

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

According to the provisions of the Decree of 3rd November, 1939:

"In all cases where a Military Appeal Tribunal has been established, persons sentenced by Military Tribunals cannot appeal to the Court of Appeal (Cour de Cassation) against the decisions of Military Tribunals and of Military Appeal Tribunals."

In peace-time, in accordance with Article 100 of the Code de Justice Militaire, judgments delivered by Military Tribunals can only be challenged by way of an appeal to the Court of Appeal, for the reasons and under the conditions set out by Article 407 et seq of the Code d'Instruction Criminelle. A convicted person has three whole days, after that on which his sentence has been notified to him, in which to inform the Clerk of the Court of his desire to appeal.

6. The Stress placed on Expeditious Procedure

The care shown in ensuring to the accused his essential rights during trial is balanced by an attempt at ensuring that there shall be no unnecessary delays arising out of purely technical disputes.

Article 12 of the Charter of the International Military Tribunal for the Far East makes the following provisions in its paragraphs a - c (which are substantially the same as those made in Article 18 of the Charter of the Nuremberg International Military Tribunal):

"Conduct of Trial. The Tribunal shall:

- a. Confine the trial strictly to an expeditious hearing of the issues raised by the charges.
- b. Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever.
- c. Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges."

Similar provisions were laid down by the Pacific September and December and by the China Regulations.

The clearest examples of the attempt to avoid miscarriage of justice through unnecessary legal technicality are provided by the rules of evidence applied in war crime trials, to which attention is now turned.

7. Rules of Evidence in General

In general the rules of evidence applied in War Crime trials are less technical than those governing the proceedings of courts conducting trials in accordance with the ordinary criminal law. This is not to say that any unfairness is done to the accused; the aim has been to ensure that no guilty person will escape punishment by exploiting technical rules. The circumstances in which war crime trials are often held make it necessary to dispense with certain such rules. For instance many eye witnesses whose evidence was needed in trials in Europe had in the meantime returned to their homes overseas and been demobilized. To transport them to the scene of trial would not have been practical, and it was for that reason that affidavit evidence was permitted and so widely used. In the Belsen trial, the Prosecutor pointed out that although the trial was held under British law, the Regulations had made certain alterations in the laws of evidence for the obvious reason that otherwise many people would be bound to escape justice because of movements of witnesses. A number of affidavits had been taken from ex-prisoners from Belsen, but many of the deponents had since disappeared. Therefore the Prosecution would call all the witnesses available and would then put the affidavits before

the Court and ask for the evidence contained therein to be accepted.

Article 13 (Evidence) of the Charter of the Military Tribunal for the Far East provides as follows:

"a. Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible."⁽¹⁾

The President's order of 2nd July 1942, appointing a Military Commission for the trial of the alleged saboteurs,⁽²⁾ included the provision that "Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man." The provisions laid down in overseas theatres were clearly influenced by this drafting.

The Mediterranean Regulations (Regulation 10) provide expressly that the technical rules of evidence shall not be applied but any evidence shall be admitted which, in the opinion of the president of the Commission, has any probative value to a reasonable man. Similar provisions are contained in paragraph 3 of the European Directive, in Regulation 16 of the Pacific September Regulations, in Regulation 5(d) of the SCAP Rules and in Regulation 16 of the China Regulations.

In the Mediterranean Regulations it is added that without limiting the scope of this rule the following in particular will apply:

"(a) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the president of the commission, unable to attend without undue delay, the commission may receive secondary evidence of statements made by or attributed to such witness.

"(b) Any document purporting to have been signed or issued officially by any member of any allied or enemy force or by any official or agency of any allied, neutral or enemy government shall be admissible as evidence without proof of the issue or signature thereof.

(1) With the exception of the omission of the final sentence, Article 19 of the Charter of the International Military Tribunal of Nuremberg has the same wording.

(2) The Case Ex Parte Quirin, 317 U.S.1 (1942).

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

Similar but not identical provisions are contained in other United States instruments. ^{the} In SCAP Rules, for instance, it is also provided (Regulation 5(d) (2)) that the Commission shall take judicial notice of facts of common knowledge, official government documents of any nation and the proceedings, records and findings of Military or other Agencies of any of the United Nations, a provision which corresponds to Art. 21 of the Charter of the International Military Tribunal, annexed to the Four-Power Agreement of 8th August 1945.

