specifically made the subject of international agreement before the drafting of the Charter of the International Military Tribunal.⁽⁴⁾ Even now, the defences which are open to alleged war criminals⁽⁵⁾ are only partly based upon the texts of international agreements; some derive from state practice and the principles of criminal law generally accepted by civilised nations.

3. THE DECISIONS OF INTERNATIONAL AND NATIONAL TRIBUNALS

(i) There is no rule of general international law conferring upon the decision of any tribunal the power to render *binding* precedents. Whether a court has power to render precedents binding on other courts depends, in municipal law, upon whether municipal law lays down that such a power shall exist, and, in international law, upon whether a special legal provision makes decisions of one court binding on another. Such special provisions have been made by Article II (d) of Control Council Law No. 10 and Article 10 of the Charter of the International Military Tribunal, and by Ordinance No. 7 of the United States Zone of Germany, which create certain legal links between the Judgment of the Nuremberg International Military Tribunal and the United States Military Tribunals operating also in Nuremberg. The first provision makes the decisions of the International Military Tribunal *on a matter of law* binding on the latter tribunals, by providing that : "Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal" shall be "regarded as a crime". The Charter of the International Military Tribunal, which binds the United States Military Tribunals,⁽⁶⁾ makes a provision of which the second sentence is the significant one in this connection :

"Article 10 : In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any

⁽¹⁾ Vol. X, p. 133.

⁽²⁾ Compare Vol. V, p. 30.

⁽³⁾ See pp. 26-7 and 43-7.

⁽⁴⁾ See Vol. VIII, pp. 80-81.

⁽⁵⁾ See pp. 155-88.

⁽⁶⁾ See p. 10, note 7.

Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned."

The Military Tribunals are therefore obliged to accept the decisions of the International Military Tribunal as to the criminality or otherwise of groups and organisations.⁽¹⁾ These decisions have also been followed by United States Military Government Tribunals when dealing with allegations of membership in criminal organisations.⁽²⁾

Article X of Ordinance No. 7 provides that the decisions of the International Military Tribunal on certain *questions of fact*, and possibly on certain questions of law,⁽³⁾ shall also be binding upon the United States Military Tribunals:

"Article X: The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except in so far as the participation therein or knowledge thereof by any particular persons may be concerned. Statements of the International Military Tribunal in the judgment of Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."

On other questions the decisions of the International Military Tribunal are not binding on the later Tribunals, and that which conducted the *Flick Trial* while bound by the provisions of the *Charter* of the International Military Tribunal⁽⁴⁾ was strictly speaking not bound by the *decisions* of the latter on the question of crimes against humanity.⁽⁵⁾ The Judgment is nevertheless, strongly persuasive and has been constantly followed on points of law in the "Subsequent Proceedings" Trials; for instance in the

⁽¹⁾ This topic is further explored on pp. 43-45 and 48-49 of Vol. XIII.

⁽²⁾ See Vol. XIII, pp. 65-67.

⁽³⁾ On the question whether the provision refers to matters of law as well as fact, see Vol. IX, pp. 55-56. It may be argued that the Tribunals which conducted the *I. G. Farben* and *Krupp Trials* would appear not to have regarded it as referring to matters of law, since, had they thought themselves bound by decisions of the Nuremberg International Military Tribunal as to whether crimes against peace were committed in certain given circumstances, they would have followed the decision of the latter tribunal that "the invasion of Austria was a premeditated aggressive step." Had they accepted this decision, it may be said, it would have followed that the Hague Regulations would have protected the Austrian population, whereas the Tribunal conducting the *I. G. Farben Trial* held that the territory was "not under the belligerent occupation of Germany," while that conducting the *Krupp Trial*, without giving its reasons for so deciding, held that it had no jurisdiction to try an alleged offence involved in the acquisition of the *Barndorfer* plant in Austria by the *Krupp* firm. (See Vol. X, p. 63.) On the other hand, it may be argued that, since Austria was not one of the Allied powers engaged in the war against Germany, the annexation of the territory must be regarded as complete, and the Hague Regulations inapplicable. This would distinguish Austria from Bohemia and Moravia, to which, as Judge Wilkins pointed out, the International Military Tribunal had found the laws and customs of war to be applicable (Vol. X, pp. 151-153). If this second argument is accepted, the attitude taken by the Tribunals in the *I. G. Farben* and *Krupp Trials* is no guidance to their attitude to Article X of Ordinance No. 7.

⁽⁴⁾ See Vol. IX, p. 57.

⁽⁵⁾ See pp. 134-5.

judgments delivered in the *I. G. Farben Trial* and the *Krupp Trial* close attention was paid to the decisions of the International Military Tribunal on the question of crimes against peace.⁽¹⁾

Turning to the legal inter-relation between the United States Military Tribunals themselves, it is safe to say that they are in no way able to bind one another. As the *Flick Trial* Judgment states, there is "no similar mandate" to that contained in Article X of Ordinance No. 7 "either as to findings of fact or conclusions of law contained in the judgments of Co-ordinate Tribunals". The judgment concluded that "The Tribunal will take judicial notice of the judgments but will treat them as advisory only".⁽²⁾ As will be seen the Tribunals have arrived at different conclusions on one aspect of the law relating to crimes against humanity.⁽³⁾ On the other hand, as an example of concurrence of opinion between the Tribunals, it may be remarked that, in the *Krupp Trial*⁽⁴⁾ the Judgment relates that: "The law with respect to the deportation from occupied territory is dealt with by Judge Phillips in his concurring opinion in the *United States v. Milch* decided by Tribunal No. II.⁽⁵⁾ We regard Judge Phillips statement of the applicable law as sound, and accordingly adopt it . . ."

Under Article II of Ordinance No. 11 of the United States Military Government, "a joint session of the Military Tribunals may be called by any of the presiding judges thereof or upon motion, addressed to each of the Tribunals, of the Chief of Counsel for War Crimes or of counsel for any defendant whose interests are affected, to hear argument upon and to review any interlocutory ruling by any of the Military Tribunals on a fundamental or important legal question either substantive or procedural, which ruling is in conflict with or is inconsistent with a prior ruling of another of the Military Tribunals". The same applies to "conflicting or inconsistent final rulings contained in the decisions or judgments of any of the Military Tribunals on a fundamental or important legal question, either substantive or procedural". Decisions by joint sessions of the Military Tribunals unless thereafter altered in another joint session, shall be binding upon all the Military Tribunals. In the case of the review of final rulings by joint sessions, the judgments reviewed may be confirmed or remanded for action consistent with the joint decision.⁽⁶⁾ It will be recalled that a joint session of the Military Tribunals was held to decide the question whether conspiracy to commit war crimes and crimes against humanity could be regarded as a separate offence.⁽⁷⁾

(ii) Any differences that may exist between the authoritative nature of the decisions of one court or type of courts and that of the decisions of another depends upon factors other than whether a reasoned decision has been handed down by the court or type of court or whether instead the latter

⁽¹⁾ See Vol. X of these Reports, pp. 30-40 and 102-30.

⁽²⁾ See Vol. IX, pp. 17.

⁽³⁾ See pp. 136-8.

⁽⁴⁾ See Vol. X, p. 144.

⁽⁵⁾ See Vol. VII, pp. 45-7.

⁽⁶⁾ The full text of the Article appears in Vol. IX, pp. 58-9.

⁽⁷⁾ See Vol. VI, p. 104. A plea by the defence that this ordinance should be applied to some of the decisions arrived at in the *High Command Trial* was rejected by the Tribunal which conducted that trial: see Vol. XII, p. 95.

has been content with a mere finding of guilty or not guilty and a passing of sentence on accused found guilty. Nevertheless it cannot be doubted that the courts which have given reasoned judgments have tended to add the most detail to the existing store of knowledge or the international law of war crimes.

There is no rule of customary International Law providing that a court delivering judgment in a war crime trial must state the reasons for its opinion; consequently international practice on this point varies. British Military Courts and United States Military Commissions do not in general deliver reasoned judgments;⁽¹⁾ both have on very rare occasions departed from the rule, however, as when the Military Commission which tried General Yamashita set out in brief its reasons⁽²⁾ or when the Military Commission before which the trial of Lieutenant General Shigeru Sawada and others was conducted, described in certain "conclusions" some facts which they regarded as mitigating circumstances.⁽³⁾ The British Military Court before which the trial of Gozawa Sadaichi and others, Singapore, 21st January-4th February, 1946,⁽⁴⁾ was held, made, on passing sentence, brief comment on the guilt of each accused found guilty. Most of these remarks concerned the subordinate position of certain accused and are quoted elsewhere.⁽⁵⁾ Even the act of the Judge Advocate acting in the trial of Gustav Alfred Jepsen, in explaining shortly to the accused why the death sentence was not to be meted out to him,⁽⁶⁾ was exceptional.

On the other hand, the United States Military Tribunals were bound by Article XV of Ordinance No. 7 of the United States Zone of Germany, which provides that: "The Judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based . . .", and the result has been the pronouncement of detailed reasoned judgments which provide the Tribunals' evidential and legal reasons for their findings as did those of the International Military Tribunals.⁽⁷⁾ Again the Norwegian,⁽⁸⁾ French⁽⁹⁾, Dutch⁽¹⁰⁾ and Chinese Courts⁽¹¹⁾ provide, in various degrees of fulness, the reasons for decisions arrived at; the Norwegian judgments frequently enter into particularly detailed analysis and discussion of the relevant law and facts. Like the International Military Tribunals, among other Courts, the Polish Supreme National Tribunal is required to produce a reasoned judgment.⁽¹²⁾

4. THE OPINIONS OF QUALIFIED TEXT WRITERS

(i) The Judge Advocate acting in the trial of Sergeant-Major Shigeru Ohashi and Six Others by an Australian Military Court, Rabaul, 20th-23rd March, 1946, stated in his summing up to the Court: "Text books by

⁽¹⁾ See Vol. I, pp. ix-x.

⁽²⁾ See Vol. IV, pp. 33-35.

⁽³⁾ See Vol. V, pp. 6-7.

⁽⁴⁾ This, the first war crime trial held in South East Asia Command, has not been mentioned in previous volumes in this series.

⁽⁵⁾ See pp. 159 and 175.

⁽⁶⁾ See pp. 172-3.

⁽⁷⁾ Vol. III, p. 120.

⁽⁸⁾ See for instance Vol. III, pp. 2-11.

⁽⁹⁾ See for instance Vol. III, pp. 40-42.

⁽¹⁰⁾ See for instance, Vol. XIV, pp. 111-38.

⁽¹¹⁾ See for instance Vol. XIV, pp. 1-7.

⁽¹²⁾ See Vol. VII, p. 95.

learned jurist, such as Oppenheim, and the Manual of Military Law in its explanatory passages are strongly persuasive and should be followed by this Court unless it is well satisfied to the contrary."⁽¹⁾

Putting aside the problem of whether the works of outstanding international lawyers can properly be regarded as sources of international law,⁽²⁾ there can be no doubting the reliance placed by war crime courts, and by Judge Advocates acting in British, Australian and Canadian Courts, on treatises such as Oppenheim-Lauterpacht, *International Law*, as authoritative statements of the law.

(ii) Official publications such as the British *Manual of Military Law* and the United States Basic Field Manual F.M. 27-10 (*Rules of Land Warfare*) are also recognised as persuasive statements of law but are not accepted as binding on the courts. The Tribunal acting in the *Hostages Trial* said the following of an opinion expressed by Professor Oppenheim on the plea of superior orders:

"The fact that the British and American armies may have adopted it for the regulations of its own armies as a matter of policy, does not have the effect of enthroneing it as a rule of International Law. We point out that army regulations are not a competent source of International Law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilised nations generally. It is possible, however, that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions have been put into general practice. It will be observed that the determination, whether a custom or practice exists, is a question of fact. Whether a fundamental principle of justice has been accepted, is a question of judicial or legislative declaration. In determining the former, military regulations may play an important rôle but, in the latter, they do not constitute an authoritative precedent.

"Those who hold to the view that superior order is a complete defence to an International Law crime, base it largely on a conflict in the articles of war promulgated by several leading nations. While we are of the opinion that army regulations are not a competent source of International Law, where a fundamental rule of justice is concerned, we submit that the conflict in any event does not sustain the position claimed for it. If, for example, one be charged with an act recognised as criminal under applicable principles of International Law and pleads superior order as a defence thereto, the duty devolves upon the Court to examine the sources of International Law to determine the merits of such a plea. If the Court finds that the army regulations of some members of the family of nations provide that superior order is a complete defence and that the army regulations of other nations express a contrary view, the Court would be obliged to hold, assuming for the sake of argument only that such regulations constitute a competent source of International

⁽¹⁾ Vol. V, p. 27.

⁽²⁾ A stimulating introduction to this problem among others is Schwarzenberger, *The Inductive Approach to International Law*, in *Harvard Law Review*, Vol. LX (1947), No. 4, p. 545.

Law, that general acceptance or consent was lacking among the family of nations. Inasmuch as a substantial conflict exists among the nations whether superior order is a defence to a criminal charge, it could only result in a further finding that the basis does not exist for declaring superior order to be a defence to an International Law crime. But, as we have already stated, army regulations are not a competent source of International Law when a fundamental rule of justice is concerned. This leaves the way clear for the Court to affirmatively declare that superior order is not a defence to an International Law crime if it finds that the principle involved is a fundamental rule of justice and for that reason has found general acceptance."⁽¹⁾

Insofar as they describe the state of International Law and do not simply reproduce the text of the Hague and Geneva Conventions, such publications as the British and United States Military Manuals, 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, *insofar as their provisions are acted upon*, they mould state practice, which is itself a source of International Law. They are not, however, legislative instruments; they are not sources of law like a statutory or prerogative order or a decision of a court, but only publications setting out the law. They have, therefore, no formal binding power, but have to be either accepted or rejected on their merits, i.e. according to whether or not in the opinion of the Court they state the law correctly.⁽²⁾

(iii) Two agencies whose decisions have had a great influence upon the moulding of the international criminal law and which may be mentioned at this point are the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which was constituted by the Allied Powers on 25th January, 1919, at the Preliminary Peace Conference in Paris, and the United Nations War Crimes Commission, which functioned during and after the second World War. The former drew up a list of acts which it regarded as war crimes and this list was accepted and slightly expanded by the United Nations War Crimes Commission. The lists drawn up by the two bodies have had considerable influence for instance upon the definition of offences punishable under the Australian, Netherlands and Chinese War Crimes Laws.⁽³⁾ The Report of the Commission on Responsibilities was specifically quoted by the Judgments delivered in the *Justice Trial*⁽⁴⁾ and in the *Klinge Trial*⁽⁵⁾.

⁽¹⁾ Vol. VIII, pp. 51-52.

⁽²⁾ See Vol. I, pp. 18-19, Vol. II, pp. 148-149, and Vol. IV, pp. 100 and 110.

⁽³⁾ See Vol. V, p. 97, Vol. XI, pp. 93-95 and Vol. XIV, pp. 153-4. Compare Vol. VII, pp. 68-69 and Vol. XIII, p. 143. The United Nations War Crimes Commission has influenced the development of war crimes law in many other directions, not least through the work of its Committee I. This work is described in the *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, H.M. Stationery Office, 1948, Chapter XV.

⁽⁴⁾ See Vol. VI, pp. 57 and 60. See also p. 23 of the present Volume.

⁽⁵⁾ See Vol. III, p. 12. The terms of reference of the United Nations War Crimes Commission were relied upon by a Netherlands Temporary Court-Martial in the Trial of Susuki Motosuke in deciding that an offence against a victim who could not be regarded as a national of one of the United Nations was not to be treated as a war crime; see Vol. XIII, pp. 127-129.

III

THE LEGAL BASIS OF COURTS ADMINISTERING INTERNATIONAL CRIMINAL LAW

A. PROVISIONS OF INTERNATIONAL LAW

(i) A footnote to the majority Judgment of the Supreme Court in the *Yamashita Case* included the statement that: "The Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties of the Versailles Peace Conference, which met after cessation of hostilities in the First World War, were of the view that violators of the Law of War could be tried by military tribunals. See Report of the Commission, 9th March, 1919, 14 American Journal of International Law 95, 121. See also memorandum of American commissioners concurring on this point, *id.*, at p. 141. The treaties of peace concluded after World War I recognised the right of the Allies and of the United States to try such offenders before military tribunals. See Art. 228 of Treaty of Versailles, 28th June, 1919; Art. 173 of Treaty of St. Germain, 10th September, 1919; Art. 157 of Treaty of Trianon, 4th June, 1920.

"The terms of the agreement which ended hostilities in the Boer War reserved the right to try, before military tribunals, enemy combatants who had violated the Law of War. 95 British and Foreign State Papers (1901-1902) 160. See also trials cited in Colby, War Crimes, 23 Michigan Law Review 482, 496-7."⁽¹⁾

The Judgment delivered in the *Justice Trial* stated:

"As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognised that tribunals may be established and punishment imposed by the State into whose hands the perpetrators fall. Those rules of international law were recognised as paramount, and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the State or in occupied territory, has been unquestioned. (*Ex parte Quirin, supra*; *In Re: Yamashita*, 90 L. ed. 343). However, enforcement of international law has been traditionally subject to practical limitations. Within the territorial boundaries of a State having a recognised, functioning government presently in the exercise of sovereign power throughout its territory, a violator of the rules of international law could be punished only by the authority of the officials of that State. The law is universal, but such a State reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions. Thus notwithstanding the paramount authority of the substantive rules of common international law the doctrines of national sovereignty have been preserved through the control of enforcement machinery. It must be admitted that Germans were not the only

⁽¹⁾ Vol. IV, p. 42, note 1.

ones who were guilty of committing war crimes; other violations of international law could, no doubt, be tried and punished by the State of which they were nationals, by the offended State if it can secure jurisdiction of the person, or by an International Tribunal if of competent authorised jurisdiction

"Long prior to the Second World War the principle of personal responsibility had been recognised.

"The Council of the Conference of Paris of 1919 undertook, with the aid of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, to incorporate in the treaty of peace arrangements for the punishment of individuals charged with responsibility for certain offences." (Hyde, *International Law* (2nd rev. ed.), Vol. III, p. 2409.)

"That Commission on Responsibility of Authors of the War found that:

"The war was carried on by the Central Empires, together with their Allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity." (Hyde, *International Law* (2nd rev. ed.), Vol. III, pp. 2409-2410.)

"As its conclusion the Commission solemnly declared:

"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." (*American Journal of International Law*, Vol. 14 (1920), p. 117.)⁽¹⁾

Again, the Judgment in the *Flick Trial* included the following quotation from the Judgment of the Nuremberg International Military Tribunal:

"That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised. In the recent case of *Ex parte Quirin* (1942, 317 U.S. 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court said:

"From the very beginning of its history this court has applied the law of war as including that part of the law of nations which prescribed for the conduct of war, the status, rights and duties of enemy nations, as well as enemy individuals."

The *Flick Trial* judgment adds:

"The application of international law to individuals is no novelty."⁽²⁾

⁽¹⁾ Vol. VI, pp. 37 and 44.

⁽²⁾ Vol. IX, p. 18. See also pp. 172-173 of that Volume.

For statements by courts, by counsel, or by Judge Advocates in British and Commonwealth trials, regarding the right to punish individuals for certain breaches of international law, see also Vol. I, p. 11; Vol. II, pp. 8 and 106; Vol. III, p. 3 and Vol. X, p. 38. Compare a statement by the Netherlands Court of Cassation in Vol. XIV, p. 114.

The Chinese War Crimes Law makes provision for the punishment of offences committed during the war "or a period of hostilities" against China (see Vol. XIV, pp. 155-6), in order to cover the period during which a state of *de facto* belligerency existed between Japan and China.

The Tokyo International Military Tribunal rejected a defence argument that Chinese armed forces were not entitled to prisoner of war status if captured by the Japanese during such a period of *de facto* belligerency.

(ii) Chief Justice Stone, in delivering the majority judgment of the Supreme Court in the *Yamashita Case* stated that:

"We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the Law of War committed before their cessation, at least until peace has been officially recognised by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the Law of War would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.

"No writer on International Law appears to have regarded the power of military tribunals, otherwise competent to try violations of the Law of War, as terminating before the formal state of war has ended. In our own military history there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offences against the Law of War committed before the cessation of hostilities.

"The extent to which the power to prosecute violations of the Law of War shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace. Here, peace has not been agreed upon or proclaimed. Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the Law of War. The conduct of the trial by the military commission has been authorised by the political branch of the Government, by military command, by International law and usage, and by the terms of the surrender of the Japanese Government."⁽¹⁾

The dissenting judges made little objection to this point, although Mr. Justice Rutledge thought that there was less necessity for a military commission to be appointed after active hostilities were over, since "there is no longer the danger which always exists before surrender and armistice . . . The nation may be more secure now than at any time after peace is officially concluded."⁽²⁾

The position under customary International Law seems to be that whereas (as was recognised by the Supreme Court and by general international practice following the recent war) jurisdiction over war crimes exists without limitation beyond the cessation of fighting and up to the conclusion of peace, jurisdiction continues after this point only over such offences as are also infringements of the municipal law of the state whose courts are trying the alleged offender. Whether an offence fulfils this test of illegality under municipal law will depend upon the laws of each State, and the attitude which these laws reflect to the principle of the territoriality of criminal law.

This position under customary International Law can, of course, be altered by international agreement, as it has been by Articles 1-3 of the Peace

⁽¹⁾ See Vol. IV, pp. 41-42. The Supreme Court here also showed how jurisdiction under United States Law also continued after the cessation of hostilities.

⁽²⁾ Vol. IV, p. 56.

Treaty between the Allied and Associated Powers and Italy⁽¹⁾ and by similar provisions in the Treaties of Peace with Roumania, Bulgaria, Hungary and Finland.

(iii) In so far as a Court tries enemy nationals for war crimes committed against nationals of the country whose authorities have established the Court, the jurisdiction of the Court is based on the undoubted right under international law, as acknowledged by the authorities quoted above⁽²⁾, among many others, of a belligerent to punish, on capture of the offenders, violations of the laws and usages of war committed by enemy nationals against the nationals of that belligerent.

According to generally recognised doctrine, however, the right to punish war crimes is not confined to the State whose nationals have suffered or on whose territory the offence took place but is possessed by any independent State whatsoever, just as is the right to punish the offence of piracy. This doctrine, under which every independent State has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victims or the place where the offence was committed, a doctrine which has received the support of the United Nations War Crimes Commission and is generally accepted as sound, received exhaustive treatment by Professor Willard B. Cowles in an article entitled *Universality of Jurisdiction over War Crimes* (California Law Review, Vol. 33 (1945), p. 177), in which the learned author states: "... when it is a matter of doing justice in places where ordinary law enforcement is difficult or suspended, the military tribunals of the United States ... have acted on the principle that crime should be punished because it is crime. They have no concern with ideas of territorial jurisdiction. ... No evidence has been found that any of the decisions just discussed were the subject of protest by the governments of the accused persons. Certain it is that in none of these United States cases is there any evidence of a consciousness on the part of the courts of any duty not to assume jurisdiction." The author then argued that "while the state whose nationals were directly affected has a primary interest, all civilized states have a very real interest in the punishment of war crimes", and that "an offence against the laws of war, as a violation of the law of nations, is a matter of general interest and concern". He concluded that "every independent state has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offence was committed".⁽³⁾

The Tribunal which conducted the *Hostages Trial* observed that:

"An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction

⁽¹⁾ These provisions are quoted in Vol. IV, p. 77.
This question of the legality of the trial of war criminals after the termination of hostilities and the related question of the permissibility under International Law of continuing, after the conclusion of peace, the operation of sentences passed on war criminals before that event, are somewhat further discussed in Vol. IV, pp. 76-77.

⁽²⁾ On pp. 23-4.

⁽³⁾ Similarly it is stated in Wheaton's *International Law*, Vol. I, Sixth Edition, p. 269, that every independent state has the judicial power to punish "piracy and other offences against the common law of nations by whomsoever and wheresoever committed."

of the state that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen.

"Some war crimes, such as spying, are not common law crimes at all; they being pure war crimes punishable as such during the war and, in this particular case, only if the offender is captured before he rejoins his army. But some other crimes, such as mass murder, are punishable during and after the war.⁽¹⁾ But such crimes are also war crimes because they were committed under the authority or orders of the belligerent who, in ordering or permitting them, violated the rules of warfare. Such crimes are punishable by the country where the crime was committed or by the belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent. There are many reasons why this must be so, not the least of which is that war is usually followed by political repercussions and upheavals which at times place persons in power who are not, for one reason or another, inclined to punish the offenders. The captor belligerent is not required to surrender the alleged war criminal when such surrender is equivalent to a passport to freedom. The only adequate remedy is the concurrent jurisdictional principle to which we have heretofore adverted. The captor belligerent may therefore surrender the alleged criminal to the state where the offence was committed, or, on the other hand, it may retain the alleged criminal for trial under its own legal processes.

