

will, in his power. This is no mere juridical quibble. To quarrel with it is to quarrel with a rule which is well established as a matter of practice and which has behind it sound legal principle.

In this context it is necessary to consider the objection, on the ground of the absence of mutuality, to the exercise of the right of punishment, on the part of the victorious belligerent, of persons handed over by the enemy. For, clearly, no similar right is conceded to the defeated State. (The word "objection" is not used here in a technical sense. In strict law, there is, as pointed out above, nothing to prevent the victorious belligerent from imposing his own conditions of the armistice.) It will be submitted presently that ways may be found for securing a measure of mutuality appealing to the popular sense of right. But, essentially, the position is not dissimilar to that which arises when the belligerent punishes a prisoner of war for a war crime committed prior to capture. He does so regardless of the ability of the adversary to exercise, effectively, the same right. Nevertheless, given the necessary judicial safeguards, the existing rule is not open to question. The same applies to the situation in which war criminals fall, en masse, into the hands of the victorious belligerent as the result of an actual or what may be termed constructive occupation of enemy territory. In the world as at present constituted it may happen that the power to exercise the right of punishment may become the monopoly of the belligerent who, in the higher and ultimate judgment of history, has identified himself with the cause of evil. The removal of such contingencies, resulting from a condition of international anarchy, must be regarded as one of the objects of the struggle in which the United Nations are engaged. At present, they and their peoples must, while applying an inelegant and rough rule of law, fortify themselves by the assumption — if the understatement be permitted — that their own cause was that of justice.

will, in his power. This is no mere juridical quibble. To quarrel with it is to quarrel with a rule which is well established as a matter of practice and which has behind it sound legal principle.

In this context it is necessary to consider the objection, on the ground of the absence of mutuality, to the exercise of the right of punishment, on the part of the victorious belligerent, of persons handed over by the enemy. For, clearly, no similar right is conceded to the defeated State. (The word "objection" is not used here in a technical sense. In strict law, there is, as pointed out above, nothing to prevent the victorious belligerent from imposing his own conditions of the armistice.) It will be submitted presently that ways may be found for securing a measure of mutuality appealing to the popular sense of right. But, essentially, the position is not dissimilar to that which arises when the belligerent punishes a prisoner of war for a war crime committed prior to capture. He does so regardless of the ability of the adversary to exercise, effectively, the same right. Nevertheless, given the necessary judicial safeguards, the existing rule is not open to question. The same applies to the situation in which war criminals fall, en masse, into the hands of the victorious belligerent as the result of an actual or what may be termed constructive occupation of enemy territory. In the world as at present constituted it may happen that the power to exercise the right of punishment may become the monopoly of the belligerent who, in the higher and ultimate judgment of history, has identified himself with the cause of evil. The removal of such contingencies, resulting from a condition of international anarchy, must be regarded as one of the objects of the struggle in which the United Nations are engaged. At present, they and their peoples must, while applying an inelegant and rough rule of law, fortify themselves by the assumption — if the understatement be permitted — that their own cause was that of justice.

IV

Safeguards of Impartiality

It is the duty of the United Nations, having regard to public opinion throughout the world, to their professed attachment to the cause of international law, and to the necessity to render their action effective, to make it abundantly clear that their claim to inflict punishment on war criminals is fully in accordance with established rules and principles of the law of nations and that it does not represent a vindictive measure of the triumphant belligerent resolved to apply retroactively to the defeated enemy the rigours of a newly created rule. This consideration explains the length of the preceding part of this memorandum. But the persuasive force of such professions will be seriously impaired unless it is accompanied by some safeguards of impartiality and by a measure of equality in the application of the law. As has been pointed out, there is nothing repugnant to international law in the circumstance that the punishment of war crimes committed by the opponent may become a right which can be exercised, in effect, by one belligerent only. But it is important, in this as in other matters, that justice should not only be done but that it should appear to have been done. The preservation both of the substance and of the semblance of impartiality is of particular importance in view of the fact that there cannot be any question of formal equality in the sense of Germany and her defeated allies being conceded the identical right to punish any war criminals of the United Nations. Under existing international law the effective concession to the opponent of a right to punish war criminals is in no way a condition of the valid exercise of that right by the other belligerent. Even in this respect, it may be desirable to consider means for mitigating the inequality fully authorised by the existing law.

However, the most important aspect of the problem is that of any additional guarantees of impartiality in the punishment of war crimes.

These guarantees may, in theory, be achieved in three ways:

I. By means of an International Criminal Court; II. By way of specific provisions in the constitution and the organisation of the municipal courts of the United Nations adjudicating upon war crimes; III. By a system of quasi-international courts of appeal.

I. The International Criminal Court. - The problem of an International Criminal Court, in particular with reference to the punishment of war crimes, has been a continuous subject of discussion in the twenty years which followed upon the first World War. It is probably true to say that, for various reasons, the project has been discouraged by a substantial majority of international lawyers. Not all of the reasons which have been adduced against the establishment of a Court of this nature can be described as sound. This applies in particular to the objection based on the difficulty of reaching an agreement as to the law to be applied by the Court or to the uncritical repetition of the view that international law being a law between sovereign - "co-ordinated" - States has no room for punishment and, consequently, for criminal courts. Those and similar arguments cannot be adequately discussed in this memorandum. However, regardless of the feasibility of establishing an International Criminal Court in the future, the following two considerations of a practical nature seem to rule it out as an adequate instrument for coping with the problem of punishing war crimes committed in the course of the second World War:

(1) The establishment of an international institution of a novel character and of the scope and of the significance of an International Criminal Court is not a task which can be accomplished within a short time. On the other hand, the punishment of war crimes cannot without obvious dangers to its realisation be postponed for any prolonged period of years. It follows that those intent upon linking up the punishment of war crimes with the establishment of an International Criminal Court run the danger of sacrificing the substance of an urgent task for what may well prove to be the shadow of its intricate machinery.

(2) In so far as the primary purpose of the establishment of an

International Criminal Court is to secure a distinct and unimpeachable measure of impartiality, that purpose must be viewed in the light of the fact that at the termination of the second World War the world will be divided, with insignificant exceptions, into two opposing camps of belligerents. An International Criminal Court would, in the circumstances, be but a reflection of the situation thus created and would in fact almost of necessity consist for the most part of judges drawn from the United Nations.

II. Means for Securing Impartiality within the Framework of Municipal Tribunals. - If the establishment of an International Criminal Court is not an adequate instrument for securing the requisite degree of impartiality, there arises the further question as to the possible safeguards on that behalf within the framework of municipal courts. The following are believed to deserve consideration:

1. The expansion of military tribunals by inclusion of lay judges of high standing. There is no compelling reason to assume that the result of some such measure would be a serious impairment of the speed of the trials. In many countries ordinary criminal courts have attained in time of peace a high degree of expedition. There are weighty reasons for disposing of the trials of war criminals in the period between the armistice and the peace treaty, but it is doubtful whether this implies the necessity of anything in the nature of a summary procedure. The state of popular feeling in the period immediately following upon the armistice and the legal difficulties likely to be involved in some of the prosecutions may make it advisable to strengthen purely military courts by the inclusion of persons of judicial experience and possessing a wider knowledge of the law.

2. Participation of neutral assessors or judges. - Serious study ought to be devoted to the proposal that neutral judges or assessors be attached, in some form or other, to the municipal courts of the United Nations engaged in trying war criminals. Such neutral assessors might be given the right to participate actively in the trial by addressing questions to witnesses and to the accused, by being

present at the deliberations of the Court, and by being entitled to express concurrence with or dissent from its decision. It might be found possible to attach practical consequences to any dissent on their part, for instance, by way of granting to the accused an unconditional right of appeal in such cases. The possibility, or probability, of neutral States refusing their co-operation is not a good reason why an effort of this kind should not be made.

3. Participation of Enemy Assessors. - The study of the best means calculated to secure not only the substance but also the forms of impartiality and of equality before the law need not stop at this point. The question must be considered to what extent the enemy States should be given the opportunity of participating in the work of the courts engaged in trying criminals by providing assessors of their own. In particular, it must be considered whether, in the case of the participation both of neutral and enemy assessors, a judgment from which they both dissented should automatically be liable to review by a superior court.

III. Quasi-international Courts of Appeal. - Attention ought to be given to the question of setting up, in addition to military or mixed military and civil tribunals, of courts of appeal composed of nationals of several of the United Nations and sitting in each of the States trying any considerable number of persons accused of war crimes. The question of the extent of, of the occasion for, and of the organisation of such appellate jurisdiction would have to be a matter of study and discussion. There may be obvious advantages from the point of view of justice and expediency in providing appellate courts which, while acting with all requisite expedition, would be in the position to bring to bear upon the cases before them a higher degree of detachment and a wider range of legal knowledge. It is possible that the adoption of some such system of appellate jurisdiction, supplemented, perhaps, by neutral and enemy assessors, may prove a satisfactory substitute for an International Criminal Court adjudicating upon war

crimes. It might also be a matter for consideration whether the courts of first instance ought not to include judges of some other United Nation.

These and any similar proposals deserve serious study. We must constantly bear in mind the fact that the due punishment of war criminals, unless it is accompanied by all practicable safeguards of impartiality and, to some extent, of mutuality, may be deficient both in effectiveness and in the part which it might otherwise play in the re-establishment of international law. Such proposals are likely to be severely criticised by those who may see in them attempts to interfere with the just rigour of retribution; they will be adversely commented upon by others as not going far enough in preventing the punishment of war crimes from becoming a one-sided weapon of revenge wielded by the victors. But studied they must be in the light of the probable circumstances of the defeat of Germany and of her allies. In those circumstances there can be no such degree of mutuality as would satisfy the purist, namely, the delivery to the defeated States of nationals of the United Nations accused of having perpetrated war crimes. But even here means may be considered for a practicable approximation to some measure of equality. The United Nations could openly proclaim their determination to investigate and to bring to trial any charges of violations of the law of war committed by their armed forces; they could give full publicity to resulting judicial proceedings; and they could offer to invite neutral or even enemy participation in any procedure that may be adopted. Thus while taking steps towards ensuring an impartial trial of enemy nationals accused of war crimes, the United Nations would at the same time do much to meet the reproach that justice has overtaken only the criminals among the defeated but not those among the victors. True statesmanship ought not to give any justifiable and avoidable excuse for any such reproach. Strengthened by the consciousness that they have gone to the extreme practicable limit of securing impartiality and equality before the law, the United Nations will be in the position to disregard the charge that, amidst a sanctimonious claim to virtue, they combined the roles of party

and judge. They will no longer have to rely exclusively on the powerful - and perhaps in itself sufficient - argument that, representing as they do the overwhelming majority of mankind, their collective decisions transcend the confines of a selfish ex parte claim. In addition, they will be entitled to insist that as a matter of experience the impartiality of German courts and findings cannot be trusted.

This latter consideration merits special emphasis. German writers have maintained repeatedly that the German Supreme Court which, after the abortive efforts to obtain the delivery of German nationals accused of war crimes in conformity with the Treaty of Versailles, tried the accused persons, displayed a high degree of conscientiousness and impartiality. In the opinion of the writer of this memorandum, that claim cannot be substantiated. Of 901 cases which came before the Supreme Court, only thirteen ended in the condemnation and conviction of the accused. In these few cases the Supreme Court found the accused guilty of such crimes as maltreatment of prisoners of war (the Muller and Neumann cases, Cmd. 1422, pp. 26, 36) and firing on the boats of survivors from hospital ships sunk by a submarine (The Llandovery Castle, *ibid.*, p. 45). The Court inflicted relatively mild sentences of imprisonment. In 692 cases the Court came to the conclusion that there were no legal grounds justifying the continuation of proceedings. In a considerable number of cases relating to maltreatment of prisoners of war, the Court found that the accused, far from having been guilty of the charges, had gone out of their way to treat the prisoners with special consideration. The doctrine of superior orders and the plea of military necessity were elevated to paramount and overriding legal principles - a line of conduct which the Supreme Court pursued in subsequent years¹⁾ in connection with the interpretation of the Hague Regulations and

1) Thus in a case decided in November, 1924, the German Reichsgericht held that the requisition by Germany of machines in occupied Belgium and their subsequent sale to private manufacturers was legitimate although contrary to the Hague Regulations. For these, in view of the Court, left intact the principle that a State's right of self-preservation has precedence over international treaties (Annual Digest, 1923-1924, Case No. 230).

the punishing for high treason of German nationals accused of denouncing to the Allied Powers the violations by Germany of her obligations in the¹⁾ matter of disarmament under the clauses of the Treaty of Versailles.

It may be a matter of controversy whether at any time there was a legitimate ground for the expectation that the courts of the defeated State would put on one side sentiments of national pride and resentment and render judgment in the spirit of judicial detachment. But the lesson of experience cannot be disregarded.

Neither, in the light of experience, are we in the position to place reliance upon the findings of any special commission of investigation instituted by a German legislative body however democratically constituted. In August, 1919, there was set up, as part of a general committee on war responsibilities appointed by the German Reichstag, a sub-committee appointed to investigate the charges of violations of the laws of war committed both by Germany and her allies. The Commission, whose work was largely under the direction of Professor Schücking, a distinguished international lawyer and subsequently one of the judges of the Permanent Court of International Justice, produced a series of reports published in 1927 in five volumes under the title Völkerrecht im Weltkrieg. A study of these volumes permits the conclusion that the Commission did not exhibit a higher degree of detachment than that displayed by the Supreme Court. It exonerated Germany from the major charges of lawlessness and piled grave accusations upon the Allied Powers.

In the matter of charges of ruthlessness and terrorism in the course of the occupation of Belgium, the Commission accepted as proven the fact that there was waged a popular war (Volkskrieg) against the German forces

1) The Reichsgericht rejected the view that the conviction of the accused would violate the rule of international law which prescribes that treaties must be fulfilled in good faith. For that principle, in the view of the Court, binds only the contracting party and not individuals (March 14, 1939, Annual Digest, 1927-1928, Case No. 5).

and that there was therefore full justification for the resulting acts of suppression. In this connection, Professor Meurer, the principal rapporteur of the Commission, justified the indiscriminate killing of hostages. He said: "In war every one is a sacrificial lamb. What appears to be humane is, from a higher standpoint, often the most inhumane. Is it not the innocent soldier who falls victim to the war crime on the part of the inhabitant, and is not the killing of hostages meant to prevent this ? ... The commander who wishes to be humane may in fact prove very inhumane in relation to the soldiers entrusted to him and thus incur a grave responsibility" (Das Völkerrecht im Weltkrieg, vol. II, p. 221). The Commission had no difficulty in holding that the "dragging" (Verschleppung) by the French authorities of the inhabitants of the occupied parts of Alsace and Lorraine to France at the outbreak of war was contrary to international law (vol. I. pp. 167-185). But it expressed the considered view that the German decree of October 28, 1916, by virtue of which "unemployed Belgian workmen who, after they had refused to accept work offered to them in Germany and, as the result, had become a charge upon public resources, were compulsorily transported to Germany in order to be provided with employment, was in accordance with Article 43 of the Hague Regulations and with international law at a time when there was no sufficient employment in Belgium and when that measure seemed to be urgently required for the restoration and maintenance of public order and public life." The Commission had no doubt that these measures were not inconsistent with Articles 46 and 52 of the Hague Regulations which guarantee the rights of inhabitants, seeing that military requirements are paramount and that the maintenance of public order and public life are a military necessity (vol. I. p. 193). The Reichsgericht had previously decided, in the course of criminal proceedings against Field-Marshal Hindenburg in respect of this charge that his action was lawful. The German-Belgian Mixed Arbitral Tribunal found on June 3, 1924, that the transportations were contrary to international law.)

With respect to the use of poison gas by the German armies, the Commission agreed that artillery projectiles containing such gases were

and that there was therefore full justification for the resulting acts of suppression. In this connection, Professor Meurer, the principal rapporteur of the Commission, justified the indiscriminate killing of hostages. He said: "In war every one is a sacrificial lamb. What appears to be humane is, from a higher standpoint, often the most inhumane. Is it not the innocent soldier who falls victim to the war crime on the part of the inhabitant, and is not the killing of hostages meant to prevent this ? ... The commander who wishes to be humane may in fact prove very inhumane in relation to the soldiers entrusted to him and thus incur a grave responsibility" (Das Völkerrecht im Weltkrieg, vol. II, p. 221). The Commission had no difficulty in holding that the "dragging" (Verschleppung) by the French authorities of the inhabitants of the occupied parts of Alsace and Lorraine to France at the outbreak of war was contrary to international law (vol. I. pp. 167-185). But it expressed the considered view that the German decree of October 28, 1916, by virtue of which "unemployed Belgian workmen who, after they had refused to accept work offered to them in Germany and, as the result, had become a charge upon public resources, were compulsorily transported to Germany in order to be provided with employment, was in accordance with Article 43 of the Hague Regulations and with international law at a time when there was no sufficient employment in Belgium and when that measure seemed to be urgently required for the restoration and maintenance of public order and public life." The Commission had no doubt that these measures were not inconsistent with Articles 46 and 52 of the Hague Regulations which guarantee the rights of inhabitants, seeing that military requirements are paramount and that the maintenance of public order and public life are a military necessity (vol. I. p. 193). The Reichsgericht had previously decided, in the course of criminal proceedings against Field-Marshal Hindenburg in respect of this charge that his action was lawful. The German-Belgian Mixed Arbitral Tribunal found on June 3, 1924, that the transportations were contrary to international law.)