The Royal Warrant provides that, except in so far as therein otherwise provided, the Rules of Procedure applicable in a Field General Court Martial of the British Army shall be applied so far as applicable to the Military Courts for the trial of war criminals. In so far as rules of evidence are concerned exceptional provisions are made by paragraph 8 (i) and 8 (ii) of the Royal Warrant. Of

these, the former runs as follows:

"8 (1) At any hearing before a Military Court convened under these Regulations the Court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the Court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a Field General Court Martial, and without prejudice to the generality of the foregoing in particular:-

- (a) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the Court, unable so to attend without undue delay, the Court may receive secondary evidence of statements made by or attributable to such witness;
- (b) any document purporting to have been signed or issued officially by any member of any Allied or enemy force or by any official or agency of any Allied, neutral or enemy government, shall be admissible as evidence without proof of the issue or signature thereof;
- (c) the Court may receive as evidence of the facts therein stated any report of the "Comite International de la Croix Rouge" or by any representative thereof, by any member of the medical profession or of any medical service, by any person acting as a "man of confidence" (homme de confiance), or by any other person whom the Court may consider was acting in the course of his duty when making the report;
- (d) the Court may receive as evidence of the facts therein stated any depositions or any record of any military Court of Inquiry or (any Summary) of any examination made by any officer detailed for the purpose by any military authority;
- (e) the Court may receive as evidence of the facts therein stated any diary, letter or other document appearing to contain information relating to the charge;
- (f) if any original document cannot be produced or, in the opinion of the Court, cannot be produced without undue delay, a copy of such document or other secondary evidence of its contents may be received in evidence;

It shall be the duty of the Court to judge of the weight to be attached to any evidence given in pursuance of this Regulation which would not otherwise be admissible."

A study of the application of these rules shows that the practice of the Courts has been to interpret them widely, so as to render admissible a considerable range of evidence and to allow the Court then to decide what weight to place on each item

8. The Admissibility of Affidavits

Much reliance as evidence has been placed during war crime trials on affidavits, that is to say on written sworn and signed statements by a witness. Defence Counsel have more than once protested against such evidence, mainly on the ground that, unlike a witness in the box, an affidavit cannot be cross-examined, but there can be no doubt as to their admissibility at least in proceedings before such courts as operate under the rules quoted under the last heading.

In this connection certain arguments which arose during the Belsen Trial are worth quoting, since the way in which they were decided strongly influenced the British practice in subsequent trials.

In his Opening Speech, the Prosecutor pointed out that although the trial was held under British law, the Regulations had made certain alterations in the laws of evidence for the obvious reason that otherwise many people would be bound to escape justice because of movements of witnesses. A number of affidavits had been taken from ex-prisoners from Belsen, but many of the deponents had since disappeared. Therefore the Prosecution would call all the witnesses available and would then put the affidavits before the Court and ask for the evidence contained therein to be accepted.

On October 3rd, the Judge Advocate asked the Prosecutor what he relied on in putting in the affidavits. The Prosecutor replied that he relied on Regulation 8 (i).

The Judge Advocate asked whether Regulation 8 (i) (a) was not intended to be read, at any rate so far as an affidavit was concerned, to the effect that the Court had first to be satisfied that the witness

was dead, or was unable to attend or to give evidence or was, in the opinion of the Court, unable to attend without undue delay.

The Prosecutor replied that the general introductory provision of Regulation 8 (1) made paragraph (a) academic by stating that Regulation 8 (1)(a) was "without prejudice to the generality of the foregoing". To the question whether the Prosecutor took the view that, even if there was a witness in the flesh who could be obtained, the Prosecutor would still be inclined to rely on the affidavits, the Prosecutor replied that technically he should take that view. It would, of course, be a matter for the Court to decide whether they considered that the statement or document appeared to be of assistance..

The Judge Advocate advised the Court that the regulation was so wide that the Prosecution's view of it was a correct one.

Captain Phillips then objected to the use of affidavit evidence, which would generally not be admissible before a Court. It was, he said, only admissible, if at all, as a result of Regulation 8 (1), and that Regulation, in his submission, was merely permissive. It said that the Court might take into consideration certain types of evidence. The objection of the Defence was that this was not a case in which the Court should receive such evidence. The Defence did not say that the Court could not do so, but they said that the Court had a discretion and that it should exercise its discretion here in favour of the Defence by refusing to accept the evidence. The whole of the evidence contained in these affidavits was, in the submission of the Defence, completely unreliable, thoroughly slipshod and incompetent.