"It cannot be doubted that the occupying powers have the right to set up special courts to try those charged with the commission of War Crimes as they are defined by International Law. *Ex Parte Quirin*, 317 U.S. 1, *in re Yamashita*, 327 U.S. 1."⁽²⁾

(iv) In so far as Allied Courts have tried enemy nationals for offences which do not constitute war crimes in the usual sense, i.e. for crimes against humanity, crimes against peace and membership of criminal organisations, jurisdiction may in some instances be based on the undoubted right under international law of a belligerent, on the total breakdown of the enemy owing to *debellatio*, to take over the entire powers of the latter, including the power to make laws and to conduct trials. Thus, by the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on the 5th June, 1945, the four Allied Powers occupying Germany assumed supreme authority, including the power to create courts and declare offences.

(v) Some Courts have been given jurisdiction over crimes against humanity and/or crimes against peace by States which cannot be said to have taken over the powers of an enemy whose nationals are effected.⁽³⁾ Here the right—long recognised under international law to try war crimes committed by enemy nationals has been extended so as to include a right to try crimes against humanity and crimes against peace as well.⁽⁴⁾

⁽¹⁾ See pp. 47-8.

⁽²⁾ Vol. VIII, pp. 54-55.

⁽³⁾ See pp. 29, 30, 33 and 36 of this volume, and Vol. XI, pp. 90-1.

⁽⁴⁾ On the development of the notion of crimes against humanity see Vol. VI, pp. 45-48. On that of the notion of crimes against peace, see the Judgment of the Nuremberg International Military Tribunal, British Command Paper, Cmd. 6964, pp. 39-41.

B. THE USE MADE BY VARIOUS ALLIED STATES AND COURTS OF THESE PROVISIONS OF INTERNATIONAL LAW

(i) The legal basis under *Municipal Law* of the various Courts, Commissions and Tribunals set up to try alleged war criminals and similar offenders necessarily varies somewhat from country to country, but it is not necessary in a survey of *international criminal law* to indulge in any extensive comparative study of the sources under *Municipal Law* of war crimes jurisdiction. It may, nevertheless, be of value to indicate briefly the relevant enactments and the type of courts to which, in each country, war crime trials have been referred, and also the jurisdiction provided for the courts by those enactments. Such a summary would illustrate the ways in which various States have interpreted or utilised those legal bases for trials, which are provided by international law, and which have been described above.⁽¹⁾

(ii) It is generally agreed that, though an alleged war criminal may properly be tried by a military court, this does not prevent his captors from trying him by a municipal court with jurisdiction under municipal law should they choose to do so. For this point of view, the municipal enactments concerning the trial of war criminals fall into three categories, according to whether they (i) create new courts; or (ii) refer cases of alleged war crimes to already existing military courts; (iii) refer such cases to already existing civil courts.

The relevant United Kingdom and United States municipal provisions fall into the first class. The French Ordinance of 28th August, 1944, is an example of the second, while the Norwegian enactments illustrate the third.

(iii) *The jurisdiction of the British Military Courts* for the trial of war criminals is based on the Royal Warrant dated 14th June, 1945, Army Order 81/45 as amended. The Royal Warrant states that His Majesty "deems it expedient to make provision for the trial and punishment of violations of the laws and usages of war" committed during any war "in which he has been or may be engaged at any time after the 2nd September, 1939". It is His Majesty's "will and pleasure" that "the custody, trial and punishment of persons charged with such violations of the laws and usages of war" shall be governed by the Regulations attached to the Warrant. The Royal Warrant is based on the Royal Prerogative, which, in English law, is "nothing else than the residue of arbitrary authority which at any given time is legally left in the hands of the Crown" (Dicey's definition).⁽²⁾

Regulation 1 of the Royal Warrant provides that "war crime" means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939.

Provisions similar to those contained in the Royal Warrant have in the *Commonwealth of Australia* been made by or under an Act of Parliament

⁽¹⁾ Provisions of municipal law concerning the jurisdiction of courts are not in all instances to be quoted in full in this present section. Where Annexes on the relevant law and practice have been provided in the previous Volumes, references back to these are given. Jurisdictional provisions from the legislation of some further countries are quoted as Annex 1 to this present Volume and reference forward to these will from time to time be made in the present section.

⁽²⁾ For further details of the legal basis in English law of British Military Courts for the trial of war criminals, see Vol. I, p. 105 and 41-42.

(War Crimes Act, 1945, No. 48/1945),⁽¹⁾ and in the *Dominion of Canada* by an Order in Council, made under the authority of the War Measures Act of Canada, and entitled *The War Crimes Regulations (Canada)* (P.C. 5831 of 30th August, 1945; Vol. II, No. 10, Canadian War Orders and Regulations). The latter were re-enacted in an Act of 31st August, 1946. The Canadian and Australian War Crime Courts are, like the British, Military Courts.⁽²⁾

In a way similar to Regulation 1 of the Royal Warrant, the Canadian Regulations define a war crime simply as "a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September 1939".⁽³⁾ The jurisdiction of British and Canadian War Crimes Courts is limited, then, to the trial of violations of the laws and usages of war, and they have not jurisdiction over crimes against humanity, crimes against peace or membership of criminal organisations.

The jurisdiction of Australian Military Courts for the trial of alleged war criminals is rather wider than that of the British and Canadian Military Courts.

Article 3 of the Commonwealth of Australian War Crimes Act states that:

"In this Act, unless the contrary intention appears . . . 'war crime' means:

(a) a violation of the laws and usages of war; or

(b) any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on the third day of September, one thousand nine hundred and forty-five, under the National Security (Inquiries) Regulations (being Statutory Rules 1941, No. 35, as amended by Statutory Rules 1941, Nos. 74 and 114 and Statutory Rules 1942, No. 273), committed in any place whatsoever, whether within or beyond Australia, during any war."⁽⁴⁾

The Instrument of Appointment referred to states that the expression "war crime" includes, *inter alia*:

"(i) Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

This definition of "crime against peace" is the same as that used in Article 6 (a) of the Charter attached to the Four-Power Agreement of 8th August, 1945. The effect of this is that "crimes against peace" form part of the term "war crimes" as defined by the Australian statute.

The Australian Act does not, on the other hand, comprise in its definition of "war crime" crimes against humanity within the meaning of Art. 6 (c) of the Charter of the International Military Tribunal, excepting of course "crimes against humanity" which also fall under the term "violations of the laws and customs of war."⁽⁵⁾

⁽¹⁾ See Vol. V, p. 94.

⁽²⁾ See Vol. IV, p. 125.

⁽³⁾ See Vol. IV, p. 125.

⁽⁴⁾ At another point, Section 3 provides that "unless the contrary intention appears, any war" means any war in which His Majesty has been engaged since the second day of September, One thousand nine hundred and thirty-nine."

⁽⁵⁾ See Vol. V, pp. 94-97.

(iv) *The United States Military Commissions* are an old institution which existed prior to the Constitution of the United States of America. They have been described as the American Common Law War Courts. They were not created by statute, but are recognised by statute law. Whereas the British Royal Warrant of 14th June, 1945, has made regulations for the trial of war criminals for all British Military Courts in all theatres of operations and in all territories under the jurisdiction of the United Kingdom Government and armed forces, the United States authorities, on the other hand, have made different provisions for different territories, namely for the Mediterranean, European, Pacific and China Theatres of Operations.⁽¹⁾

The jurisdictions conferred upon the United States Military Commissions operating these different theatres have not been the same in extent. The narrowest jurisdiction is that vested in the Military Commissions appointed in the Mediterranean Theatre of Operations. In the Mediterranean Regulations (Regulation 1) the expression "war crime" means a violation of the laws or customs of war. United States Commissions other than those appointed in the Mediterranean Theatre of Operation have, however, been empowered to try other offences in addition to war crimes. The European Directive adds violations of the laws of nations other than the laws or customs of war, and violations of the local law of the occupied territory, while the Regulations used in the Pacific theatre and in China in describing the offences subject to trial by Military Tribunals reflect the influence of the Four Power Agreement of 8th August, 1945, and particularly of Article 6 of the Charter of the International Military Tribunal annexed to it. Under the Charter the International Military Tribunal has jurisdiction over:

- (a) Crimes against peace;
- (b) War Crimes, namely violation of the laws or customs of war; and
- (c) Crimes against humanity.⁽²⁾

(v) *The competence of French Military Tribunals* to try war criminals is based on the Ordinance of 28th August, 1944, concerning the suppression of war crimes, which, by virtue of Article 6 thereof, is applicable not only to Metropolitan France but also to Algeria and the Colonies.

The first paragraph of Article 1 of the Ordinance provides that persons guilty of offences under the Ordinance shall be tried by French Military Tribunals in accordance with the French laws in force. Trials held by virtue of the Ordinance have taken place before Permanent Military Tribunals and Military Appeal Tribunals, for which legal provision already existed before its enactment for the trial of offences by French military personnel.⁽³⁾

The necessary starting point for a study of *Norwegian law relating to the trial of war criminals* is the law of 13th December, 1946 (No. 14) on the Punishment of Foreign War Criminals, the text of which differs only in one minor respect relating to punishment from that of a Provisional Decree of the same subject dated 4th May, 1945. In promulgating the Provisional Decree, the Norwegian Government in London acted in accordance with the resolution adopted by the Storting at Elverum on 9th April, 1940, and with

⁽¹⁾ See Vol. I, p. 52, Vol. III, pp. 103-105 and 56-57, 60, 62 and 65-66.

⁽²⁾ See Vol. III, pp. 105-107. Records of trials, held before such Military Commissions, which have been forwarded to the United Nations War Crimes Commission have, however, in fact concerned only allegations of war crimes.

⁽³⁾ See Vol. III, pp. 93 and 49-50.

s. 17 of the Norwegian Constitution, which provides that "The King may make or repeal regulations concerning commerce, customs, trade and industry and police; they must not, however, be at variance with the Constitution or the laws passed by the Storting . . . They shall operate provisionally until the next Storting." The Law was passed by the Storting on 12th December, 1946, and was sanctioned by the King on 13th December, 1946. Paragraph 1 of the Law reads as follows:

"Acts which, by reason of their character, come within the scope of Norwegian criminal legislation are punished according to Norwegian law, if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norway or were directed against Norwegian citizens or Norwegian interests."

One result of the words "are punished according to Norwegian law" is that in Norway no special Courts, military or otherwise, have been set up to try cases of alleged war crimes. Such proceedings are brought before the ordinary Courts of the land.⁽¹⁾

The conducting of War Crime trials before the *Danish Civil Courts* is provided for in the Danish Act of Parliament of 12th July, 1946, on the Punishment of War Criminals while the Belgian Law of 20th June, 1947, relates to the competence of *Belgian Military Tribunals* in the matter of war crimes. Other relevant Belgian enactments are the Decree of 5th August, 1943, and the Act of Parliament of 30th April, 1947.⁽²⁾

The Law of 2nd August, 1947, of the Grand Duchy of Luxembourg provides for the trial of alleged war criminals in Luxembourg by a specially established War Crimes Court, which, according to Article 20 of the Law, was to have a mixed civil and military composition.

(vi) It is possible to discern a difference between the Anglo-Saxon and the prevailing Continental legal approach to the punishment of war criminals and the French, Norwegian, Danish, and Luxembourg provisions may be used to demonstrate the latter.

The first paragraph of Article I of the French Ordinance of 28th August, 1944, for instance, reads as follows: "Enemy nationals or agents of other than French nationality who are serving enemy administration or interests and who are guilty of crimes or delicts committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before 17th June, 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies, shall be tried by French Military Tribunals in accordance with the French laws in force, and according to the provisions set out in the present Ordinance, where such offences, even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war."⁽³⁾ When a

⁽¹⁾ See Vol. III, p. 81.

⁽²⁾ For certain Belgian provisions relating to the jurisdiction of these Tribunals, see pp. 203-4.

⁽³⁾ Italics inserted.

French Military Tribunal tries an alleged war criminal, the judges decide first whether a provision of the French Criminal Code has been violated and, only secondly, whether this breach was justified by the laws and customs of war.⁽¹⁾

Again, the Norwegian attitude towards the treatment of war criminals follows the general Continental practice by stressing that before punishment of any individual offender becomes legal, he must be shown to have offended against some specific provision of Norwegian municipal law as well as against the laws and usages of war. The Norwegian approach is shown in the first sentence of Article 1 of the Law of 13th December, 1946 (No. 14): "Acts which, by reason of their character, *come within the scope of Norwegian criminal legislation* are punished according to Norwegian law, if they were committed *in violation of the laws and customs of war* by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norway or were directed against Norwegian citizens or Norwegian interests . . ."⁽²⁾

Similarly, Article 1 of the Danish Law of 12th July, 1946, on the Punishment of War Criminals provides that: "If a non-Danish subject, being in the service of Germany or serving under one of Germany's allies, has *infringed the rules and customs of international law governing Occupation and War and has performed, in Denmark or to the detriment of Danish interests, any deed punishable per se in Danish Law*, an action can be brought against such person in respect of the crime committed and a punishment imposed in a Danish Court in pursuance of this Act."⁽³⁾

⁽¹⁾ See Vol. III, pp. 93-96.

⁽²⁾ Italics inserted. See Vol. III, pp. 81-85. A commentary of the Norwegian Ministry of Justice and Police which explained the provisions of the Law claims that this attitude is the same as that adopted in the Moscow Declaration, which provided that war criminals other than major criminals were to be tried and punished in accordance with the laws of the liberated countries. The Ministry, quoting Art. 96 of the Constitution: "No one may be convicted except according to law, or be punished except according to judicial sentence . . .", then goes on to state that: "Norwegian courts can only inflict punishment according to provisions of Norwegian civil or military law. The principle laid down in Art. 96 of the Constitution must be interpreted in this connection so as to make an arbitrary application of an undefined provision of international law inadmissible. In Norway, international law is not incorporated into national law as an integral part, as in the case of various foreign legal systems. Before a rule of substantive international law can be applied by Norwegian Courts, it must be incorporated into Norwegian national law by a special act. A clear example of this is Art. 92 of our military criminal code, which fixes the punishment for a typical war crime committed by enemy soldiers. The paragraph is based on the international regulations which are to be found in the Geneva Convention of 1929, regarding the treatment of sick and wounded; cf. Art. 23 of the Hague Regulations."

It is to be noted, however, that a Norwegian Court is not precluded from sentencing a war criminal to death by the fact that the municipal enactments enabling the supreme penalty to be exacted for his offence was not passed until after the commission thereof. Accordingly, judgment went against Karl Hans Hermann Klinge when he appealed to the Supreme Court of Norway against his being condemned to death as a war criminal by the Eidsivating Lagmannsrett. Counsel for Klinge claimed that the Lagmannsrett had unjustly applied the Provisional Decree of 4th May, 1945; as the crimes for which the defendant had been convicted had been committed before the passing of that Decree, the punishment should have been restricted to the limits set by Arts. 228, 229 and 62 of the Civil Criminal Code, according to which the death sentence could not have been passed: "No law may be given retroactive effect." For various reasons set out in Vol. III, pp. 3-6 and 10-11, a majority of the Supreme Court judges rejected these arguments. See also Vol. III, pp. 13-14.

⁽³⁾ Italics inserted.

It should be added however, that paragraph 2 of the Danish Act states that "This Act shall apply . . . also to all acts which, though not specifically cited above, are covered by Art. 6 of the Charter of the International Military Tribunal. . ."

Article 1 of the Law of 2nd August, 1947, on the suppression of war crimes, of the Grand Duchy of Luxembourg provides that:

"Agents of other than Luxembourg nationality, who are guilty of crimes or delicts falling within the competence of the Luxembourg tribunals and which were committed after the outbreak of hostilities, if these offences were committed at the time or under the pretext of the state of war and were *not justified by the laws and customs of war*, whether such agents were captured within the Grand Duchy or on enemy territory or whether the Government secure them by extradition, shall be prosecuted before a War Crime Court and tried in accordance with the Luxembourg laws in force and with the provisions of the present law."⁽¹⁾

The Anglo-American legal approach to war crime trials has been a little different in this respect. Instruments such as the British Royal Warrant or the United States Theatre Regulations and Directives, which have validity in the respective municipal legal systems, have provided in general terms that the Courts operating under them shall have jurisdiction over war crimes, but the practice of these Courts, insofar as they try war crimes *stricto sensu*, is to require only that a breach of the laws and usages of war must be shown. An enactment governing such a court may sometimes attempt to define the scope of the term "war crime", and further, the provisions of municipal law are often quoted, as analogies,⁽²⁾ by Counsel, and in British trials by the Judge Advocate or Legal Member, but the violation of any set of legal rules other than the laws and usages of war (possibly as interpreted in the enactment) need not be shown.⁽³⁾

It will be seen that for an offence to be punishable under, for instance, the French war crimes law it must be shown to have violated not only the laws and usages of war but also the relevant municipal laws. While the jurisdiction of courts set up under such laws as the French Ordinance cannot (in theory at least) be wider than that of courts, like the British Military Courts, which are simply empowered to try violations of the laws and usages of war, it can certainly be *narrower* than that jurisdiction.

That this possibility is not a merely theoretical one was shown by the successful appeal to the Cour de Cassation of Hugo Gruner, ex-Kreisleiter of Thann, against the sentence of death passed on him (as on Robert Wagner, ex-Gauleiter of Alsace, and others) by the Permanent Military Tribunal at Strasbourg, which sat from 23rd April to 3rd May, 1946.⁽⁴⁾

The requirement laid down by the French and Norwegian war crimes enactments, among others, to the effect that an alleged war crime must be shown to have offended not only the laws and usages of war but also municipal law, is not without other and similar accompanying difficulties, since municipal law may define more narrowly the offence or provide a lesser punishment.

⁽¹⁾ Italics inserted.

⁽²⁾ See pp. 7-10.

⁽³⁾ Concerning the application of municipal law provisions in war crime trials see an opinion expressed by Professor Brierly quoted in Vol. IX, p. x.

⁽⁴⁾ See Vol. III, pp. 47-49.

Klinge was enabled thereby to claim that the retroactive application of the Ordinance under which he was sentenced to death was contrary to a more fundamental document having validity in the municipal law of Norway, namely the Norwegian Constitution. A minority of judges of the Supreme Court indeed voted in favour of his appeal.⁽¹⁾ A more general difficulty, however, arises out of the need on the part of the legislator to see to it that the municipal law is supplemented, where necessary, in order to ensure that the provisions of that law are wide enough to provide against those war crimes, as the term is understood in current legal thought, which it was the intention of the authorities concerned to try.

Thus Article 1 of the French Ordinance of 28th August, 1944, states that, "in particular" certain specified provisions of the *Code Pénal* and *Code de Justice Militaire* shall be the subject of prosecution. Further, Article 2 of the Ordinance lays down that certain specific war crimes shall be treated as violations of certain specified provisions of the Codes.⁽²⁾

Article 2 of the Luxembourg Law of 2nd August, 1947, contains a similar collection of paragraphs, interpreting provisions of the *Code Pénal* of Luxembourg so as to cover various types of war crimes, while Article 2 of the Norwegian Law on the Punishment of Foreign War Criminals⁽³⁾ was passed into law due to the feeling of the Norwegian Ministry of Justice that: "The German economic exploitation of Norway stands in this respect in a class by itself. Its scale and the forms in which it has been carried out lie in some respects so far beyond the usual conception of criminal law that it is difficult or even impossible to regard the different acts as being within the scope of existing provisions of the Civil or Military Criminal Codes. In order to amend this deficiency the Ministry consider it necessary to lay down a special provision which covers every kind of German exploitation in Norway performed by force or threat thereof . . . Acts like the excessive issue of currency notes, unreasonable fixing of prices, irresponsible exploitation of clearing agreements, etc., can hardly be assimilated with any particular crime already defined and covered by the law. If criminal prosecution against those individually responsible in this connection should arise, it is deemed necessary that the law should give certain instructions to those administering the law. Those regulations, however, should be given a very comprehensive though general form, considering the very varied economic transactions which may arise in this connection."⁽⁴⁾

(vii) The trial of war criminals before *Dutch Courts* is regulated by two sets of rules. One set relates to the trials held by *metropolitan Dutch courts*, and the other to those conducted by courts of the *Netherlands East Indies*. In each of the two geographical areas concerned rules were enacted by the respective governments, the rules of Holland relying mainly on existing provisions of Dutch common penal law and those of the Netherlands East Indies on novel provisions introducing in the sphere of war crimes numerous exceptions to the Netherlands East Indies Penal Code. Metropolitan rules

⁽¹⁾ See Vol. III, pp. 6-10 and 11. For the treatment of a similar question by the Netherlands Court of Cassation, see Vol. XIV, pp. 118-23.

⁽²⁾ See Vol. III, pp. 95-96.

⁽³⁾ See Vol. III, pp. 84-85.

⁽⁴⁾ Vol. III, p. 84.

are prescribed by a number of Decrees enacted by the Netherlands Government between 1943 and 1947, while trials of war criminals in the territories belonging to the Netherlands East Indies are regulated by several decrees which were enacted in 1946 by the Lieutenant Governor-General within his constitutional powers.⁽¹⁾

While the Netherlands East Indies war crimes legislation from the outset applied international law directly, as do British Military Courts for instance, the metropolitan Dutch legislation originally treated war crimes as such offences under municipal penal law as were not justified by the laws and customs of war, but later adopted a compromise according to which international law was observed on questions relating to the definition of offences and municipal law relied upon to prescribe the punishment to be applied.⁽²⁾

(viii) The legal basis of war crime trials before *Polish courts* is provided by a number of texts which were embodied in the consolidated text of the Decree of 31st August, 1944, contained in the Schedule to the Proclamation of the Minister of Justice dated 11th December, 1946 (Official Gazette, No. 69, item 377). Polish trials of war criminals and traitors are held before civil courts, including a specially established Supreme National Tribunal.⁽³⁾

From a study of the offences which fall within the jurisdiction of the relevant Polish Courts⁽⁴⁾ it appears that the Polish attitude towards the treatment of war criminals follows the general continental practice that before punishment is inflicted, an individual offender must be shown to have offended against some specific provision of Polish municipal law. An additional characteristic of the Polish system is that the violation of any set of international rules or the laws and customs of war need not be shown.

Consequently, the provisions of the Decree of 1944 dealing with crimes committed in connection with the war do not define the terms "war crime" and "war criminal", but from the spirit of this law it seems to follow that the offences which have been made punishable are such infractions of Polish law as are not justified by the laws and customs of war. In general it appears that the Polish special legislation dealing with crimes committed in connection with the war comprise in fact war crimes, crimes against humanity and crimes against peace as envisaged by international enactments now in force although these specific types of crimes have not been specifically defined by Polish law and have only been referred to in a general way in those provisions of the Decree of 1944 which deal with criminal organisations.⁽⁵⁾

(ix) A Law governing the Trial of War Criminals was enacted by the Chinese Authorities on 24th October, 1946; Article XIV of this law provides that:

"Article XIV. War crime cases shall be within the jurisdiction of the Military Tribunals for the Trial of War Criminals, attached to various Military Organisations by order of the Ministry of Defence."⁽⁶⁾

⁽¹⁾ See Vol. XI, pp. 86-92 and 3-4, Vol. XIII, pp. 123-4 and Vol. XIV, pp. 111-14.

⁽²⁾ See Vol. XI, pp. 87-88.

⁽³⁾ See Vol. VII, pp. 4-5, 18, 82-83 and 91-92 for further details of the relevant Polish enactments.

⁽⁴⁾ See Vol. VII, pp. 84-88.

⁽⁵⁾ See Vol. VII, pp. 88-91.

⁽⁶⁾ See Vol. XIV, p. 3 and 152.

A study of Articles II, III and IV of the law of 24th October, 1946, ⁽¹⁾ shows that the Chinese War Crimes Law resembles the Australian in that both provide Courts acting under their provisions with jurisdiction to try, in addition to alleged war crimes proper (i.e., violations of the laws and usages of war), what may be termed "crimes against peace" (cf. Article II Section 1 of the Chinese Law) but not such crimes against humanity as do not at the same time represent war crimes. Thus, while offences against certain types of victims other than Chinese and Australian Nationals may be tried before Chinese and Australian Courts respectively (cf. Article VII of the Chinese provision and Article 12 of the Australian), offences by enemy nationals against enemy nationals definitely cannot be so tried.