With respect to the use of poison gas by the German armies, the Commission agreed that artillery projectiles containing such gases were

first used by the German armies. But it declined to see in that practice a violation of the prohibition, included in the Hague Declaration of 1899, "of the use of projectiles the sole object of which is the diffusion of asphyxiating and deleterious gases" on the ground that this was not the "sole object" of the explosives launched by German artillery (vol. IV, pp. 7 - 9, 39 - 42). Neither, in the view of the Commission, was the use of these projectiles contrary to the prohibition, laid down in Article 23 (a) and (c) of the Hague Regulations, of the use of poison and poisoned weapons on the ground that these did not include poison gas. The same applied to the use of gas clouds by Germany. At the same time the Commission found that the French army was equipped and first used weapons clearly prohibited by the Hague Declaration and the Hague Regulations, and that the subsequent use of the gas weapon by Germany was justified as a measure of reprisals. In the matter of air warfare, and in particular of air bombardment, the conclusion of the Commission was that the rules of international law on the subject had been violated not by Germany, but by the Allied Powers (vol. IV. p. 53.) The conduct of unrestricted submarine warfare by Germany was declared to have been in accordance with international law as a legitimate measure of reprisals against the unlawful blockade proclaimed by the Allies (vol. IV. p. 113).

Occasionally, it was only after a circuitous legal argument that the Commission arrived at a conclusion favourable to Germany. Thus with regard to Article 23g of the Hague Regulations which prohibited "belligerents to destroy or seize enemy property unless such destruction or seizure be imperatively demanded by the necessities of the war", the Commission agreed that that article lent itself both to a restricted and to a wide interpretation. "Necessities of war" could mean either imperative military necessity directly connected with offensive or defensive action, or, generally, any military advantage accruing from devastation. The Commission expressed the view that the restricted interpretation was to be preferred. However, in a curious non sequitur, it proceeded to state that,

for the purposes of the investigation, it was sufficient if they were satisfied that the military authorities in question considered in good faith military necessity to be involved: "The Commission could not safely undertake a technical review of military necessity." Having gone thus far, it had no difficulty in considering as legitimate the general devastation effected by the German army at the time of the retreat in 1917 to the so-called Siegfried-line; the devastation during the retreat in 1918; and the destruction of the mines in Northern France and in Belgium (vol. I. pp. 61 - 64). As a rule, however, the Commission avoided the appearance of undue restraint. With regard to the action of the Allied Powers in Greece it put on record its conclusion that "there was hardly a rule of neutrality which had not been flagrantly violated by the Entente" (vol. II. p. 16). The Commission entertained no doubts as to its own impartiality. It described its work as a "historic innovation, seeing that never before had a parliamentary organ undertaken the task of pronouncing, exclusively by reference to international law, legal judgment on events and measures" (vol. I. p. 6).

The author of this memorandum has thought it useful to comment in some detail on the record of the German Supreme Court and of the Commission on Violations of the Law of War as throwing light on the prospects of impartial application of international law by the courts and other agencies of Germany. These comments have not been made in any spirit of recrimination. They may be found useful as a reminder that the cause of impartial justice may be served in ways other than a mechanical equality in procedure.

for the purposes of the investigation, it was sufficient if they were satisfied that the military authorities in question considered in good faith military necessity to be involved: "The Commission could not safely undertake a technical review of military necessity." Having gone thus far, it had no difficulty in considering as legitimate the general devastation effected by the German army at the time of the retreat in 1917 to the so-called Siegfried-line; the devastation during the retreat in 1918; and the destruction of the mines in Northern France and in Belgium (vol. I, pp. 61 - 64). As a rule, however, the Commission avoided the appearance of undue restraint. With regard to the action of the Allied Powers in Greece it put on record its conclusion that "there was hardly a rule of neutrality which had not been flagrantly violated by the Entente" (vol. II, p. 16). The Commission entertained no doubts as to its own impartiality. It described its work as a "historic innovation, seeing that never before had a parliamentary organ undertaken the task of pronouncing, exclusively by reference to international law, legal judgment on events and measures" (vol. I, p. 6).

The author of this memorandum has thought it useful to comment in some detail on the record of the German Supreme Court and of the Commission on Violations of the Law of War as throwing light on the prospects of impartial application of international law by the courts and other agencies of Germany. These comments have not been made in any spirit of recrimination. They may be found useful as a reminder that the cause of impartial justice may be served in ways other than a mechanical equality in procedure.

V.

Extradition from Neutral States

The observations which follow are concerned with the situation which may arise in case nationals of Germany and of her allies should seek refuge in neutral countries in order to avoid prosecution for war crimes. The contingency of neutral countries being compelled to hand over such persons as the result of political pressure, regardless of the legal merits of the question, need not be considered here. In this memorandum it is proposed to consider the legal grounds, if any, on which the United Nations will be able to base their demand for the delivery of such fugitives. In particular, to what extent will they be able to rely on the law of extradition, especially as expressed in the existing extradition treaties? To what extent will there be room for the application of what may now be regarded as the rule of customary international law in the matter of non-extradition of political offenders?

It is clear that any problems which may be raised in this connection will have to be settled, in the first instance, on the basis of such extradition treaties as may exist between the neutral State in question and any of the United Nations concerned asking for the extradition of a particular person or persons. It is not believed that extradition could, in such cases, be properly refused on the ground of the political nature of the offence in the accepted meaning of the term. The conception of a political crime has a definite meaning in the law of extradition. A political crime is one committed in the attempt to substitute one government for another or one form of government for another. Courts, including German and Swiss Courts, have attached decisive importance to that distinguishing feature of political crimes. Crimes committed by anarchists opposing all government; crimes perpetrated as an act of political revenge; crimes committed for motives of patriotism but unrelated to any attempt to change the government or the form thereof - all these have been held by highest municipal tribunals not to come within the category of political crimes protected from extradition. It is clear that, whatever else may be the basis of the asylum sought by war criminals

in neutral States, it cannot be that of the accepted notion of political offences.

The above line of reasoning, although relevant, is somewhat technical if we consider that the principle of non-extradition of political offenders has, in fact, no reasonable connection with the question of extradition for war crimes. If extradition were asked for the political crime of initiating the war in violation of the General Treaty for the Renunciation of War; if it were requested for commencing the war in disregard of Hague Convention No. III providing for a declaration of war; if it were insisted on for a decision of military policy in the conduct of war like the ordering of general devastation, or of a breach of truce; if extradition were demanded for taking of life and destruction of property incidental to lawful warlike operations — in all these cases, the analogy, although technically departing from established terminology, does not seem altogether divorced from the accepted notion of a political crime.

But acts which per se constitute common crimes and which are contrary to rules of war cannot legitimately be assimilated to political offences. The fact that certain acts, otherwise criminal, like taking of life or causing bodily injury, are committed in pursuance of lawful warfare, deprives them of the stigma of criminality according to common law and renders them, in a vague sense, political. But once it has been established that these acts have been perpetrated outside the channels of lawful warfare, there vanishes the decisive factor which lifts them above the reprobation of common criminality.

Undoubtedly the border-line between lawful and unlawful acts of war is often a shadowy one, and to that extent the neutral State may deem itself entitled to considerable latitude in granting or refusing extradition. But the distinction wielded by the executive and judicial authorities of the neutral States must be exercised in good faith. Should the neutral State or its courts adopt a general policy of non-extradition in the matter of war crimes on the ground that they are political, any of the United Nations concerned would, it is believed, be confronted prima facie with a breach of any existing extradition treaty. Should that happen, a remedy

for the breach of the treaty might be found in some cases in any surviving obligation of compulsory judicial settlement. As between Switzerland, for instance, and Poland, or Belgium, or Holland, the provisions of the Optional Clause might be found sufficient for the purpose. A decision of the Permanent Court on the matter would, in substance, dispose of the controversy between States in the relations of which the Optional Clause never was or has ceased to be operative, as for instance, may be the case of Great Britain as the result of the British declaration of September, 1939, suspending the operation of the Clause with regard to the disputes arising out of events occurring during the hostilities. A neutral State refusing to comply with its treaty obligations would expose itself to a denunciation, on the part of the United Nations, of the existing extradition treaties. Moreover, the consequences of a breach of a treaty of this kind, in defiance of the public opinion of the world and in a misplaced insistence on the principle of asylum, may justifiably cover acts of reprisals and self-help appropriate to the occasion. For this reason, it would be proper for the United Nations, in a joint and solemn pronouncement addressed to remaining neutral States, to reserve all their rights both under existing extradition treaties and under customary international law, and to warn neutral States of the risks and possible complications inherent in the admission of the guilty persons and resulting from the inability or the unwillingness of these States to surrender persons accused of crimes which have shocked the conscience of mankind.

While the provisions of the existing extradition treaties between neutral States and many of the United Nations must be studied in detail in relation to any probable situation, it is clear that they are likely to cover most of possible war crimes both ratione loci and ratione materiae. They will cover, ratione loci, acts committed in such parts of the territory of the requesting State as were under enemy occupation; acts in or from the air over the territory of the requesting State and having effect in its territory; acts, wherever committed, having effect on what is constructively State territory, namely, vessels flying the flag of the United Nations; and, probably, acts ordered by persons

for the breach of the treaty might be found in some cases in any surviving obligation of compulsory judicial settlement. As between Switzerland, for instance, and Poland, or Belgium, or Holland, the provisions of the Optional Clause might be found sufficient for the purpose. A decision of the Permanent Court on the matter would, in substance, dispose of the controversy between States in the relations of which the Optional Clause never was or has ceased to be operative, as for instance, may be the case of Great Britain as the result of the British declaration of September, 1939, suspending the operation of the Clause with regard to the disputes arising out of events occurring during the hostilities. A neutral State refusing to comply with its treaty obligations would expose itself to a denunciation, on the part of the United Nations, of the existing extradition treaties. Moreover, the consequences of a breach of a treaty of this kind, in defiance of the public opinion of the world and in a misplaced insistence on the principle of asylum, may justifiably cover acts of reprisals and self-help appropriate to the occasion. For this reason, it would be proper for the United Nations, in a joint and solemn pronouncement addressed to remaining neutral States, to reserve all their rights both under existing extradition treaties and under customary international law, and to warn neutral States of the risks and possible complications inherent in the admission of the guilty persons and resulting from the inability or the unwillingness of these States to surrender persons accused of crimes which have shocked the conscience of mankind.

While the provisions of the existing extradition treaties between neutral States and many of the United Nations must be studied in detail in relation to any probable situation, it is clear that they are likely to cover most of possible war crimes both ratione loci and ratione materiae. They will cover, ratione loci, acts committed in such parts of the territory of the requesting State as were under enemy occupation; acts in or from the air over the territory of the requesting State and having effect in its territory; acts, wherever committed, having effect on what is constructively State territory, namely, vessels flying the flag of the United Nations; and, probably, acts ordered by persons

present in German or other enemy territory but having effect in the territory of any of the United Nations. They will include, ratione materiae, the common crimes usually enumerated in the extradition treaties like murder, assassination, manslaughter, wilful assault resulting in death or permanent disablement, rape, false imprisonment, crimes against personal liberty, larceny, robbery, extortion, malicious injury to property, threats or attacks upon persons or property, and so on. Most of the illegalities perpetrated in occupied territory and in the course of air and naval warfare can be reduced to crimes such as those enumerated above.

At the same time there will remain a considerable segment of cases which, for various reasons, will not come within the purview of extradition treaties, for instance, crimes against prisoners of war committed in German territory or in that of her allies. Will neutral States, acting out of a misplaced attachment to the humanitarian principle of asylum or out of ideological affinity with the present German régime, be in a position, in such cases, to offer the shelter of impunity to persons accused of war crimes and to rely on existing law in support of their action. To what extent is it true to say that the handing over of war criminals - or of any other criminals - who seek refuge in foreign countries can take place only on the basis of extradition treaties? It is doubtful whether we are entitled to assume any such limitation. In a very real sense the function of extradition treaties is to regulate in detail and to provide machinery for giving effect to the general principle of extradition. That principle, although it has not yet hardened into a legal obligation, is in accordance with a growing recognition of its necessity. There are numerous cases on record, including those decided by German courts, in which extradition has been granted in the absence of an extradition treaty. There is no rule of international law which prevents a State from handing over accused persons for trial, though in some States, notably in Great Britain and in the United States, there exist domestic safeguards such as the writ of habeas corpus which prevents the executive from handing a person over

to another State except in accordance with a statute based on a treaty. A State refusing to conclude any extradition treaties and to extradite foreign criminals would not be failing in any formal legal duty, but it is clear that its conduct would come dangerously near to an abuse of a right and to an international nuisance. In that case any pressure which the requesting State may exercise in order to bring about a change of attitude on the part of its neighbour could not properly be regarded as mere assertion of power.

The privilege and the moral duty of granting asylum to the persecuted ought not rashly to be interfered with. But the respect due to that privilege must in turn be conditioned by the manner in which it is exercised. The principle of asylum is put in jeopardy when it is used in a way amounting to a denial of justice to States which, in the persons of their citizens, deem themselves to have been the victims of cruel and systematic crimes. If, for instance, the principal authors of German war crimes were to take refuge in Spanish territory and if Spain, relying on the absence of an extradition treaty, were to refuse to hand over such persons for judicial trial surrounded by necessary safeguards of impartiality, a contingency would arise in which the requesting States would be entitled to assert that Spain has become guilty of an abuse of the right of asylum and that she is committing against these States an illegality which they are at liberty to remove by such means as international law and the unprecedented character of the situation seem to authorise. An abuse of a right is not lightly to be presumed. The doctrine of abuse of rights is an innovation in international law. But, although an innovation, it has received repeated endorsement by the Permanent Court of International Justice and, in obvious cases, it provides a perfectly legitimate starting point for remedial action. The circumstance that extradition is refused in respect of crimes condemned by international law and international conventions to which the neutral State in question is a party would be particularly relevant. The situation will, in that case, be totally different from that which arose as the result of the refusal of Holland to deliver William II of Hohenzollern whom the

Allied and Associated Powers arraigned, in Article 227 of the Treaty of Versailles, "for a supreme offence against international morality and the sanctity of treaties." Neither the accusation of the Treaty of Versailles nor the request subsequently made in pursuance thereof were primarily based on law. As M. Clemenceau put it in his Note of January 11, 1920, this "was not a case of a public accusation fundamentally of a legal character, but of an act of high international policy demanded by the conscience of mankind." This, it may be assumed, will not be the basis of any requests for extradition made by the United Nations. Such requests will be based on charges of violation of the law. Moreover, the United Nations will be in the position to assert that the crimes perpetrated by Germany were unprecedented both in their extent and in their studied disregard of legal restraints, and that they are therefore justified in insisting that the conventional and customary law of extradition be interpreted in the light of that fact. At the same time, the neutral States in question will be entitled to ask for an assurance that the intended prosecution for war crimes will not be used as a mere instrument of revenge. They will be entitled to claim the right to refuse extradition in cases in which, in their view, the alleged offence partakes of the character of an offence against the rules of warfare in its wider sense rather than of a common law crime and in which they are prepared to submit that preliminary question to judicial determination. They may avail themselves of any offer, and insist on making it as effective as possible, to associate neutral assessors or judges with the activities of the courts charged with the trial of war criminals.

VI.

The Limits of Punishment of War Crimes.

The question of the manner in which the various courts engaged in the trial of war criminals will apply municipal and international law need not be considered in this memorandum in detail. But it is advisable to examine at this juncture some of the principal factors which, in individual cases, may have the result of excluding punishment or mitigating its severity. The study of these factors is indicated both in deference to the duty of confining the punishment of war crimes within the limits of international law and as showing, in the final result, that the efficacy of the law is not seriously affected by what appear to be, at first sight, vast exceptions. These possible limitations may be considered under three heads:

- (1) the plea of superior orders;
- (2) the uncertainties and controversial aspects of the law of war;
- (3) the operation of reprisals.

(1) The Plea of Superior Orders

In its report presented to the Preliminary Peace Conference at Paris, the Commission on Responsibilities said: "We desire to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the Court to decide whether a plea of superior orders is sufficient to acquit the person charged with responsibility." Although this reference to the plea of superior orders was, in its context, limited to one particular situation, namely, of a prior conviction of a superior officer or official, the above statement was probably intended to give a general answer to the problem raised by the plea of superior orders. It appears from

the statement as quoted: (a) that the Commission desired to dissociate itself from the view expressed, among others, in the British Military Manual (as well as in the United States Rules of Warfare) that "members of the armed forces who commit such violations of the recognised rules of warfare as are ordered by their Governments or by their commander¹⁾ are not war criminals and cannot therefore be punished by the enemy"; (b) that the Commission did not consider it within its province - or within the reach of agreement among its members - to lay down detailed principles for the guidance of national courts in the matter.