The Judge Advocate said that it was entirely a matter for the Court's discretion whether they accepted this evidence or not. It was for the Court to consider what weight should be attached to any affidavit. In his view, all these exhibits would be admissible in evidence, but what was left for the Court to decide was how much weight

they would attach to any particular document, having heard the whole of the circumstances and having considered it in the light of other evidence.

The Court decided that they would receive in evidence the affidavits tendered by the Prosecution. They added, however, that when they came to decide what weight should be attached to any particular affidavit, they would bear in mind any observation which the Defence might address to them.

On 19th September, 1945, the affidavit of Colonel Johnston was put in by the Prosecutor. One of the Defending Officers objected to three paragraphs of the affidavit on the ground that they contained merely comment on points which it was the Court's duty to decide. A difficulty arose from the fact that the Court must know what was in a paragraph in order to decide whether to admit it or not. The Prosecutor pointed out that this was inevitably so in a system of Courts Martial, under which the Court was judge both of law and of fact. The Court must, in fact read themselves, or have read to them, the paragraphs in order that they might consider the legal point; then they must do the impossible and say "we refuse to allow this to be put before us and in our capacity of judges of fact, we will ignore them, although in our capacity of judges of law we must consider them first".

One of the paragraphs objected to was left out on the advice of the Judge Advocate, who remarked that the deponent was going rather outside his province. As to the two remaining paragraphs, the Court decided that there should not be entered the words "In short such orders and the carrying out of such orders was mass murder" and a reference to "accomplices in mass murder".

During the hearing of the evidence for the defence, the question arose whether, at that stage of the trial, affidavits made by witnesses who had been heard by the Court in person could be put in, in order to

show the unreliability not of the witnesses involved but of the affidavits as a whole, all of them having been produced by the same War Crimes Investigation Unit.

The Defence argued that it was essential, in the present case, where the evidence for the Prosecution was largely documentary, for the Defence to be able to challenge the whole system whereby that documentary evidence was produced by pointing out discrepancies between what witnesses had said in Court and what they had said in written statements not yet entered as evidence.

This was opposed by the Prosecution on the ground that the examination and the cross-examination of the respective witnesses was the proper time to point out discrepancies between the affidavits and the oral evidence of witnesses and that if the defending officers had missed this opportunity, they could not submit the affidavit at a time when the witnesses had no opportunity of explaining the alleged discrepancy in the course of their cross-examination.

The Court ruled that, if there were any witnesses who gave evidence in Court personally and were cross-examined in regard to affidavits that they had made, and if those affidavits were not put in as evidence, the Court would allow any Defending Officer to put in such affidavits during the course of his defence, for the purpose of establishing the manner in which these affidavits had been taken.

On the other hand the Court felt that, in the case of witnesses who gave evidence in person and were not cross-examined in regard to their affidavits, the Court should not admit such affidavits, because they would carry no weight with them unless accompanied by a cross-examination of the witnesses so that the Court could appreciate exactly what their evidence would be in regard to the taking of the affidavits.

During the trial of Erich Killinger and four others by a British Military Court, Wuppertal, November 26th - December 3rd, 1945, before

the entering of the affidavit evidence for the Prosecution, the Defence applied for one deponent to be produced in person. The Defence had been given to understand that the British Officer in question would be available for questioning. The Court decided, after hearing argument, that the deponent could not be produced "without undue delay" (in the wording of Regulation 8 (1) (a)), and the President of the Court added the significant statement that "we realise that this affidavit business does not carry the weight of the man himself here, as evidence, and when it is read we will hear what objections you have got to anything that the affidavit says, and we will give that, as a Court, due weight". The President's words may fairly be taken as a reference to the fact that if evidence is given by means of an affidavit the person providing the evidence is not present in Court to be examined, cross-examined and re-examined.

Nevertheless, in his summing up, the Judge Advocate in the trial of Karl Adam Golkel and thirteen others, by a British Military Court, Wuppertal, Germany, 15th - 21st May, 1946, stressed that: "There is no rule that evidence given in the witness box must be given more weight than evidence, statements, taken on oath outside the court. As I said earlier, take into account all the circumstances..." A discussion of the relative value as evidence of pre-trial statements produced in Court in documentary form and of oral testimony delivered in the witness box had arisen from the fact that four of the accused withdrew in Court wholly or in large part the evidence which they had given in pre-trial statements against five other accused. It may fairly be said that five accused, Pahl, Pilz, Limberg, Thilker and Bott, were found not guilty as a direct result of this fact. There were also less sensational but similar recantations of evidence relating to others among the accused.