(x) A Yugoslav Law of 25th August, 1945, governs the *trial of war criminals and traitors by Yugoslav Courts*. Such offences are tried by either civil or military courts, according to the provisions of paragraphs 1 and 2 of Article 14 of the law:

"(1) Criminal acts under this law are tried in the first instance by the People's County Courts, or in the case of military persons, by military courts.

"(2) In particularly important cases, criminal cases under Article 2 of this Law are to be tried by the Supreme Courts of the federative units, or if the act is of general state significance by the Military Bench of the Supreme Federal Court, or otherwise, by the Supreme Federal Court."⁽²⁾

(xi) Provisions for the *trial of war criminals and traitors in Czechoslovakia* was made by Decree No. 16 of 19th June, 1945, of the President of the Czechoslovak Republic, Law No. 22 of 24th January, 1946, of the Provisional National Assembly of the Republic, Law No. 245 of 18th December, 1946, of the Constituent National Assembly of the Republic, and Decrees Nos. 33/1945 and 57/1946 of the Slovak National Council. Such trials were to be held before specially appointed People's Courts.⁽³⁾

(xii) *Trials of alleged war criminals in Greece* are held in accordance with the Constitutional Act 73/1945 (Government Gazette p. 250), before either the Special Court Martial in Athens of mixed military and civilian composition or Courts Martial of entirely military composition.

Under the provisions of the Act, enemy nationals may be tried before Greek War Crime Courts for any offence which would be a violation of Article 6 of the Charter of the International Military Tribunal. The Greek Courts therefore have jurisdiction over crimes against humanity and crimes against peace as well as over war crimes. Acts which constitute offences against the Greek Penal Code may also be brought before such Courts when they have been committed by enemy nationals and were not justified by the laws and usages of war.

(xiii) Apart from the British and United States Military Courts and Commissions which have been established for the trial of alleged war criminals in Germany (for instance at Wuppertal and Hamburg in the British Zone

⁽¹⁾ See Vol. XIV, p. 3-4 and 152-6.

⁽²⁾ Certain provisions regarding the jurisdiction of these Courts are set out in Annex I to this Vol. pp. 207-9.

⁽³⁾ For relevant jurisdictional provisions, see pp. 205-7.

and at Dachau in the United States Zone) *several systems of Military Government Courts* have also been set up, in the various zones, with power to try war crimes and other offences.

Proclamation No. 1 of General Eisenhower, acting as Supreme Commander of the Allied Expeditionary Force, provided in Section II:

"Supreme legislative, judicial and executive authority and powers within the occupied territory are vested in me as Supreme Commander of the Allied Forces and a Military Governor, and the Military Government is established to exercise these powers under my direction. All persons in the occupied territory will obey immediately and without question all the enactments and orders of the Military Government. *Military Government Courts will be established* for the punishment of offenders. Resistance to the Allied Forces will be ruthlessly stamped out. Other serious offences will be dealt with severely."⁽¹⁾

In his Ordinance No. 2, General Eisenhower, again acting as Supreme Commander, established Military Government Courts for the parts of Germany occupied by the western Allies. He also issued Rules of Procedure of Military Government Courts, and, further, Ordinance No. 1 (Crimes and Offences). The date of Promulgation of Ordinances Nos. 1 and 2 was 18th September, 1944.

In the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on 5th June, 1945,⁽²⁾ however, *the four Allied Powers occupying Germany assumed supreme authority over Germany*. By the establishment of the Allied Control Council the same Allies set up a body which was to have supreme authority over "matters affecting Germany as a whole".

The Declaration states, *inter alia*, that:

"The Representative of the Supreme Commands of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the French Republic, hereinafter called the 'Allied Representatives', acting by authority of their respective Governments and in the interests of the United Nations, accordingly make the following Declaration:

"The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption for the purposes stated above, of the said authority and powers does not affect the annexation of Germany."

Articles I and II of the Proclamation No. 1 establishing the Allied Control Council run as follows:

"I. As announced on 5th June, 1945, supreme authority with respect to Germany has been assumed by the Governments of the United States of America, the Union of the Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic.

⁽¹⁾ Italics inserted.

⁽²⁾ British Command Paper (1945) Cmd. 6648.

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⁽¹⁾ Italics inserted.

⁽²⁾ British Command Paper (1945) Cmd. 6648.

"II. In virtue of the supreme authority and powers thus assumed by the four Governments, the Control Council has been established and supreme authority in matters affecting Germany as a whole has been conferred upon the Control Council."

Article III of Proclamation No. 1 of the Control Council provides as follows:

"Any military laws, proclamations, orders, ordinances, notices, regulations and directives issued by or under the authority of the respective Commanders-in-Chief for their respective Zones of Occupation are continued in force in their respective Zones of Occupation."

Shortly after the Declaration of Berlin, the British, United States, French and Russian Zones were brought into being and the jurisdiction of General Eisenhower as Supreme Commander over the western occupied territories came to an end.

When, after the Berlin Declaration of 5th June, 1945, General Eisenhower, in his capacity of Commander-in-Chief of the American Forces in Europe, took over the administration of the American occupation zone, he made a proclamation stating, *inter alia*, that all orders by the Military Government, including proclamations, laws, regulations and notices given by the Supreme Commander or on his instructions, remained in force in the American occupation zone unless repealed or altered by the Commander-in-Chief himself. The Military Government Ordinance No. 2 and the Rules of Procedure in Military Government Courts are, therefore, the basis of Military Government Courts established in the American zone of occupation.⁽¹⁾

Similarly, Ordinance No. 4 (Confirmation of Legislation) of the British Zone, runs as follows:

"Whereas on 14th July, 1945, the Commander-in-Chief of the British Zone of Control assumed all authority and power theretofore possessed and exercised by the Supreme Commander Allied Expeditionary Force within the British Zone, NOW IT IS HEREBY ORDERED as follows:

ARTICLE I

1. All Military Government Proclamations, Ordinances, Laws, Notices, Regulations and other enactments and orders and all amendments and modifications thereof issued by or under the authority of the Supreme Commander Allied Expeditionary Force and effective within the British Zone of Control on 14th July, 1945, are hereby confirmed and (subject to the provisions of Article II hereof) will continue in force throughout the British Zone until repealed or amended by or under the authority of the Commander-in-Chief of the British Zone of Control.

ARTICLE II

2. All the enactments mentioned in Article I hereof shall where the context so required or admits be read and construed as if throughout the expression 'Commander-in-Chief of the British Zone of Control' were substituted for the expression 'Supreme Commander Allied Expeditionary Force.'

⁽¹⁾ Vol. III, pp. 113-114.

ARTICLE III

3. The British Zone of Control is that portion of Germany which is occupied by the forces serving under the command of the Commander-in-Chief of the British Armed Forces of Occupation in Germany. It does not include the British Sector of Berlin."

Military Government Courts continued, therefore, to operate in the British Zone as under Ordinance No. 2 (with amendments) until 1st January, 1947, when under Ordinance No. 68 they were replaced by a system of Control Commission Courts.⁽¹⁾

A French High Command in Germany was created on 15th June, 1945, and Ordinance No. 1 of 28th July, 1945, of the French Commander-in-Chief, which was thus enacted after the Berlin Declaration and after the emergence of the four Allied Zones, maintained in force the two Ordinances of the Supreme Allied Commander referred to above. This brief account of the legal history of the French Military Government Tribunals is repeated in the Preamble to Ordinances Nos. 20 and 36 of the French Commander-in-Chief, which make provisions regarding the jurisdiction of French Military Government Courts.⁽²⁾

On 20th December, 1945, Law No. 10 (*Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*) of the Allied Control Council came into force; its purpose, according to its preamble was "to give effect to the terms of the Moscow Declaration of 30th October, 1943, and the London Agreement of 8th August, 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal."

Law No. 10 reaffirms the right of the Commander-in-Chief of each Zone to establish within his zone tribunals for the punishment, *inter alia*, of war crimes. Article III thereof provides that:

"1. Each occupying authority, within its Zone of occupation,

(a) shall have the right to cause persons within such zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested. . . .

(b) shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal. . . .

2. The Tribunal by which persons charged with offences hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8th August, 1945. . . ."

The effect of Law No. 10 within the Zones of Germany must now be traced. By Article 1 of Ordinance No. 36 of 25th February, 1946, the French Zone

⁽¹⁾ See p. 41.

⁽²⁾ Vol. III, pp. 100-101.

Commander has simply bestowed upon the existing Military Government Courts in the French Zone jurisdiction over the offences set out in Article II of Law No. 10.⁽¹⁾

Ordinance No. 7 of the Military Government of the United States Zone of Germany, which became effective on 18th October, 1946, provided, in the words of its Article I, for "the establishment of Military Tribunals which shall have power to try and punish persons charged with offences recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes." Article II (a) of the Ordinance, as will be seen presently, referred to Law No. 10 as one of the legal sources from which the power to promulgate the Ordinance arose. It is in pursuance of this Ordinance that the Military Tribunals were set up to conduct the trials commonly referred to as the "Nuremberg Subsequent Proceedings".⁽²⁾

Ordinance No. 68 of the British Zone of 1st January, 1947, set up a new system of Control Commission Courts; Law No. 10 is not directly referred to in this Ordinance, but paragraph 3 of the latter includes within the criminal offences which Control Commission Courts shall have jurisdiction to try: "All offences under any proclamation, law, Ordinance, Notice or Order issued by or under the authority of the Allied Control Council for Germany in force in the British Zone."

(xiv) The legal basis of these Courts set up in Germany having been described, it remains to describe their jurisdiction.

⁽¹⁾ Vol. III, p. 101.

⁽²⁾ Vol. III, p. 114, and see Vol. VI, pp. 26-33 for a further examination of the legal basis of Law No. 10 and Ordinance No. 7, taken from the Judgment delivered in the *Justice Trial*. Compare Vol. IX, pp. 16-17, Vol. X, pp. 130-31 and Vol. XII, pp. 59-62. Contrast Vol. VI, p. 74.

A hitherto unquoted passage from Judge Musmanno's judgment in the *Milch Trial* describes the legal basis of Law No. 10, as well as touching upon the plea that the law represented *ex post facto* legislation. (See also pp. 166-70):

"It is sufficient for this Tribunal to cite Control Council Law No. 10 as authority for its action in this case. Since, however, the Control Council came into being after the ending of the War, and since the laws which it published necessarily also followed the termination of hostilities, it has been argued by Defence Counsel that it does not comport with justice and reason that a defendant should be condemned for an act which, prior to its commission, was not accepted in international law as a crime. From the day of surrender Germany has been without a government of its own, and as the Allied powers are exercising quasi-sovereign jurisdiction in practically all phases of German relations, both internal and external, the very circumstances of Germany's present political situation not only justifies but demands that the Control Council establish government in its three fundamental phases, namely, the judiciary, the executive and the legislative. Otherwise chaos would fling Germany into even a more precipitous abyss than the one into which she has fallen, and the supreme and perhaps irreparable disaster, arrested by Allied intervention, would be upon her.

"Yet it can be argued and it has been argued that despite the imperative need of an occupational force with its almost unlimited jurisdiction, such an occupying force simply represents the authority of victor over vanquished. In the discharge of its duties under the law which created it, this Tribunal is not called upon to answer the arguments just indicated, but a respect for the opinion of mankind invites a listing of the reasons which establishes the justice of the procedure here invoked and the reasons which must invest its judgment with the solemnity and solidity of accepted international law.

"In the first place, it is not Control Council Law No. 10 which makes abuse of civilian populations an international crime, nor even the decision of the International Military Tribunal, which in turn derived its power from the London Charter which had as its antecedent the Moscow Declaration of 1943. International Law is not a body of codes and statutes, but the gradual expression, case by case, of the moral judgments of the civilised world, and no International Law textbook of the last century ever sanctioned the deportation of a civilian population for labor."

The jurisdiction of the *Military Government Courts set up by General Eisenhower as Supreme Commander* was defined in Article II of Ordinance No. 2 as follows:

"1. Military Government Courts shall have jurisdiction over all persons in the occupied territory except persons other than civilians who are subject to military, naval or air force law and are serving under the command of the Supreme Commander, Allied Expeditionary Force, or any other Commander of any forces of the United Nations.

2. Military Government Courts shall have jurisdiction over:

(a) All offences against the laws and usages of war.

(b) All offences under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.

(c) All offences under the laws of the occupied territory or of any part thereof."

As has been seen, these Courts continued to exist in the *British Zone*, from the time when the latter came into existence until the setting up of the Control Commission Courts, under Ordinance No. 68 of the British Zone. Paragraph 2 of Ordinance No. 68 makes the same provision as Article II, paragraph 1 of the Supreme Commander's No. 2, with the substitution of "Control Commission Courts" for "Military Government Courts", of "British Zone" for "occupied territory", and of "Commander-in-Chief" for "Supreme Commander, Allied Expeditionary Force". For purposes of greater clarity, commas have been placed at the beginning and end of the phrase "other than civilians".

Paragraph 3 of Ordinance No. 68 makes a provision, which is similar to that of paragraph 2 of Article II of Ordinance No. 2, while paragraph 4 of Ordinance No. 68 adds a provision relating to civil jurisdiction.⁽¹⁾

Articles 1 and 2 of Ordinance No. 20 of the *French High Command in Germany* provide that:

"ARTICLE 1.

Military Government Tribunals are competent to try all war crimes defined by international agreements in force between the occupying Powers whenever the authors of such war crimes, committed after the 1st September, 1939, are of enemy nationality or are agents, other than Frenchmen, in the service of the enemy, and whenever such crimes have been committed outside of France or territories which were under the authority of France at the time when the crimes were committed."

"ARTICLE 2.

These crimes are punishable by all the penalties which such Tribunals are empowered to pronounce, including the death penalty."

Article 1 of Ordinance No. 36 lays down that:

"Military Government Tribunals in the French Zone of Occupation in Germany are competent, in virtue of Law No. 10 of the Allied Control

⁽¹⁾ No use has, however, been made of the jurisdiction of Control Commission Courts to try offences against the laws and usages of war.

Council concerning the punishment of persons responsible for war crimes, crimes against peace and crimes against humanity, to try the crimes set out in that law."⁽¹⁾

The provisions of Law No. 10 which are important in this connection are those contained in Article II, of which paragraphs 1 and 2 run as follows :

" 1. Each of the following acts is recognised as a crime :

(a) *Crimes against Peace.* Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) *War Crimes.* Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

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

(d) Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal.

" 2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organisation or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in financial, industrial or economic life of any such country."

In the United States Zone of Germany, Military Government Courts continued to operate under Ordinance No. 2 of the Supreme Commander after establishment of the four allied Zones, but were later supplemented by the setting up of Military Tribunals under Ordinance No. 7 of the Military Government of the United States Zone, which enactment became effective on 18th October, 1946.

⁽¹⁾ Vol. III, pp. 101-102.

Articles I and II (a) in full of Ordinance No. 7 provide that :

" *Article I.* The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offences.

" *Article II.* (a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8th August, 1945, certain tribunals to be known as ' Military Tribunals ' shall be established hereunder."⁽¹⁾

Article II of Control Council Law No. 10, which is referred to in Article I of Ordinance No. 7 has already been quoted.⁽²⁾

(xv) Under the doctrine of the Universality of Jurisdiction over war crimes,⁽³⁾ international law takes account of the crime itself rather than (a) the nationality of the victim (provided that he can be regarded as an Allied national or treated as such),⁽⁴⁾ or (b) the nationality of the accused (provided that he can be regarded as having identified himself with the enemy), or (c) the place of the offence.

(a) There have been numerous reports in this series of trials by the Courts of one ally of offences committed against the nationals of another ally or of persons treated as Allied nationals, and in many trials no victims were involved of the nationality of the State conducting the trial.⁽⁵⁾ It may be added that, in a trial at Maymyo, 18th July-1st August, 1947,⁽⁶⁾ two Japanese accused, Yoshimasa Nishizama and Sadeharo Haratake were found guilty by a British Military Court of offences committed against Chinese and Indian inhabitants of territory occupied by Japan.

In the trial of Chogo Hashimoto by a United States Military Commission, Yokohama, Japan, 12th-17th February, 1947,⁽⁶⁾ a Japanese accused was found guilty of ill-treatment of certain prisoners of war, all of whom were Canadian. Again, in a case held before a United States General Military Government Court in Dachau, 12th-14th August, 1947, Anton Stinglwagner and Max Lengfelder⁽⁶⁾ were found guilty of participating in the killing of Polish and Czech inmates in Dachau Concentration Camp. This is only one example of many trials by United States Military Government Courts in which concentration camp victims of offences proved were shown to have been nationals of European allied countries.

⁽¹⁾ Vol. III, pp. 115-116.

⁽²⁾ See p. 42. Regarding Article 10 of the Charter of the International Military Tribunal, to which specific reference is made in Article II of Ordinance No. 7, and implicit reference in Article II, 1(d) of Law No. 10, see pp. 17-18.

⁽³⁾ See pp. 26-27.

⁽⁴⁾ See Vol. XIII, pp. 127-9.

⁽⁵⁾ See for example Vol. I, pp. 42, 47, 52-53, 102-103 and 106 ; Vol. II, pp. 4 and 8 ; Vol. IV, p. 113 ; Vol. VII, p. 76 ; and Vol. XI, pp. 10, 81 and 84.

⁽⁶⁾ Not previously treated in this series.

A considerable number of Australian war crime trials have concerned offences in which the victims have been wholly Chinese or Indian. Under Sections 7 and 12 of the Australian War Crimes Act, 1945, the Australian Military Courts have jurisdiction in all cases where the victim has been either resident in Australia or a British or an Allied subject.⁽¹⁾ Article 1 of the Norwegian Law of 13th December, 1946, provides not only against acts contrary to Norwegian interests but also against acts committed abroad to the prejudice of Allied legal interests or to interests which, as laid down by Royal proclamation, are deemed to be equivalent thereto.⁽²⁾ The Chinese war crimes law provided that offences committed against Allied nations or their nationals or against aliens under the protection of the Chinese Government were also within the jurisdiction of Chinese courts.⁽³⁾

In the trial of Josef Remmele at Dachau, Germany, 9th-15th September, 1947, before a General Military Government Court,⁽⁴⁾ it was alleged that two violations of the laws and usages of war were committed prior to the date the United States entered the war against Germany (11th December, 1941), the victims being Czechoslovak and Russian nationals. In finding the accused guilty on these charges the Court seems to have accepted the principle that, while the existence of a state of war is a necessary condition precedent to the existence of a "war crime", it is not a *sine qua non* of the jurisdiction of an independent state to try and to punish an offence against the laws and customs of war. The fact that the accused may have committed the offence prior to the entry of the United States into war with Germany did not bar the United States from jurisdiction to try and to punish the accused for the offences charged. The Confirming Authority approved the finding of guilty as to the offence against the Soviet nationals. The same attitude has been taken to the same question in several other trials before United States Military Government Courts.

A State may of course limit the jurisdiction of its war crime Courts so as not to take full benefit of the principle of the universality of jurisdiction. Article 1 of the French Ordinance of 28th August, 1944, makes detailed provisions regarding the possible victims of war crimes which may be tried before French Military Tribunals.⁽⁵⁾ In accordance with this provision, in many war crime trials before French Military Tribunals, punishment has been meted out for offences against Russian, Polish and Italian prisoners of war or civilian deportees committed on French territory, but, under Article 1 of the Ordinance offences committed against non-French Allied nationals outside France or "territories under the authority of France" would in general (but with certain exceptions as stated) fall outside the jurisdiction of French Military Tribunals. The fact that one of the accused found guilty in the *Wagner Trial* before a French Military Tribunal at Strasbourg made a successful appeal on these grounds has been noted.⁽⁶⁾ On the other hand Albert Wagner was found guilty of an offence committed in Germany

⁽¹⁾ See Vol. V, pp. 97-98.

⁽²⁾ See Vol. III, pp. 83 and 84.

⁽³⁾ See Vol. XIV, pp. 156-7.

⁽⁴⁾ Not previously referred to in these Reports.

⁽⁵⁾ See p. 31.

⁽⁶⁾ See p. 33.

by a French Military Government Court although the victim was a Russian national, since the Court's jurisdiction was framed more widely than that of French Military Tribunals for the trial of war criminals.⁽¹⁾

(b) While the nationality of the accused in war crime trials has usually been that of the country which is the enemy when looked at from the point of view of the nation conducting the trial,⁽²⁾ this has not been invariably the case. The jurisdiction of war crime courts has on suitable occasions, been interpreted so as to include within its scope not only enemy nationals but also neutral and even Allied nationals who had in some way identified themselves with the policies of the enemy authorities.

Thus, six of the accused in the *Belsen Trial* who were found guilty were Poles, that is to say nationals of a country allied to the United Kingdom, before one of whose Military Courts the trial was held. Their Counsel had claimed that the offences which they were alleged to have committed against Poles and other nationals could not amount to war crimes. By finding them guilty, however, the Court approved the argument of the Prosecution that if the Polish accused, whether to save themselves from being beaten or from whatever motive, accepted positions of responsibility in the camp under the S.S. and beat and ill-treated prisoners, acting on behalf of the S.S., they had identified themselves with the Germans, and were as guilty as the S.S. themselves.⁽⁴⁾

It will be recalled⁽⁵⁾ that the first paragraph of Article 1 of the French Ordinance of 28th August, 1944, provides that "Enemy nationals or agents of other than French nationality who are serving the enemy administration or interests"⁽⁶⁾ and who commit certain offences, shall be punishable by French Military Tribunals.

Thus a national of Luxembourg, an Allied country, was found guilty of war crimes by a French Military Tribunal at Lyon on 23rd November, 1945.⁽⁷⁾ The accused, a Lucien Fromes, joined the ranks of the Gestapo as a *Hauptsturmführer* and was tried for murder, pillage and wanton destruction of property committed on French territory. Found guilty on all counts, he was condemned to death.

Again, the Military Tribunal in Paris on 25th April, 1947, at least assumed jurisdiction over Lendines Monte, a national of a non-belligerent country, Spain. He was tried on two different counts: for "violations against the external security of the State", and for "murder and ill-treatment". In both cases the place of the alleged crimes was in Germany, where the defendant was interned in concentration camps from 1940-1945 after having been found in France as a Spanish Republican refugee. On the first count he was charged with having "maintained relations during the war with

⁽¹⁾ See Vol. XIII, p. 119.

⁽²⁾ Most of the trials reported in these volumes have in fact involved German or Japanese accused. The trials selected for reporting have been chosen for their legal interest and it should be noted that a number of records of trials of Italian accused were also available to the United Nations War Crimes Commission.

⁽³⁾ Compare also interesting Chinese provisions regarding the nationality of the accused: see Vol. XIV, p. 155.

⁽⁴⁾ Vol. II, p. 150.

⁽⁵⁾ See p. 31.

⁽⁶⁾ Italics inserted.

⁽⁷⁾ Trial not previously treated in this series.

subjects and agents of an enemy country", acting against the security of the French state, and on the second count with having physically ill-treated French, Belgian and Spanish inmates in the camps and with having killed a Spaniard. The defendant was acquitted on the first count and on the second the Court ordered additional investigations. The essence of the second charge was that, as an inmate in German concentration camps, he allied himself with the German authorities and ill-treated other inmates in the same way as did the authorities themselves.

In a third French trial, that of Albert Raskin, held before the Permanent Military Tribunal at Lyon (Judgment delivered on 16th January, 1947) the accused was a Belgian compulsorily enrolled (*enrôlé de force*) in the German army. He was found guilty of conspiracy (*association de malfaiteurs*)⁽¹⁾.

In the trial of Joaquin Espinosa by a United States General Military Government Court in Germany, 9th-12th May, 1947⁽²⁾, a Spanish national was found guilty of violations of the laws and usages of war in that, as an inmate of the Gusen Concentration Camps, sub-camps of Mauthausen, he did "wrongfully encourage, aid, abet and participated in" the ill-treatment of other inmates. The findings and sentence of three years' imprisonment was confirmed.

In the trial of Gustav Alfred Jepson (a Danish National) and two German accused, by a British Military Court in Luneburg, 13th-23rd August, 1946, the Prosecutor began his opening address with the following words:

"May it please the court, a War Crime, under the terms of the Royal Warrant embodying the Regulations for the trial of War Criminals, means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged any time since the 2nd September, 1939.