It is not surprising that the Commission found it necessary to dissociate itself from the view that superior orders are a sufficient justification. A rule of this nature, unless reduced to legitimate proportions, would in most cases result in almost automatic impunity in consequence of responsibility being shifted from one organ to another in the hierarchy of the State or its armed forces. If the rule as stated in the British and American military manuals actually represented the existing position in international law, the prospect of bringing to justice any substantial portion of offenders would indeed be slender.

1) § 443. This principle appears for the first time in Chapter XIV written in 1914 by Professor Oppenheim and Colonel Edmonds under the title "The Laws and Usages of War on Land". Article 366 of the United States Rules of Land Warfare repeats, almost literally, the British rule. There is no trace of it in the Instructions, drafted by Lieber in 1863, for the Government of Armies of the United States in the Field (for these Instructions see Halleck, International Law, vol. II. pp. 40 - 55). Chapter XIV of the British Manual has no statutory force. It is probable that in any case its provisions must be interpreted by reference to other parts of the Manual, in particular to those which stress the duty of obedience to lawful orders only (see below).

The activity of the German Reichsgericht in connection with the charges, put forward by the Allied Powers, against German officers, illustrates in an interesting manner the true implications of an unqualified acceptance of the doctrine of superior orders. The person first on the British list of individuals whose prosecution for war crimes was demanded was Grand Admiral Tirpitz, Secretary of State of the German Navy between August 1914 and March 1916. He was charged with having ordered unrestricted submarine warfare. The Reichsgericht quashed the proceedings on the ground that, in addition to the fact that unrestricted submarine warfare was not contrary to international law, the Grand Admiral was not responsible for the order in question. The Reichsgericht found also that that order was not given by Admiral von Capelle who was Secretary of the Navy from March 1916 to July 1918; or by Admiral Schoor, Commander of the Fleet from January 1916 to June 1918; or by Admiral Hipper, Commander of the Fleet from August 1918 to November 1918; or Admiral Muller, Chief of the Naval Cabinet of the Emperor throughout the war. Who did give the order? The judgments of the Reichsgericht do not elucidate this point. But in the decision concerning Admiral von Hipper the Reichsgericht lifted to some extent the veil of discretion by stating it was not the Chief of Fleet who was responsible for the order of unrestricted submarine warfare, but the Head of the Supreme Command of Naval Operations - presumably the Emperor himself. In view of this it is not surprising that the Supreme Court acquitted, as having acted under superior orders, individual naval commanders whom the British list charged "with sinking ships without warning in circumstances of unusual cruelty and inhumanity." If this interpretation of the plea of superior orders were to prevail, then it is clear that in many cases no one but the Head of the State, especially under a regime of absolutism or dictatorship, could be held responsible for decisions of major importance involving a breach of international law - a solution the futility of which is enhanced by the international irresponsibility, asserted by many, of the Head of the State.

The problem raised by the plea of superior orders is, by general admission, one of great complexity both in international and municipal law. How intricate it is may be gauged from the fact that the solution adopted in recent British and American military manuals with regard to war crimes is at variance with that in force in both countries in the domain of constitutional and criminal law. Moreover, the law on the subject in these and in other countries in the field of municipal law is not free of ambiguities and apparent inconsistencies. In Great Britain and in the United States a soldier cannot validly adduce superior orders as a circumstance relieving him of liability for an illegal act. This is a rule established by a long series of decisions in both countries. The difficulties resulting from the possible conflict between the duty of the soldier to obey orders and his subjection to the general law of the land are appreciated by judges and writers, and sympathy is occasionally expressed with the predicament of the soldier who is thus subject to two possibly conflicting jurisdictions. But the major rule, although qualified in some decisions and although mitigated by the admitted right of executive remedial action, has remained intact.

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

1) The changes in British legislation on the subject are significant. According to the Military Code of 1715 "every officer or soldier who should refuse to obey the military orders of his superior officer" was liable to capital punishment. The Mutiny Act of 1717 was to the same effect. In Sutton v. Johnston (1 East Rep. 458) we find Lord Mansfield saying: "A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives - he must obey - nothing can excuse him but a physical impossibility." There is no reference in this passage to the legality of the order. In 1749 the wording of the Mutiny Act was changed in the sense that it provided for punishment for disobedience to "any lawful command". § 9 of the Army Act (44 & 45 Vict.c.58) is to the same effect.

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

Conversely, countries which, in the interest of the efficiency of their armed forces, have adopted the rule that obedience to superior orders excludes liability, make an exception in cases in which the orders are illegal. They, in turn, differ as to the necessary degree of the obviousness of the illegality. The German Code of Military Criminal Law provided that the soldier must execute all orders without fear of legal consequences, but added that this does not apply to orders of which the soldier know with certainty that they aimed at the commission of a crime. According to the law of other States, the immunity of the soldier obeying orders ceases if he knows or ought to have known of the unlawful nature of the order. There are indeed some States, in particular France, in which there is, apparently, no qualification to the rule that superior orders are in all circumstances a valid excuse. Writers of authority, like Duguit, have defended that

that rule with vigour on the ground that it is indispensable to the cohesion and to the efficiency of the army. But it has not been asserted that its effect is to relieve French nationals of responsibility when tried before foreign tribunals for the violation of the municipal law of these countries or of international law even if that foreign country itself has adopted an identical rule. For it is, by necessary implication, a rule applicable only to the State's own nationals and only in respect of its own municipal law. In fact, no country has more emphatically than France rejected the plea of superior orders when put forward by enemy soldiers and officers accused of war crimes. It is an interesting gloss on the complexity of the problem that in Great Britain and in the United States the plea of superior orders is, on the whole, without decisive effect in internal criminal or constitutional law, although it is apparently treated as a full justification in relation to war crimes, while in France, where the plea of superior orders is an absolute defence in the municipal sphere, it is disregarded in the matter of war crimes.

There is no international judicial authority on the subject, but writers on international law have almost universally rejected the doctrine of superior orders as an absolute justification of war crimes.

In view of the substantial diversity, both apparent and real, in the judicial and legislative practice of various States, it will be necessary, in any war crimes trials conducted by the courts of the United Nations, to approach the subject of superior orders on the basis of general principles of criminal law, namely, as an element in ascertaining the existence of mens rea as a condition of accountability. In the first instance, there can be no liability, or there must be diminished liability, if the accused acted in the legitimate belief that he was acting in accordance with law, both municipal and international. In his estimate of the legal position, the circumstance that he has received orders to act in a certain way must be regarded, prima facie, as creating in the accused the conviction of the lawfulness of the action as ordered. By the same token, the clearly illegal nature

of the order - illegal by reference to generally acknowledged principles of international law obvious to any person of ordinary understanding - renders the fact of superior orders irrelevant. Secondly, such a degree of compulsion as must be deemed to exist in the case of a soldier or officer exposing himself to danger of death as the result of a refusal to obey an order excludes pro tanto the accountability of the accused (unless, indeed, it can be said that the person threatened with such summary punishment is not entitled to save his own life at the expense of the victim). The result of the combination of these two principles will be, at the one end, that a person obeying an obviously unlawful order the refusal to obey which would not put him in immediate jeopardy, will not be able to shield himself behind the excuse of superior orders. At the other end, a person obeying an illegal order which is not on the face of it unlawful and disobedience to which would expose him to the full rigours of military discipline, may fully rely on the plea of superior orders. There will be a variety of intermediate situations between these two extremes.

There ought to be no doubt that should courts entrusted with the trials of war crimes disregard altogether the plea of superior orders, they would be adopting a course which could not be regarded as defensible. It is probably not necessary, even if it were proper to do so, for the United Nations to announce in advance to what extent their courts would recognise the plea of superior orders. But it is of importance that jurists should study and clarify the subject. Such study is likely to show that while the fact of superior orders sets a limit to the punishment of acts which might otherwise constitute war crimes, it is not a limit which will warp the effectiveness of the law in a manner which may be rightly regarded as a perversion of justice. It will not cover crimes committed by superior authorities and officers acting under their own responsibility and initiative; it will not protect criminal acts committed by subordinates for purposes of private gain and lust; it will not shield acts committed in pursuance of orders so glaringly offending against fundamental conceptions of

law and humanity as to remove them from the orbit of any possible justification, including that of immediate danger to the person charged with the execution of the orders; it will not excuse crimes committed in obedience to unlawful orders in circumstances in which the person executing the crime was not acting under the immediate impact of fear of drastic consequences of summary martial justice following upon a refusal to act - these latter are the crimes perpetrated by the vast army of officials in the occupied territories. If these limits of the doctrine of superior orders are taken into consideration, then its judicious application, far from defeating the ends of justice, will testify in a significant manner to the determination of the United Nations to abide also in this matter by the obligations of international law.

(2) Uncertainties of the Law of War.

Similar considerations apply to the second factor which must in some ways limit both the scope of prosecutions for war crimes and their punishment. That factor results from the controversial character of some of the most important aspects of modern war. There are acts of warfare which an impartial international tribunal would probably hold to be contrary to international law, but the lawfulness of which has been to a sufficient degree a subject of controversy or uncertainty to preclude them from being the subject of a criminal prosecution. There ought, for instance, to be little doubt that - apart, perhaps, from the doubtful operation of the law of reprisals - an international tribunal would hold that the German methods of submarine warfare and of mine-laying were contrary to international law. And yet, because of the controversial state of international law on these matters, there may be lacking in respect of such acts that degree of mens rea which, in matters of this kind, constitutes an essential condition of criminality. Such acts as the sinking of merchant vessels without warning or indiscriminate mine-laying

may supply ample reason for condemnation and protest; they may afford ground for retaliatory action of a most sweeping and comprehensive nature like the British Retaliatory Orders in Council of November, 1939; they may, at the end of the war, justify the imposition of collective sanctions by way of compensation or otherwise as distinguished from individual penalties of a criminal nature. But criminal proceedings before the municipal courts of the victor may seem to many a questionable method of removing outstanding doubts and laying down authoritatively the existing law on subjects of controversy. The fact is that, for instance, the legitimacy of sinking, without warning, of defensively armed merchantmen has been a subject of dispute - even apart from the question of reprisals. At one period, the Government of the United States was inclined to support the German legal view of the matter. The exact effect of Hague Convention No. VIII on the laying of submarine contact mines has been a matter of dispute. The same applies to such questions as general devastation or requisitions for purposes other than the needs of the army of occupation.

Total war has, in fact, altered the complexion of many rules. At a time when the "scorched earth" policy, with regard to the belligerent's own territory, has become part of a widespread practice, general destruction of property ordered as an incident of broad military strategy will not properly form the subject-matter of a criminal indictment. Modern warfare has raised, and, in some respects left unsolved, the problem of reconciling the fundamental distinction between combatants and non-combatants - a distinction without which the law of war loses much of its meaning - with the advent of new weapons and with the increase of the numbers both of combatants and non-combatants engaged in work of vital importance for the war effort. This applies in particular to the question of aerial bombardment of centres of population. The ubiquity and indefiniteness of legitimate objectives; the difficulty of localising the effects of bombardment; and bombing by way of retaliation - all these factors may make it difficult to answer the question of the legitimacy of aerial bombardment by way of

may supply ample reason for condemnation and protest; they may afford ground for retaliatory action of a most sweeping and comprehensive nature like the British Retaliatory Orders in Council of November, 1939; they may, at the end of the war, justify the imposition of collective sanctions by way of compensation or otherwise as distinguished from individual penalties of a criminal nature. But criminal proceedings before the municipal courts of the victor may seem to many a questionable method of removing outstanding doubts and laying down authoritatively the existing law on subjects of controversy. The fact is that, for instance, the legitimacy of sinking, without warning, of defensively armed merchantmen has been a subject of dispute - even apart from the question of reprisals. At one period, the Government of the United States was inclined to support the German legal view of the matter. The exact effect of Hague Convention No. VIII on the laying of submarine contact mines has been a matter of dispute. The same applies to such questions as general devastation or requisitions for purposes other than the needs of the army of occupation.

Total war has, in fact, altered the complexion of many rules. At a time when the "scorched earth" policy, with regard to the belligerent's own territory, has become part of a widespread practice, general destruction of property ordered as an incident of broad military strategy will not properly form the subject-matter of a criminal indictment. Modern warfare has raised, and, in some respects left unsolved, the problem of reconciling the fundamental distinction between combatants and non-combatants - a distinction without which the law of war loses much of its meaning - with the advent of new weapons and with the increase of the numbers both of combatants and non-combatants engaged in work of vital importance for the war effort. This applies in particular to the question of aerial bombardment of centres of population. The ubiquity and indefiniteness of legitimate objectives; the difficulty of localising the effects of bombardment; and bombing by way of retaliation - all these factors may make it difficult to answer the question of the legitimacy of aerial bombardment by way of

criminal prosecutions against individuals. It is doubtful whether, in this and similar matters, tribunals entrusted with the task of punishing war criminals in the period between the armistice and the peace treaty are a proper agency for solving controversial and difficult problems of the law of war. For this reason it is probable that retribution for much of the ravages of war, of loss of life, and of destruction of property perpetrated with a criminal intent may have to remain outside the scope of prosecution of individuals for war crimes. This does not mean that the guilty State will escape all the consequences of such actions committed on its behalf. There remains, in particular, the duty of compensation such as envisaged in Article 3 of Hague Convention No. IV or in Article 25 of the so-called Hague Air Warfare Rules of 1923. Neither will any uncertainty of the law shield persons accused of clearly criminal acts unrelated to the major aspects of disputed rules, such as sinking of life boats containing survivors from torpedoed ships, or deliberate machine gunning of civilian refugees, or, possibly, such acts of mere terrorism and frightfulness as the bombardment of Rotterdam in April 1940.

Moreover, it does not appear that the difficulties arising out of any uncertainty as to the existing law have a direct bearing upon those acts of Germany and her allies which have provided the impetus for the almost universal insistence on the punishment of war crimes. Criminal acts with regard to which prosecution of individuals for war crimes may appear improper owing to the disputed nature of the rules in question arise largely in connection with military, naval and air operations proper. No such reasonable degree of uncertainty exists as a rule in the matter of misdeeds committed in the course of military occupation of enemy territory. Here the unchallenged authority of a ruthless invader offers opportunities for crimes the heinousness of which is not attenuated by any possible appeal to military necessity, to the uncertainty of the law, or to the operation of reprisals.

The fact of the controversial character of some of the rules of

war tends not only to impose a limitation upon the scope of offences which may properly be prosecuted as war crimes. It has a direct bearing on the question of the plea of superior orders. If it is true that, as pointed out above, the obviousness and the indisputability of the crime tend to eliminate one of the possible justifications of the plea of superior orders, then the controversial character of a particular rule of war adds weight to any appeal to superior orders. An international tribunal may find that the order was illegal. But any element of doubt, however ill-founded, preliminary to such a finding must weigh with particular force in the decision of the court to dismiss the plea of superior orders.

(3) The Effect of the Operation of Reprisals

The same considerations apply, with even greater force, to the effect of the operation of reprisals - both in general and in relation to the plea of superior orders. In the first and in the second World War reprisals have been the legal cloak for the departure, some of which was unavoidable, from many of the accepted rules of warfare. In a sense, reprisals have fulfilled the function which would normally have been left to agreement between States, namely, that of the adaptation of the law to the changed conditions of modern warfare. In the sphere of maritime war the operation of reprisals in both world wars has, in practice, rendered obsolete the observance of most of the traditional rules. It is irrelevant to enquire whose original illegality opened wide the flood gates of retaliation. It is sufficient to note that the flood swept away with devastating thoroughness many of the elaborate, though often controversial, rules.

A war crime does not necessarily cease to be such for the reason that it is committed under the guise of reprisals. But an act committed in pursuance of reprisals which are lawful in their origin and in their execution cannot properly be treated as a war crime. A tribunal con-

fronted with an excuse of this nature will be faced with a task of considerable difficulty. International law regulates, in a necessarily rough and indeterminate manner, the occasions for and the use of reprisals both in peace and in war. It postulates the requirements of a prior attempt at redress by negotiation, of proportionality, of reasonableness, of compliance with fundamental principles of war such as respect for the lives of non-combatants, of due consideration for the legitimate interests of neutrals. But no rule of thumb is applicable to these matters, and it may be difficult to lay down specific rules for the guidance of tribunals. The question of the extent to which such rules can be framed in advance must be a matter for careful study.

The element of reprisals may have a significant and perplexing bearing upon the plea of superior orders. It has been shown that the strength of the plea of superior orders is conditioned by the degree of heinousness of the offence and its approximation to a common crime apparently divorced both from belligerent necessity and from elementary considerations of humanity. But these latter considerations may become irrelevant when the act has been ordered, or represented to the subordinate as having been ordered, in pursuance of reprisals against a similar or identical crime committed by the adversary. The subordinate may be expected, when confronted with an order contemptuous of law, humanity and decency, to assert, at the risk of his own life, his own standard of law and morality. This is an exacting, though unavoidable, test. But no such independence of conviction and action may be expected in cases when the soldier or officer is confronted with a command ordering an act admittedly illegal, cruel and brutal, but issued as a reprisal against the similarly reprehensible conduct of the adversary. We may attribute to the accused a rudimentary knowledge of the law and an elementary standard of morality, but it may be more difficult to expect him to be in the possession of the necessary information to enable him to judge the lawfulness of the retaliatory measures in question in relation to the circumstances

fronted with an excuse of this nature will be faced with a task of considerable difficulty. International law regulates, in a necessarily rough and indeterminate manner, the occasions for and the use of reprisals both in peace and in war. It postulates the requirements of a prior attempt at redress by negotiation, of proportionality, of reasonableness, of compliance with fundamental principles of war such as respect for the lives of non-combatants, of due consideration for the legitimate interests of neutrals. But no rule of thumb is applicable to those matters, and it may be difficult to lay down specific rules for the guidance of tribunals. The question of the extent to which such rules can be framed in advance must be a matter for careful study.