9. The Admissibility of Pre-Trial Statements by one

Accused Against Another

In the Special Order appointing the Commission which conducted the trial of Albert Bury and "ilhelm Hafner^a/United States Military Commission,

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sitting at Freising, Germany, 15th July, 1945, power was granted to it to make such rules for the conduct of the proceedings, consistent with the powers of a Military Commission, as were deemed necessary for a full and fair trial. The Commission announced at the outset that its proceedings were to "be governed generally by the rules of procedure and evidence as laid down in the Manual for Courts-Martial with the following changes. Statements made by the accused in the course of investigations which appear to be regularly and properly authenticated will be admitted in evidence, subject to such attack as the accused may desire to make. The statements made by the accused that are admitted in evidence will be received generally against all of the accused subject to such rebuttal as the accused or any of them may elect to make..."

During the Belsen Trial, on the 5th October, objection was raised by Major Cranfield, one of the Defence Counsel, to the admission of an affidavit made by the accused Kopper. It was submitted that the affidavit was objectionable as evidence against any of the other accused.

Major Cranfield pointed out that while this affidavit was admissible under Regulation 8 of the Royal Warrant, that provision was merely permissive. He called on the Court to reject the evidence as being completely worthless. The Prosecution's own witnesses had called Kopper an informer and one who lied. In support of his argument he quoted a passage from page 94 of the British Manual of Military Law governing the procedure followed in Courts Martial: "If the Prosecution find it necessary to call one suspected participator in a crime as a witness against the others the proper course is not to arraign him or, if he has been so arraigned, to offer no evidence and to take a verdict of acquittal." The reason was clear. The spectacle of one criminal turning on his fellow criminals to save his own skin was not one which was attractive to British justice.

The Prosecutor submitted that the meaning of the Regulation was that the Court could admit evidence that would not otherwise be admitted, but that if they found that they might accept it then they must accept it,

subject to such weight as they might attach to it afterwards. The Court had not a discretion to say: "all this evidence is legal and we will accept this part and reject that part". The case came within a specific category mentioned under Regulation 8 (i). Any deposition, any summary, or any examination made by any officer detailed for the purpose by any military authority was included, and the Court had heard that Major Champion and Major Smallwood, (two officers who had appeared as witnesses), were in fact Both detailed. Regulation 8 (ii) rendered it permissible to enter evidence by one accused against another.

Replying, Major Cranfield said that in his view the object of Regulation 8 (i) was to introduce into the law of procedure governing the Court the proposition that if one of the accused were proved a member of a unit, then evidence against another member of that unit would be evidence against the accused, merely because he was a member of the unit. Regulation 8 (ii) did not render the affidavit admissible.

After quoting Regulation 8 (i) the Judge Advocate said that he saw no reason in law why the Court should reject this affidavit. They would have to read the document and then say whether they were satisfied that it appeared to be an authentic document on the face of it. They must then say whether it was a document which would help in proving or disproving the charges.

The Court decided that the document would be admitted, while reserving the right to judge what weight to place on it.

One view of the attitude which a court might possibly be expected to take towards such evidence, whether in affidavit form or from a "live" witness, is provided, however, by the Judge Advocate in the trial of Werner Rohde and eight others by a British Military Court at Wuppertal, Germany, on 29th May - 1st June, 1946, who in his summing up, pointed out that a great deal of the evidence in the case was provided by accomplices "that is, persons who are also charged, or obviously could be charged, with having taken part in the same offence." He warned the Court "that the

evidence of an accomplice must be regarded always with the greatest suspicion. Every accomplice is giving evidence which is of a tainted nature. He may have many reasons for not telling the truth himself. He may be trying to exculpate himself and throw the blame on somebody else, and there may be a hundred and one reasons why he should not be telling the truth.... This does not mean that you cannot believe him or you cannot accept the evidence of an accomplice, but it means that before you do so you must first caution yourselves on those lines. If, having done so and in spite of having so warned yourselves, you believe that what he is saying is true, you are perfectly free to act upon his evidence." He added: "When you are looking for corroboration of an accomplice's evidence, one accomplice cannot corroborate another."