"I read out that definition because of the unusual feature in this case presented by the presence of a Danish national amongst the accused. It is superfluous for me to say that he has been extradited to stand his trial with, or course, the consent of the Danish Government. In practice in this Zone a War Crime has come to mean any violation of the usages of war committed either by the Germans or by any person in German employ in which the victims were British or Allied nationals."

The Danish accused was found guilty of ill-treatment and killings of "Allied nationals, internees of concentration camps, during a train journey", and sentenced to imprisonment for life. His sentence was confirmed.⁽³⁾

Again in the *Ravensbruck Trial* (Trial of Johann Schwarzhüder and 15 others before a British Military Court at Hamburg, 5th December, 1946 to 3rd February, 1947),⁽⁴⁾ one of the accused who was found guilty was of Swiss nationality, and in the *Mauthausen Concentration Camp Trial* (the Trial

⁽¹⁾ These three French trials have not previously been referred to in this series. Regarding the third trial, see also p. 91. Although the accused was forcibly enrolled into the German army, the actual offence for which he was condemned was that of having voluntarily participated in an undertaking arrived at for the purpose of preparing or committing crimes against persons or property.

⁽²⁾ Not previously treated in these Reports.

⁽³⁾ See also pp. 20 and 172.

⁽⁴⁾ Not previously dealt with in these Reports.

of *Altfuldisch and Others*),⁽¹⁾ also, certain of those sentenced were Allied nationals. Among the accused found guilty of violation of the laws and usages of war in the *Flossenburg Trial* (Trial of Friedrich Becker and Others by a United States Military Government Court, 14th May, 1946-22nd January, 1947 at Dachau),⁽²⁾ were a Netherlands National and a Yugoslav National.

(c) In the trial of Tanaka Hisakazu and others,⁽³⁾ a United States Military Commission overruled a plea to the jurisdiction of the Commission based on the fact that the offence took place in Hong Kong, a British Crown Colony. Similarly the offences punished in the trial of Lieutenant-General Shigeru Sawada and three others by a United States Military Commission at Shanghai, were committed on Chinese territory⁽⁴⁾ as those punished in the *Almelo Trial* by a British Military Court were committed in the Netherlands.⁽⁵⁾ In the trial of Erich Wippermann and in the trial of Hans Heitkamp by a United States Military Government Court at Dachau 16th-23rd May, 1947 and 7-8 August, 1947 respectively⁽⁶⁾ the defence unsuccessfully objected to the jurisdiction of the Courts on the ground that the offences had been committed on territory which at the time of the trial was respectively in the British and French Zones of Occupation in Germany. After a trial by a United States Military Government Court at Dachau, 26-27th August, 1946,⁽⁷⁾ Franz Umstatter was found guilty of an offence against a prisoner of war, the charge not specifying the place of the alleged crime. It may be added that, among others, the Netherlands legislation provides jurisdiction over war crimes committed on non-Netherlands territory.⁽⁸⁾

(xvi) The Judgment delivered in the *Hostages Trial* pointed out that "Some war crimes, such as spying, are not common law crimes at all; they being pure war crimes punishable as such during the war and, in this particular case, only if the offender is captured before he rejoins his army. But some other crimes, such as mass murder, are punishable during and after the war."⁽⁹⁾

It would be possible to analyse offences against international criminal law into the following two categories:

(a) Those which correspond roughly to offences prescribed by systems of municipal law in general.

(b) Those which do not so correspond.

⁽¹⁾ See Vol. XI, p. 15. According to an explanatory memorandum of the Norwegian Ministry of Justice, the Norwegian Law of 13th December "applies to foreigners regardless of nationality, who have voluntarily entered the country [Norway] in order to work in German public or private enterprises. Foreign slave labourers and Allied prisoners of war or internees naturally do not come under the Decree." (Vol. III, pp. 83-4).

⁽²⁾ Not previously dealt with in these Reports.

⁽³⁾ See Vol. V, p. 66.

⁽⁴⁾ See Vol. V, p. 9.

⁽⁵⁾ See Vol. I, p. 42.

⁽⁶⁾ Not previously treated in these volumes.

⁽⁷⁾ See Vol. XI, p. 97.

It may be added here that jurisdiction over war criminals does not appear even to depend upon the state whose courts conduct the trial having actual custody of the accused, since certain French war crime Tribunals, for instance, have declared persons guilty in their absence. Thus the Tribunal acting in the *Trial of ex-Gauleiter Wagner* sentenced the accused Huber to death in his absence. (See Vol. III, pp. 42 and 98-9). A United States Military Government Court may also proceed in the absence of an accused. (Vol. III, p. 117). The Nuremberg International Military Tribunal sentenced to death the accused Borman in his absence.

⁽⁸⁾ Vol. VIII, p. 54. Compare p. 25 of the present volume.

An example of the second is breach of armistice. In general, however, development of war crimes law has been in the direction of extending to allied victims, and in certain circumstances even to ex-enemy victims, the protection of laws analogous to those which would have protected them under systems of municipal law in peace time. One indication that war crime jurisdiction is largely the applying of a missing link in the jurisdiction over criminal offences is the fact that no direct physical (as distinct from temporal) connection with operations of war need be shown. The term "war crimes" has been interpreted so as to include within its scope many offences by an enemy against Allied nationals committed during war time on enemy soil or occupied territory, with no direct connection with the war. Thus, for instance, war crimes have been found to include offences committed against allied civilians in concentration camps, in civilian hospitals, and in the streets of towns. Nor need it be shown that the accused was a member of the enemy's armed forces.⁽¹⁾ Another indication of the same kind is the development of the law relating to crimes against humanity, whereby some protection under international law is extended to ex-enemy nationals.⁽²⁾

⁽¹⁾ See p. 59.

⁽²⁾ See pp. 134-8.

IV

THE PARTIES TO CRIMES

A. RULES RELATING TO COMPLICITY

(i) The possible range of persons who may be held guilty of war crimes or crimes against humanity⁽¹⁾ is not limited to those who physically performed the illegal deed. Many others have been held to be sufficiently connected with an offence to be held criminally liable and here the generally established rules relating to complicity have proved a useful guide to the courts.

(ii) The British practice has been to charge an accused with being "concerned in" the committing of a specific war crime and the English law relating to principals and accessories has often been set out, by Judge Advocates as well as counsel, as providing analogies on which the Court might act.

Thus in the trial of Franz Schonfeld and nine others by a British Military Court, Essen, 11th-26th June, 1946, the Judge Advocate went to some pains to expound the law concerning parties to an offence in relation to a charge of being "concerned in" a killing, departing incidentally from the analogy of English law by exempting from liability all persons who, under that law, would be regarded as accessories after the fact, persons whose activities related to the time after the commission of the offence: "Conduct on the part of an accused subsequent to the death, while it may throw light on the nature of the killing and the reason for it, that is to say whether it was justifiable or a crime, cannot by itself be regarded as constituting the offence of 'being concerned in the killing', or any degree thereof".

The Judge Advocate proceeded as follows:

"An Accessory before the Fact to Felony is one who, though absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony.

"If the party is actually or constructively present when the felony is committed, he is an aider and abettor. It is essential, to constitute the offence of accessory, that the party should be absent at the time the offence is committed. A tacit acquiescence, or words which amount to a bare permission will not be sufficient to constitute this offence.

"If the accessory orders or advises one crime and the principal intentionally commits another; that is to say that the principal offender is ordered to burn a house and instead commits a larceny, a theft, the accessory before the fact will not be answerable in law for the theft. If, however, the principal commits the offence of murder upon A—and you may think that this is important—when he has been ordered to commit it upon B, and he does that by mistake, the accessory will be liable in respect of the murder upon A.

⁽¹⁾ The relevant aspects of crimes against peace and membership of criminal organisations are dealt with separately on p. 58.

"The accessory is, however, liable for all that ensues upon the execution of the unlawful act commanded; that is to say if A commands B to beat C, and B beats C so that he dies, A is accessory to the murder of C. There must be some active proceeding on the part of the accessory, that is, he must procure, incite or in some other way encourage the act done by the principal.

"A principal in the first degree, of whom you have already heard mentioned in this case, is one who is the actor, or actual perpetrator of the fact. It is not necessary that he should be actually present when the offence is consummated, nor, if he is present, is it necessary that the act should be perpetrated with his own hands. If the agent, that is the perpetrator, is aware of the nature of his act—even if the employer is absent—he is a principal in the first degree. If the employer is present, the agent, that is the person who commits the act, is liable as a principal in the second degree.

"Those who are present at the commission of an offence, and aid and abet its commission, are principals in the second degree.

"The presence of a person at the scene of the crime may be actual in the sense that he is there, or it may be constructive. It is not necessary that the party should be actually present, an eye-witness or ear-witness of the transaction; he is, in construction of law, present, aiding and abetting if, with the intention of giving assistance, he is near enough to afford it should occasion arise. Thus, if he is outside the house, watching, to prevent a surprise, or the like, whilst his companions are in the house committing a felony, such a constructive presence is sufficient to make him a principal in the second degree... but he must be near enough to give assistance. There must also be a participation in the act; for even if a man is present whilst a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony. It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present aiding and abetting."⁽¹⁾

In the trial of Karl Adam Golkel and thirteen others by a British Military Court, Wuppertal, Germany, 15th-21st May, 1946, the Judge Advocate, speaking in his summing up of the words "concerned in the killing" of prisoners of war (which was the offence alleged) made the following comment:

"It is for the members of the Court to decide what participation is fairly within the meaning of those words. But it is quite clear that those words do not mean that a man actually had to be present at the site of the shooting; a man would be concerned in the shooting if he was

⁽¹⁾ Vol. XI, pp. 69-70. For an example of a citation by Counsel of the rules of English law on complicity, see Vol. XI, p. 75.

50 miles away if he had ordered it and had taken the executive steps to set the shooting in motion. You must consider not only physical acts done at the scene of the shooting, but whether a particular accused ordered it or took any part in organising it, even if he was not present at the wood."⁽¹⁾

Similar advice was offered by the Judge Advocate acting in the trial of Werner Rohde and eight others by a British Military Court, Wuppertal, Germany, 29th May-1st June, 1946. Regarding the meaning of the term "concerned in the killing", contained in the charge, the Judge Advocate explained that to be concerned in a killing it was not necessary that a person should actually have been present. None of the accused was actually charged with killing any of the women concerned. If two or more men set out on a murder and one stood half a mile away from where the actual murder was committed, perhaps to keep guard, although he was not actually present when the murder was done, if he was taking part with the other man with the knowledge that that other man was going to put the killing into effect then he was just as guilty as the person who fired the shot or delivered the blow.⁽²⁾

The application of these rules relating to complicity may be seen if a study is made of persons found guilty by British war crimes courts in the light of the actual degree of connection between themselves and the crime proved, and the last two mentioned trials are of legal interest in that they do illustrate the various courses of action which have been held to make an accused guilty of the war crime of being "concerned in the killing" of prisoners of war.⁽³⁾ It will be noted that in the former certain of those found guilty of being concerned in the killing of certain Allied victims had driven them to the wood where they were shot or kept watch during the execution; while in the latter trial one accused, a first-aid N.C.O. at Natzweiler, admitted that he obeyed an order to bring the lethal drug and that he heard, in conversations between the doctors and other officers in the camp, references to "the four women spies," "we cannot escape the order" and "execution"; he received a sentence of four years' imprisonment. A second accused received a five years' sentence apparently for complicity as what would be called in English law an accessory after the fact; he was a prisoner whose task was to work the oven of the crematorium in which the bodies of the victims were burnt. He admitted that he lit the oven on the occasion but without knowing that there was anything unusual in the circumstances. No one claimed that he took part in the actual killing.

An example in the British courts of liability both for instigation and for inaction while under a duty to act is provided by the *Essen Lynching Case*. Here a German private and a German captain were held guilty of being concerned in the killing of three British prisoners of war, the former having refrained from interfering with a crowd which murdered the prisoners, although entrusted with their custody, the latter having ordered the escort not to interfere in any way with the crowd if they should molest the prisoners. It was confirmed by some German witnesses, though not admitted by the

⁽¹⁾ Vol. V, p. 53.

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⁽³⁾ See Vol. V, pp. 45–47 and 54–55.

captain, that he made remarks to the effect that the airmen ought to be shot or that they would be shot⁽¹⁾. In the *Zyklon B Trial*, two accused were condemned to death for *arranging* for the supply of (not supplying) lethal gas to concentration camps, knowing that it was to be used for the illegal killing of inmates there.⁽²⁾

(iii) The United States Military Tribunals operating in Nuremberg have acted under the very broad terms of Article II, 2 of Law No. 10 of the Control Council :

"Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organisation or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country."

The Supplemental Judgment, dated 11th August, 1948, of the Tribunal which tried Oswald Pohl and others⁽³⁾ contains the following observation :

"An elaborate and complex operation, such as the deportation and extermination of the Jews and the appropriation of all their property, is obviously a task for more than one man. Launching or promulgating such a programme may originate in the mind of one man or a group of men. Working out the details of the plan may fall to another. Procurement of personnel and the issuing of actual operational orders may fall to others. The actual execution of the plan in the field involves the operation of another, or it may be several other persons or groups. Marshalling and distributing the loot, or allocating the victims, is another phase of the operations which may be entrusted to an individual or a group far removed from the original planners. As may be expected, we find the various participants in the programme tossing the shuttlecock of responsibility from one to the other. The originator says : 'It is true that I thought of the programme, but I did not carry it out.' The

⁽¹⁾ See Vol. I, pp. 88-92. The court did not pronounce any reasons for its findings in this trial and there was no Judge Advocate attached to the Court. While it would be legally sound to suppose that the Captain could have been found guilty as instigator of the offence committed by the private, the Prosecution claimed that the Captain had given to the escort instructions that they should take the prisoners to the nearest Luftwaffe unit for interrogation, and that this order, though on the face of it correct, was given out to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. It was alleged that he had ordered the escort not to interfere in any way with the crowd if they should molest the prisoners. The Prosecutor expressly stated that he was not suggesting that the mere fact of passing on the secret order to the escort that they should not interfere to protect the prisoners against the crowd was sufficiently proximate to the killing, so that on that alone the Captain was concerned in the killing. The Prosecutor submitted that, if the Court was not satisfied beyond reasonable doubt that he had incited the crowd to lynch these airmen, he was then entitled to acquittal, but, if the Court was satisfied that he did in fact say these people were to be shot, and did in fact incite the crowd to kill the airmen, he was guilty. (Vol. I, pp. 89-90).

⁽²⁾ See Vol. I, p. 93.

⁽³⁾ See Vol. VII, p. 49 and footnote 1 thereto.

next in line says : 'It is true I laid the plan out on paper and designated the *modus operandi* but it was not my plan and I did not actually carry it out.' The third in line says : 'It is true I shot people, but I was merely carrying out orders from above.' The next in line says : 'It is true that I received the loot from this programme and inventoried it and disposed of it, but I did not steal it nor kill the owners of it. I was only carrying out orders from a higher level.' To invoke a parallelism, let us assume that four men are charged with robbing a bank. The first makes a preliminary observation, draws a ground sketch of the bank and of the best means of escape. The second drives the others to the bank at the time of the robbery and spirits them away after its completion. The third actually enters the bank and at the point of a gun steals the money. The fourth undertakes to hide or dispose of the loot, with knowledge of its origin. Under these circumstances, the acts of any one of the four, within the scope of the overall plan, become the acts of all the others. Control Council Law No. 10 recognises this principle of confederacy when it provides in Article II 2 'any person . . . is deemed to have committed a crime as defined in paragraph 1 of this article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission . . . ' ⁽¹⁾

Elsewhere the judgment again made clear that the Tribunal intended criminal liability to cover accessories after the fact. (The Tribunal is speaking of Action Reinhardt) :

"The fact that Pohl himself did not actually transport the stolen goods to the Reich or did not himself remove the gold from the teeth of dead inmates, does not exculpate him. This was a broad criminal programme, requiring the co-operation of many persons, and Pohl's part was to *conserve and account for the loot*. Having knowledge of the illegal purposes of the Action and of the crimes which accompanied it, his active participation *even in the after-phases* of the Action make him *particeps criminis* in the whole affair. . . .

"Assuming that Frank ultimately heard of the extermination measures, can it be said as a matter of law that his participation in the distribution of the personal property of the inmates exterminated makes him a participant or an accessory in the actual murders? Any participation of Frank's was *post facto* participation and was confined entirely to the distribution of property previously seized by others. *Unquestionably this makes him a participant in the criminal conversion of the chattels, but not in the murders which preceded the confiscation.*" ⁽²⁾

As the Judgment delivered in the *Justice Trial* stated : "The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime" ⁽³⁾

Indeed the *Justice Trial* is a striking illustration of the operation of Article II, 2, including the widely worded sub-paragraph (d) thereof.⁽⁴⁾ Here the

⁽¹⁾ For another judicial reference to Article II, 2, see Vol. X, p. 50.

⁽²⁾ Italics inserted.

⁽³⁾ Vol. VI, p. 62.

⁽⁴⁾ On this point see also pp. 95-6.

Tribunal in its Judgment called for a recognition of the fact that, *inter alia*, the form of the indictment was "not governed by the familiar rules of American criminal law and procedure". It was pointed out that no defendant was specifically charged with the murder or abuse of any particular person. The charge did not concern isolated offences, but was one of "conscious participation in a nation-wide governmentally organised system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice and through the instrumentality of the courts. . . . Thus it is that apparent generality of the indictment was not only necessary but proper. No indictment couched in specific terms and in the manner of the common law could have encompassed within practicable limits the generality of the offence with which these defendants stand charged".⁽¹⁾

A glance at the terms of the indictment reveals the characteristic to which the Tribunal made reference.⁽²⁾ It will be seen, for instance, that the defendants were accused of committing war crimes and crimes against humanity in that "they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of offences against thousands of persons."⁽³⁾ That the Tribunal approved this wording may be judged from the fact that it stated more than once that: "The essential elements to prove a defendant guilty under the indictment in this case are that a defendant had knowledge of an offence charged in the indictment and established by the evidence, and that he was connected with the commission of that offence".⁽⁴⁾

In view of the nature of the offences alleged, as reflected by the indictment, it was not unnatural that a considerable proportion of the evidence placed before the Tribunal aimed at showing the general character of the degradation of the German judicial system after 1933, of the use made by that system, in pursuance of Nazi policy, of the Nacht und Nebel scheme, and of the persecution of Jews and Poles; and that the Tribunal devoted a considerable portion of its Judgment to a description of these features before passing on to ascertaining the extent to which each accused could be held liable for the many offences inevitably involved in their furtherance. Nor is it surprising that the Judgment contains some interesting illustrations of the ways in which an accused can be said to be sufficiently "connected with" the offences to make him guilty of complicity therein. The Tribunal would seem to have approved the following submission, made in the Prosecution's Opening Speech, and based upon an analysis of the Judgment of the International Military Tribunal⁽⁵⁾:

"It seems clear . . . that there need not be pre-arrangement with or subsequent request by the person or persons who actually commits the crime and a defendant to make him guilty as the International Military Tribunal interpreted the words 'being connected with'. It would appear to be sufficient that the defendant knew that a crime was being committed, and with that knowledge acted in relation to it in any of the relationships set out in paragraph 2 of article II which we have heretofore been discussing." (Italics inserted.)

⁽¹⁾ See Vol. VI, p. 50.

⁽²⁾ See Vol. VI, pp. 2-5.

⁽³⁾ Italics inserted.

⁽⁴⁾ See Vol. VI, p. 84, note 4.

A study of the attitude of the Tribunal to the evidence relating to the defendant Joel⁽¹⁾ revealed, in the first place, that Joel was not said to have been directly responsible for the death or ill-treatment of specific persons; the aim instead was to show his relation to a scheme or system of which the final results were in fact criminal. In the second place, the Tribunal clearly regarded as important not only evidence of positive action on the part of Joel but also proof of knowledge of acts on the part of others which were done in furtherance of the Nacht und Nebel plan.

No official was protected by his high rank, and the wording of the Judgment suggests that the Tribunal was willing to hold persons who held the positions of overall responsibility in the Ministry of Justice responsible for the large-scale enterprises carried out by the Ministry, which were involved in the Nacht und Nebel scheme and the persecutions on political and racial grounds, provided that those accused could be said to have had knowledge of these schemes⁽²⁾. Since the defendants were accused of participation in certain illegal enterprises, however, it was naturally not necessary in every case to show that the illegal acts for which Ministry officials were alleged to be responsible were actually committed under the auspices of the Ministry of Justice.⁽³⁾

The question of knowledge was treated by the Tribunal as one of the highest importance, and repeated reference was made in the Judgment to the fact that various accused had knowledge, or must be assumed to have had knowledge, of the use made of the German legal system by Hitler and his associates, of the Nacht und Nebel plan and of the schemes for racial persecution. It would seem inevitable that this stress should be placed upon evidence of knowledge in a trial where the main allegations made related not to individual offences but to complicity in carrying out large-scale schemes which involved at some point the commission of criminal acts.

The necessity for knowledge to be shown or to be legitimately assumed caused the Tribunal to refer very frequently in its Judgment to the fact that documents, reports and orders were not *issued* but *received* by various

⁽¹⁾ See Vol. VI, pp. 86-87.

⁽²⁾ See for, an instance, Vol. VI, p. 87. Similarly the Judgment in the *I. G. Farben Trial* includes the following passage:

"It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term Farben as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the Prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorised or approved it. Responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the Vorstand. Conversely, one may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids orders, or abets. But the evidence must establish action of the character we have indicated, with knowledge of the essential elements of the crime." (Vol. X, p. 52. Italics inserted.)

The Judgment delivered in the *Pohl Trial* conceded that: "Perhaps in the case of a person who had power or authority to either start or stop a criminal act, knowledge of the fact coupled with silence could be interpreted as consent," which would involve criminal liability according to the Tribunal.

⁽³⁾ See Vol. VI, pp. 87-88.

accused.⁽¹⁾ At a number of points in its Judgment the Tribunal presumed knowledge on the part of an accused and in view of the nature of the facts of the case it was inevitable that the Tribunal should regard this course in certain instances as a necessary and a safe one to take.⁽²⁾

The novel difficulties arising from the need to show a relation between an accused and certain large-scale illegal enterprises carried out by many persons at many places and over a period of time may be thought to explain also the introduction of two further types of evidence (also summarised in the Judgment of the Tribunal)—first, evidence showing the support given by certain accused to Nazi doctrines, and secondly, evidence of acts of the accused before the outbreak of war in 1939.⁽³⁾ Immediately before reviewing the evidence relating to the changes to the German legal system made under Nazi rule from 1933 onwards, the Tribunal said: "... Though the overt acts with which the defendants are charged occurred after September, 1939, the evidence now to be considered will make clear the conditions under which the defendants acted and will show knowledge, intent and motive on their part, for in the period of preparation some of the defendants played a leading part in moulding the judicial system which they later employed."

The evidence which the Tribunal then proceeded to summarise included considerable information on the acts of the accused between 1933 and 1939 and the Tribunal was also careful to set out the relevant official positions held in and after 1933 by all those accused who were found guilty of any of the charges against them.⁽⁴⁾

Regulation 5 of the United States Pacific Regulations governing the trial of war criminals, of 24th September, 1945, after defining the substantive crimes punishable under that instrument⁽⁵⁾ refers to "participation in a common plan or conspiracy to accomplish any of the foregoing" and states that "Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan of conspiracy."⁽⁶⁾ The same passage is included in the United States China Regulations.⁽⁷⁾

(iv) In French war crime trials, complicity in a crime is often involved.

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

⁽¹⁾ See, for instance, Vol. VI, p. 88. Sometimes it appears at first sight that the Tribunal regarded mere knowledge as sufficient evidence of guilt. It seems safe to assume, however, that it was the intention of the Tribunal to signify that when certain accused took part in the Night and Fog programme it was not without knowledge of its criminal features that they did so. (See Vol. VI, p. 88.)

⁽²⁾ See, for instance, Vol. VI, p. 89.

⁽³⁾ See, for instances, Vol. VI, p. 89.

⁽⁴⁾ See Vol. VI, pp. 89-90. As an indication of the limits placed upon the doctrine of complicity compare the finding in the *Flick Trial* of not guilty under Count Two of the accused, Weiss, Burkart and Kaletsch apparently on the ground mainly that, while they supplied information and even advice to Flick relating to the Rombach plant (and presumably must be said to have had knowledge of the offence committed), they were merely Flick's salaried employees and had no power to make decisions. (Vol. IX, p. 24.)

⁽⁵⁾ See p. 30.

⁽⁶⁾ Vol. III, p. 106.