The element of reprisals may have a significant and perplexing bearing upon the plea of superior orders. It has been shown that the strength of the plea of superior orders is conditioned by the degree of heinousness of the offence and its approximation to a common crime apparently divorced both from belligerent necessity and from elementary considerations of humanity. But those latter considerations may become irrelevant when the act has been ordered, or represented to the subordinate as having been ordered, in pursuance of reprisals against a similar or identical crime committed by the adversary. The subordinate may be expected, when confronted with an order contemptuous of law, humanity and decency, to assert, at the risk of his own life, his own standard of law and morality. This is an exacting, though unavoidable, test. But no such independence of conviction and action may be expected in cases when the soldier or officer is confronted with a command ordering an act admittedly illegal, cruel and brutal, but issued as a reprisal against the similarly reprehensible conduct of the adversary. We may attribute to the accused a rudimentary knowledge of the law and an elementary standard of morality, but it may be more difficult to expect him to be in the possession of the necessary information to enable him to judge the lawfulness of the retaliatory measures in question in relation to the circumstances

alleged to have given rise to them. An example will illustrate the position: No person can be allowed to plead that he was unaware of the prohibition of killing prisoners of war who have surrendered at discretion. No person can be permitted to assert that, while persuaded of the utter illegality of killing prisoners of war, he had no option but to obey an order. But an accused who pleads not only an order, but the fact that the order was represented as a reprisal for the killing by the adversary of the prisoners of his own State, is in a different position. In fact, he might in such cases have a lawful excuse even independently of the plea of superior orders. When the German Supreme Court in the case of the Dover Castle acquitted the accused who pleaded guilty of torpedoing a British hospital ship, the Court expressed the view that the accused were entitled to hold, on the information supplied to them by their superiors, that the sinking of enemy hospital ships was a legitimate reprisal against the abuse of hospital ships by the enemy in violation of Hague Convention No. X.

On the other hand, as in the matter of the uncertainty of the law of warfare, the import of the operation of reprisals is not as considerable as would appear at first sight. In particular, it does not seriously affect that most potent source of war crimes which originates with the lawlessness, the greed, and the brutality of the occupying State.

While it is imperative that we should bear in mind the limitations upon the prosecution and punishment of war criminals — limitations such as those following from the plea of superior orders, from the controversial character of some laws of war, and from the application of reprisals — it is of equal importance that we should not in this matter lose the wood for the trees. These exceptions may make the work of the tribunals more intricate and more responsible, but there is no reason to assume that they will invariably affect the issue. Superior orders may be invoked, uncertainties of the law of war may be relied upon, and reprisals may be

cited as an excuse - but that does not mean that when thus appealed to they will confound the ends of justice. They will be subjected to judicial scrutiny. They may be found sufficiently weighty to warrant acquittal; they may be considered in the light of and as having the effect of extenuating circumstances; or they may, upon careful investigation, be brushed aside as a flimsy device to cover the horrors of a war crime.

At the same time, it is clear that all these three factors imply a limitation upon the punishment of war crimes. It must be a matter for consideration whether these limitations ought to be the subject of study and expression of opinion by jurists and Governments at this juncture or whether they must be left to be answered by courts alongside with any other questions of law. In the view of the writer, these are problems of a general nature as distinguished from the application of any particular rules. Their preliminary study might be of assistance to the courts in due course. Any careful attention given to them by the authorities of the United Nations might well act as an additional assurance, in relation to their own peoples and public opinion at large, of their determination to conduct the trials of war criminals within the limits which law and justice impose.

CONFIDENTIAL: NOT FOR PUBLICATION

D.4.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

COMMITTEE CONCERNED WITH CRIMES AGAINST INTERNATIONAL PUBLIC ORDER

INTERIM REPORT OF 15 JULY, 1942

1. International Criminal Court.

While most of us believe that the time is ripe for the establishment of a Permanent International Criminal Court, we all hold the provisional view that a very large percentage of the crimes which have been and will be committed incidental to and in the course of the present war (which for the present we shall merely refer to as "war crimes") can be punished by means of the jurisdiction of the municipal courts of the Allied Powers, both civil and military. Accordingly Monsieur Burnay, Professor Glaser, and Professor Lauterpacht, with General de Baer as Chairman, were appointed a sub-committee with the following terms of reference:

To examine and state (a) the scope and meaning of the conception of war crimes (b) the extent to which the punishment of war crimes can be achieved by means of the application of national laws including military law and by means of national jurisdiction both military and non-military (c) what war crimes cannot be dealt with in one of these ways.

2. The Armistice

We recommend that:

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

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

3. The Defence of Superior Orders

Professor Goodhart, Professor Lauterpacht and Dr de Moor were appointed a sub-committee to examine and report upon the defence of superior orders.

4. Surrender by Neutral States

(a) We recommend that:

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

(b) Monsieur Bones and Monsieur Vlitsch were appointed a sub-committee to examine and report on the subject of Extradition.

5. It was agreed to leave the date of the next meeting to be arranged at the discretion of the Chairman after the sub-committees had made some definite progress with their reports.

6. The meeting terminated with a vote of thanks to the Polish Authorities for their hospitality.

CONFIDENTIAL

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

COMMITTEE CONCERNED WITH CRIMES AGAINST INTERNATIONAL PUBLIC ORDER

General de Baer's Sub-Committee

Note to Members of the Sub-Committee

The terms of reference of the Sub-Committee are as follows:

To examine and state: (a) The scope and meaning of the conception of war crimes; (b) the extent to which the punishment of war crimes can be achieved by means of the application of national law, including military law, and by means of national jurisdiction both military and non-military; (c) what war crimes cannot be dealt with in one of these ways.

(2) With regard to (b) selected members of the general committee have been asked to prepare a statement as to the position of the municipal law of their country, in particular with reference to the question whether it confers upon national courts jurisdiction to punish crimes committed abroad.

(3) With regard to (a) it is believed that the task of the sub-committee is to enquire which are the war crimes in respect of which the immediate handing over of the accused to the United Nations ought to be sought as one of the terms of the armistice. It is possible that the sub-committee may, in accordance with the view put forward on pp. 5-11 of Professor Lauterpacht's memorandum, arrive at the conclusion that while all violations of the law of war are, in a sense, war crimes, only some of them ought to be treated as war crimes in the above, limited meaning. (i.e., "such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity."

(ibid., p.9).

Other violations of the law of war would still be subject either to criminal prosecution before municipal or international courts or to the duty of compensation, but they would not be made subject to the obligation of immediate delivery of the accused as a condition of the armistice.

(4) If this approach meets with approval, the sub-committee might properly attempt the task of preparing a list of war crimes to be included in the demand for immediate delivery of the accused.

(5) The answer to (c) will be largely, though not exclusively dependent upon the answer to (b) and, to some extent to (a). It must depend upon considerations both of a legal and political character, and it must be influenced by the fact that in view of most members of the general committee, the establishment of an International Criminal Court as a source of supplemental jurisdiction is both feasible and desirable. It might be convenient if each member of the Sub-Committee could prepare a tentative list of subjects which on account both of their residuary character in relation to (a) and (b) as well as for other reasons are not properly within the jurisdiction of municipal courts and which point, therefore, to the establishment of an International Criminal Court.

(6) It is believed that it is within the competence of the sub-committee to enquire to what extent provision should be made for trial by an International Court of war crimes with regard to which municipal courts possess jurisdiction, but which, by reason of internal or external difficulties, ought, in the opinion of the judicial or the political authorities of the State concerned, to be tried by an International Court.

(7) It is hoped that each of the four members of the Sub-Committee may find it convenient to comment in some detail on the matters raised in this Note.

M. de B.

24 August, 1942.

Dr de BAER'S SUB-COMMITTEE

on the

MEANING AND SCOPE OF WAR CRIMES Etc.,

(Questionnaire of the Chairman of the Sub-Committee and the
answers of Dr de Baer, Professor Glaser, and
Professor Lauterpacht).

CONFIDENTIAL: NOT FOR PUBLICATION

Dr de BAER'S SUB-COMMITTEE
on the
MEANING AND SCOPE OF WAR CRIMES Etc.,

Answers to Questionnaire

BELGIUM
(Dr de Baer)

The terms of reference of the Sub-Committee are as follows:

To examine and state: (a) The scope and meaning of the conception of war crimes; (b) the extent to which the punishment of war crimes can be achieved by means of the application of national law, including military law, and by means of national jurisdiction both military and non-military; (c) what war crimes cannot be dealt with in one of these ways.

1. Scope of the word "war" in this concept:

Before examining the scope of the conception of war crimes it is of some use to determine what is implied in this expression by the word "war". "War" is now a "de facto" question more than a "de jure" question: the attack on China was made without any declaration of war, likewise the successive aggressions on Austria and Czechoslovakia. Some Czech members of our Committee have expressed the opinion that crimes committed by the Nazi occupiers after the invasion of their country be considered as war crimes. There is certainly room for the opinion that crimes committed in that country before September 1939 (such as crimes committed by the Gestapo in June 1939 in Kladno) should not be treated in a different way from crimes committed after that date, especially as the invasion of Czechoslovakia was resisted by a part of the Czechoslovak Army, so that it is possible to concede that a virtual state of war has existed there since the beginning of the occupation. In this respect the occupation of Austria on 11 March 1938 was an act of international violence which might also be assimilated to a state of war, as well as the Japanese aggression on Manchuria in 1930. The only view we can take at present seems to be that the moment from which a country is at war is a question of fact, the determination of which is not the concern of our Committee, but should be done, when the time comes, by the authorities of each one of the countries concerned. From this follows that this Committee is not in a position to precise in terms of time - and to fix dates in respect of - the conception of a war crime.

2. Purpose of the concept of war crimes:

Another preliminary matter which should be made clear is the purpose which we

CONFIDENTIAL: NOT FOR PUBLICATION

Dr de BAER'S SUB-COMMITTEE
on the
MEANING AND SCOPE OF WAR CRIMES Etc.,

Answers to Questionnaire

BELGIUM
(Dr de Baer)

The terms of reference of the Sub-Committee are as follows:

To examine and state: (a) The scope and meaning of the conception of war crimes: (b) the extent to which the punishment of war crimes can be achieved by means of the application of national law, including military law, and by means of national jurisdiction both military and non-military; (c) what war crimes cannot be dealt with in one of these ways.

1. Scope of the word "war" in this concept:

Before examining the scope of the conception of war crimes it is of some use to determine what is implied in this expression by the word "war". "War" is now a "de facto" question more than a "de jure" question: the attack on China was made without any declaration of war, likewise the successive aggressions on Austria and Czechoslovakia. Some Czech members of our Committee have expressed the opinion that crimes committed by the Nazi occupiers after the invasion of their country be considered as war crimes. There is certainly room for the opinion that crimes committed in that country before September 1939 (such as crimes committed by the Gestapo in June 1939 in Kladno) should not be treated in a different way from crimes committed after that date, especially as the invasion of Czechoslovakia was resisted by a part of the Czechoslovak Army, so that it is possible to concede that a virtual state of war has existed there since the beginning of the occupation. In this respect the occupation of Austria on 11 March 1938 was an act of international violence which might also be assimilated to a state of war, as well as the Japanese aggression on Manchuria in 1930. The only view we can take at present seems to be that the moment from which a country is at war is a question of fact, the determination of which is not the concern of our Committee, but should be done, when the time comes, by the authorities of each one of the countries concerned. From this follows that this Committee is not in a position to precise in terms of time - and to fix dates in respect of - the conception of a war crime.

2. Purpose of the concept of war crimes:

Another preliminary matter which should be made clear is the purpose which we

have in view when we draw a line of demarcation between war crimes and other crimes
It seems that this object is a double one:

(a) to make a list of those crimes which, in the eyes of the whole of mankind appear as being of such a heinous nature, that their punishment is a matter of vital importance for the future existence - and for the morality and sense of justice - of the human race;

(b) to establish a difference between two sorts of criminals; - on one hand those who have committed crimes mentioned in the aforesaid list; the demand for the surrender of those accused will be made and backed by the whole of the Forces of the United Nations either (1) before, as a condition of any armistice terms or (2) by such armistice terms, or (3) afterwards but by operation of such armistice terms, - on the other hand those criminals, the demand for surrender of whom will be the individual concern of the country which claims jurisdiction to try them. This will not prevent any country from punishing - nor will it curtail any country's right to punish - the perpetrator of any crime as to which its courts have jurisdiction, nor even from obtaining his surrender by another country, but such surrender will be conditioned, not by the Armistice terms, but by the provisions of any extradition treaty which may be in existence between the two countries concerned.

3. Definition proposed:

Several definitions of a war crime have been suggested: The British Manual of Military Law (no. 441) defines it "the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment on capture of the offender". Such a definition however is not much more than a truism, and is of no help whatever to a Court which might be called upon to decide whether an act is a crime or not. This "a posteriori" definition was taken from Oppenheim's "International Law". A far more precise definition is given by Professor Lauterpacht in his Memorandum on Punishment of War Crimes: "such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of the human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity". This excellent definition which is, without a doubt, a valuable guide, would, it seems, not suffer much if it were abridged; moreover, in view of what has been said under §2 (b), it seems that it would be useful to state in our definition of a war crime, something to the effect that the surrender of the criminals, which is to be demanded in the armistice terms,

and their punishment, are the concern, not of one individual nation alone, but of the United Nations as a whole, representing civilised mankind. Therefore the following definition is submitted: "outrages such as, by reason of their heinous nature and of the fact that they are unrelated to reasonably conceived requirements of military necessity, are regarded as violations of the customs of warfare and of the general principles of criminal law, the punishment of which is the concern of civilised mankind". To make this more clear I will submit the following definition in French: "des crimes qui, à raison de leur caractère abominable et du fait qu'ils n'étaient pas nécessités par les opérations militaires, sont universellement considérés tant comme des violations des usages de la guerre que comme des crimes de droit commun, et dont le châtement importe à l'humanité entière".

4. Necessity of a revision of the lists of war crimes:

There are many existing lists of war crimes, there is one in the British Manual of Military Law (nos. 442-443), there is another in Oppenheim-Lauterpacht, the Committee of Enquiry into the Breaches of the Laws of War suggested another and there is a fourth included in the Report presented on 29 March, 1929, to the preliminary Peace Conference by the Commission of XV. The savage methods of Nazi barbarity are proving these lists to be incomplete: we do not know yet to what extent the imagination of the Gestapo has devised crimes of a new kind, but some documents, published by Allied Governments, already give us some indication as to the degradation to which not only Axis individuals, but responsible persons of authority have sunk: the Note on "German Occupation in Poland" presented by the Polish Government on 3 May, 1941, the June 1942 Notes and Declarations of the Czechoslovak Government, and "Two Years of German Oppression in Czechoslovakia", the Molotoff Notes on German Atrocities, the Greek White Paper of January 1942, the very recent reports of the Inter-Allied Information Committee on the extermination of Jews in the Axis countries, (20 December, 1942) etc..., are evidence that the existing ideas on war crimes have to be revised. On the other hand, modern warfare, and namely aerial warfare which affects not only the fighting forces but the whole civilian population, had led us to modify our conception of war crimes so as to exclude from it some acts which, in the last war, were definite violations of the then existing rules of war. The same can be said about sea warfare: the bombing of ships by aircraft cannot be preceded by a timely warning and has become, however deplorable this may be, one of the usual methods of sea warfare. Finally,

it more and more stands out that whereas the subordinates who are charged with the carrying out of some criminal orders may have some responsibility and incur some liability for the way in which they have executed them, the main guilt rests upon those in whom the orders originated, and these should not escape punishment, however exalted may be their rank or position.

5. A suggested provisional list:

It is submitted that in drawing this list we keep in view, rather than crimes as defined by any specific criminal law, any acts which come under the proposed definition, whether they are punishable by all - or by some - municipal laws, or not. It seems that three categories of crimes can be submitted for consideration:

- (a) acts directly connected with warfare and contrary to customs of war,
- (b) acts which have caused death, illness, bodily harm or loss of liberty to those to whom they were applied,
- (c) serious crimes against property. Some of the acts included in the two first categories are almost indistinguishable from each other as to their heinousness: acts such as a mass deportation or segregation in inhuman and unhealthy conditions, or an act such as the Roumanian Col. Nikolaesku's who, in his order No. 24220 ordered all foodstuffs and clothing to be taken from the population, which was left to die by starvation and exposure, are not less cruel than killing by shooting.

First category: acts directly connected with warfare and contrary to customs of war;

- (i) Making use of poisoned or otherwise forbidden arms and ammunition, including asphyxiating, poisonous, and similar gases or methods.
- (ii) Wilful attacks on hospitals ships and hospitals.
- (iii) Refusal of quarter.
- (iv) Killing of the wounded.
- (v) Wilful prevention of the saving of lives on land or at sea, when such saving was possible.
- (vi) Use of civilians or prisoners of war as a screen for troops, or for clearing minefields or removing mines, or for any other work immediately connected with actual fighting.
- (vii) Any other violation of The Hague Convention IV or of the Convention of Washington.