In making these remarks the Judge Advocate was applying to the case the practice followed in English Criminal Law, according to which, "where a witness was himself an Accomplice in the very crime to which an indictment relates, it is the duty of the judge to caution the jury strongly as to the invariable danger of convicting upon such evidence without corroboration. Moreover this corroboration must confirm not merely a material particular of the witness's story, but some particular which connects the prisoner himself with it,.... Corroboration by another accomplice, or even by several accomplices, does not suffice.....But these common-law rules as to the necessity of corroborating accomplices amount only to a caution and not to a command."(1)

10. The Admissibility of Hearsay Evidence

Further examples of the more drastic rules of evidence permissible before courts trying war criminals are found in the frequency with which "hearsay" evidence is admitted. For instance, in English Civil Courts, subject to exceptions, a statement, whether oral or written, made by a person who is not called as a witness is not admissible to prove the truth

(1) Kenny, Outlines of Criminal Law, 15th Edition, pp. 459 - 61.

of any matter contained in that statement (see Harris and Wilshire's Criminal Law, Seventeenth Edition, p. 482). Such evidence is rendered permissible by Regulation 8 (1) of the Royal Warrant provided it satisfied the conditions laid down therein.⁽¹⁾ In the Belsen Trial much hearsay evidence was admitted, including some contained in the affidavits entered.

11. Accused not Entitled to the Rights of a Prisoner
of War as Regards Trial

In the trial of General Anton Dostler, Commander of the 75th German Army Corps by a United States Military Commission in Rome, 8th - 12th October, 1945, and in the Trial of General Yamashita by a United States Military Tribunal at Manila, Philippine Islands, October 29th - November 7th, 1945, the Defence unsuccessfully claimed on behalf of the accused and in connection with their trial the benefits of the 1929 Geneva Prisoners of War Convention. The reply of the Prosecutor in the former trial was that the provisions of the Geneva Convention with regard to the trial of prisoners of war, which the Defence had put forward, pertained to offences committed by a prisoner of war in captivity, and did not pertain to offences committed against the Law of Nations prior to his becoming a prisoner of war.

If the argument of the Defence regarding the interpretation of the Geneva Convention were correct, it would have far-reaching consequences with regard to the trial of such war criminals as had been members of the armed forces of the enemy and had therefore, on being captured, acquired the status of prisoners of war. War Criminals would be protected by Article 63 of the Geneva Convention which provides that: "A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power." This Article would guarantee them, within

(1) See p.72

the United States jurisdiction, the statutory safeguards of the Articles of War and the protection of the "due process of law" clause of the Fifth Amendment, and in other jurisdictions all the procedural rights granted by the law of the capturing State to its own soldiers. Furthermore the interpretation of the Defence would make the provisions of Articles 60 - 66 of the Geneva Convention applicable. It would therefore, be necessary for the authorities instituting the proceedings to notify the representative of the Protecting Power (Art. 60), the representative of the protecting Power would have the right to attend the hearing of the case (Art. 62, para. 3), the alleged war criminal would have the right of appeal against any sentence against him in the same manner as persons belonging to the armed forces of the detaining Power (Art. 64), sentences pronounced against prisoners of war would have to be communicated immediately to the Protecting Power (Art. 65) and, if sentence of death were passed on a prisoner of war, a communication setting forth in detail the nature and the circumstances of the offence would have to be addressed to the representative of the protecting Power for transmission to the Power in whose armed forces the prisoner served (Art. 66, para. 1); and it would, finally, be forbidden to carry out the sentence before the expiration of a period of at least three months from the date of the receipt of this communication by the protecting Power (Art. 66, para. 2).

The Military Commission in the Dostler trial decided that the provisions of Art. 63 of the Geneva Convention were not applicable to the case. As is customary, the reasons of the Military Commission were not given.