⁽⁷⁾ Vol. III, p. 107. Concerning "common design." See also p. 94.

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

Article 60 of the *Code Pénal* defines as an accomplice to a crime or delict: "Any person who, by gifts, promises, threats, abuse of power or authority, or guilty machinations or devices (*artifices*), has instigated a crime or delict or given orders for the perpetration of a crime or delict; any person who has supplied the arms, tools or any other means that have been used in the commission of the crime or offence, knowing that they would be so used; or who has wittingly aided or assisted the author or authors of the crime or offence in any acts preparatory to, or facilitating its perpetration, or in its execution. . . ."

Article 4 of the French Ordinance of 28th August, 1944, lays down that "Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices insofar as they have organised or tolerated the criminal acts of their subordinates."

All the accused in the *Wagner Trial* except Grüner, who was charged with premeditated murder, were charged with complicity in that crime. Consequently a large proportion of the questions put by the President to the Judges in the Wagner trial enquired whether the accused had been accomplices in the commission of the various acts alleged. The Judges were asked whether Wagner had been an accomplice, "in abuse of authority or power," in the passing of the illegal sentences alleged in the case, and in the shooting of the prisoners of war. The Judges were also asked whether Röhn, in like manner, had been an accomplice in the latter crime. Some of the accused were found guilty of having been accomplices in premeditated murder, and one was found guilty of having actually committed premeditated murder.⁽¹⁾

(v) Complicity in crimes is also expressly made punishable by Article 4 of the Norwegian War Crimes Law⁽²⁾ and by Netherlands war crimes law,⁽³⁾ while rules relating to complicity have been applied in trials of war criminals by the courts of other countries.⁽⁴⁾

(vi) In the *Essen Lynching Case*, as stated above, an accused was found guilty on the grounds of having failed to intervene to protect prisoners of war under his care. Of crimes of omission in general, it may be said that the extent of liability depends upon the extent of the duty to act which international law imposes in the circumstances of the case. Examples of the operation of this rule are provided by cases of the responsibility of commanders who take no action to prevent offences from being committed by their troops⁽⁵⁾ and by the cases in which accused were found guilty of criminal neglect of children placed under their care.⁽⁶⁾

⁽¹⁾ Vol. III, pp. 24, 40-42 and 94-95. For further examples from the French courts see Vol. VII, pp. 70-2, Vol. VIII, p. 21 (apparently) and 31-3.

⁽²⁾ Quoted on p. 89.

⁽³⁾ See Vol. XI, pp. 97-8.

⁽⁴⁾ For a dictum by the Polish Supreme National Tribunal on responsibility for incitement see Vol. XIII, p. 116.

⁽⁵⁾ See pp. 62-76.

⁽⁶⁾ See p. 61.

(vii) In connection with liability for crimes against peace, sub-paragraph (f) of Article II. 2 of Control Council Law No. 10, quoted above⁽¹⁾ is of interest, since it makes a special provision, separate from those made in sub-paragraphs (a)–(e), for such liability which appears to render automatically guilty of crimes against peace anyone who "held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or Satellites or held high position in the financial, industrial or economic life of any such country." In practice, however, Tribunals acting under Law No. 10 have not availed themselves of the wide scope of this provision in trying persons accused of crimes against peace and have instead evolved a body of rules on this crime which, briefly, require knowledge and effective participation as pre-requisites of guilt.⁽²⁾

(viii) The Judgment delivered in the *Flick Trial* includes the following statement :

"One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes. So there can be no force in the argument that when, from 1939 on, these two defendants were associated with Himmler and through him with the S.S., they could not be liable because there had been no statute nor judgment declaring the S.S. a criminal organisation and incriminating those who were members or in other manner contributed to its support."⁽³⁾

At first sight it may appear that the Tribunal is here laying down a rule relating to *complicity* in membership of criminal organisations according to which an accused may be found guilty without having actually been a member of a criminal organisation. A glance at the indictment reveals, however, that there were two counts involved in the trial which in some way concerned criminal organisations and that only one of these two counts had been brought against both the accused referred to in the quotation (Flick and Steinbrinck). This, the fourth count, charged not pure membership of criminal organisation (as did the fifth, which was brought against Steinbrinck alone) but a wider type of support of *specific criminal activities* on the part of the S.S., such support amounting to the committing of war crimes and crimes against humanity on the part of these two accused.⁽⁴⁾ Both accused were found guilty under this count, and Steinbrinck was found guilty under Count V, charging membership.⁽⁵⁾

B. CATEGORIES OF CRIMINALS

In most systems of criminal law it is of little general interest to examine the possible criminal liability of different occupational groups within a population. Subject to certain exceptions in the case of special categories

⁽¹⁾ See p. 52.

⁽²⁾ See pp. 142–7.

⁽³⁾ Vol. IX, p. 29. Italics inserted.

⁽⁴⁾ See Vol. IX, p. 5.

⁽⁵⁾ It has been suggested on pp. 98–9 that the law relating to membership in criminal organisations is in essence an application of the principle of joint responsibility for crimes committed in pursuance of a common criminal design. It may be thought that the finding of guilty against the accused Flick and Steinbrinck under Count IV is another application of that principle, *formal "membership" of the organisation in this instance not being involved.*

such as minors or lunatics, all persons are usually equally bound by the general provisions of the applicable criminal law. With the international criminal law as it has developed in recent years the position is different. In many instances rules have developed in relation to particular categories such as commanding generals and staff officers. Furthermore to itemise the different categories of persons who have been found guilty of war crimes and related offences is important in view of the argument sometimes previously advanced⁽¹⁾ that only military personnel could be held so guilty. Those actually found so guilty have included not only soldiers, but civilians coming within the categories of administrators, political party officials, industrialists, judges, prosecutors, doctors, nurses, prison wardens, and concentration camp inmates. Soldiers held guilty have included not only the rank and file, but high-ranking officers and chiefs of staff. It is clear that the mere fact of being a civilian affords no protection whatever to a charge based upon international criminal law. In an early British trial the *Essen Lynching Case* civilians appeared among persons found guilty of being concerned in the killing of three British prisoners of war.⁽²⁾ These accused were of no particular known vocation ; indeed their calling was irrelevant.

(i) **PARTY OFFICIALS AND ADMINISTRATORS.** As an example of the guilt of political party officials and civilian administrators for war crimes, reference may be made to the trial of Robert Wagner, Gauleiter and Head of the Civil Government of Alsace during the Occupation, and six others, by a Permanent Military Tribunal at Strasbourg, 23rd April–3rd May, 1946, and the French Court of Appeal, 24th July, 1946.⁽³⁾ Those found guilty included Wagner himself, and an ex-deputy Gauleiter of Alsace, two ex-members of the Civil Administration of Alsace, and the ex-Kreisleiter of Thann. Most of the accused found guilty of war crimes or crimes against humanity in the *Justice Trial* were ex-members of the Reich Ministry of Justice and were tried mainly for their acts as such.⁽⁴⁾

(ii) **INDUSTRIALISTS AND BUSINESS MEN.** In the *Zyklon B Case* two German industrialists, undoubtedly civilians, were sentenced to death as war criminals for having been instrumental in the supply of poison gas to concentration camps, knowing of its use there in murdering allied nationals.⁽⁵⁾

Other trials involving business men for crimes committed as such, irrespective of official connections, are the *Flick*, *I.G. Farben*, and *Krupp Trials*. In these proceedings the Defence denied that such private individuals, having no official functions, could be found guilty of crimes under international law, while the Prosecution successfully claimed that they could be held so guilty.⁽⁶⁾

The Judgment in the *Flick Trial* includes the following words :

"Except as to some of Steinbrinck's activities the accused were not officially connected with Nazi Government, but were private citizens engaged as business men in the heavy industry of Germany. . . .

⁽¹⁾ For instance by the Defence in the *Belsen Trial* ; see Vol. II, pp. 72, 105 and 152.

⁽²⁾ See Vol. I, pp. 88–92. Compare Vol. IX, pp. 65–6.

⁽³⁾ See Vol. III, pp. 23–55, especially 24–27.

⁽⁴⁾ See Vol. VI, pp. 1–110, especially 10–26 and 62. Compare Vol. XIII, pp. 136–7.

⁽⁵⁾ See Vol. I, pp. 93–103.

⁽⁶⁾ See Vol. X, pp. 168–172.

"The question of the responsibility of individuals for such breaches of international law as constitute crimes, has been widely discussed and is settled in part by the judgment of the I.M.T. It cannot longer be successfully maintained that international law is concerned only with the actions of sovereign States and provides no punishment for individuals. . .

"But the International Military Tribunal was dealing with officials and agencies of the State, and it is argued that individuals holding no public offices and not representing the State, do not, and should not, come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender *in propria persona*. The application of international law to individuals is no novelty. (See *The Nuremberg Trial and Aggressive War*, by Sheldon Glueck, Chapter V, pp. 60-7 inclusive, and cases there cited.) There is no justification for a limitation of responsibility to public officials."⁽¹⁾

Parts of these passages were cited with approval in the *I.G. Farben Judgment*⁽²⁾ while the judgment delivered in the *Krupp Trial* states, *inter alia*, that: "The laws and customs of war are binding no less upon private individuals than upon government officials and military personnel. In case they are violated there may be a difference in the degree of guilt, depending upon the circumstances, but none in the fact of guilt."⁽³⁾

(iii) JUDGES. Many of the accused found guilty of war crimes in the trials reported in Volume V⁽⁴⁾ were held responsible for offences committed as Chief Judge, Judge or Legal Member of courts which passed unjustified sentences upon allied victims, such sentences being carried out. In the *Wagner Trial* the accused Huber who had been President of the Special Court at Strasbourg, was sentenced (in his absence) to death, having been found guilty of complicity in the murder of 14 victims, on whom he had passed unjustified death sentences which were carried out.⁽⁵⁾ Again, in the *Justice Trial*, Judges appeared among the accused and were found guilty of war crimes or crimes against humanity committed by them in their capacity as judges.⁽⁶⁾ In the *Latza Trial*, Judge Schei of the Norwegian Supreme Court pointed out that the fact that a war crime had been committed by an enemy citizen in his capacity as judge did not mean that such a crime was beyond the scope of the Norwegian law on war crimes.⁽¹⁾

⁽¹⁾ See Vol. IX, pp. 17-18.

⁽²⁾ Vol. X, p. 47.

⁽³⁾ Vol. X, p. 150. Regarding a British Trial which further illustrates the responsibility for the welfare of prisoners of war employed in factories of civilians in charge of such establishments, see Vol. X, pp. 167-8. Compare Vol. XI, p. 51. The Tribunal acting in the *Krupp Trial* applied the usual rules relating to complicity in judging the responsibility of the accused: "The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient . . ." (See Vol. X, p. 150).

⁽⁴⁾ See Vol. V, pp. 77-78.

⁽⁵⁾ See Vol. III, pp. 27, 31, 32 and 42.

⁽⁶⁾ See Vol. VI, pp. 22-26, 62 and 76.

⁽⁷⁾ See Vol. XIV, p. 63.

(iv) PROSECUTORS. The *Wagner Trial*, the *Justice Trial* and the trials reported in Volume V are also authorities for assessing the possible responsibility of prosecutors for war crimes and crimes against humanity involved in the passing of false sentences which are carried out.⁽¹⁾ A study of the *Wagner Trial* and of the trials reported upon in Volume V showed that the courts and the confirming authorities have been less willing to punish persons accused of committing war crimes purely in the capacity of a prosecutor than they have been in the case of judges. This may arise out a feeling that, while a judge has a duty to be impartial, a prosecutor is of course expected to do his best, within certain limits, to secure a conviction. It may also be the result of a feeling that the acts of a prosecutor are more remote from the carrying out of sentence than are those of a judge.

An offender cannot rely upon the fact that some intervening cause may upset his purposes, however, and, in finding Lautz and Joel guilty, the Tribunal in the *Justice Trial* clearly held that the argument based on lack of causation must fail. Its decision is an indication that public prosecutors can be found guilty of war crimes and crimes against humanity for acts performed by them when acting as such.

(v) DOCTORS AND NURSES. In the *Hadamard Trial* civilian personnel of a medical institution were found guilty of unlawfully putting to death Russian and Polish nationals.⁽²⁾ They included a doctor and nurses. Doctors were found guilty of war crimes and crimes against humanity also in the *Trial of Karl Brandt and others* by a United States Military Tribunal in Nuremberg,⁽³⁾ and both doctors and children's nurses in the *Velpke Children's Home Case* and the *Trial of Georg Tyrolt and others* by a British Military Court, Helmsstedt, 20th May-24th June, 1946.⁽⁴⁾

(vi) EXECUTIONERS. Executioners of Allied victims have been found guilty of a war crime if they knew that no fair trial had been accorded to the victims or (perhaps) if it was not reasonable for them to assume that such a trial had been accorded.⁽⁵⁾ In the trial of Oscar Hans by a British Military Court, Hamburg, 18th-25th August, 1948,⁽⁶⁾ the Judge Advocate made the question of the actual knowledge of the executioner the only test: "If he did not know that there had not been a legal trial, again let him be acquitted".

(vii) CONCENTRATION CAMP INMATES. In the *Belsen Trial*, some of the accused found guilty were members of the S.S., which could be regarded as a military formation, but others were inmates of the camp and possessed an undisputable civilian status.⁽⁷⁾ There are many other instances of such persons being held guilty of war crimes.

⁽¹⁾ See Vol. III, pp. 27, 31-32 and 42, Vol. V, p. 78, and Vol. VI, pp. 85-86.

⁽²⁾ See Vol. I, pp. 53-54.

⁽³⁾ See Vol. VII, pp. 49-53.

⁽⁴⁾ See Vol. VII, pp. 76-81. In the former trial the Court inflicted a term of ten years' imprisonment on a Dr. Demmerick, who had never received official instructions to tend the babies in a children's home, but who, according to the Prosecution, had by his acts "assumed the care of those children in place of their mothers".

⁽⁵⁾ See Vol. I, pp. 72 and 76 and Vol. V, pp. 79-81.

⁽⁶⁾ Not previously treated in these Volumes.

⁽⁷⁾ See Vol. II, pp. 153-4.

(viii) **MILITARY OFFICERS AND OTHER SUPERIORS.** The question of the extent of responsibility of superiors, particularly superior officers, for the offences of their subordinates has been the subject of comment at several points in these Volumes.⁽¹⁾

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

One example among many is the trial of General Anton Dostler, by a United States Military Commission, Rome, 8th-12th October, 1945, in which the accused was found guilty of having ordered the illegal shooting of fifteen prisoners of war.⁽²⁾ Another example is the trial of Generals Mueller and Brauer by a Greek Court Martial at Athens;⁽³⁾ these accused were found guilty of ordering others to commit war crimes, and were sentenced to death.

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, paragraph 345 of the United States Basic Field Manual, F.M. 27-10, in dealing with the admissibility of the defence of Superior Orders, ends with the words: "... The person giving such orders may also be punished."

Similarly the Judge Advocate acting in the Trial of Kurt Meyer by a Canadian Military Court at Aurich advised the court 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⁽⁴⁾, and the judgment delivered in the *High Command Trial* contains a number of examples of this well-established responsibility of a superior for offences ordered by him.⁽⁵⁾

The 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 has not been shown to have ordered, on the grounds that he ought to have used his authority to prevent their being committed or their continued perpetration, or that he must, taking into account all the circumstances, be presumed to have either ordered or condoned the offences. The extent to which such liability can be admitted is not easy to lay down, either legally or morally. The principles governing this sphere of international law have not yet crystallised, but at least it can be said that it is not in every instance necessary to prove explicitly that the commander actually ordered the offences, and it has frequently been laid down in enactments and in judicial decisions that a commander has a duty to prevent crimes from being committed by his subordinates.

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

⁽¹⁾ See Vol. IV, pp. 83-96, Vol. V, pp. 78-79, Vol. VI, p. 87, note 2, Vol. VII, pp. 61-64, Vol. VIII, pp. 88-89, Vol. IX, p. 54, Vol. XI, pp. 70-1 and Vol. XII, pp. 105-12.

⁽²⁾ See Vol. I, pp. 22-34.

⁽³⁾ Not previously treated in this series.

⁽⁴⁾ Vol. IV, p. 107.

⁽⁵⁾ See Vol. XII, p. 106.

responsible for such offence of his troops as he has not been explicitly proved to have ordered. The relevant trials and municipal law enactments may be classified under the following two categories:

(i) 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.

(a) TRIALS AND PROVISIONS RELEVANT TO THE QUESTION OF THE BURDEN OF PROOF

Of interest in connection with the shifting of the burden of proof are Regulations 10(3), (4) and (5) of the War Crimes Regulations (Canada). These Regulations lay down that, in certain stated circumstances, the proof of offences committed by groups of persons shall constitute *prima facie* evidence of responsibility on the part of certain individuals. Of these provisions, Regulations 10(3), of which the effect is substantially the same as that of Regulation 8(ii) of the British Royal Warrant,⁽¹⁾ runs as follows:

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

The Canadian Regulations 10(4) and (5) make the following provisions:

"(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.

"(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 is clear that these provisions do not purport to define the extent to which a commander is legally liable for offences committed by the troops under

⁽¹⁾ See p. 92.

his command : they relate to matters of evidence and no substantive law. Furthermore, they provide discretionary powers and are not mandatory in nature.⁽¹⁾

During the Trial of Kurt Meyer by a Canadian Military Court at Aurich the Court heard discussion of the effect of Regulation 10 (3), (4) and (5).⁽²⁾ The Judge Advocate advised the Court that by virtue of these Regulations, it was unnecessary, as far as the second, fourth and fifth charges made in the trial 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 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.⁽³⁾

The Judge Advocate also made some remarks on the proving by circumstantial evidence of the giving of a *direct order*. Dealing with the third charge, 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 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 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."⁽⁴⁾

⁽¹⁾ Vol. IV, pp. 128-129.

⁽²⁾ Insofar as *Counsel* touched upon these matters, their remarks are set out in Vol. IV, pp. 110-112. The arguments quoted in Vol. IV, pp. 123-124, from the *Trial of Kurt Student* by a British Military Court also deal with questions of evidence.

⁽³⁾ Vol. IV, p. 108. During the trial proceedings, a discussion arose as to the extent to which evidence not directly connected with the offences alleged on the Charge Sheet could be rendered admissible by Regulation 10(4). (See Vol. IV, pp. 111-2).

⁽⁴⁾ Vol. IV, p. 108.

The Trial of Karl Rauer and Six Others by a British Military Court at Wuppertal seems to suggest that responsibility may be inferred from surrounding circumstances, including the prevailing state of discipline in an army.⁽¹⁾ It is also worthy of note that the participation in offences of officers standing in the chain of command between an accused commander and the main body of his troops may be regarded as some evidence of the responsibility of the commander for the offences of those troops.⁽²⁾ Regulation 10 (5) of the Canadian Regulations makes it possible for a Court to regard even the *presence* of an officer at the scene of the war crime, either at or immediately before its commission, as *prima facie* evidence of the responsibility not merely of the officer but also of the commander of the formation, unit, body or group whose members committed the crime.⁽³⁾ Regulation 8 (ii) of the British Royal Warrant, like Regulation 10 (3) of the Canadian Regulations, may be applied so as to enable suitable evidence to be introduced as *prima facie* evidence of a commander's responsibility in the same way as it may be as evidence of the responsibility of any other member of a unit or group.⁽⁴⁾

Also of interest in connection with the question of circumstantial evidence as indicating that a superior *must be taken to have ordered* or connived at offences on the part of his subordinates is a passage from the Judgment of the International Military Tribunal for the Far East :

"During a period of several months the Tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all theatres of war on a scale *so vast, yet following so common a pattern* in all theatres that *only one conclusion is possible*—the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces."⁽⁵⁾

(b) TRIALS AND PROVISIONS RELEVANT TO THE QUESTION OF SUBSTANTIVE LAW

It is clearly established that a responsibility may arise in the absence of any direct proof of the giving of an order for the commission of crimes.

The principle that a duty rests on a commander to prevent his troops from committing crimes, the *omission* to fulfil which would give rise to liability, is illustrated by a number of trials, of which three trials by United States Military Commissions in the Far East and various trials by Australian

⁽¹⁾ Vol. IV, pp. 113-117.

⁽²⁾ Compare the words of the Commission which tried Yamashita, set out on pp. 34 and 35 of Vol. IV.

⁽³⁾ See p. 63.

⁽⁴⁾ See p. 92. For a discussion during the *Belsen Trial* of the application of Regulation 8(ii) and of the possible operation against Kramer, Kommandant of Belsen Concentration Camp, reference should be made to pp. 140-141 of Vol. II.

⁽⁵⁾ Official transcript of the *Judgment of the International Military Tribunal for the Far East*, p. 1001. (Italics inserted).

Stress was also placed, in the discussions referred to on p. 64 footnote 2, and in Regulation 10(4) quoted above, on the repeated occurrence of offences by troops under one command as *prima facie* evidence of the responsibility of the commander for those offences. For an example of the same line of thought in the *Yamashita Trial* see pp. 17, 34 and 35 of Vol. IV, and a comment on p. 94 of that Volume.

Military Courts have been described or referred to on pages 86-87 of Volume IV.⁽¹⁾ The Judgment of the majority of the United States Supreme Court on the *Yamashita Case* included these words :

" It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war [as had been charged against Yamashita] are recognised in International Law as violations of the Law of War. Articles 4, 28, 46 and 47, Annex to Fourth Hague Convention, 1907, 36 Stat. 2277, 2296, 2303, 2306-7. But 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 charge 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 its 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 recognised 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 fulfil in order to be accorded the rights of lawful belligerents, that it must be 'commanded by a person responsible for his subordinates.' 36 Stat. 2295. 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.' 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2992, 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

(1) One of the Australian trials mentioned, that of Babu Masao has been more fully reported in Vol. XI, at pp. 56-61. See especially pp. 57-60 where, *inter alia*, some further examples of this type of responsibility are set out.

Fourth Hague Convention, 36 Stat. 2306, 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 penalised by our own military tribunals. A like principle has been applied so as to impose liability on the United States in international arbitrations. *Case of Jenaud*, 3 Moore, International Arbitrations, 3000; *Case of 'The Zafiro'*, 5 Hackworth, Digest of International Law, 707."⁽¹⁾

During the *Belsen Trial*, the Judge Advocate, speaking of the allegations regarding Kramer's actions at Belsen, said that he did not think it mattered very much whether he acted wilfully or merely with culpable neglect; the question was whether the Prosecution had proved that Kramer did not carry out his duties as far as he was able to do and that he had caused at any rate physical suffering upon Allied nationals by reason of his actions? Further, there was no charge against Dr. Klein of any deliberate acts of cruelty, and it was for the Court to consider whether Klein had a fair opportunity to do anything with regard to the conditions in Belsen and whether he so failed to act that the Court would have to find him guilty of the charge. What had to be decided was whether, in the time when he was really responsible and could improve matters, he failed either deliberately or in a culpable way deserving of punishment to do what he should have done.⁽²⁾

The principles governing this type of liability, however, are not yet settled. The question seems to have three aspects.

(i) How far can a commander be held liable for not taking steps before the committing of offences, to prevent their possible perpetration?

(ii) How far must he be shown to have known of the committing of offences in order to be made liable for not intervening to stop offences already being perpetrated?

(iii) How far has he a duty to discover whether offences are being committed?

Certain relevant provisions of municipal law exist. Thus, Article 4 of the French Ordinance of 28th August, 1944, Concerning the Suppression of War Crimes, 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."⁽³⁾

(1) Vol. IV, pp. 43-44 (Italics inserted). For the dissenting opinions on this point see pp. 51-54, 57 and 58-61 of that Volume.

(2) Vol. II, p. 120.

(3) Vol. III, p. 94.

In a similar manner, Article 3 of Law of 2nd August, 1947, of the Grand Duchy of Luxembourg, on the Suppression of War Crimes, reads as follows :

"Without prejudice to the provisions of Articles 66 and 67 of the *Code Pénal*, the following may be charged, according to the circumstances, as co-authors or as accomplices in the crimes and delicts set out in Article 1 of the present Law : superiors in rank who have tolerated the criminal activities of their subordinates, and those who, without being the superiors in rank of the principal authors, have aided these crimes or delicts."

Article IX of the Chinese Law of 24th October, 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."⁽¹⁾

A special provision was also made in the Netherlands relating to the responsibility of a superior for war crimes committed by his subordinates. The Law of July, 1947, adds *inter alia*, the following provision to the Extraordinary Penal Law Decree of 22nd December, 1943 :

"Article 27 (a) (3) : Any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment as laid down in paragraphs 1 and 2."