Second category: acts not directly connected with warfare and which have caused death, illness, bodily harm or loss of liberty to those to whom they were applied:

(a) crimes committed without order or authority:

serious crimes against persons punishable by ordinary criminal law, committed without any pretence of legal authority or order, (including e.g., murder, manslaughter, infliction or grievous bodily harm, torture, false imprisonment, rape, etc...)

(b) crimes ordered by or committed under order of or with approval of authorities:

- (i) Common murder - or mass murder of civilians or prisoners of war.
- (ii) Administrative murder: putting hostages to death.
- (iii) Execution (judicial murder), bodily disablement or prolonged deprivation of liberty ordered by a court which was either (a) composed of persons some of whom have no authority to sit on it, or (b) without jurisdiction as to the person or the act, or (c) imposing a sentence in violation of the law or without due respect for the rights of the defence.
- (iv) Wilful starvation of populations, excessive removal of foodstuffs, or depriving persons of shelter, clothing and/or other means of sustenance.
- (v) Compulsory enlistment of civilians or prisoners of war in enemy forces, or in dangerous war work.
- (vi) Internment or segregation in inhuman conditions.
- (vii) Mass deportation.
- (viii) Abduction of women with the object of prostitution.
- (ix) Abduction of children.
- (x) Serious ill-treatment or torture of civilians or prisoners of war.
- (xi) Compelling sick or wounded, women, children or old people to a work which is out of proportion with their condition, age or sex.
- (xii) Imposing collective punishments.
- (xiii) Any other violations of the Geneva Convention of 1929.

Third Category: serious crime against property:

(a) crimes committed without authority or order:

Crimes against property under ordinary criminal law (theft - looting - robbery, arson, etc...)

(b) crimes committed under order or with approval of authorities:

- (i) Wanton destruction of property unrelated to military events, carried out by the occupying authorities, in occupied countries.
- (ii) Plundering or removal of property belonging to the State, Associations, Churches, Schools, etc... or private individuals.

6. I am well aware that if an inordinate number of war criminals is to be prosecuted, the scheme will defeat its own ends. I am aware also that the present list includes many kinds of crimes. I feel however that, whereas discretion should be used in prosecuting the criminals, and whereas only the perpetrators of the most serious crimes should be prosecuted, we should not, by deliberately omitting crimes from the list, make it impossible for the Governments to prosecute persons accused of such crimes. Some of these accused may have committed the less heinous crimes in such considerable numbers that their criminality is greater than that which would have been theirs if they had committed one or two of the gravest category. It is with this object that crimes against property have been included in the list; it will be for the Governments or for the public prosecutors to discriminate between the criminals who really deserve exemplary punishments and those who can be overlooked.

7. Finally, some agreement should be reached as to the criminality of an attempt to commit a war crime; and also of conspiracy and complicity: In this respect I submit:

- (i) That an "attempt to commit a crime" should not be considered as a war crime, whatever may have been the reasons which caused the attempt to miscarry.
- (ii) That the conception of a war crime, in respect of conspiracy and complicity, should be restricted to principals and to accessories who, by giving orders to commit crimes which have been effectively committed, have incurred a liability for such crimes; and such liability may be heavier than that which is incurred by the actual perpetrators.
- (iii) In no case should the conception of a war crime be extended to an accessory after the fact.

B. EXTENT TO WHICH THE PUNISHMENT OF WAR CRIMES CAN BE ACHIEVED BY MEANS OF THE APPLICATION OF NATIONAL LAW, INCLUDING MILITARY LAW, AND BY MEANS OF NATIONAL JURISDICTION, BOTH MILITARY AND NON MILITARY.

1. Crimes committed on national territory:

In most countries, the principle of territoriality governs criminal law. By virtue of this principle National Courts (civil or military) applying their own national law (civil or military) are able to punish in their own way crimes which were committed on national soil.

2. Crimes committed abroad:

Some countries such as Poland are adequately equipped to take legal action in respect of crimes committed abroad against any of their nationals (see

Other countries on the contrary, such as Great Britain, Belgium, France, Holland, Luxembourg etc... have no legislation enabling their courts to take jurisdiction in respect of such. Consequently, the crimes committed against Allied nationals on Axis territory will either:

- (a) remain unpunished,
- (b) or else a pretence of prosecution will be made before German Courts, and by what happened at the Leipzig trials we know what will be the issue.
- (c) It may also be that some of the Allied countries enact legislation to give their home Courts jurisdiction to try crimes committed abroad, but there are against this procedure some serious objections. (See appendix).

C. WHAT WAR CRIMES CANNOT BE DEALT WITH IN ONE OF THESE WAYS:

The crimes which cannot be dealt with in one of these ways are:

1. The crimes which are not covered by each national criminal law: When drafting the note of 24 August and the subsequent questionnaire of 22 October, it had been hoped that members would by their answers, enable the Sub-Committee to present a survey of the crimes which were not covered by national laws. The small number of answers received to the Questionnaire, and the lack of response on this particular question (which, I admit, is not a simple one and requires much thought and study) compel me to refer to the answers which have been given by individual members.
2. The crimes committed in Axis countries against
 - (a) nationals of the United Nations,
 - (b) heimatlose or persons who cannot prove or have been deprived from their nationality.

As a remedy to this situation it is suggested:

- (a) That all crimes which can be punished by National Courts should be judged by such Courts.
- (b) That an International Criminal Court should be instituted to have jurisdiction of the residue of crimes which should include:
 - (i) crimes in respect of which no Allied Court had jurisdiction,
 - (ii) specifically international crimes as to which two or more Allied Courts have jurisdiction,
 - (iii) crimes in respect of which, although an Allied Court has jurisdiction the nation concerned prefers not to try it in its own courts,
 - (iv) crimes committed in Axis countries against the "heimatlose", persons who cannot prove their nationality or who have been deprived from their nationality.

(c) That the United Nations should agree upon a convention laying down the main principles of international criminal law, defining the crimes and affixing penalties to them;

and that, until such a convention has been agreed upon, the Court should apply:

- (i) International treaties, conventions and declarations, whether general or particular, recognized by the States which are before the Court;
- (ii) International custom, as evidence of a general practice accepted as law;
- (iii) the general principles of public or international law recognized by civilized nations;
- (iv) judicial decisions and doctrines of highly qualified publicists as subsidiary means for the determination of rules of law;

provided that no act may be tried as an offence unless it is specified as a criminal offence either in the Statute of the Court or in the municipal law of the accused, or in the law of his residence at the time of the commission of the crime, or in the law of the place where the crime was committed.

The above suggestion seems the only one which would cover all war crimes, it does not in any way curtail the jurisdiction of National Courts, it is acceptable to all. This solution would provide a remedy endowed with a maximum authority and strength, it would form the nucleus of future international criminal law.

I would like to point out that it is similar to the recommendations which were made in 1919 by the British Committee of Enquiry into the Breaches of the laws of War (Macmillan-Peterson Committee) and by the majority of the members of the Commission on the Responsibility of the Authors of the War (Commission of XV).

APPENDIX

(to answers to the note of 24 August, 1942)

POSSIBLE OBJECTIONS AGAINST AN INTERNATIONAL CRIMINAL COURT

First objection: If national law is insufficient, the countries concerned should modify the existing law by conferring upon their courts jurisdiction to try foreigners who have committed crimes abroad against their nationals.

Answer: As it has been pointed out, enacting new laws is not an easy matter for Governments in exile who lack the necessary staff to study such reforms, who are deprived from the advice of their ordinary counsellors and the support of their Parliaments, and who are out of contact with their people; this is especially the case when the prospective alterations tend to modify the whole traditional basis of a legal system: in most European countries criminal law is based upon the territorial principle; if alongside with this principle it is to be held that the accused can be judged according to the law of the country of the victim, this is an important alteration which may have far reaching repercussions.

I am well aware that British Courts have recognised the jurisdiction of a foreign court in respect of persons accused of having, in Britain, committed acts the criminal result of which was to be obtained abroad (Reg. v. Nillins : 53, L.J.M.C. 157 and R. v. Veltheim : Russel on Crimes, 8th ed. p. 55), but I believe that the rule that "a foreigner committing an offence of any kind, even against an Englishman, on foreign territory cannot be tried for it in an English Court" is still undisputed, at least when the criminal result was to be obtained abroad. (Reg. v. Keyn, L.R. 2 Ex. D.p.117).

All countries are not ready to accept the principle that when one of their own nationals has, within his own country committed an act, he should be made to answer for that act in a foreign country, before a foreign court, according to a foreign law. This is not a principle which will appeal to many lawyers.

I know that this principle will only apply to German and Axis nationals but when one lays down a principle of law it is doubtful whether it should be one by which one is not prepared to obey oneself and which is contrary to well established precedents.

Second objection: It will be too difficult to institute an International Court, especially if the International Criminal law must be recast as well.

Answer: Inertia is a tremendous obstacle, not easy to move. It has always been difficult to introduce any progressive idea, and I can understand that one lacks the courage to undertake it. Force of habit, traditions, are strong and the fact that circumspection is needed before altering laws contrives to put obstacles in the way.

It seems that if the Allied Governments were really convinced that an International Criminal Court is necessary, it could be instituted in a very short time: if the vast structure of the League of Nations could be set up in a few months, there is no reason why an International Court could not be set up in a few weeks, considering the preliminary work that has already been done.

The same applies to the elementary rules of International Criminal law, which would be a mere codification of the existing laws of war. Here again we have sound bases upon which to work, namely The Hague, Geneva Conventions, etc. A draft could be prepared in a few weeks, circulated to the Governments and a convention could meet within a short time to discuss it.

It is not so difficult really, it only needs the impulse of a great nation. I suspect if such impulse were to come from the United States or from Great Britain the obstacles would be easily overcome.

Moreover an International Criminal Court could be instituted even before the International Criminal law was drafted: until such drafting had been done the Court could apply international treaties, international custom, the general principles of international law and even judicial decisions and doctrines provided that no act were tried as an offence unless it was specified as a criminal offence in the municipal law of the accused, or in the law of his residence at the time of the commission of the crime, or in the law of the place where the crime was committed. This would certainly not provide for all categories of crimes but until the convention were drafted it would be possible to punish at least some of the criminals who would otherwise escape punishment altogether.

Third objection: The opinion has been voiced that in respect of crimes committed within Germany against Allied nationals, the number of those crimes will be "relatively small" and that they are in consequence negligible.

Answer: I have grave doubts as to the "relatively small" number of these crimes: the number of British prisoners of war who are in German hands is of course not considerable when compared to those belonging to the other Allied nations, and the

Answer: Inertia is a tremendous obstacle, not easy to move. It has always been difficult to introduce any progressive idea, and I can understand that one lacks the courage to undertake it. Force of habit, traditions, are strong and the fact that circumspection is needed before altering laws contrives to put obstacles in the way.

It seems that if the Allied Governments were really convinced that an International Criminal Court is necessary, it could be instituted in a very short time: if the vast structure of the League of Nations could be set up in a few months, there is no reason why an International Court could not be set up in a few weeks, considering the preliminary work that has already been done.

The same applies to the elementary rules of International Criminal law, which would be a mere codification of the existing laws of war. Here again we have sound bases upon which to work, namely The Hague, Geneva Conventions, etc. A draft could be prepared in a few weeks, circulated to the Governments and a convention could meet within a short time to discuss it.

It is not so difficult really, it only needs the impulse of a great nation. I suspect if such impulse were to come from the United States or from Great Britain the obstacles would be easily overcome.

Moreover an International Criminal Court could be instituted even before the International Criminal law was drafted: until such drafting had been done the Court could apply international treaties, international custom, the general principles of international law and even judicial decisions and doctrines provided that no act were tried as an offence unless it was specified as a criminal offence in the municipal law of the accused, or in the law of his residence at the time of the commission of the crime, or in the law of the place where the crime was committed. This would certainly not provide for all categories of crimes but until the convention were drafted it would be possible to punish at least some of the criminals who would otherwise escape punishment altogether.

Third objection: The opinion has been voiced that in respect of crimes committed within Germany against Allied nationals, the number of these crimes will be "relatively small" and that they are in consequence negligible.

Answer: I have grave doubts as to the "relatively small" number of these crimes: the number of British prisoners of war who are in German hands is of course not considerable when compared to those belonging to the other Allied nations, and the

Germans have in their hands no British civilians at all, so that to Britishers this side of the problem may be of little interest. But to the countries whose whole army has been and still is in captivity the interest is considerable indeed.

I see no reason why the proportion of war crimes committed against prisoners of war should be less than after the last war, when over 100 commanders of prison camps figured on the first list of war criminals, and when more than half of the test cases submitted by the British Government to the Leipzig Court (four out of seven) concerned ill-treatment of prisoners of war.

This time there are not only the prisoners of war: there are at this moment about 6 million foreign workers in Germany, the great majority of whom are Allies. These people are committing acts of sabotage, are escaping from their work and have created so many difficulties for their Nazi employers that special committees have been instituted to deal with them, so that those who refuse to work or break discipline are sent to prison or to special institutions. It would be a wonder if in respect of all these people who have been forcibly carried away, their unwillingness to work for their enemies had not caused the Germans to take, not only forceful, but criminal measures against them in a considerable number of cases.

Finally there are the Jewish victims in respect of whom the President of the American-Jewish Congress told President Roosevelt on 8 December, 1942, that they now numbered at least 2 million and that another 5 million were in danger of extermination.

It seems that, when measures are framed to provide retribution for the whole of the war crimes, these three categories of victims which comprise many millions of persons should not be overlooked and deprived of any protection.

Fourth objection: Why not use martial or military law and allow military courts or commissions to deal with war crimes after the war?

Answer: I would not have mentioned this objection had I not heard it several times brought up by distinguished lawyers.

It is not necessary to point out to the learned members of our Commission that martial law and military law are very different from each other:

Martial "law" is not a law, no more than the "law" of the jungle. In England it has four different meanings; on the Continent it has no positive existence. "Military law" on the contrary is concrete: it is embodied in written rules and Statutes. But it is different in each country, and applies mainly to members of the Forces, exceptionally to civilians or inhabitants of an occupied country (in England:

"British Manual of Military Law"; in U.S.A.: "Rules of Land Warfare"; in Belgium: "Code Pénal Militaire" and "Code de procédure Pénale Militaire"; and so on).

If England had been invaded in 1914 and the Germans had committed crimes here, there is little doubt that, after victory had been won, the British ordinary Courts would have decided that they had jurisdiction to judge those criminals (contrary to the doctrine held in U.S.A. in Coleman v. Tennessee etc.). And if ordinary British Criminal Courts had been denied jurisdiction, on the grounds that the Federal Courts of U.S.A. had held that this was "contrary to international law", it is doubtful whether British Courts would willingly have submitted to such foreign doctrine.

This is exactly the position in which Continental Courts were placed by the Versailles Treaty: whereas the ordinary Courts of the occupied countries had jurisdiction to try war crimes committed in their country, the authors of the Peace Treaty, disregarding such jurisdiction, and accepting the American doctrine proposed by Mr Lansing, decided (art. 228 & 229) that war crimes would be judged by military Courts. These provisions could not have been carried out for several reasons, moreover their application would have violated some Continental Constitutions.

The conclusion in respect of crimes committed in Allied countries is that no attempt should be made to substitute, inside such countries, the jurisdiction of military Courts to the jurisdiction of the ordinary Courts as was done in art. 228. That mistake should not be repeated.

As to crimes committed in Germany, Allied Military Courts or Courts-Martial have no jurisdiction to try such crimes.

It is true that such jurisdiction could be conferred upon them but in order to obtain this object it would be necessary that:

1. An International convention similar in its effects to art. 228 of the Versailles Treaty be drafted, giving to the Allied nations the right to institute military Courts in Germany, to try war criminals according to the national law of the Court;
2. The necessary modifications be brought to the internal legislation of each country in order to confer special jurisdiction upon military courts to try these criminals.

After the last war the first of the two was done by the Versailles Treaty. The second part was never done, it was not even attempted. Consequently even if the accused had been surrendered when they were demanded, the question of jurisdiction of the military Courts would have been a serious problem.

In point of fact however, to confer upon the military Courts of each of the Allied countries jurisdiction to try Germans, civilian or military, accused of having committed in Germany crimes against the nationals of their country would be in my opinion a gross mistake: The Institution of such courts summarily administering foreign military justice in Germany would be purely vindictive; only an International Court composed of professional judges before which the accused would enjoy the guarantees of a fair trial, with the opportunity of defence and the assistance of counsel would be admissible

In point of fact however, to confer upon the military Courts of each of the Allied countries jurisdiction to try Germans, civilian or military, accused of having committed in Germany crimes against the nationals of their country would be in my opinion a gross mistake: The Institution of such courts summarily administering foreign military justice in Germany would be purely vindictive; only an International Court composed of professional judges before which the accused would enjoy the guarantees of a fair trial, with the opportunity of defence and the assistance of counsel would be admissible

CONFIDENTIAL: NOT FOR PUBLICATION

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de BAER'S SUB-COMMITTEE

on the

MEANING AND SCOPE OF WAR CRIMES Etc.,

Answers to Questionnaire

POLAND

(Professor Glaser)

The terms of reference of the Sub-Committee are as follows:

To examine and state: (a) The scope and meaning of the conception of war crimes: (b) the extent to which the punishment of war crimes can be achieved by means of the application of national law, including military law, and by means of national jurisdiction both military and non-military; (c) what war crimes cannot be dealt with in one of these ways.