The decision of the Military Commission on this point is in accordance with the decision of the majority of the Supreme Court of the United States in the case of the Japanese General Yamashita (delivered on 4th February, 1946). The Supreme Court, per Stone, C.J., held that Art. 63 (and Art. 60) of the Geneva Convention have reference only to offences committed by a prisoner of war while a prisoner of war and not to violations of the law of

war committed while a combatant. This conclusion of the majority of the Supreme Court is based upon the setting in which these articles are placed in the Geneva Convention. Art. 63 of the Convention appears in Part 3 ("Judicial Suits") of Chapter 3, entitled "Penalties applicable to Prisoners of War." This forms part of Section V, "Prisoners' Relations with the Authorities," one of the sections of title III, "Captivity." All taken together relate only to the conduct and control of prisoners of war while in captivity; Chapter 3 is a comprehensive description of the substantive offences which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offences, and of the procedure by which guilt may be adjudged and sentence pronounced. The majority of the Supreme Court therefore thought it clear that Part 3, and Art. 63 which it includes, apply only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war.

Mr. Justice Rutledge, in his minority opinion, in which Mr. Justice Murphy joined, held that the context in which Arts. 60 and 63 are placed did not give any support to the argument of the majority of the Court. Neither Art. 60 nor Art. 63 contained, in the opinion of the minority, such a restriction of meaning as the majority read into them. In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before the capture or later. In Mr. Justice Rutledge's opinion, policy supported this view. For such a construction was required for the security of United States soldiers, taken prisoner, as much as for that of prisoners taken by the United States. And the opposite view would leave prisoners of war open to any form of trial and punishment, for offences against the law of war, which their captors might wish to use, while safeguarding them, to the extent of the treaty limitations, in cases of disciplinary offences. This, in many instances, the minority contended, would be to make the treaty strain at a gnat and swallow a camel.

The view that an alleged war criminal is not entitled to the status of a prisoner of war was, however, taken also by the French Cour de Cassation in the appeal of Robert Wagner, Ex-Gauleiter of Alsace, and others against the sentences of death passed on them by the Permanent Military Tribunal at Strasbourg on 3rd May 1946. The attitude of the Court on the question here under discussion arose out of one of the less important arguments put forward by the appellants, a plea put forward by Wagner, Röhn and Schuppel, and based upon the alleged violation of Art.156 of the Code de Justice Militaire, claiming that the Military Tribunal was irregularly composed because Wagner had the rank of a General commanding an Army Corps and the Tribunal could not, therefore, properly be presided over by a Colonel.

The Judgment of the Court of Appeal pointed out that, according to Art.5 of the Ordinance of 28th August 1944, "For adjudicating on war crimes the Military Tribunal shall be constituted in the way laid down in the Code de Justice Militaire."

The provisions of Art.10 et seq. and 156 of the Code de Justice Militaire, which varied the composition of Military Tribunals according to the rank of the accused, applied only to French military personnel and to persons treated as such.

Paragraph 13 of Art.10, according to which Military Tribunals called upon to try prisoners of war are composed in the same way as for the trial of French military personnel, that is according to rank, would not be applied to Wagner, who was not sent before a Military Court as a prisoner of war. It is therefore right that the appellants were brought before a Military Tribunal composed in accordance with Arts.156 and 186 of the Code de Justice Militaire.

X . X X

(This section on the rights of the accused is to be completed by the addition of a few additional relevant provisions and a final paragraph is to be added summarising how the contents of the section demonstrate the way in which the regulations, under which war crime trials are held, "represent an attempt to secure to the accused his right to a fair trial while ensuring that the obviously guilty shall not escape punishment because of legal technicalities.")

III/113
20th October 1947.

UNITED NATIONS WAR CRIMES COMMISSION.
HUMAN RIGHTS REPORT: PRELIMINARY PAPERS.

THE NUREMBERG TRIAL.

Rapporteur: Dr. J. LITAWSKI.

PAPER I. (1)

LEGAL BASIS AND JURISDICTION OF THE TRIBUNAL.

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petrators.- The degree of responsibility.- Attempts.-
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(1)

For the list of other instalments envisaged to cover the sub-
ject of Human Rights in the Nuremberg Trial, see Covering
Note to Doc. III/107.

A. LEGAL BASIS OF THE TRIBUNAL.

The Nuremberg Tribunal found its being in the Agreement entered into in London on August 8, 1945, by the Four Major Powers, in which they provided for the establishment of an International Military Tribunal for the trial of war criminals whose offences have no "particular geographical location", and, in an Annex to the Agreement, they provided also a Charter of the Tribunal setting forth in 30 articles the constitution, jurisdiction and general principles, and powers of the Tribunal, the procedure to be followed in the course of the preliminary investigations and conduct of the trial, and the provisions concerning the judgment and sentence.⁽¹⁾

In accordance with Article 5 of the Agreement 19
(2)
Governments of the United Nations have expressed their adherence to the Agreement, and the Charter, both of which had been concluded by the Four Powers "acting in the interests

(1)

Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of The Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed in London on 8th August, 1945, H.M.S.O. Cmd. 6668.