A similar provision is contained in Article 9 of the N.E.I. Statute Book Decree No. 45 of 1946, which reads :

"He whose subordinate has committed a war crime shall be equally punishable for that war crime, if he has tolerated its commission by his subordinate whilst knowing, or at least must have reasonably supposed, that it was being or would be committed."⁽²⁾

It will be seen that the French enactment mentions only crimes "organised or tolerated," the Luxembourg provision only those "tolerated" and the Netherlands enactments only those deliberately permitted or knowingly tolerated. A reference to an element of knowledge enters into the drafting of each of these three texts.

The Chinese enactment does not define the extent of the duty of commanders "to prevent crimes from being committed by their subordinates," but the extent to which the Chinese Courts have been willing to go in pinning responsibility of this kind on to 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. Here 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.⁽³⁾

It seems implicit in the Judge Advocate's words in the trial by a British Military Court at Wuppertal, 10th and 11th July, 1946, of General Victor Seeger that some kind of knowledge on the accused's part was necessary to

⁽¹⁾ Vol. XIV, p. 158.

⁽²⁾ See Vol. XI, pp. 100-1.

⁽³⁾ See Vol. IV, p. 88 and Vol. XIV, p. 7.

make him guilty,⁽¹⁾ and the three reports by British and Canadian trials contained in Volume IV also provide, *inter alia*, some evidence that an accused must have had knowledge of the offences of his troops.⁽²⁾ Similarly, in the trial of Baba Masao by an Australian Military Court at Rabaul, the Judge Advocate advised the Court that "In order to succeed the prosecution must prove . . . that war crimes were committed as a result of the accused's failure to discharge his duties as a commander *either by deliberately failing in his duties or by culpably or wilfully disregarding them*, not caring whether this resulted in the commission of a war crime or not."⁽³⁾

A study of a passage from the judgment delivered in the *Trial of Field Marshal Erhard Milch* by a United States Military Tribunal at Nuremberg, from 2nd January, 1947, to 17th April, 1947, in which the Tribunal dealt with the accused's alleged responsibility under Count Two, has shown that the accused was held not guilty of being implicated in the conducting of the illegal experiments referred to because the Tribunal was not satisfied that he knew of their illegal nature ; no duty to find whether they had such a nature is mentioned.⁽⁴⁾ Similarly the type of liability described by the Judge Advocate in the Trial of Frans Schonfeld and nine others by a British Military Court, Essen, 11th-26th June, 1946, assumed knowledge on the part of the accused : "Criminal responsibility might also arise, in the case of a person occupying a position of authority, through culpable negligence, for example, if Harders had reasonable grounds for supposing that his men were going to indulge in committing a war crime against their opponents—whether they be Dutch Resistance opponents or Allied airmen opponents—and in fact they did so, and he failed to take all reasonable steps to prevent such an occurrence. I think, if such a doctrine were to be invoked in this case, the court, before acting upon it to the detriment of Harders would require to be satisfied that Hardegan, prior to leaving for Tilburg on 9th July, 1944, had apprised Harders that it was their intention to murder any suspicious characters they found. In any event, the court would have to be satisfied that the crimes alleged were the natural result of the negligence of the accused ; in other words, that a direction from Harders, given at the correct time, would have prevented any unjustifiable killing taking place."⁽⁵⁾

Among the accused in the trials reported on in Volume V there appeared two higher officers alleged to have had an overall responsibility for certain purported proceedings taken against Allied victims by persons under their command. Reference should be made in this connection to the evidence relating to Major General Shigeru Sawada⁽⁶⁾ and General Tanaka Hisakasu.⁽⁷⁾ Both were found guilty, but the Confirming Authority disapproved the sentences passed on the second accused. It will be recalled that both generals were away from the scene at the time when the purported trials were held. Whereas Shigeru Sawada was *personally informed of the proceedings* on his return, however, and also admitted having had jurisdiction

⁽¹⁾ See Vol. IV, pp. 88-89.

⁽²⁾ See Vol. IV, p. 89.

⁽³⁾ Vol. XI, p. 60.

⁽⁴⁾ See Vol. IV, pp. 89-91 and Vol. VII, pp. 61-63.

⁽⁵⁾ Vol. XI, pp. 70-1.

⁽⁶⁾ See pp. 1, 4-5 and 8 of Vol. V.

⁽⁷⁾ See pp. 66, 68 and 70 of Vol. V.

over the prison where certain of the victims had been incarcerated under the conditions described on p. 6 of Volume V, Tanaka Hisakasu did not return to his command headquarters until after the execution of the victim and *was not proved to have known* in advance that the trial would not be fair or to have known or had reasonable grounds to believe that, if the prisoner should be convicted, the execution of the sentence would be carried out without his consent, which was required by Japanese law.⁽¹⁾

In the judgment in the *Pohl Trial*, the accused Erwin Tschentscher, who had been a battalion commander of a supply column, and a company commander, on the Russian Front during 1941, was held not responsible for the murder of Jewish civilians and other non-combatants in Poland and the Ukraine by members of his commands at that time. The Tribunal found that he had no "actual knowledge" of these offences, and added that the decision of the Supreme Court in the *Yamashita Trial* "does not apply to the defendant Tschentscher", for, "conceding the evidence of the Prosecution to be true as to the participation of subordinates under his command, such participation by them was *not of sufficient magnitude or duration* to constitute *notice* to the defendant, and thus give an opportunity to control their actions. Therefore, the Tribunal finds and adjudges that the defendant Tschentscher is not guilty of participating in the murders and atrocities committed in the Russian campaign as alleged by the prosecution."⁽²⁾

The Judgment in the *High Command Trial* stated that a high commander "has the right to assume that details entrusted to responsible subordinates will be legally executed". Criminal responsibility does not automatically attach to him for all acts of his subordinates. There must be an unlawful act on his part or a failure to supervise his subordinates constituting criminal negligence on his part. Later the Tribunal stated explicitly that "the commander must have knowledge of these offences and acquiesce or participate or criminally neglect to interfere in their commission and that the offences committed must be patently criminal".⁽³⁾ A similar test was applied to offences committed by units taking orders from other authorities: "The sole question then as to such defendants in this case is whether or not they knew of the criminal activities of the Einsatzgruppen or the Security Police and S.D. and neglected to suppress them. . . . When we discuss the evidence against the various defendants, we shall treat with greater detail the evidence relating to the activities of the Einsatzgruppen in the commands of the various defendants, and to what extent, if any, such activities were known to and acquiesced in or supported by them."⁽⁴⁾

⁽¹⁾ Vol. V, pp. 78-79.

⁽²⁾ Vol. VII, pp. 63-64. (Italics inserted). In the *Flick Trial*, the accused Flick was shown to have had "knowledge and approval" of the acts of a subordinate, Weiss, for which he was held jointly responsible: See Vol. IX, p. 54.

⁽³⁾ It will be noted that the last nine words of the passage quoted add a further restriction to the commander's responsibility, one not recognised in other trials reported upon in these volumes, in which trials it was assumed that if the commander knew that his subordinates were carrying out acts which were in fact illegal he would not then be able to plead that he did not know that such acts were illegal.

⁽⁴⁾ See Vol. XII, pp. 110-111, where other examples of the Tribunal's attitude to this question of knowledge are set out or referred to.

It appears however that, in suitable circumstances, the requirement of knowledge may be dispensed with. On certain occasions⁽¹⁾ the Tribunal laid down that accused "*should have had . . . knowledge*" of reports made to them of offences committed, and the Tribunal adopted "as a correct statement of law" the opinion of the Tribunal in the *Hostages Trial* that:

"Want of knowledge of the contents of reports made to him [i.e. to the Commanding General] is not a defence. Reports to Commanding Generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf."⁽²⁾

Some support is given, in fact, as will be shown, to the view that a commander has a duty, not only to prevent crimes of which he has knowledge or which seem to him likely to occur, but also to take reasonable steps to discover the standard of conduct of his troops, and it may be that this view will gain ground.

The Supreme Court of the United States 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 term "appropriate in the circumstances" serves to underline the remark made previously 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 Commission which tried Yamashita seemed to assume that he had had a duty to "discover and control" the acts of his subordinates:

"It is absurd . . . to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, 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."⁽³⁾

The majority judgment of the Supreme Court would appear to have left open the possibility that, in certain circumstances, such a duty could exist. In dissenting, Mr. Justice Murphy expressed the opinion that: "Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different".

⁽¹⁾ Quoted in Vol. XII, pp. 111-112.

⁽²⁾ See Vol. VIII, p. 71 and Vol. XII, p. 112. In the notes to the *Yamashita Trial* it was suggested that: "Short of maintaining that a Commander has a duty to *discover* the state of discipline prevailing among his troops, Courts dealing with cases such as those at present under discussion may in suitable instances have regarded means of knowledge as being the same as knowledge itself. This presumption has been defined as follows:

"Means of knowledge and knowledge itself are, in legal effect, the same thing where there is enough to put a party on inquiry. Knowledge which one has or ought to have under the circumstances is imputed to him. . . . In other words, whatever fairly puts a person on inquiry is sufficient notice where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. A person has no right to shut his eyes or his ears to avoid information, and then say that he had no notice: he does wrong not to heed to "signs and signals" seen by him." (39 Am. Jur., pp. 236-237, Sec. 12.)" (Vol. IV, pp. 94-95.)

⁽³⁾ Vol. IV, p. 35.

Certain passages from the judgment of the United States Military Tribunal which tried Karl Brandt and Others at Nuremberg, from 9th December, 1946, to 20th August, 1947 (*The Doctors' Trial*), which have been quoted on pages 91-93 of Volume IV, indicate that the Military Tribunal which conducted that trial assumed that certain accused were under a duty to make active investigations to find whether certain experiments made by their subordinates were legal, especially in the sense that the subjects had given their voluntary consent. The Tribunal stated, *inter alia*: "The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs, or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity".

Elsewhere, the Judgment in the *Doctors' Trial* stated that: "Occupying the position he did and being a physician of ability and experience, the duty rested upon him [Karl Brandt] to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps," and it may be that the fact that Milch was not "a physician of ability and experience," and the circumstance that "His position involved vast responsibilities covering a wide industrial field, and there were certainly countless subordinate fields within the Luftwaffe of which he had only cursory knowledge," including the conduct of medical experiments, go far towards explaining why his judges excused Milch of a duty to discover whether the experiments carried out by persons within his general command were of a legal character.⁽¹⁾

Speaking of one of the accused before it, the Tribunal acting in the *Pohl Trial* said:

"Mummethy's assertions that he did not know what was happening in the labour camps and enterprises under his jurisdiction does not exonerate him. *It was his duty to know.*"⁽²⁾

The Judgment delivered in the *Tokyo Trial* includes an interesting passage on responsibility for offences against prisoners of war which, apart from its general interest, is significant as showing that the International Military Tribunal of the Far East also was willing to postulate a duty on the part of a superior to find out whether offences were being committed by his subordinates:

"In general the responsibility for prisoners held by Japan may be stated to have rested upon:

- (1) Members of the Government;
- (2) Military or Naval Officers in command of formations having prisoners in their possession;
- (3) Officials in those departments which were concerned with the well-being of prisoners;
- (4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.

⁽¹⁾ Vol. VII, p. 63.

⁽²⁾ Italics inserted.

"It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners if:

- (1) They fail to establish such a system;
- (2) Having established such a system, they fail to secure its continued and efficient working.

"Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance.

"Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for, and conventional war crimes be committed, unless:

- (1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or,
- (2) They are at fault in having failed to acquire such knowledge.

"If such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his office required or permitted him to take any action to prevent such crimes. On the other hand, it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether these assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

"A member of a Cabinet which, collectively, as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet, thereby continuing to participate in its collective responsibility for protection of prisoners, he willingly assumes responsibility for any ill-treatment in the future.

"Army or Navy Commanders can, by order, secure proper treatment and prevent ill-treatment of prisoners. So can Ministers of War and

of the Navy. If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.

"Departmental officials having knowledge of ill-treatment of prisoners are not responsible for reason of their failure to resign; but if their functions included the administration of the system of protection of prisoners and if they had or should have had knowledge of crimes and did nothing effective, to the extent of their powers, to prevent their occurrence in the future, then they are responsible for such future crimes."⁽¹⁾

The Tribunal acting in the *High Command Trial* dealt with, *inter alia*, the position of a commanding officer who knows that men under his command are committing violations of international law in pursuance of orders from his superiors passed down independently of him. While admitting the difficulty of his position,⁽²⁾ the Tribunal held that "by doing nothing he cannot wash his hands of international responsibility. His only defence lies in the fact that the order was from a superior, which Control Council Law No. 10 declares constitutes only a mitigating circumstance."⁽³⁾

The Tribunal was willing to admit that a commanding General's responsibility under international law for conditions in territory under the occupation of his troops could to some extent be affected by his status under the military and other municipal laws of his country.⁽⁴⁾ The responsibility of commanders of occupied territories was said to be fixed, *inter alia*, by "the authority of the commander which has been delegated to him by his own government. . . . It must be borne in mind that a military commander, whether it be of an occupied territory or otherwise, is subject both to the orders of his military superior and the State itself as to his jurisdiction and functions." The *Yamashita Case* was distinguished from the present on the grounds of a differing extent of authority permitted by the State to the accused involved.

In the Tribunal's opinion, however, the doctrine that a commander's governmental authorities may in effect relieve him of certain of his responsibility under international law has its limits: ". . . under international law and accepted usages of civilised nations" a military commander in an occupied area "has certain responsibilities which he cannot set aside or ignore by reason of activities of his own State within his area". Furthermore, the Tribunal seems to have felt that, while none of the accused had the

⁽¹⁾ Official Transcript of the Judgment of the International Military Tribunal for the Far East, pp. 29-32. (Italics inserted).

⁽²⁾ See Vol. XII, p. 74.

⁽³⁾ An application of this ruling by the Tribunal is described in Vol. XII, pp. 106-107.

⁽⁴⁾ This possibility has not received attention in other reasoned Judgments reported in these volumes. The decision of the Supreme Court in the *Yamashita Case* laid down the duty of a commander to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population (see Vol. IV, pp. 42-44). The Supreme Court did not use the words "within his authority" and would appear to have meant "within his physical power".

wide powers of a Yamashita, their authority was nevertheless very extensive. The accused would be responsible for all crimes committed by the Einsatzgruppen of the Security Police and S.D. of which they had knowledge and which they neglected to suppress.

The specific reference to the Einsatzgruppen arose from the fact that the Defence had asserted "that the executive power of field commanders did not extend to the activities of certain economic and police agencies which operated within their areas". It will be recalled that the Tribunal before which the *Hostages Trial* was held expressed the same opinion as the present Tribunal and a part of the Judgment in that Trial was quoted, *inter alia*, by the Tribunal acting in the *High Command Trial*:

"It is the duty of the commanding general in occupied territory to maintain peace and order, punish crime and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territory having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain S.S. units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent or approval of these defendants. But this cannot be a defence for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence."⁽¹⁾

Further, it appears that, just as a commanding general has wide responsibilities under international law, so also is he allowed considerable latitude in the ways in which he fulfills these responsibilities; the Tribunal held that "the duty imposed upon a military commander is the protection of the civilian population. Whether this protection be assured by the prosecution of soldiers charged with offences against the civilian population, or whether it be assured by disciplinary measures or otherwise, is immaterial from an international standpoint."⁽²⁾

The judgment delivered in the *Hostages Trial* has already been referred to in these pages on the question of the extent to which a commanding general in occupied territory may be held liable for the offences of troops under his command. It may be convenient to summarise the relevant passages.⁽³⁾ Three points in particular are worthy of note: (a) a commander having executive authority over occupied territory—in effect the person on whom rests principally the obligations laid down in Section III (*Military Authority over the Territory of the Hostile State*) of Hague Convention No. IV of 1907—shall not be able to plead that offences were committed, within the occupied territory under his authority, by persons taking orders from authorities other than himself, as the S.S. took orders directly from Himmler, and the same applies to subordinate commanders to whom executive powers have been delegated; (b) such a commander—and indeed any commander—will

⁽¹⁾ See Vol. VII, pp. 69-70 and Vol. XII, pp. 107-110.

⁽²⁾ See Vol. XII, p. 83.

⁽³⁾ These are set out in Vol. VIII, pp. 69-70.

not usually be permitted to deny knowledge of the contents of reports made specially for his benefit; and (c) a commanding general will usually be held liable for events during his temporary absence from headquarters which arise out of a "general prescribed policy formulated by him."

The judgment elsewhere reinforced the first principle by stating that a commanding general of occupied territory "cannot escape responsibility by a claim of a want of authority. The authority is inherent in his position as commanding general of occupied territory. The primary responsibility for the prevention and punishment of crime lies with the commanding general, a responsibility from which he cannot escape by denying his authority over the perpetrators." From this rule it follows that a commanding general cannot hide behind a "puppet government" and plead that he is not responsible for their acts; the Tribunal applied this conclusion to the accused von Leyser who was commanding general of a corps area.⁽¹⁾ Elsewhere, the Tribunal repeated: "We must assert again, in view of the defendant's statement that the responsibility for the taking of reprisal measures rested with the divisional commanders and the Croatian government, that a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about."

(ix) STAFF OFFICERS

A comparison of the evidence relating to the accused Foertsch and von Geitner⁽²⁾, two of the accused in the *Hostages Trial*, and the findings of the Tribunal upon them indicates the limits beyond which the Tribunal found it impossible to hold a chief of staff liable for the acts of the subordinates of his commander. The Tribunal took the view, for instance, that a chief of staff could not be held responsible for the outcome of his commander's orders which he approved from the point of view of form, and issued on the latter's behalf.

Of Foertsch the Tribunal concluded that "the nature of the position of the defendant Foertsch as Chief of Staff, his entire want of command authority in the field, his attempts to procure the rescission of certain unlawful orders and the mitigation of others, as well as the want of direct evidence placing responsibility upon him, leads us to conclude that the Prosecution has failed to make a case against the defendant. No overt act from which a criminal intent could be inferred, has been established.

"That he had knowledge of the doing of acts which we have herein held to be unlawful under International Law cannot be doubted. It is not enough to say that he must have been a guilty participant. It must be shown by some responsible act that he was. Many of these acts were committed by organisations over which the Wehrmacht, with the exception of the commanding general, had no control at all. Many others were carried out through regular channels over his voiced objection or passive resistance. The evidence fails to show the commission of an unlawful act which was the result of any action, affirmative or passive, on the part of this defendant. His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal

⁽¹⁾ See Vol. VIII, pp. 72-74.

⁽²⁾ For this evidence see Vol. VIII, pp. 42-43.

law. He must be one who orders, abets or takes a consenting part in the crime. We cannot say that the defendant met the foregoing requirements as to participation. We are required to say therefore that the evidence does not show beyond a reasonable doubt that the defendant Foertsch is guilty on any of the counts charged."

Von Geitner was also found not guilty, on the grounds of his not having been shown to have taken any consenting part in illegal acts, "coupled with the nature and responsibilities of his position and the want of authority on his part to prevent the execution of the unlawful acts charged."⁽¹⁾

On the other hand, two trials reported in Volume V of this series have shown that a Chief of Staff may be held guilty of committing war crimes⁽²⁾. Certainly the position of Chief of Staff provides no immunity upon its holder and the responsibility of such a person for war crimes must be judged upon the facts of each case. An examination of the relevant facts of the two trials mentioned above shows that the chiefs of staff who were held guilty took a closer and more willing and active part in the offences charged than did Foertsch and von Geitner.⁽³⁾

The question of the extent of responsibility of staff officers arose again in the *High Command Trial*. Here the Tribunal held⁽⁴⁾ that the fact that Geitner and Foertsch were acquitted in the *Hostages Trial* did not signify that staff officers were absolved from all criminal responsibility for matters in which their commanding officer could be held responsible. The Tribunal regarded as sound the finding in the previous trial but held that "the facts in that case are not applicable to any defendant on trial in this case."

On the other hand the Tribunal ruled that "If the basic idea is criminal under international law, the staff officer who puts that idea into the form of a military order, either himself or through subordinates under him, or takes personal action to see that it is properly distributed to those units where it becomes effective commits a criminal act under international law"; whereas the preparation, and approval as to form, of criminal orders, and the distribution of such orders, appeared among the duties of either Foertsch or von Geitner, who were nevertheless acquitted. It should be added, however, that the detailed legal drafting of these orders was in the hands of a legal department or officer outside the authority of the two accused named.⁽⁵⁾

A chief of staff cannot, apparently, be held guilty of crimes of omission as a commanding general may be.⁽⁶⁾ "A failure to properly exercise command authority", said the Judgment, "is not the responsibility of a chief of staff."⁽⁷⁾ The Tribunal pointed out that "it was of course the duty of a chief of staff to keep [his] commander informed of the activities which took place within the field of his command insofar at least as they were considered of sufficient importance by such commander", but it appears from the context that the Tribunal regarded such duty as being one laid down by German military law and not one existing under international

⁽¹⁾ Vol. VIII, pp. 75-76.

⁽²⁾ See Vol. V, p. 79.

⁽³⁾ Compare Vol. V, pp. 62, 63, 67, 68 and 69 with pp. 42-43 of Vol. VIII.

⁽⁴⁾ See Vol. XII, p. 80.

⁽⁵⁾ See Vol. VIII, pp. 42-43.

⁽⁶⁾ See p. 62.

⁽⁷⁾ See Vol. XII, p. 81.

law.⁽¹⁾ If it were laid down by international law that a chief of staff must keep his commanding officer informed of certain matters then it would be possible for the chief of staff to be guilty of a war crime of omission, i.e. a failure to fulfil *his own duty* as a staff officer not his superiors "command authority" referred to above. The Tribunal's words do not, however, allow it to be said that a chief of staff may be guilty of such a war crime of omission.

This conclusion is borne out by other words of the Tribunal indicating that only positive action can make a chief of staff guilty: "In the absence of participation in criminal orders or their execution within a command, a chief of staff does not become criminally responsible for criminal acts occurring therein."⁽²⁾

The opportunity of a chief of staff to commit war crimes seems, in the opinion of the Tribunal, to arise from his power "to issue orders and directives in the name of his commander", a power which varies widely in practice but which may allow sufficient exercise of initiative and discretion to involve the chief of staff in the commission of offences under the laws and usages of war.⁽³⁾

Extracts made in Volume XII from the Judgment of the Tribunal on the accused Woehler⁽⁴⁾ seemed to indicate that a chief of staff may be held responsible for war crimes committed as a result of his orders if such orders are not "basic orders" such as "necessarily would be submitted to a commander-in-chief" but orders which "a chief of staff would normally issue of his own volition."

The fact that the making of a substantial contribution to the drafting of an illegal order (as distinct from approving it from the point of view of form) may make an accused criminally liable was shown by the passages from the Judgment dealing with the accused Lehmann⁽⁵⁾ and Warlimont.⁽⁶⁾

The International Military Tribunal for the Far East had no hesitation in declaring a Chief-of-Staff responsible for war crimes, but it will be observed that the following passage from its Judgment indicates that the accused involved had been "in a position to influence policy":

"In October, 1944, Muto became Chief-of-Staff to Yamashita in the Philippines. He held that post until the Surrender. His position was now very different from that which he held during the so-called "Rape of Nanking". He was now in a position to influence policy. During his tenure or office as such Chief-of-Staff a campaign of massacre, torture and other atrocities was waged by the Japanese troops on the civilian population and prisoners of war and civilian internees were starved, tortured and murdered. Muto shares responsibility for these gross breaches of the Laws of War. We reject his defence that he knew nothing of these occurrences. It is wholly incredible. The Tribunal finds Muto guilty on Counts 54 and 55."⁽⁷⁾

⁽¹⁾ See Vol. XII, pp. 80-81.

⁽²⁾ See Vol. XII, p. 81.

⁽³⁾ See Vol. XII, pp. 81-82.

⁽⁴⁾ See Vol. XII, pp. 113-115.

⁽⁵⁾ See Vol. XII, pp. 116-118.

⁽⁶⁾ See Vol. XII, p. 118.

⁽⁷⁾ Official transcript of the Judgment of the International Military Tribunal for the Far East, p. 1186.