In answer to Mr de Baer's note to Members of the Sub-Committee, I have the pleasure in expressing my opinion as follows:

In my answer to Professor McNair's questionnaire I already expressed my view with regard to the tribunals: that in my opinion it would be advisable to adopt national jurisdiction as a principle. International jurisdiction should be established only for special cases where justified by exceptional circumstances.

The reasons justifying national jurisdiction are manifold. First of all it is obvious that the administration of justice for the so-called war-crimes should be very rapid and efficient. The trials in this domain should be closed in a short period after the war is over. This could be done only and exclusively by national courts. The machinery of international tribunals is in its very nature complicated and slow. At any rate the experience in this domain does not encourage optimism. The further reason for such national jurisdiction is to be found in the moral feelings of the now enslaved nations. Beyond doubt one of the main aims of the administration of justice is to satisfy the moral feelings of the nation wounded by the offender. This can be done only if the nation has confidence in the tribunals, and such confidence is only possible where the tribunals are composed of those who belong to the nation itself, who feel with it, who understand its needs, its sentiments, its

faith. Finally we must remember that the administration of justice by national courts is also dictated, undoubtedly, by the interest of justice itself. The so called principle of immediacy requires that the trial should take place where the crime has been committed, and in such a manner as to enable the judges to hear and see all kind of relevant evidence, and to pass judgment on their own observations. It is understandable that all these conditions require national courts.

There are twofold arguments quoted in favour of international jurisdiction. First of all that the national law of the respective countries would not cover all the wrongs and damage done by the invader. If this is true, and I think that it is, the only solution would be to supplement the respective codes in an appropriate manner. Such additions could not be criticized as being a break with the principle "nullum crimen sine lege", because this principle concerns in particular the illegality (lawlessness) of the action performed by the doer, and it is obvious that the crimes committed by the enemy were forbidden, therefore lawless even at the time they were committed, according to national and international law. Apart from this it is worth while mentioning that this argument cited against national jurisdiction, would even if justified, equally apply to international courts because, they too, would have to have new legal basis for prosecution, trial and punishment.

The second argument against national law and in favour of international jurisdiction, is that extradition would be obtainable only and exclusively for trials before international courts. This argument is doubtful insofar as in either case, establishment of national or international jurisdiction, it would be necessary to stipulate for the immediate delivery of the accused in terms of the armistice. It seems to me that it would not be difficult to obtain such clause even in the case of national courts if assurance were given of the impartiality of such courts. Such guarantee could consist, as Professor McNair suggested, in the admission of some "international" observers.

As regards the Polish Code of 1932 (Penal Code), this already provides for the punishment of crimes committed abroad against Polish citizens. In this connection I cite Article 5:

"The Polish law is applicable to foreigners who have committed an offence abroad, directed against the welfare or interest of the Polish State, of a Polish citizen, or of a Polish juridical person".

On the other hand this Code, like many others, does not cover all kind of crimes, committed by the invader. Unfortunately our legislator was not so ingenious as was the invader. For example it would be difficult to find a provision in our Code applicable to such cases as compelling young women to become pregnant against their will, physical and mental torture, transfer of population, establishment of ghettos, and so on. But even could our Code be so interpreted as to cover such crimes, which is not the case, the punishments provided therein are not sufficient to meet such crimes.

In this connection it is worth while remembering that the Germans abandoned the principle "nullum crimen" a long time before war broke out, and that they introduced retroactivity of penal legislation in Poland for so-called political crimes which enabled them to punish those Poles who rebelled against the Germans in Silesia some twenty years earlier.

I quite agree with the suggestion that it would be advisable to prepare now a list of crimes for which extradition should be stipulated in the armistice.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de BAER'S SUB-COMMITTEE

On the

MEANING AND SCOPE OF WAR CRIMES Etc.,

Answers to Questionnaire

GREAT BRITAIN
(Professor Lauterpacht)

I. With regard to paragraphs (3) and (4) of Dr de Baer's note, assuming that the sub-committee are in agreement with the view put forward in my Memorandum and reproduced in Dr de Baer's note, the following is suggested as a tentative list of crimes with regard to which the immediate handing over the accused ought to be sought as an essential condition of the armistice:

1. Grave crimes against person and property committed without any pretence of legal authority or order, i.e., crimes of private lust. These include murder, manslaughter, infliction of grievous bodily harm, torture, false imprisonment, blackmail, rape, theft and pillage on a large scale.
2. Plunder, infliction of grievous bodily harm, and torture committed under cover of legal authority or in obedience to superior orders.
3. Participation in and execution of judicial sentences clearly contrary to international law and resulting in death, bodily disablement, or prolonged deprivation of liberty.
4. Ordering of or permitting or participation in massacres of civilian population or of prisoners of war.
5. Ordering of or permitting or participation in mass executions of hostages.
6. Ordering and execution of measures of enforced prostitution. [This will cover, among others sterilisation of women by doctors].
7. Ordering of and participation by officials in administrative detention in concentration camps, especially in cases resulting in death or mental or bodily disablement.

8. Ordering of an participation by officials in measures of deportation for compulsory labour.

9. Ordering of and participation by officials in measures of racial segregation and extermination against the Jewish section of the population.

[This particular war crime is of a novel character. But so is in the annals of military occupation the deliberate and proclaimed policy of Germany to achieve through segregation, accompanied by denial of adequate food and medical services, the extermination of the Jewish population in the territories under her control. For this reason the policy of racial segregation directed against the Jews appears as a specific war crime in the memoranda submitted by the various members of the Committee. The number of persons associated with that policy of extermination to a degree sufficient to warrant prosecution before tribunals must necessarily be limited. However, the cruelty and the moral and physical suffering inflicted upon a substantial section of the population of the occupied territories as the result of that policy of extermination are such that its execution ought to be specifically branded as a war crime so serious as to justify inclusion among the crimes in respect of which the handing over of the principal persons responsible must be insisted upon as a condition of the armistice].

10. Forcing the civilian population to take part in military operations and preparations in a manner calculated to endanger the life of civilians (such as digging trenches in the neighbourhood of military operations or using civilians as a shield for advancing troops).

11. Deprivation of localities and districts of foodstuffs in a manner calculated to expose the civilian population to starvation.

12. Bombing of centres of civilian population for the sole purpose of terrorization as in the case of the bombardment of Rotterdam.

13. Bombing or machine-gunning of civilian refugees from the air.

14. Firing on boats with survivors of torpedoed merchant vessels.

[The sinking of merchant vessels without warning or the ordering of such sinking, as well as the bombing of merchant vessels and the ordering of such bombing, are not included in this list. It is not suggested that these acts do not constitute war crimes - in particular on the part of

those responsible for the orders. However, the controversy which has ranged round this aspect of sea warfare and the fact that the latter has become part of a policy of reprisals pursued by both sides seem to indicate a procedure different from that to be followed with regard to other grave war crimes enumerated in the present list. The same applies to mine-laying in violation of existing law].

15. Maltreatment of prisoners of war.
16. Using or ordering the use of dum-dum bullets and other munition and weapons prohibited by international law.
17. Deliberate attacks upon hospital ships and grave violations of the Geneva Convention on the Treatment of Sick and Wounded.
18. Ordering or permitting refusal of quarter or execution of orders to that effect.

II. The above list does not include such war crimes as arbitrary destruction of property, unlawful requisitions, removal of private and public property, confiscation of property, usurpation of authority and alteration of existing laws in excess of the powers conferred by international law, administrative and legislative measures taken as the result of the unlawful practice of annexation during war, imposition of collective penalties, destruction of buildings and monuments of religious, charitable, scientific and historic character, imposition of inferior civil status, measures aiming at the destruction or debasement of the cultural life of the population of the occupied territory and the like. All these are war crimes, but, for the reasons stated in my memorandum, they ought not, in my view, to be included among the crimes in respect of which immediate handing over is to be demanded as a condition of the armistice. This does not mean that no penalty ought to be exacted for these crimes. The United Nations must reserve the right to demand the handing over of persons responsible at some future date. But their trial does not present those elements of political and moral urgency as in the case of the other war crimes as enumerated above.

III. The trial of the persons responsible for war crimes enumerated in the preceding paragraph (II) might be entrusted to an International Criminal Court to be created as part of the general international settlement. Jurisdiction

over these crimes seems to me to be the principal, if not the only, subject-matter of the jurisdiction to be conferred upon the International Criminal Court in connection with the prosecution of war crimes. Any jurisdiction of the International Criminal Court will not probably be due, to any appreciable extent to the operation of the territorial principle. Even in those few States in which the territorial principle would prevent the assumption of jurisdiction over some categories of war criminals, legislation can be speedily introduced and passed to circumvent that difficulty. It is not easy to imagine a more compelling cause, politically and otherwise, for remedial legislation.

IV. Similarly, it is not practicable to expect that some of the "residuary" jurisdiction of the International Criminal Court will be called for by the fact that in respect of a number of war criminals several States will claim and have jurisdiction. For the number of individuals in this category will be small. At the same time, although their number will not be large, it will probably include some of the most prominent war criminals, namely, persons of high executive and military authority whose orders covered acts performed in several countries. This category of war criminals will deserve and, for various reasons, call for speedy and exemplary punishment. It will certainly not be reasonable to expose that punishment to the delays inevitably connected with the establishment of an International Criminal Court.

V. For these reasons, if the sub-committee and the General Committee are to recommend the establishment of an International Criminal Court for adjudicating on what has been described as the "residuary" segment of cases, it will be advisable to concentrate on that aspect of residuary jurisdiction which arises from the prosecution of the less grave war crimes as enumerated above under (II) rather than to stress the effect of the territorial principle or the joint jurisdiction of a number of States.

VI. As stated in Dr de Baer's note, it is within the competence of the sub-committee to enquire to what extent provision should be made for trial by an International Criminal Court of war crimes with regard to which municipal courts possess jurisdiction, but which, by reason of internal or external difficulties

ought, in the opinion of the judicial or the political authorities for the State concerned, to be tried by an International Court. No such possible difficulties occur to me, except, perhaps, the uncertainty as to the rule of international law on any particular question.

Dr de BAER'S SUB-COMMITTEE

NATIONAL LAWS AND JURISDICTIONS

(Questionnaire of the Chairman of the Sub-Committee and
answers on the position in Belgium, France, Great Britain,
Czechoslovakia, Holland, Luxembourg, Poland, Norway and
Greece).

CONFIDENTIAL

W.6.
22 October, 1942.

INTERNATIONAL COMMISSION
FOR
PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de BAER'S SUB-COMMITTEE

This Sub-Committee has been asked, inter alia, to examine and state "the extent to which the punishment of war crimes can be achieved by means of the application of national laws, including military law, and by means of national jurisdictions, both military and non-military."

It would assist the Sub-Committee if, for each nation, the members of the Committee would be good enough, after consultation, to prepare a statement, as detailed as convenient, on the following questions:

- (1) In what circumstances, if any, does the law of your country confer upon courts jurisdiction to punish criminal acts committed abroad:
 - (a) by nationals;
 - (b) by aliens?
- (2) To what extent, if any, does the territorial principle of your criminal law confer upon your courts jurisdiction in respect of criminal acts committed by aliens on the high seas or from the air above the high seas against ships or persons on board ships flying the flag of your country?
- (3) What law do the military courts of your country apply? Do they apply a special military code or the ordinary municipal criminal code? Are they authorized to apply "martial law", "the law of war" or "international law"? With regard to what categories of persons have they jurisdiction? Does the latter embrace both soldiers and civilians? In the matter of jurisdiction over civilians, what is the position with regard to enemy nationals:
 - (1) in national territory, (2) in enemy territory in the event of your armed forces occupying parts of enemy territory?

To what extent is the jurisdiction of military courts in your country affected by the territorial principle (if any) of your criminal law, i.e., the principle that courts have jurisdiction to punish such acts only as are committed in national territory? (The object of this question is to elicit to what extent, if any, the general terms of the jurisdiction conferred upon military courts in respect of war crimes exclude or modify the application of the territorial principle).

- (4) In case the law of your country does not authorise civil or/and military tribunals to exercise jurisdiction in respect of crimes committed abroad, what are the legal and political difficulties in the way of a change in the existing law in the direction of conferring such jurisdiction upon military or civil tribunals or both?
- (5) Does the law of your country adequately provide for the punishment of all war crimes which have been committed in your country?
- (6) In case the answer to question 5 is in the negative, what are the legal and political difficulties in the way of a change of the existing law in the direction of making such adequate provision?

Some members of the Committee to whom this questionnaire is sent may perhaps have answered some of the questions in connection with their membership of the London International Assembly Committee. They may find the answers sent to that Committee useful for the purpose of answering the enclosed questionnaire. But it is hoped that your answer to the present questionnaire will be complete in itself.

M. de BAER.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de BAER'S SUB-COMMITTEE

NATIONAL LAWS AND JURISDICTIONS

Answers to Questionnaire

BELGIUM
(Dr de Baer)

This Sub-Committee has been asked, inter alia, to examine and state "the extent to which the punishment of war crimes can be achieved by means of the application of national laws, including military law, and by means of national jurisdictions, both military and non-military".

It would assist the Sub-Committee if, for each nation, the members of the Committee would be good enough, after consultation, to prepare a statement, as detailed as convenient, on the following questions:

- (1) In what circumstances, if any, does the law of your country confer upon courts jurisdiction to punish criminal acts committed abroad:

(a) by nationals; (b) by aliens?

The principle which governs the whole matter is laid down in art. 4 of the Penal Code: "no offence committed outside Belgian territory, whether by Belgian nationals or by foreigners, is punishable in Belgium except when otherwise provided by law".

According to this principle the rule is that Belgian criminal law applies only to offences committed within Belgium, and that in respect of offences committed abroad, Belgian courts have no jurisdiction, except when Belgian law provides that they have. Belgian courts have in this respect no discretion and their right to take cognizance of such offences is strictly limited to instances in respect of which jurisdiction has been expressly conferred upon them.

Such jurisdiction has been expressly conferred in the following cases:

1. As to offences committed abroad by Belgians:

- (a) By virtue of art. 6 to 9 of the Belgian Code d'Instruction Criminelle any Belgian subject who outside Belgian territory has committed anyone of the following crimes may be prosecuted before the Belgian courts and punished according to Belgian law:
 - (1) Any crime against the security of the State,
 - (2) Any crime concerning counterfeiting of Belgian currency, State papers, seals, stamps, etc....
 - (3) Any crime concerning or connected with counterfeiting of foreign currency, but in this case proceedings can only be taken if the foreign government concerned notifies this crime to the Belgian authorities.

- (4) Any crime or misdemeanour committed against any Belgian subject,
 - (5) Any crime mentioned in the extradition law or any crime connected with duelling: in this case he can be prosecuted in Belgium either if the crime is notified by the foreign government or if the victim or the victims' family lodge a complaint,
 - (6) Any crime connected with slave traffic provided the accused person is present in Belgium and can be summoned there in view of his trial before a Belgian court.
 - (7) Any crime connected with white slave traffic provided the accused person is present in Belgium and can be summoned there in view of his trial before a Belgian court,
 - (8) Any crime connected with obscene publications,
 - (9) In some limited cases some crimes or misdemeanours in matters of forestry, fishing, and game laws.
- (b) Members of the Belgian Forces abroad who have committed any crime abroad can be dealt with by the Belgian military tribunals according to Belgian military law.

2. As to offences committed abroad by foreigners:

Any foreigner who has committed abroad any of the following offences may be prosecuted and tried in Belgium and punished according to Belgian law:

- (a) In the two following cases he may be tried in Belgium whether he is a principal or an accessory, whether he is residing in Belgium or not, whether he has there a domicile or not; in other words he can be tried in absentia, even if he has never set his foot on Belgian soil:
- (1) Any crime against the security of the State,
 - (2) Any crime concerning counterfeiting of Belgian currency, State papers, seals, stamps, etc....
- (b) In the following cases the foreigner may be tried in Belgium, provided that he has either his domicile in Belgium, or that he is present in person in Belgium (either voluntarily or by compulsion, after his surrender has been obtained) so that he can be summoned there to appear before the court:
- (1) In the case of any crime concerning or connected with counterfeiting of foreign currency, (in this case proceedings will only be taken if the foreign government concerned notified this crime to the Belgian authorities),

- (2) Any foreigner who, outside Belgian territory, takes a part (either as a principal or an accessory) to any crime, committed abroad by a Belgian subject and mentioned in answer to no.1 here above, may be prosecuted and tried in Belgium either together with the accused Belgian or after his conviction.
- (3) Any foreigner who, outside Belgian territory, is a part (either as a principal or an accessory) to an crime committed in Belgium. (From this follows that any person who, within an Axis country orders a crime to be committed in Belgian territory comes under the jurisdiction of Belgian courts provided that he is either present in Belgium or can be summoned there at his domicile.)
- (4) As to crimes committed from abroad, which are to take effect in Belgium: A typical case would be if a bomb were sent by post from abroad into Belgium to explode there, and killed a resident of Belgium: although such a case is not ruled by any Belgian law, and although opinions are divided as to which court has jurisdiction, it seems that this would be a case of dual jurisdiction for both the foreign and the Belgian court. The same would apply if a gun were fired from a neighbouring country to kill a person on Belgian soil. As to a bomb dropped from a foreign aircraft upon Belgian territory the case is even clearer, for Belgian territory extends to the air which is above the country.
- (c) After the last war some foreigners (Germans), who had committed offences against members of the Belgian Forces of Occupation in the Rhineland, were tried and sentenced by the Belgian Military Tribunals functioning in the occupied zones. Such action, however justified it may have been in fact, was not founded on any provision of Belgian law, and it could not have been done in Belgium without flagrant violation of the Constitution.
- (2) To what extent, if any, does the territorial principle of your criminal law confer upon your courts jurisdiction in respect of criminal acts committed by aliens on the high seas or from the air above the high seas against ships or persons on board ships flying the flag of your country?