(x) PARACHUTE TROOPS

In the trial of Kurt Student by a British Military Court, Luneberg, Germany, 6th-10th May, 1946, the accused claimed that the temporary detailing of prisoners to work in the fighting zone was unavoidable in airborne operations. In his summing up, the Judge Advocate made an interesting observation on the question whether parachute troops should occupy the same position as others in relation to the provisions of the International Conventions on the Conduct of Warfare. "Parachutists," he said to the Court, "are not like ordinary soldiers. They have difficult situations to deal with and they often have to work in small numbers. They have to work on their own initiative and it is for you, as soldiers, to say whether the same standard must be adopted by a parachutist when he is dropped in hostile country in small numbers as with the ordinary soldier in the ordinary infantry attack and it is for you to decide whether on this expedition those paratroops would not be told that they would have to be ruthless, that they would have to fight hard and they would have difficult circumstances to get over but their paramount object must be to carry out the plan. Now, gentlemen, I invite you later on to consider how parachutists are trained and how they must be trained for their difficult duties. I am bound to say here that the Defence are saying in the case of this particular formation trained by Student that it was trained most humanely, that they would be clear as to what to do and that they would behave strictly in accordance with the laws and usages of war. I will say no more on that point but it is one, no doubt, which will occur to you and you will have to consider the conduct of the parachute troops in the positions in which they were brought. I think you will take the view that the Defence feels that the Hague Convention and International Agreements are out of date in that they act rather harshly on the parachutist, and they would make them read no doubt so that the parachutist would not come under this International Law which is intended to make fighting less severe for non-combatants and combatants alike."⁽¹⁾

This question has not been the subject of authoritative pronouncement in any other trial brought to the notice of the United Nations War Crimes Commission.

⁽¹⁾ Vol. IV, p. 112.

V SOME TYPES OF VICTIMS OF CRIMES

Some words should be said regarding some of the categories of person protected by international criminal law as it now exists, in order to demonstrate the extent of the protection afforded.

1. PRISONERS OF WAR

(i) If a captive has not been a lawful belligerent before capture, he does not become entitled to full prisoner of war protection on being taken prisoner. The categories who are entitled to such protection on capture are those who fall within the terms of Articles 1-3 of the Hague Regulations :

"Article 1. The laws, rights and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions :

- (1) They must be commanded by a person responsible for his subordinates ;
- (2) They must have a fixed distinctive sign recognizable at a distance ;
- (3) They must carry arms openly ; and
- (4) They must conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army.'

Article 2. The inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly, and if they respect the laws and customs of war.

Article 3. The armed forces of the belligerents may consist of combatants and non-combatants. In the case of capture by the enemy, both have the right to be treated as prisoners of war."

The Tribunal acting in the *Hostages Trial* was faced with the question whether certain belligerent units could be regarded as lawful under international law as laid down in the Hague Regulations :

"There is convincing evidence in the record that certain band units in both Yugoslavia and Greece complied with the requirements of International Law entitling them to the status of a lawful belligerent. But the greater portion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent. The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents.

"The evidence shows that the bands were sometimes designated as units common to military organisation. They, however, had no common uniform. They generally wore civilian clothes although parts of German, Italian and Serbian uniforms were used to the extent they could be obtained. The Soviet Star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. There is some evidence that various groups of the resistance forces were commanded by a centralised command, such as the partisans of Marshal Tito, the Chetniks of Draja Mihailovitch and the Edes of General Zervas. It is in evidence also that a few partisan bands met the requirements of lawful belligerency. The bands, however, with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs. . . .

"Guerrilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities by harassing the enemy with unorganised forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured, may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applies to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured. . . . Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.

"It is contended by the prosecution that the so-called guerrillas were in fact irregular troops. A preliminary discussion of the subject is essential to a proper determination of the applicable law. Members of militia or a volunteer corps, even though they are not a part of the regular army, are lawful combatants if (a) they are commanded by a responsible person, (b) if they possess some distinctive insignia which can be observed at a distance, (c) if they carry arms openly and (d) if they observe the laws and customs of war. See Chapter I, Article I, Hague Regulations of 1907. In considering the evidence adduced on

this subject, the foregoing rules will be applied. The question whether a captured fighter is a guerrilla or an irregular is sometimes a close one that can be determined only by a careful evaluation of the evidence before the court.

"The question of the rights of the population of an invaded and occupied country to resist has been the subject of many conventional debates. (Brussels Conference of 1874; Hague Peace Conference of 1899.) A review of the positions assumed by the various nations can serve no useful purpose here for the simple reason that a compromise (Hague Regulations, 1907) was reached which has remained the controlling authority in the fixing of a legal belligerency. If the requirements of the Hague Regulations, 1907, are met, a lawful belligerency exists; if they are not met, it is an unlawful one."⁽¹⁾

It would seem that in the Tribunal's opinion, it would be possible for a fighting group to be entitled to belligerent status under Article 1 of the Convention, even though not "supported by an organised government".⁽²⁾

If a combatant falls outside the category of legal combatant he becomes guilty of a type of war crime called war treason and may be executed on capture subject to the right to a fair trial.⁽³⁾

(ii) Article 23(c) of the Hague Regulations forbids the killing or wounding of an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion.⁽⁴⁾ The Regulations were drafted long before the possibility of airmen escaping from aircraft by parachute was a practical possibility; nevertheless, Article 23(c) has been interpreted so as to protect baled-out airmen, whether captured by armed forces or civilians.⁽⁵⁾

On the other hand, the decision of the United States Military Court at Dachau which tried Josef Hangolb shows that the mere fact of having baled out of an aircraft does not automatically entitle an airman to prisoner of war status.⁽⁶⁾

(iii) Furthermore, there is no doubt that the protection afforded by the Hague and Geneva Conventions and by customary international law to prisoners of war attaches to them wherever they are. This protection has been applied to prisoners interned not only in prisoner of war camps but

⁽¹⁾ Vol. VIII, pp. 56-59 and 75. Elsewhere the Tribunal was called upon to decide whether a certain group of Italian troops who resisted German demands for surrender could legally be shot on capture. The Tribunal found, on the contrary, that the Italian forces which so continued to resist "met all the requirements of the Hague Regulations as to belligerent status". (See Vol. VIII, pp. 71-72). For a further discussion of the application of Article 1 of the Hague Regulations, see Vol. XI, pp. 27-29, and cf Vol. XII, pp. 85-6 and 94.

⁽²⁾ Vol. VIII, p. 58. In the Trial of Carl Bauer, Ernst Schrameck and Herbert Falten, a Permanent Military Tribunal at Dijon held that certain irregular combatants in France were entitled to prisoner of war treatment on capture but did not indicate whether it relied upon Article 1 or Article 2 of the Hague Regulations. See Vol. VIII, pp. 16-19.

⁽³⁾ See pp. 111-112 and 113.

⁽⁴⁾ See p. 99.

⁽⁵⁾ For two instances among many, see Vol. I, pp. 85-86 and 91.

⁽⁶⁾ Vol. XIV, p. 88.

also in concentration camps.⁽¹⁾ Again, the Geneva Prisoners of War Convention tends to speak in terms of the conditions of prisoner of war camps and the treatment of prisoners of war while in such camps; nevertheless the provisions of the Convention or the rules of customary law codified therein have been held applicable also to the conditions of prisoners of war while on the line of march between camps or while on the sea on their way to camps.

Thus, in the trial of Arno Heering, held before a British Military Court at Hanover, 24th-26th January, 1946, a member of a guard company was accused of ill-treating members of the British army and other British and Allied nationals while on the march with a column of prisoners of war from Marienburg to Brunswick. The accused was found guilty, the prosecutor having submitted that the column of march described in the trial was to all intents the same and in the same position as a Prisoner of War Camp. All the duties set out in the Geneva Prisoner of War Convention, he claimed, fell on the shoulders of the accused.⁽²⁾

Similarly, in the trial of Shoichi Yamamoto and others by an Australian Military Court at Rabaul, 20th-27th May, 1946, several accused were found guilty of "ill-treatment of prisoners of war between Sandakan and Ranau between 29th January 1945 and 28th February 1945 compelled prisoners of war in their charge to march long forced marches under difficult condition when sick and underfed as a result whereof many of the said prisoners of war died". The offence proved took place when about 450 prisoners of war were being moved from one camp to another.

That the protection of the laws and customs of war attaches to prisoners of war wherever they may be is further proved by the trial of Kishio Uchiyama and Mitsugu Fukuda by an Australian Military Court at Singapore, 18th-29th April, 1947. Here the accused were found guilty of "committing a war crime in that they on the high seas, between 4th July 1944 and 8th September 1944 on a voyage from Singapore to Moji (Japan) aboard the s.s. "Rashin Maru" as officer in charge and non-commissioned officer second in charge respectively of a draft of Allied prisoners of war

⁽¹⁾ During the course of the *Belsen Trial*, Colonel Smith (Defence Counsel) pointed out that in one of the instances charged, where victims were prisoners of war, a British subject who had been captured as a prisoner of war was transferred to the Concentration Camp. This was a clear international wrong, but the wrong consisted in ceasing to treat him as a prisoner of war, in taking him out of the camp, where he was protected by the Geneva Convention, and putting him in a concentration camp where he was exposed to the same treatment as any other inmate. The responsibility rested with those who sent him to Auschwitz or Belsen, but the responsibility of the people at Auschwitz and Belsen was the same in regard to that man as to any other inmate. Counsel did not know whether they even knew he was a prisoner of war. In any case they had no option but to treat him as anyone else.

In his closing address, the Prosecutor claimed that Colonel Smith had suggested that the crime involved was the moving of the prisoner of war from the prisoner of war camp into the concentration camp and that anything which happened to him thereafter was thereby excused. The Prosecutor found it difficult to accept the suggestion that if a man was ill-treated in a prisoner of war camp that was a war crime, but if the ill-treatment took place outside in the street or in a concentration camp, it was not. Insofar as it did not arrive at a special finding regarding the victim in question, who was mentioned on the Belsen Charge Sheet, the Court would appear to have rejected Colonel Smith's argument. (Vol. II, pp. 74, 106 and 121-122).

⁽²⁾ See Vol. XI, pp. 79-80.

for whose well being they were responsible were, in violation of the laws and usages of war together concerned in the inhumane treatment of the said prisoners of war thereby contributing to the physical and mental suffering of the said prisoners of war."⁽¹⁾

2. CIVILIANS IN OCCUPIED TERRITORY AND ALLIED CIVILIANS IN ENEMY TERRITORY

(i) The Hague Regulations are often assumed to protect the nationals of an occupied territory, but the use of the expressions "inhabitants" and "population" in Articles 44, 45, 50 and 52 of the Regulations attached to the Convention suggests that protection may also extend to certain inhabitants of occupied territory who are not at the same time nationals of the country occupied, for instance, neutrals. The Preamble to the Convention states that the provisions thereof are intended "to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants". The word "inhabitants" is also used in the more well-known paragraph of the Preamble which has appeared from time to time in these Volumes.⁽²⁾

The Tribunal acting in the *Justice Trial* said the following of the definition of "war crimes" in the Charter of the International Military Tribunal and in Law No. 10:

"The scope of enquiry as to war crimes is, of course, limited by the provisions, properly construed, of the Charter and C.C. Law 10. In this particular, the two enactments are in substantial harmony. Both indicate by inclusion and exclusion the intent that the term 'war crimes' shall be employed to cover acts in violation of the laws and customs of war directed against non-Germans, and shall not include atrocities committed by Germans against their own nationals. It will be observed that Article VI of the Charter enumerates as war crimes acts against prisoners of war, persons on the seas, hostages, wanton destruction of cities and the like, devastation not justified by military necessity, plunder of public or private property (obviously not property of Germany or Germans), and 'ill-treatment or deportation to slave labour, or for any other purpose, of civilian population of, or in, occupied territory'. C.C. Law 10, *supra*, employs similar language. It reads:

'... ill-treatment or deportation to slave labour or for any other purpose of civilian population from occupied territory.'"⁽³⁾

It would be going too far to claim that this tendency to regard the Hague Convention as protecting civilians other than Allied civilians signifies that ex-enemies are protected,⁽⁴⁾ but it should be noted that the protection of war crime courts has been extended to certain neutrals, according to the municipal

⁽¹⁾ Vol. XI, p. 80, note 1.

⁽²⁾ See p. 7, note 1.

⁽³⁾ Vol. VI, pp. 38-39. (Italics are in the original). Compare the quotation from the *Krupp Trial* judgment, on pp. 16-17.

⁽⁴⁾ See pp. 86-88.

legislation of some countries. For instance, Article 1 of the Norwegian Law of 13th December, 1946, on the Punishment of Foreign War Criminals provides:

"Acts which, by reason of their character, come within the scope of Norwegian criminal legislation are punishable, according to Norwegian law, if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norway or were directed against Norwegian citizens or Norwegian interests. In accordance with the terms of the Civil Criminal Code No. 12, paragraph 4, with which should be read No. 13, paragraphs 1 and 3, the above provision applies also to acts committed abroad to the prejudice of Allied legal rights or of rights which, as laid down by Royal Proclamation, are deemed to be equivalent thereto."⁽¹⁾

Certain categories of neutral citizens would seem also to be protected by Article 1 of the French Ordinance of 28th August, 1944, concerning the prosecution of war criminals, which provides as follows:

"Article 1. Enemy nationals or agents of other than French nationality who are serving enemy administration or interests and who are guilty of crimes or offences committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before 17th June, 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies, shall be prosecuted by French military tribunals and shall be judged in accordance with the French laws in force, and according to the provisions set out in the present ordinance where such offences, even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war."⁽²⁾

Article VII of the Chinese Law of 24th October, 1946, governing the trial of war criminals, provides that:

"Alien combatants and non-combatants who committed any of the offences provided under Article II against the Allied Nations or their nationals, or against aliens under the protection of the Chinese Government, are subject to the application of the present law."⁽³⁾

(ii) On a narrow interpretation, the Hague Convention does not protect civilians outside of occupied territory since the heading of Section II of the Hague Convention is "Military authority over the territory of the Hostile State", but this has not in fact prevented courts from extending the protection of the laws and usages of war not only to Allied civilians on enemy soil but also to their children born on enemy soil.

⁽¹⁾ Vol. III, p. 83 (Italics inserted). An explanatory memorandum of the Norwegian Ministry of Justice and Police dealing with this law states that, in referring to rights which are equivalent to Allied rights, the draftsmen had in mind particularly: (a) Danish citizens and their economic interests, and (b) neutral citizens in Norway or other Allied armed forces or persons employed in other Allied war work. (Vol. III, p. 84).

⁽²⁾ Vol. III, p. 93.

⁽³⁾ Vol. XIV, pp. 156-7. (Italics inserted).

In the *Hadamar Trial* (the trial of Alphons Klein and six others before an American Military Commission at Wiesbaden), various accused were found guilty of taking part in the deliberate killing of, among other people, over 400 Polish and Soviet nationals, many if not most of whom were civilians, by injections of poisonous drugs. Here, the fact that the offences took place in Hadamar, Germany and not in occupied territory, was treated as entirely irrelevant.⁽¹⁾

Another example among the many, is the *Belsen Trial*. In this trial, the offences committed in Auschwitz and those committed in Belsen were treated by the court as being on entirely the same footing, the fact that Belsen was on German territory and Auschwitz in occupied Poland being treated as beside the point from the legal point of view.⁽²⁾

In the trial of Heinrich Gerike and seven others (the *Velpke Children's Home case*), various accused were found guilty of being concerned in the killing by wilful neglect of Polish children born on German territory.⁽³⁾ A similar trial was that of Georg Tyrolt and others by a British Military Court, Helmstedt, 20th May-24th June, 1946.⁽⁴⁾

It is clear that the rules laid down in the Hague Regulations must be followed in respect of inhabitants of occupied territory who have been sent into the country of the occupant for forced labour, as had the mothers of the children who were sent into the Velpke home, and to children born to them while in captivity.⁽⁵⁾

3. EX-ENEMY NATIONALS

Enemy nationals are left unprotected in war crime trials proper, by contrast with trials of what are known as "crimes against humanity." For instance,

⁽¹⁾ Vol. I, pp. 46-54.

⁽²⁾ Vol. II, pp. 4 and 121-122. In his opening statement in the trial, the Prosecutor quoted paragraphs 442 and 443 of the British *Manual of Military Law*:

"442. War crimes may be divided into four different classes:

(i) Violations of the recognised rules of warfare by members of the armed forces . . .
"443. The more important violations are the following: ill-treatment of prisoners of war; . . . ill-treatment of inhabitants in occupied territory . . ."

The prosecutor claimed that although the words "inhabitants in occupied countries" were used, it was obvious that they should be extended to "all inhabitants of occupied countries who have been deported from their own country," the deportation, in fact, being a further infringement of the law.

⁽³⁾ Vol. VII, p. 80.

⁽⁴⁾ Vol. VIII, p. 81.

⁽⁵⁾ It was pointed out by the Prosecutor in the *Velpke Trial* that such deportation was itself contrary to international law. It could have been argued by the Defence that the offence of deportation was committed by persons other than the accused; nevertheless, it seems reasonable to assume that the inhabitants of an occupied territory keep their rights under international law when forced to leave their own country, even though this is not expressly provided in the Hague Convention. Indeed, the Tribunal which conducted the *Justice Trial* stated clearly that the transfer of "Night and Fog" prisoners from occupied territories to Germany did not cleanse the "Night and Fog" Plan of its iniquity "or render it legal in any respect." (Vol. VI, p. 56).

Similarly, the Judge Advocate acting in the Trial of Georg Tyrolt and others by a British Military Court, said of the victims of the offences charged in that case: "Quite obviously if it is wrong to show lack of respect to their family life and individual life in their own country, you cannot get out of that obligation simply by taking them to your country and then ill-treating them there." (Vol. VII, p. 81).

the British Royal Warrant provides, in Regulation 1, that the offences to be tried by British Military Courts shall only be *violations of the laws and usages of war* committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939.⁽¹⁾

In the trial of Susuki Motosuke by a Netherlands Temporary Court-Martial, the accused was found not guilty of a war crime, as charged, but guilty of a breach of the Netherlands East Indies Penal Code, in respect of one of the victims of whose killing he was alleged to have been responsible; the Court came to this decision in view of the fact that this one victim could not be regarded as being a national of one of the United Nations since he had freely joined the Japanese Army in the Netherlands East Indies, and had therefore been in "foreign military service without the permission" of the Dutch Government, and was therefore not a Netherlands subject at the time of his execution.⁽²⁾

Nevertheless, certain offences against ex-enemy nationals do fall within the jurisdiction of some courts under the title "crimes against humanity." The types of courts referred to and the relevant jurisdictional provisions have already been described or cited,⁽³⁾ while the general characteristics of such crimes are set out later.⁽⁴⁾ Here it is necessary only to indicate what persons, according to various rulings, have been protected by jurisdictional provisions binding upon certain Allied courts which have tried cases after the Second World War.

⁽¹⁾ Vol. I, p. 105. The question received some discussion during the course of the *Belsen Trial*. The defence objected to the proposal of the prosecution to put in affidavits which included the allegation of an offence committed against a Hungarian girl. Defence counsel pointed out that the charge against the accused referred to the committing of a war crime which involved the ill-treatment and killing of allied nationals. Counsel also thought that it was within the knowledge of the court that a war crime could not be committed by a German against a Hungarian since the latter would not be an Allied national. The Prosecutor made two points in replying: Hungary, he said, left the Axis before April, 1945, and had come on to the Allied side; at that time, therefore, the Hungarians were at least some form of Allies, though Counsel did not know to what extent. A more general point made by the Prosecutor was that what he was trying to prove was the treatment of the Allied inmates of the camp. He thought that he was perfectly entitled to put before the court evidence of the treatment of other persons in the camp. If there were ten people and he wanted to prove that one of them was badly treated, in the Prosecutor's submission, he was perfectly entitled to prove that the ten were badly treated. The treatment of all the inmates in the camp was relevant to show the treatment of any individual inmate. The Court decided that the paragraph be included in the evidence before the Court.

Colonel Smith (Counsel for the defendants in general) claimed that only offences against Allied nationals could be regarded by the Court as war crimes, and that "Allied nationals" meant nationals of the United Nations. The term therefore excluded Hungarians and Italians. As has been seen, the Prosecutor himself in effect disclaimed any intention of charging the accused of crimes against persons other than Allied nationals. Both Prosecution and Defence therefore recognised that, under the Royal Warrant, the jurisdiction of British Military Courts is limited to the trial of war crimes proper and excludes crimes against humanity as defined in Article 6(c) of the Charter of the International Military Tribunal. British Military Courts deal with such crimes only if they are also violations of the laws and usages of war. (Vol. II, pp. 150-151).

⁽²⁾ See Vol. XIII, pp. 127-128.

⁽³⁾ See p. 27, note 3, and pp. 40-3.

⁽⁴⁾ See pp. 134-8.

According to the Judgment delivered in the *Justice Trial*, crimes against humanity may have been committed by German nationals against other German nationals or any stateless person.⁽¹⁾ According to the Judgment in the *Milch Trial*,⁽²⁾ the words "or nationals of Hungary and Rumania" could be added to the possible victims of this dictum. Further, according to the Judgment in the *Einsatzgruppen Trial*, Law No. 10, when it deals with crimes against humanity, is not restricted as to the nationality of the victim.⁽³⁾

⁽¹⁾ See Vol. VI, pp. 39-40.

⁽²⁾ See Vol. VII, p. 40.

⁽³⁾ See Vol. IX, p. 47.

VI TYPES OF OFFENCES

A. INCHOATE OFFENCES

1. INCITEMENT

That incitement to commit a war crime may be itself punishable, irrespective of whether that crime is ever committed, is proved by cases in which the giving of criminal orders which were never carried out, has nevertheless been punished by the courts.⁽¹⁾

2. ATTEMPTS

Some recognition has been given to the possibility that a person may be guilty of a war crime even though he merely attempted to commit an offence and the offence was never completed. Thus, Article 4 of the Norwegian Law of 13th December, 1946, on the punishment of foreign war criminals, provides that :

"The attempted commission of any crime referred to in Article No. 1 of the present law is subject to the same punishment as an accomplished act. Complicity is likewise punishable."

For an application of this provision, reference should be made to page 120 of Volume VI.

Again, Article 13(1) of a Yugoslav Law of 25th August, 1945, which provides for the trial of war criminals and traitors, lays down that :

"An attempt to commit acts outlined in this Law shall be punishable as a complete criminal act."

Under the Dutch war crimes laws, an attempt to commit a war crime is equally punishable with the crime itself.⁽²⁾

Neither are convictions for attempts at war crimes unknown in French practice. Thus, Jean Georges Stucker was sentenced to imprisonment for two years, for the offence of having attempted to secure the arrest or detention of a French national, by a French Military Tribunal at Metz, 25th November, 1947.⁽³⁾

The relevant French provision is Article 2 of the *Code Pénal* which states that :

"Any attempted crime which is manifested by the commencement of its execution, if it has been stopped or has lost its effect only by virtue of circumstances independent of the will of its author, is considered to be the same as the completed crime."

⁽¹⁾ See p. 133.

⁽²⁾ See Vol. XI, pp. 97-98.

⁽³⁾ See Vol. VII, p. 73.

3. CONSPIRACIES

The existence as a separate offence of conspiracy to commit the crime of waging aggressive war does not seem to have been doubted by the United States Military Tribunals :⁽¹⁾ in this they accepted the view of the Nuremberg International Military Tribunal.⁽²⁾ On the other hand, again following the decision of the International Military Tribunal,⁽³⁾ they have not recognised as a separate offence conspiracy to commit war crimes or crimes against humanity.

On 9th July, 1947, a joint session of five United States Military Tribunals was held in order to hear counsel argue regarding the sufficiency of counts which charged defendants with conspiracy to commit war crimes and crimes against humanity as a separate offence. Such counts had been brought against the accused in the *Justice Trial*, in the trial of Karl Brandt and others (*The Doctors' Trial*) and in the trial of Oswald Pohl and others, which were also being held before certain of the Military Tribunals mentioned above. Counsel for the defendants in these three trials challenged the sufficiency of these counts while General Telford Taylor, who led the prosecution in these trials, argued in support of it.

After arguments had been heard⁽⁴⁾ the Tribunals decided in favour of the defence submission, and the Tribunal conducting the *Justice Trial* ruled accordingly, as follows :

"Count 1 of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully, wilfully and knowingly did conspire and agree together to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, Article 2. It is charged that the alleged crime was committed between January, 1933 and April, 1945.

"It is the ruling of this Tribunal that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime ; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offence. . . ."⁽⁵⁾

War Crime trials involving charges of conspiracy have not, however, been unknown. Article 265 of the French *Code Pénal* provides that "Any association formed, whatever its duration or the number of its members, and any undertaking arrived at for the purpose of preparing or committing crimes against persons or against property, constitutes a crime against the public peace." This provision, *inter alia*, was relied upon in the trial of Henri Georges Stadelhofer by a French Military Tribunal at Marseilles, 15th April, 1948 ; in finding him guilty of the crime of *association de malfaiteurs*, among other offences, the Tribunal gave an affirmative answer to the question whether he, a German national, was guilty, during time of war, of "having formed with various members of the German Gestapo an

⁽¹⁾ See p. 148.

⁽²⁾ See British Command Paper Cmd. 6964, pp. 42-44.

⁽³⁾ *Ibid.*, p. 44.

⁽⁴⁾ These arguments are summarised in Vol. VI, pp. 105-109.

⁽⁵⁾ Vol. VI, p. 5.

association with the aim of preparing or committing crimes against persons or property, without justification under the laws and usages of war.⁽¹⁾ A further example of a French prosecution for conspiracy is the trial of Horst Hebestreit,⁽²⁾ once chief of the S.D. at St. Girons. In the trial of Albert Raskin by a French Military Tribunal at Lyon, 16th January, 1947, the only charge was that of *association de malfaiteurs*, the accused being found guilty and sentenced to two years' imprisonment. His offence was that of having taken part in the work of German units which exercised police functions in France.

Provisions were also made in the Netherlands laws for the punishment of conspiracy to commit a war crime equally with the crime itself.⁽³⁾

The application of laws regarding conspiracy must be distinguished from the following : ⁽⁴⁾

- (i) procedural provisions permitting the holding of joint trials ;
- (ii) Regulation 8 (ii) of the British Royal Warrant of 14th June, 1945, Army Order 81/45, as amended, and similar provisions made by other countries ;
- (iii) the concept of common design ; and
- (iv) the law relating to criminal organisations.

⁽¹⁾ Vol. VI, p. 106, note 1. Article 2⁽²⁾ of the French Ordinance of 28th August, 1944, makes the provision quoted above applicable to "organisations or agencies engaged in systematic terrorism." (Vol. III, p. 95). In the course of his dissenting judgment in the *Justice Trial*, Judge Blair made some remarks concerning the decision in that trial which is recorded above. His opinion was that : "Since the language of paragraph 2 of Law No. 10 expressly provides that any person connected with plans involving the commission of a war crime or crime against humanity is deemed to have committed such crimes, it is equivalent to providing that the crime is committed by acts constituting a conspiracy under the ordinary meaning of the term. Manifestly it was not necessary to place the label 'conspiracy' upon acts which themselves define and constitute in fact and in law a conspiracy. Paragraph 2 was so interpreted by the Zone Commander when he issued Military Government Ordinance No. 7, which authorised the creation of this and similar military tribunals, and which provides in Article 1 that :

"The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes."

The Tribunal, he concluded, "should therefore declare that military tribunals as created by Ordinance No. 7 have jurisdiction over 'conspiracy to commit' any and all crimes defined in Article II of Law No. 10." (Vol. VI, p. 110.)

⁽²⁾ Not previously considered in this series.

⁽³⁾ See Vol. XI, p. 98.

⁽⁴⁾ One of the striking features of the type of warfare waged by the Axis Powers in general and by the Nazi regime in particular was the phenomenon of mass criminality for which certain organisations were responsible. In a great number of official and non-official statements, programmes and recommendations, attention was drawn to this fact, which was bound to confront the authorities charged with the meting out of just retribution with a formidable task and with great difficulties of a procedural and perhaps also of a substantive legal nature. For instance, the United Nations War Crimes Commission adopted on 16th May, 1945, a recommendation to its Member Governments in which it was said that the Commission had "ascertained that countless crimes have been committed during the war by organised gangs, Gestapo groups, S.S. or Military Units, sometimes entire formations". In order to secure the punishment of the guilty, the Commission recommended, *inter alia*, the committing for trial, either jointly or individually, of all those who, as members of these criminal gangs, had taken part in any way in the carrying out of crimes committed collectively by groups, formations and units. These statements and recommendations may be thought to have been the inspiring force behind the provisions now to be discussed but it is important to recognise their mutual differences and the differences between each and the concept of conspiracy.

The relevant distinctions are set out below.

(i) *A joint charge* is one on which two or more accused are tried for the same offence by the same court at the same time. In his summing up in the trial of Georg Tyrolt and others, before a British Military Court, Helmstedt, Germany, from 20th May–24th June, 1946, the Judge Advocate said that : "There is nothing magic about a joint charge except that it enables you to try more than one person at one time. . . ." ⁽¹⁾

Offences thus charged have been various ; examples of such charges have appeared in the reports on the *Belsen Trial* ⁽²⁾ and in most of the trials held before United States Military Tribunals in Nuremberg. ⁽³⁾

(ii) *Regulation 8 (ii) of the Royal Warrant and similar provisions.* Regulation 8 (ii), as amended, provides :

"Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime. In any such case all or any members of any such unit or group may be tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the court."

Substantially the same provision is made by Regulation 10 (3) of the Canadian War Crimes Regulations. ⁽⁴⁾ Regulation 12 of the Regulations made under the Australian War Crimes Act of 1945 has exactly the same terms as Regulation 8 (ii) quoted above. ⁽⁵⁾ The United States China Regulations contain the following provisions (16 (d) and (e)) :

"(d) If the accused is charged with an offence involving concerted criminal action upon the part of a military or naval unit, or any group or organisation, evidence which has been given previously at a trial of any other member of that unit, group or organisation, relative to that concerted offence, may be received as *prima facie* evidence that the accused likewise is guilty of that offence.

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

⁽¹⁾ See Vol. XI, p. 45, note 1.

⁽²⁾ See Vol. II, p. 4.

⁽³⁾ Reported in Vols. VI, VII, VIII, IX, X, XII, XIII and XIV.

⁽⁴⁾ Vol. IV, p. 128.

⁽⁵⁾ Vol. V, p. 100.

Similar provisions were contained in the SCAP Regulations, but were deleted by the letter of 27th December, 1946. ⁽¹⁾

A directive was issued by Headquarters, European Theatre dated 14th October, 1946, relating to United States Military Government Courts. The directive contains in its paragraph 12 detailed provisions under the heading "Mass Atrocity Subsequent Proceedings". It is there recalled that "certain mass atrocity cases have heretofore been tried, i.e., Hadamar, Dachau and Mauthausen cases, wherein the principal participants of the respective mass atrocities were charged with violating the laws and usages of war under particulars alleging that they acted in pursuance of a common design to subject persons to killings, beatings, torture, starvation, abuses and indignities, or particulars substantially to the same effect. The courts pronounced sentences in those cases involving imprisonment and death and of necessity, in view of the issues involved therein, found that the mass atrocity operation involved in each was criminal in nature and that those involved in the mass atrocities acting in pursuance of a common design did subject persons to killings, beatings, tortures, etc." The Directive provides, with regard to subsequent proceedings against accused other than those involved in initial or "parent" mass atrocity cases, *inter alia*, that : "In such trial of additional participants in the mass atrocity, the prosecuting officer will furnish the court certified copies of the charge and particulars of the findings and the sentences pronounced in the parent case." Thereupon the court "will take judicial notice of the decision rendered in the parent case, including the finding of the court (in the parent case) that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, did subject persons to killings, beatings, tortures, etc., and no examination of the record in such parent case need be made for this purpose. In such trials of additional participants in the mass atrocity, the court will presume, subject to being rebutted by appropriate evidence, that those shown by competent evidence to have participated in the mass atrocity knew of the criminal nature thereof." ⁽²⁾

It will be seen that all of these provisions relate to questions of proof and define no forms of criminal liability. They thus differ from provisions regarding conspiracy, which do define a type of crime.

Regulation 8(ii) was extensively discussed in the course of the *Belsen Trial*. It is impossible to state whether and how far the court acted on Regulation 8(ii) in convicting various accused. Reference has been made, however, to the interpretations placed on this provision by Counsel. ⁽³⁾ Both Defence and Prosecution were agreed in fact that, before this provision could operate against any individual accused, it must have been proved that he knowingly took part in a common plan to ill-treat the prisoners in the two camps. The classification of Regulation 8(ii) as a provision relating to evidence and not as one of substantive law is justified, despite the references made by the Prosecutor to the English law of conspiracy. ⁽⁴⁾

⁽¹⁾ Vol. III, p. 111.

⁽²⁾ (Italics inserted). This provision has received some discussion in the notes to the *Dachau Trial* in Vol. XI, pp. 16–17.

⁽³⁾ See Vol. II, pp. 139–141.

⁽⁴⁾ See Vol. II, pp. 108–109.

Such arguments were intended simply to elucidate the meaning of the term "concerted action," and Regulation 8(ii) as a whole appears to be relevant only for purposes of assessing evidence. What is to be proved or disproved remains "the responsibility of each member of that unit or group for that crime." Evidence rendered admissible by the Regulation is not more than *prima facie* evidence.⁽¹⁾

The Judge Advocate acting in the trial of Willi Tessmann and others by a British Military Court in Hamburg, 1st-24th September, 1947, advised the Court as follows:

"The first point of law to be remembered, I think, is this: there are nine Accused, and the charge sheet with which they are confronted contains three charges. Herr Dr. Breymeier in his final address and Herr Dr. Graener both submitted that in spite of the terms of Regulation 8(ii) of the Regulations governing our procedure, the case of each Accused must be considered quite separately. In my view that is correct in the circumstances of this case. The regulation referred to says in effect that if you are dealing with a group of people or a unit and there is evidence against some, that is *prima facie* evidence against the others; but I think it would be right here to say that when all is heard and the whole of the evidence has been produced, then you must look at each individual case and each charge quite separately."

In the absence of reasoned judgments it is impossible to say how far the courts have in fact applied the evidential provisions just quoted, with the exception of that made by the directive of 14th October, 1946.⁽²⁾

(iii) *Common design*⁽³⁾ In a large number of trials held before United States Military Government Courts the charges made were charges that accused "acted in pursuance of a common design to commit" certain stated offences; an example of such wording is provided by the charge made in the *Dachau Trial*.⁽⁴⁾

⁽¹⁾ In the notes to the Trial of Franz Schonfeld and nine others, by a British Military Court at Essen, it has been suggested that an examination of the text of this provision shows that, in order for effect to be given to it, the following circumstances must prevail:

(a) there must be evidence that a war crime was the result of *concerted action*, but it is not said that the aim of such action must be illegal or that it must be the commission of the offence which was in fact committed;

(b) the war crime must have been in some way the *result* of such concerted action, though, again according to the strict letter of the Regulation, not necessarily the intended result. (See Vol. XI, p. 71, and compare Vol. III, pp. 69-70).

⁽²⁾ See page 93.

⁽³⁾ See also pages 52-56.

⁽⁴⁾ See Vol. XI, pp. 5 and 14. The importance placed by the prosecution in that trial on the concept of common design may be judged from p. 12 of Vol. XI. Compare the use of the words "acting in pursuance of a common interest" in the *Hadamard Trial* indictment (Vol. I, p. 47).

It would appear that to prove guilt under a charge of acting in pursuance of a common design it must be shown (i) that there was a system⁽¹⁾ in force to commit certain offences; (ii) that the accused was aware of the system⁽²⁾ and (iii) that the accused participated in operating the system.⁽³⁾ It seems to have been acknowledged by the United States Courts trying cases in which acting in pursuance of a common design is charged that such charges are not the same as conspiracy charges; to prove the former there must be evidence not only of agreement but also of action in furtherance of it.

The charge in the *Justice Trial* was similar, though the words "common design" were not used. It was charged, *inter alia*, that all the accused unlawfully, wilfully and knowingly committed war crimes and crimes against humanity "in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with *plans and enterprises* involving the commission of" certain offences.⁽⁴⁾ The Tribunal acting in the trial pointed out in its Judgment that "no defendant was specifically charged with the murder or abuse of any particular person. The charge did not concern isolated offences, but was one of 'conscious participation in a nation-wide governmentally organised system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice and through the instrumentality of the courts.'⁽⁵⁾ The Tribunal stated more than once that: "The essential elements to prove a defendant guilty under the indictment in this case are that a defendant had knowledge of an offence charged in the

⁽¹⁾ It has been suggested in the notes to the *Dachau Trial* that it may be that the facts needed to prove the existence of this system would not always suffice to prove conspiracy as a separate offence. (See Vol. XI, p. 14). While the matter is in doubt, the Prosecution in the *Flossenburg Trial* (Trial of Friedrich Becker and others by a United States Military Court at Dachau, 14th May, 1946-22nd January, 1947), would appear to have taken this view. The Prosecutor claimed that Counsel for the defence wanted to persuade the court that it was a case of conspiracy that the court was trying, and that, once having convinced the court that the accused were charged with conspiracy, their next step would be to maintain that there had been a failure of proof of any conspiracy: "They would say that in every conspiracy there must be an agreement, either expressed or implied, to do an unlawful act or to do a lawful act by unlawful means." Then, said the Prosecutor, the defence counsel would claim "that such an agreement between the S.S. and the capos would be ridiculous on its face; that such agreement would be impossible on the face of the evidence which reveals that not all of the accused were present at Flossenburg at the same time, nor at the same place, nor even knew each other." The Prosecutor observed that "Such a contention would be clearly valid if the offence charged were a conspiracy. But the offence with which these accused stand charged is *not* a conspiracy... in the case at bar, even though it may be contended that the capos and the S.S. were at each other's throats, and even though it be shown that not all of the accused were present at Flossenburg at the same time, and even though it be shown that some of the accused never knew nor spoke to one another, still it is submitted that each of the accused was capable of and *did* entertain the common intent or design to subject the inmates of Flossenburg to beatings, killings, tortures, starvation, and other indignities."

⁽²⁾ In the *Mauthausen Trial*, the court, having regard to the general facts, assumed this knowledge to exist on the part of the accused. (See Vol. XI, pp. 15-16).

⁽³⁾ See Vol. XI, pp. 12-13.

⁽⁴⁾ See Vol. VI, pp. 3 and 4. (Italics inserted). This wording was based upon that of Article II, 2, of Control Council Law No. 10 and was used also in for instance, the indictment in the *Milch Trial*; see Vol. VII, pp. 27-28.

⁽⁵⁾ Using similar language the Prosecution in the *Flossenburg Trial* claimed that: "Again, let me emphasize, this Court is not trying these accused for their own specific acts of murder, but you are trying them for their part in aiding, abetting, or participating in a common design to subject the prisoners to beatings, killings and tortures."

indictment and established by the evidence, and that *he was connected with the commission of that offence.*"⁽¹⁾ Speaking of racial persecution in particular, the Judgment said, *inter alia*: "The record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offence charged in the indictment. The defendants are not now charged with conspiracy as a separate and substantive offence, but it is alleged that they participated in carrying out a governmental plan and programme for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency."⁽²⁾

It will be observed that the Tribunal acted upon the principle that acting in pursuance of a common design is not the same as entering into a conspiracy.

What, it may be asked, is there to be gained from charging that an accused acted in pursuance of a common design to commit certain offences instead of charging the simple perpetration of those crimes? The answer seems to be that, while the prosecution has the additional task of proving the existence of a common design, yet once that is proved the prosecution can rely upon the rule which exists in many systems of law that those who take part in a common design to commit an offence which is carried out by one of them are all fully responsible for that offence in the eyes of the criminal law.⁽³⁾ The Judge Advocate acting in the trial of Franz Schonfeld and nine others before a British Military Court, in his summing up, stressed this rule as it exists in English Law:

"In our law if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them, in carrying out the purpose, kills a man, it is murder in all who are

⁽¹⁾ See Vol. VI, p. 84 and see pp. 52-56 of this present volume where this type of complicity is further examined.

⁽²⁾ Vol. VI, p. 62.

⁽³⁾ Although Count One in the *Justice Trial* was the subject of a special ruling on the part of the Tribunal (see Vol. VI, pp. 5-6) paragraph 3 of that count is worth quoting as setting out the very principle mentioned above:

"All of the defendants herein, acting in concert with each other and with others, unlawfully, wilfully, and knowingly participated as leaders, organisers, instigators and accomplices in the formulation and execution of the same common design, conspiracy, plans and enterprises to commit, and which involved the commission of, War Crimes and Crimes against Humanity, and accordingly are individually responsible for their own acts and for all acts performed by any person or persons in execution of the said common design, conspiracy, plans, and enterprises." (Vol. VI, p. 2).

In the *Dachau Trial*, the prosecution quoted from Wharton, "Criminal Law," 12th edition, Vol. I, p. 341: "If any perpetrators be 'outside of an enclosure watching to prevent surprise or for the purpose of keeping guard while his confederates inside are committing a felony, such constructive presence is sufficient to make him a principal in the second degree. No matter how wide may be the separation of the confederates, if they are all engaged in a common plan for the execution of the felony and all take their part in the furtherance of the common design, all are liable as principals.'" (Vol. XI, p. 13).

present, whether they actually did or abet or not, provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly."⁽¹⁾

It will be recalled that in the *Essen Lynching Case* certain of the accused were found guilty of killing three prisoners of war because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been actually proved that they had individually shot or given the blows which caused the death.⁽²⁾

It may be added that while the charge in the *Belsen Trial* approached no nearer to the concept of common design than the statement that the accused "were together concerned as parties to the ill-treatment of" certain persons,⁽³⁾ there were nevertheless references in the speeches of Counsel and the summing up of the Judge Advocate to an alleged agreement, either tacit or express, to ill-treat or kill victims.⁽⁴⁾ In this particular trial such references may have been made in view either of the principle of responsibility mentioned immediately above,⁽⁵⁾ or of Regulation 8(ii) which has been treated previously.⁽⁶⁾

In conclusion it may be repeated that the difference between a charge of conspiracy and one of acting in pursuance of a common design is that the

⁽¹⁾ See Vol. XI, p. 68; and compare p. 71 of that volume. See also Vol. II, p. 141 and footnote 3 thereto. In the *Almelo Trial*, the Judge Advocate pointed out that if people were all present together at the same time taking part in a common enterprise which was unlawful, each one in his own way assisting the common purpose of all, they were all equally guilty in law. (Vol. I, p. 40).

The Tribunal which conducted the *Krupp Trial* would appear to have been unwilling to apply one aspect of this rule to crimes against peace:

"Under a widely accepted, less conservative theory of conspiracy, those who, with knowledge of the criminal plan, enter into the common enterprise at a later date, become responsible for everything that was done under the conspiracy previously started. Hence, had the Tribunal adopted that doctrine, it would have had to determine whether Gustav Krupp had the requisite state of mind, and whether, when the defendants reached highly responsible positions, they became parties to his plan, or, in other words, his co-conspirators. For, I am convinced that when the defendants reached their top positions within the Krupp concern, they knew the basic policy of the concern and of Gustav Krupp. "As said before, the Tribunal did not adopt this line . . ." (Vol. X, p. 130).

⁽²⁾ See Vol. I, pp. 88-92. It was the submission of the Prosecution in this trial that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen, was guilty in that he was concerned in the killing. It was impossible to separate any one of these acts from another; they all made up what is known as a lynching. From the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men. Compare Vol. XI, pp. 76 and 77.

⁽³⁾ Vol. II, p. 4.

⁽⁴⁾ See, for instance, Vol. II, pp. 118, 120 and 121.

⁽⁵⁾ Thus the Judge Advocate recalled that: "The case for the Prosecution was that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened." (Vol. II, p. 120. For a presentation of this point by the Prosecution in the trial see Vol. II, p. 9.

⁽⁶⁾ See pp. 92-94.

first would claim that an agreement to commit offences had been made⁽¹⁾ while the second would allege not only the making of an agreement but the performance of acts pursuant to it.

(iv) *Membership of criminal organisations* is discussed elsewhere in this volume.⁽²⁾ Here it is necessary only to compare or contrast it with the crime of conspiracy.

The Judgment of the Nuremberg International Military Tribunal, whose opinions⁽³⁾ have been regarded as strongly persuasive by the United States Military Tribunals acting under Law No. 10, made the following comment, among others, in a section of its Judgment headed *The Accused Organisations* :

"A criminal organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the Organisation. Membership alone is not enough to come within the scope of these declarations."⁽⁴⁾

The International Military Tribunal's definition of the crime of membership comes very near to that of a pure conspiracy. It speaks of a group "formed or used in connection with the commission of crimes . . ." not of a group so formed and used. This leaves the impression that such a group formed for the commission of crimes would itself constitute an organisation of which membership would be criminal, irrespective of whether the group was also used for criminal acts. On the other hand the Tribunal speaks of "co-operation for criminal purposes", not of mere agreement for such purposes. Furthermore, Article 9 of the Charter under which the Tribunal operated stated, *inter alia* that "At the trial of any individual member of any group or organisation the Tribunal may declare (*in connection with any act of which the individual may be convicted*) that the group or organisation of which the individual was a member was a criminal organisation . . ." and the history of the development of the concept of membership⁽⁵⁾ suggests strongly that what it was to punish was no mere conspiracy to commit crimes but a knowing and voluntary membership of organisations which

⁽¹⁾ Acts done pursuant to a conspiracy may be admitted as *proof* that a conspiracy existed but are not part of the offence as defined by criminal law.

⁽²⁾ See pp. 150-154.

⁽³⁾ i.e. those which are not actually legally binding on the Military Tribunals; see pp. 17-19.

⁽⁴⁾ British Command Paper, Cmd. 6964, p. 67.

⁽⁵⁾ See Vol. XIII, pp. 42-43.

did in fact commit crimes, and those on a wide scale. Viewed in this light, membership resembles more the crime of acting in pursuance of a common design than it does that of conspiracy.⁽¹⁾

B. WAR CRIMES

1. OFFENCES AGAINST PRISONERS OF WAR

(i) The *killing of prisoners of war without due cause* is a clear violation of both customary and conventional international law. Thus, Article 23 of the Hague Convention provides that :

"Article 23. In addition to the prohibitions provided by special Conventions, it is particularly forbidden—

"(c) To kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion."

A great many war crime trials have involved convictions on charges alleging responsibility for such killings.⁽²⁾

(ii) It is open to a person accused of killing a prisoner of war to plead that the execution was in face a legal killing; this plea is dealt with elsewhere under the section on defence pleas.⁽³⁾ Apart from the possibility that on the facts of any given case an accused may fail to substantiate his defence of legitimate killing, there is further possibility that the courts have recognised as a separate positive crime the *denial of a fair trial to prisoners of war*, the committing of which would make an accused guilty of a war crime irrespective of whether the victims actually suffered or not.⁽⁴⁾ It is felt that the courts would require the same evidence to prove the perpetration of this positive offence, assuming it to be recognised, as they would regard as vitiating a plea that a killing was a legitimate one.⁽⁵⁾

The material relating to these two possible criminal aspects of the denial of a fair trial to prisoners of war which has appeared in Volumes V and VI has been taken from trials in which the accused were faced with charges of the denial of that right to prisoners of war accused of offences committed before they became prisoners of war.⁽⁶⁾ It will be recalled that Allied war crime courts have several times ruled that the provisions of Part 3 (Judicial Proceedings) of Part III, Section V, Chapter 3 of the Geneva Prisoners of War Convention of 1929 do not apply to the trial of a person accused of a war crime as distinct from an offence committed while a prisoner,⁽⁷⁾ and

⁽¹⁾ It may be added here that, as defined by the International Military Tribunal, the "crime of membership" is much less an innovation than an examination of the provisions of the Charter of the Tribunal (see pp. 17-18 and 98) may have suggested. To hold a person guilty of voluntarily participating in the activities of an organisation knowing that such organisation possessed illegal purposes or carried out illegal acts would not be contrary to the municipal laws of most countries.

⁽²⁾ See, for instance, Vol. I, pp. 22-23, 35, 72, 82 and 88; Vol. II, p. 1; Vol. III, pp. 23, 56, 60, 62 and 65; Vol. IV, pp. 99, 107, 108, 109 and 113-114. Vol. VIII, pp. 15, 19-20, and reports contained in Vol. XI.

⁽³⁾ See pp. 161-166 and 186-187.

⁽⁴⁾ For a discussion of this point see Vol. VI, pp. 102-103.

⁽⁵⁾ See pp. 162-166.

⁽⁶⁾ Cf. Vol. V, pp. 71-73.

⁽⁷⁾ See Vol. I, pp. 23 and 29-31, Vol. III, pp. 42-43, and 50; Vol. VIII, p. 55, Vol. XI, pp. 9-10 Vol. XII, pp. 63-64 and Vol. XIV, pp. 114-118. The same attitude has been taken by the International Military Tribunal of the Far East (pp. 27-28 of the official transcript of the Judgment).