Although there is in Belgian law no explicit provision affirming that a ship flying the flag of Belgium is deemed to be a part of Belgian soil, there is a statute conferring upon Belgian courts jurisdiction in respect of offences committed on Belgian ships, either by Belgians or by aliens. In this case the rules mentioned

in the answer to question 1 apply: therefore there is little doubt that if a Belgian ship on the high seas were attacked by a foreign ship or aircraft, the crime, the effect of which was to be obtained on the Belgian ship, could be construed as belonging to the jurisdiction of Belgian courts.

- (3) What law do the military courts of your country apply? Do they apply a special military code or the ordinary municipal criminal code? Are they authorised to apply "martial law", "the law of war" or "international law"? With regard to what categories of persons do they have jurisdiction? Does the latter embrace both soldiers and civilians? In the matter of jurisdiction over civilians, what is the position with regard to enemy nationals (a) in national territory, (b) in enemy territory in the event of your armed forces occupying parts of enemy territory? To what extent is the jurisdiction of military courts in your country affected by the territorial principle (if any) of your criminal law, i.e. the principle that courts have jurisdiction to punish such acts only as are committed in national territory? (The object of this question is to elicit to what extent, if any, the general terms of the jurisdiction conferred upon military courts in respect of war crimes exclude or modify the application of the territorial principle).

It is difficult to answer this question in a few words: first of all some explanation is needed concerning the particular nature and the jurisdiction of Belgian military tribunals and concerning the law which these tribunals apply.

(a) Nature and law: The military courts of Belgium are not the equivalent of British "military courts". In this matter, like in many others, homonyms are apt to mislead. British military courts are, as I understand from the British Manual of Military Law, temporary courts, distinct from statutory courts-martial, which are instituted in time of war by the will of the military commander and under his personal responsibility; the law which they dispense is military law, i.e., the will of the military commander as necessitated by circumstances, and this implies the suspension of ordinary law; it is in fact simply military authority exercised in accordance with the customs of war and only limited by necessity.

There is in Belgium, no equivalent of British "military courts" or of American "military commissions".

Belgian military tribunals, which include courts-martial (Conseils de Guerre) and a court of appeal (Cour Militaire), are regular permanent courts which function in peace-time as well as in time of war, they are in no subordinate position towards the military commander but are independent courts in the same way as the ordinary courts. The law which they apply is a criminal statute which is called "Code Pénal Militaire"; it is supplemented when necessary by the rules of Belgian ordinary criminal law (Code Pénal), but never do these courts apply to offenders either the law of war or international law, or martial law. They have their own statutory rules of procedure which are known as Code de Procédure Pénale Militaire. These rules are equally strict

as any other ordinary criminal rules of procedure: Belgian military courts are no more allowed to depart from these rules than any ordinary criminal court may disregard its own.

(b) Jurisdiction: Whereas civil criminal courts are governed by the leading principle of territoriality of criminal law (i.e., they have jurisdiction only as regards offences committed within the territory of their venue, but irrespective of the nationality of the accused), the jurisdiction of military courts on the contrary is governed by the principle of personality (i.e., military law applies, and the military court has jurisdiction to try any offender who is a member of the Forces under the military command near which it functions, irrespective of the place where the offence was committed).

There are, it is true, some exceptions to this rule in time of war, when military courts have jurisdiction to try not only soldiers, but also civilians accused of crimes against the safety of the State. But generally speaking military law is personal rather than territorial and the military courts are not precluded from punishing offences which were committed outside the territory of their venue.

It has been pointed out above that Belgian military courts do not dispense any other law than the Belgian Code Pénal Militaire they have never applied any other law even when, after the 1918 Armistice, they were called upon to function in the occupied Rhineland.

In occupied Rhineland, their regular functions were the same as in Belgium: i.e., to try - and to pass sentences upon - members of the Forces who had committed offences. Alongside with this normal jurisdiction, these courts assumed the right to try Rhineland civilians whenever they had committed offences interfering with the rights or the safety of the Forces of occupation. (The basis of this right was found in a proclamation by Marshall Foch, but not in any Belgian law, therefore the exercise of such jurisdiction would have been illegal in Belgian territory and could only be tolerated because it was happening abroad). Thus these courts imposed punishments upon German civilians for thefts to the prejudice of - or for murder of - members of the Allied Forces of occupation. But, even when they had assumed jurisdiction in this way, they did not apply "martial law" to the cases which were brought before them, but the ordinary rules of Belgian law, to which they most strictly adhered. Moreover the crimes in respect of which these courts assumed jurisdiction were strictly limited to crimes which had been committed during the occupation (i.e., after the Armistice); in no case did their jurisdiction extend to the punishment of what we call "war crimes"

nor did they ever attempt to assume jurisdiction in respect of such crimes.

From this follows that Belgian military courts have no jurisdiction to try crimes which were committed in Belgium during the German occupation (i.e., "war crimes").

To sum up:

1. Belgian Military Tribunals apply a special military code, supplemented, when necessary by the ordinary municipal criminal code. They do not apply either "martial law", or the "law of war", or "international law".

2. As a rule, they have jurisdiction over members of the Forces only. Exceptionally however, in time of war, their jurisdiction extends over civilians in respect of a very limited number of offences.

3. With regard to enemy subjects:

- (a) in national territory, even in time of war, the mere fact of being an enemy subject does not submit an accused to the jurisdiction of military courts;
- (b) in enemy territory, military courts have, in 1919-1920, by reason of emergency, assumed jurisdiction over civilian inhabitants who had committed offences affecting the safety of the army of occupation.

(4) In case the law of your country does not authorise civil or/and military tribunals to exercise jurisdiction in respect of crimes committed abroad, what are the legal and political difficulties in the way of a change in the existing law in the direction of conferring such jurisdiction upon military or civil tribunals or both?

In theory, the legal or political difficulties which are in the way of a change in the existing law are not such as could not be overcome: anything can be done by legislation "except change a man into a woman" as the English saying goes. Nevertheless passing new legislation is always a matter in respect of which the Governments show some reluctance. Even in this country where the body of legislators is functioning as it does in normal times, there seems to be little inclination towards modifying existing laws. It is therefore natural that Governments in exile, deprived as they are from the contact of their Parliament and their people, and from the valuable opinion of their ordinary legal counsellors or advisory bodies, show little readiness to introduce in their legislation innovations some of which have been hitherto deemed incompatible with their legal system, and which, however much they may seem necessary under the stress of present circumstances may be, in the long run, inadvisable or contrary to the secular traditions of their country. Whereas in Great Britain, the personnel to plan legislative reforms is not lacking at this moment, the same cannot be said of the refugee Allied Governments, whose staff is

reduced to a skeleton and who find some difficulty in performing the daily duties needed for their administration.

In connection with this question (change of legislation) there is another reason why Governments are at this moment chary of passing legislation concerning war crimes: If they pass new laws the acts described in these new laws will henceforth be punishable crimes, but at the same time it will be acknowledging the fact that hitherto such acts could not be punished because they were not within the scope of the existing criminal law. Consequently, if the existing laws are altered, all acts committed previously to the modification will escape punishment, whereas, if things are left as they are, some Governments foster the hope that their courts, in order to meet the need, may stretch their jurisprudence to cover the case.

So much for the practical difficulties. Let us now examine the legal aspect of the question:

1. In respect of civil courts:

The whole Belgian Criminal system of jurisdiction of civil courts is based upon the principle of territoriality. If, instead of this, jurisdiction is to be based upon the nationality of the victim, the repercussions of such a change may be far reaching, many rules connected with this principle may have to be remodelled, and it is doubtful whether a Government in exile will undertake such a work.

There are a few countries, such as Poland, where any crime committed abroad by any foreigner against a Polish national can be tried by a Polish court, but the very basis of this theory has met with some opposition and has not passed uncriticized. It is true that legislation could be enacted, giving Belgian courts jurisdiction to try crimes committed in Axis countries against Belgian nationals; it is even possible that legislation may be passed giving British courts jurisdiction as to crimes committed in Germany or Japan against British nationals, but it is doubtful whether such procedure would be convenient: the accused would have to be brought to this country together with all the witnesses and evidence, and the obstacle of language would have to be overcome. Moreover, the idea that a person who has committed an act inside his own country, should be tried for that act by the courts of another country, according to a foreign law, is not one that will appeal to many lawyers.

But even if such a law were enacted, what would be its effect? Let us suppose that a new law were enacted on the model of the Polish system, which is the system that provides the widest possibilities of jurisdiction in respect of crimes committed abroad by foreigners. At first sight, and on paper, crimes committed abroad seem

to be adequately covered by these provisions. May I be allowed, however, to draw the attention of this Commission on the practical impossibility to carry them out: for let us not forget that even these provisions are futile unless the accused and all the witnesses consent to go to Poland to attend the trial, or unless his extradition can be obtained. The eventuality of a German criminal voluntarily coming to Poland to be tried there can be safely ruled out. As to obtaining his extradition from Germany, is there anybody who has the slightest doubt that every possible obstacle will be put in the way, that the Germans will, with reason, invoke their own laws, which expressly forbid the surrender of a national, and that even if the accused is made to appear before the foreign court, it will not be easy to obtain the presence of the witnesses there? We have seen with what success the Germans avoided the application of articles 228-230 of the Versailles Treaty and we may be sure that they will repeat their endeavours to avoid retribution.

2. As to military Tribunals:

In this respect a distinction should be made between military tribunals functioning in Belgium, and the same tribunals which might be functioning abroad.

- (a) As regards military tribunals functioning in Belgium: If, by means of legislation, a rule were enacted, providing that persons chargeable with a crime to be tried by a civil court sitting with a jury shall henceforth be tried by a military court this would be an encroachment upon the rights of the accused, and such legislation would be contrary to art. 98 of the Constitution. The right to try crimes (felonies) could therefore not be conferred upon military courts without the constitution being violated.
- (b) As regards military tribunals functioning outside Belgium: For the sake of clearness, let us put the question in a concrete way: If Belgian Forces, bringing with them their military courts were in the future to occupy a portion of Germany, could these courts be charged with the punishment of war crimes committed by Axis nationals in Belgium at the time when Belgium was occupied by Axis Forces? The answer is: Provided of course that some international arrangement conferred such jurisdiction upon them and provided that the necessary legislation were passed to this effect by the Belgian legislative authority, although I see many reasons why this should not be done, there is no constitutional impossibility of doing so.

For, although the nationals of some countries consider that their Constitution applies to the whole world (cfr. the American delegation at the Peace Conference

who refused to give their assent to the proposal that led to art. 227 of the Treaty of Versailles because this article was in disagreement with art. 1 of the American Constitution, and although art. 227 was to be carried out outside U.S. territory), the Belgians have never contended that their Constitution applies outside Belgium proper: thus in 1893 they decided that it would not be applicable to any colonial possession Belgium might acquire.

Pursuant to this, as the provisions of the Belgian Constitution do not apply abroad, Belgian military courts functioning abroad could be charged with any kind of jurisdiction, (N.B. The same applies to civil courts which might be instituted abroad) and could be called upon to apply any kind of law provided of course this were done by proper legislation.

From this follows that any kind of courts could be instituted abroad, either civil or military or mixed, that such courts could comprise either Belgian judges only, or judges of several nationalities, that such courts could be charged with applying either Belgian law or an international convention, or foreign law, and that even a system such as provided in art. 228-230 of the Versailles Treaty could be put into operation, provided of course the law to be applied were drafted and clearly stated.

It is needless to say that I have in this paper considered the problem exclusively under the angle of Belgian law, and that, if Belgian law included such provisions as sections 363-364-365 of the "Laws and Usages of War on Land" (British Manual of Military Law, Chapter XIV) that my views upon the matter would be different, it is also needless to say that I do not advocate the aforesaid solution. (Cf. my other note).

- (5) Does the law of your country adequately provide for the punishment of all war crimes which have been committed in your country?

A complete answer to this question cannot be given at this moment because all war crimes committed in Belgium are not known here.

However, among the war crimes we know of, there are a certain number as to which it is doubtful whether the law provides a punishment, others in respect of which Belgian law is certainly inadequate.

Here are a few examples:

- (1) Causing death by starvation or exposure, by depriving persons of shelter and/or means of sustenance (e.g. order No. 24220 of Col. Nikolaesku, Chief of Staff of Rumanian 14th Division: Molotoff Notes, H.M. Stationery Office 1942, p.6.)

- (2) Mass Murder (a) by excessive removal of foodstuff
(b) by wilful destruction of foodstuff
- (3) Forcing civilians to act as a screen for advancing units.
- (4) Ordering civilians to remove mines in a mine-field.
- (5) Enforcing enrolment in the army of civilians belonging to territories which have been forcibly annexed before any Peace Treaty (e.g. civilians of Alsace-Lorraine, of Eupen-Malmédy, etc...)
- (6) Annexation of territory (whereby compulsory enlistment of citizens, and consequently the killing of such citizens is made possible).
- (7) The official responsible for a regulation whereby the infliction of collective or other penalties, illegal by local law, is made possible.
- (8) The official responsible for a regulation whereby arrest, segregation, deportation, abduction or any removal of populations or individuals are provided in violation of the local law.
- (9) Any crime committed by order of a superior authority.
- (10) Death caused by action of a Court of Justice: - constituted either
 - { regularly, Edith Cavell case, Brussels, October 1915,
 - or { irregularly, case of Captain Fryatt, Bruges, 1916.
- with or without jurisdiction,
- delivering a sentence)in execution of a law
)in violation of a law.
- (6) In case the answer to question 5 is in the negative, what are the legal and political difficulties in the way of a change of the existing law in the direction of making such adequate provision?

The answer to this question is the same as that under question 4.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de BAER'S SUB-COMMITTEE

NATIONAL LAWS AND JURISDICTIONS

Answers to Questionnaire

FRANCE
(Monsieur Simon)

- (1) In What circumstances, if any, does the law of your country confer upon courts jurisdiction to punish criminal acts committed abroad:

(a) by nationals; (b) by aliens?

Par rapport aux infractions commises à l'étranger, la législation pénale française prévoit que:-

- 1) lorsque l'agent est un Français, les infractions les plus graves peuvent être poursuivies en France,
- 2) lorsque l'agent est un étranger, il peut être puni pour les crimes dirigés contre la sûreté ou le crédit de l'Etat français.

(a) Les crimes attentatoires à la sûreté de l'Etat ou de contrefaçon du sceau de l'Etat, de monnaies nationales ayant cours, de papiers nationaux, de billets de banque autorisés par la loi, commis hors du territoire de la France, peuvent être jugés ou poursuivis en France, d'après les dispositions des lois françaises, quelle que soit la nationalité des auteurs et des complices; mais il est nécessaire à tous points de vue, de distinguer, suivant que les auteurs ou complices de ces infractions sont de nationalité française ou étrangère:-

Si les faits dont il s'agit dans l'article 7 du Code d'Instruction Criminelle sont commis par un Français, celui-ci, avant son retour en France, peut être poursuivi et jugé par contumace (Code d'Instruction Criminelle, art.5); tandis que, s'ils sont commis par un étranger, l'article 7 exige comme condition préalable de la poursuite que cet étranger soit arrêté en France, ou que le gouvernement français ait obtenu son extradition.

L'étranger, à qui il est reproché d'avoir commis, hors de France, un crime contre la sûreté ou le crédit de l'Etat français et qui se trouve en fait aux mains de l'autorité française, ne peut pas échapper à l'application de la loi pénale française

en fournissant les justifications prévues par l'article 5, paragraphe 4 du Code d'Instruction Criminelle ("aucune poursuite n'a lieu contre le Français qui justifie qu'il a été jugé définitivement à l'étranger pour les faits qui lui sont reprochés, et, en cas de condamnation, qu'il a subi ou prescrit sa peine ou obtenu sa grâce").

Ces conditions sont complétées par les articles 75 et suivants du Code Pénal qui définissent et punissent les crimes et délits contre la sûreté extérieure de l'Etat (Décret-loi du 29 juillet 1939, modifiant les articles 75 à 85 du Code Pénal).

(b) Les autres crimes définis et punis par la loi française ne sont susceptibles d'être poursuivis et jugés en France, lorsqu'ils ont été perpétrés hors du territoire, que s'ils sont commis par un Français (article 5, alinéa 2 du Code d'Instruction Criminelle:- "tout Français qui, hors du territoire de la France, s'est rendu coupable d'un fait qualifié de délit par la loi française, peut être poursuivi et jugé en France, si le fait est puni par la législation du pays où il a été commis. Il en sera de même si l'inculpé n'a acquis la nationalité française qu'après l'accomplissement du crime ou du délit").

- (2) To what extent, if any, does the territorial principle of your criminal law confer upon your courts jurisdiction in respect of criminal acts committed by aliens on the high seas or from the air above the high seas against ships or persons on board ships flying the flag of your country?

La loi pénale française étant l'expression de la souveraineté s'applique dans toute l'étendue du territoire où s'exerce cette souveraineté aux Français comme à l'étranger ("les lois de police et de sûreté obligent tous ceux qui se trouvent sur le territoire" - Code civil, article 3.).

La notion juridique du territoire ne comprend pas seulement l'espace contenu dans les limites de l'Etat, mais aussi les autres lieux où la souveraineté exerce son autorité, sa juridiction, c'est-à-dire:-

- 1) la mer territoriale;
- 2) les navires;
- 3) les lieux occupés en dehors des frontières, soit en temps de paix, soit en temps de guerre par nos armées;
- 4) les pays hors chrétienté, où les consuls ont juridiction en matière pénale;
- 5) le territoire aérien.

Les tribunaux français ont donc compétence pour juger les crimes commis par des étrangers en haute mer, ou dans les airs au-dessus de la haute mer, contre les navires ou les personnes se trouvant à bord des navires battant pavillon français.

- (3) What law do the Military Courts of your country apply? Do they apply a special military code or the ordinary municipal criminal code? Are they authorised to apply "martial law", "the law of war" or "international law"? With regard to what categories of persons have they jurisdiction? Does the latter embrace both soldiers and civilians? In the matter of jurisdiction over civilians, what is the position with regard to enemy nationals: (1) in national territory, (2) in enemy territory in the event of your armed forces occupying parts of enemy territory? To what extent is the jurisdiction of military courts in your country affected by the territorial principle (if any) of your criminal law, i.e., the principle that courts have jurisdiction to punish such acts only as are committed in national territory? (The object of this question is to elicit to what extent, if any, the general terms of the jurisdiction conferred upon military courts in respect of war crimes exclude or modify the application of the territorial principle).

En droit français, les infractions peuvent être spéciales à deux points de vue distincts:-

Elles peuvent être spéciales parce qu'elles résultent de la violation non des devoirs communs à tous les membres de la société, mais des devoirs particuliers qui s'imposent à certaines personnes à raison de leur état. Parmi ces dernières, les plus importantes sont les infractions spécifiquement militaires énumérées au Livre II du Code de Justice Militaire.

Même en temps de paix, les tribunaux militaires composés de militaires sous la présidence d'un Conseiller à la Cour d'Appel ont compétence pour juger:-

- 1) les crimes et délits militaires commis en quelque lieu que ce soit, par des militaires;
- 2) les crimes et délits de droit commun commis par des militaires dans les casernes, quartiers, établissements militaires, et chez l'hôte.

En revanche, les tribunaux répressifs de droit commun sont compétents pour juger les infractions de droit commun commis par des militaires hors des casernes, quartiers, établissements militaires, ou hors de chez l'hôte.

En période de guerre ou de troubles civils, la compétence des juridictions militaires est étendue, ratione materiae et ratione personae puisque celles-ci:-

(a) aux armées en opérations ou dans les circonscriptions, déclarées en état de guerre, ont compétence, à l'égard de tous crimes et délits commis par des individus, même civils, employés à l'armée ou autorisés à suivre l'armée; aux armées opérant en présence de l'ennemi, ont compétence à l'égard de tous individus, même civils, même non attachés à l'armée, même étrangers, auteurs de crimes ou délits prévus par les articles 192 à 248 du Code de Justice Militaire, c'est-à-dire, d'infractions de nature à porter atteinte à la sûreté de l'armée; (b) lors de l'état de siège déclaré en cas de péril imminent, résultant d'une guerre étrangère, se voient déférer le jugement des crimes et délits quels qu'en soient les auteurs contre la sûreté

extérieure ou intérieure de l'Etat, la Constitution, l'ordre et la paix publics, prévus par le Code Pénal et même plus généralement, de tous les crimes et délits portant atteinte à la Défense Nationale; (c) lors d'état de siège déclaré en cas de péril imminent résultant d'une insurrection à main armée, se voient déférer le jugement des crimes quels qu'en soient les auteurs contre la sûreté extérieure ou intérieure de l'Etat, l'ordre et la paix publics, prévus à la fois par le Code Pénal et Code de Justice Militaire et les crimes connexes.

Les étrangers habitant la France ou se trouvant en territoire français sont soumis aux mêmes règles que les Français, en ce qui concerne les crimes et délits énumérés plus haut.

Au cas où les armées françaises occuperaient un territoire étranger, celui-ci est réputé, au point de vue de l'application de la loi pénale, territoire français. En effet, l'article 164 du Code de Justice Militaire dispose:-

"Sont justiciables des tribunaux militaires, si l'armée est soit sur le territoire ennemi, soit sur un territoire étranger dont elle assure l'occupation, ou sur lequel elle exerce un mandat, tous individus inculpés, soit comme auteurs, soit comme complices d'un des crimes ou délits punis par les articles 192 à 248 inclusivement du présent code".

L'interprétation dominante de ces dispositions est que les juridictions des armées françaises opérant en territoire ennemi ou occupé, ou dans les zones rebelles des protectorats, ou des pays sous mandat, ont compétence à l'égard de toutes personnes pour toutes les infractions même non militaires, même prévues par le Code pénal ordinaire ayant porté atteinte ou simplement de nature à porter éventuellement atteinte à la sûreté d l'armée.

- (4) In case the law of your country does not authorise civil or/and military tribunals to exercise jurisdiction in respect of crimes committed abroad, what are the legal and political difficulties in the way of a change in the existing law in the direction of conferring such jurisdiction upon military or civil tribunals or both?

Il n'y a aucune difficulté à modifier la législation existante, en ce qui concerne l'extension de la compétence des juridictions civiles et militaires par rapport aux infractions commises à l'étranger.

- (5) Does the law of your country adequately provide for the punishment of all war crimes which have been committed in your country?

Les dispositions du droit pénal français couvrent "tout les crimes de guerre".

Les difficultés ne viendront pas de l'insuffisance des incriminations; elles résulteront plutôt de l'excuse absolutoire de l'article 64 du Code Pénal, que, à défaut d'autres exceptions spéciales, les inculpés ne manqueront pas d'invoquer.

- (6) In case the answer to question 5 is in the negative, what are the legal and political difficulties in the way of a change of the existing law in the direction of making such adequate provision?

Il sera nécessaire de modifier la législation pénale sur ce point, ce qui pose la question de la rétroactivité: cet obstacle n'est pas insurmontable en France.

CONFIDENTIAL: NOT FOR PUBLICATION

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de BAER'S SUB-COMMITTEE

NATIONAL LAWS AND JURISDICTIONS

Answers to Questionnaire

GREAT BRITAIN
(Professor Lauterpacht)

- (1) In what circumstances, if any, does the law of your country confer upon courts jurisdiction to punish criminal acts committed abroad:

(a) by nationals; (b) by aliens?

(a) British Courts have no jurisdiction to try and to punish their nationals for criminal acts committed abroad, save where such jurisdiction has been expressly created by statute. The number of such statutory exceptions is not great. Examples of such are: Treason, Murder, Perjury, Bigamy.

(b) British Courts have no jurisdiction to try or to punish criminal acts committed abroad by aliens. To this there is only one minor statutory exception (Sect. 687 of the Merchant Shipping Act 1894, 57 & 58 Vict.C.60)

- (2) To what extent, if any, does the territorial principle of your criminal law confer upon your courts jurisdiction in respect of criminal acts committed by aliens on the high seas or from the air above the high seas against ships or persons on board ships flying the flag of your country?

Except in the case of piracy jure gentium criminal acts committed by aliens on the high seas are regarded by English law in the same way as acts committed by them abroad, save that any act committed or taking effect in a British ship is regarded in the same way as if committed or taking effect in British territory.

It would seem therefore that criminal acts committed by aliens from the air above the high seas against ships or persons on board ships flying the British flag, would be within the jurisdiction of the appropriate British court.

- (3) What law do the military courts of your country apply? Do they apply a special military code or the ordinary municipal criminal code? Are they authorised to apply "martial law", "the law of war" or "international law"? With regard to what categories of persons have they jurisdiction? Does the latter embrace both soldiers and civilians? In the matter of jurisdiction over civilians, what is the position with regard to enemy nationals: (1) in national territory, (2) in enemy territory in the event of your armed forces occupying parts of enemy territory? To what extent is the jurisdiction of military courts in your country affected by the territorial principle (if any) of your criminal law, i.e., the principle that courts have jurisdiction to punish such acts only as are committed in national territory? (The object of this question is to elicit to what extent, if any, the general terms of the jurisdiction conferred upon military courts in respect of war crimes exclude or modify the application of the territorial principle).

For the purpose of answering this question it is necessary to distinguish between the law applied by ordinary courts-martial in the narrower sense of the word and that applied by military courts under martial law. The first is the law mainly laid down in the Army Act, the Naval Discipline Act and the Air Force Act; it governs the conduct and the internal discipline of officers and soldiers of the British armed forces in time of peace and war, both at home and abroad, it is administered by courts-martial - regimental, district, or general - established under these Acts. On the other hand, the law applied by military courts under martial law comes into operation: (a) in relation to the civilian population in connection with the suspension of the ordinary law in case of invasion, riots and insurrection, and (b) in connection with the application and enforcement of the laws and customs of war by the armed forces of the Crown in occupied enemy territory or in the theatre of war operations generally.

For the purposes of this questionnaire we are concerned only with the latter courts as described under (b). These courts, in addition to enforcing the laws and regulations laid down by the commanding general in charge of the occupied territory, apply the laws and customs of war as set forth in Chapter XIV of the Manual of Military Law (1929) (Amendments No.12) notified by the Army Council in the Army Orders for January, 1936. Although Chapter XIV of the Military Manual has not been given statutory force it is, in general, an exposition of the conventional and customary rules of international law as understood by Great Britain. The business of the military courts applying that law is not to apply English criminal law either in its substantive or procedural sense. As said, they apply international law as well as the specific law proscribed by the commanding general in charge of the occupied territory. The law which they apply covers, accordingly, both civilians and members of the enemy armed forces. It is highly improbable that they are bound

by the territorial principle of English criminal law. In fact their primary purpose is to punish offences committed in occupied enemy territory or in the theatre of war operations generally.

[At the same time it does not seem to be essential that military courts engaged in applying the laws of usages of war (including the prosecution of war crimes) should be established either within occupied territory or with the immediate vicinity of military operations. The view has been widely held that when Great Britain is at war any portion of its territory is, in relation to enemy aliens, within the "zone of operations". It would appear therefore that the operation of military courts in the wider sense (i.e., courts applying the laws and usages of war) is not necessarily confined to occupied territory or to the area of military operations. Similarly, courts-martial established under the Army Act (or the Naval Discipline Act and Air Force Act) may have conferred upon them by statute jurisdiction over persons, or in respect of acts, otherwise not subject to military law in the narrower sense. Thus in 1914 the Defence of the Realm Consolidation Act (5 Geo,5.c.8) provided for punishment by courts-martial of certain categories of persons assisting the enemy as if they were subject to military law and had on active service committed an offence under the Army Act. The Treachery Act, 1940, which provides for death penalty for acts "designed or likely to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty's Forces, or to endanger life", laid down that an alien enemy may be prosecuted for such offences before a courts-martial as if he were at the time of the commission of the offence subject to military law. According to the Naval Discipline Act there are subject to the Act spies and persons on board H.M. ships endeavouring to seduce persons subject to the Naval Discipline Act from their duty of allegiance."]

- (4) In case the law of your country does not authorise civil or/and military tribunals to exercise jurisdiction in respect of crimes committed abroad, what are the legal and political difficulties in the way of a change in the existing law in the direction of conferring such jurisdiction upon military or civil tribunals or both?

In view of the answer to Question 3 it is not considered necessary to answer Question 4 in so far as it refers to military tribunals. With regard to ordinary criminal courts, it is clear that they cannot, according to existing law, exercise jurisdiction with regard to offences committed abroad (except, possibly in the matter of offences committed on the high seas or from the air on the high seas and affecting persons on board a British ship.). I do not know of any serious legal

or political difficulty which would make it impossible for Parliament to alter the existing law in regard to specified categories of war crimes committed abroad. The fact that, as mentioned above, ordinary courts-martial in Great Britain have, by virtue of special war legislation, had conferred upon them jurisdiction over civilians with regard to a number of offences, shows that there is no particular difficulty in the way of modifying established principles, in particular those of a jurisdictional character, in order to meet situations arising out of the war.

- (5) Does the law of your country adequately provide for the punishment of all war crimes which have been committed in your country?
- (6) In case the answer to question 5 is in the negative, what are the legal and political difficulties in the way of a change of the existing law in the direction of making such adequate provision?

It is believed that the answer to these questions is covered by the answers to question 3 and 4.

CONFIDENTIAL: NOT FOR PUBLICATION

D.11.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de BAER'S SUB-COMMITTEE

NATIONAL LAWS AND JURISDICTIONS

Answers to Questionnaire

CZECHOSLOVAKIA
(Dr Benes)

- (1) In what circumstances, if any, does the law of your country confer upon courts jurisdiction to punish criminal acts committed abroad:

(a) by nationals; (b) by aliens?

(a) According to the provisions of Section 36 of the Criminal Code of 1852, 27 May, No.117 RGB for crimes committed abroad a Czechoslovak subject, if arrested in the act, will not be extradited, but will be dealt with according to the provisions of the Criminal Code and without regard to the laws of the country in which the crimes has been committed. If, however, he has already been punished abroad for the same act, the sentence imposed upon him according to the provisions of this Code should take due regard to his previous punishment.

Thus, as far as crimes of Czechoslovak subjects committed abroad are concerned, the Czechoslovak Criminal Code, has accepted to its full extent the principle of personality.

(b) Section 38 of the Czechoslovak Criminal Code deals with the punishment of crimes committed abroad by foreigners. It lays down:

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

Accordingly, to a certain extent, - at least as far as certain crimes are concerned - also foreigners can be punished by Czechoslovak courts for acts committed abroad. Yet, on the whole, it can be said that the majority of offences committed by foreigners abroad cannot - according to the present legal position - be dealt with by Czechoslovak courts.

- (2) To what extent, if any, does the territorial principle of your criminal law confer upon your courts jurisdiction in respect of criminal acts committed by aliens on the high seas or from the air above the high seas against ships or persons on board ships flying the flag of your country?

The Czechoslovak legal system recognizes the universal principle of international law that ships as well as all things and persons thereon remain during the time they are on the open sea under the jurisdiction of the State under whose flag they sail. Accordingly it is necessary to consider criminal acts committed on vessels sailing under the Czechoslovak flag as offences committed on Czechoslovak territory. It is absolutely irrelevant whether the attack against vessels sailing under the Czechoslovak flag is directed from another vessel or from the air above the high seas.

- (3) What law do the military courts of your country apply? Do they apply a special military code or the ordinary municipal criminal code? Are they authorised to apply "martial law", "the law of war" or "international law"? With regard to what categories of persons have they jurisdiction? Does the latter embrace both soldiers and civilians? In the matter of jurisdiction over civilians, what is the position with regard to enemy nationals: (1) in national territory, (2) in enemy territory in the event of your armed forces occupying parts of enemy territory? To what extent is the jurisdiction of military courts in your country affected by the territorial principle (if any) of your criminal law, i.e., the principle that courts have jurisdiction to punish such acts only as are committed in national territory? (The object of this question is to elicit to what extent, if any, the general terms of the jurisdiction conferred upon military courts in respect of war crimes or modify the application of the territorial principle).

Czechoslovak Military Courts make use of a special Penal Code / Act of 1855, 15 January, No.19 RGB / and of a special Military Penal Procedure / Act of 8 July, 1912, No. 131-12 RGB/.

Provisions concerning "martial law" in military law are the same as in civil penal law. Military courts can use martial law only in special cases according to specific provisions of the Military Penal Procedure.

The Military Penal Procedure provides in Section 11 for the extent of the jurisdiction of Military Courts. It enumerates persons who are subjected to the jurisdiction of military courts for all criminal acts. In addition to the military and members of the gendarmerie and a few military groups of minor importance, also prisoners of war and hostages which have been placed under Military or police protection, fall under the jurisdiction of military courts. According to Section 12 of the above Military Penal Procedure prisoners of war and hostages are subjected to military penal jurisdiction only for acts committed in the period during which their status subjected them to the jurisdiction of military tribunals. According to Section 13 also civilians can be subjected to the jurisdiction of military courts for specific acts - e.g. recruits for refusing to obey the enlistment order, those