(2)

These Governments are the following:
Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxemburg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay.

of all the United Nations," (1)

The establishment of the Tribunal was a natural and logical outcome of the many declarations made from time to time during the recent war by the Governments of the United Nations of their intention that War Criminals should be brought to justice. (2) After recalling in the Preamble that, in accordance with the Moscow Declaration of 30th October 1943, those Germans who have been responsible for or have taken a consenting part in atrocities and crimes will be "sent back to the countries in which their abominable deeds were done" in order that they may be tried by the National Courts of those countries, the Agreement provides in Article 1, as already indicated, that an International Tribunal shall be established "for the trial of war criminals whose offences have no particular geographical location", these being the major war criminals.

This decision of the Signatories is also re-stated in Article 1 of the Charter itself with the addition that the Tribunal shall be established for the just and prompt trial and punishment of these criminals.

The Tribunal was invested by the Charter with power to try and punish persons who had committed crimes against peace, war crimes and crimes against humanity as defined in the Charter.

In its Judgment the Tribunal stated that in creating the Tribunal the Signatory Powers "have done together what any one of them might have done singly; for it is not to be doubted

(1) The Preamble to the Agreement, paragraph 4.

(2) See, by this Rapporteur, Historical Survey of the Problem of Violations of Human Rights, Part II, 1939-1945.

-4-

that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants (were) entitled to ask (was) to receive a fair trial on the facts and law". (1)

In addition, the Tribunal expressed the opinion that the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world. (2)

These brief statements of the Tribunal, as well as the relevant provisions of the Agreement and the Charter, raise a number of intrinsic problems and questions as to the exact status of the Nuremberg Tribunal and its military, international, judicial and ad hoc characteristics which are of primary relevance for assessing properly the importance of the Nuremberg Trial and the authority of the Nuremberg Judgment for the development of International Law in general, and in the sphere of the protection of human rights in particular. Here, the problem also arises whether and to what extent the attitude of the Tribunal with regard particularly to the question of violations of human rights which come within the notion of crimes against humanity, and its interpretation of the law in general, was or is binding for the decision in other cases tried or to be tried before other courts, be it the International Military Tribunal for the Far East, or municipal, occupational or military tribunals of other United Nations or other countries.

(1) Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg 1946, H.M.S.O., Cmd. 6964, p.38.

(2) Ibid, p. 38.

Analysis of all these highly important problems can however be made only after all preliminary questions as to the law of the Charter, as well as the exposition of the facts related to the violations of human rights, as they have been established by the Tribunal, have been dealt with. They must therefore be left for one of the concluding sections of this part of the Report.

In accordance with Article 2 of the Charter, the Tribunal consisted of four members, each with an alternate, one member and one alternate having been appointed by each of the Signatories. (1)

B. JURISDICTION OF THE TRIBUNAL.

Part II of the Charter of the International Military Tribunal at Nuremberg (2) which sets forth the jurisdiction and general principles to be followed in the conduct of the trial of the major war criminals of the

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These members were the following:

Lord Justice LAWRENCE, Member for the United Kingdom of Great Britain and Northern Ireland; Mr. Justice BIRKETT, Alternate Member.

Mr. Francis BIDDLE, Member for the United States of America; Judge John J. PARKER, Alternate Member.

M. le Professeur Donnedieu de VABRES, Member for the French Republic; M. Le Conseiller R. FALCO, Alternate Member.

Major General I. T. NIKITCHENKO, Member for the Union of Soviet Socialist Republics; Lieutenant Colonel A.F. VOLCHKOV, Alternate Member.

Lord Justice Lawrence was elected President of the Tribunal for the Trial at Nuremberg, in accordance with Article 4 (b) of the Charter.

(2) Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed in London, on 8th August, 1945.

European Axis countries, and in particular its Articles 6, 7, 8 and 9, is technically speaking the law which the Charter required the Tribunal to administer, and by which the Tribunal was bound.

Article 6 provides that the Tribunal "shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes". According to the specific provisions of this article "the following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:-

- "(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- "(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- "(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

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

The above text of sub-paragraph (c) is the English text as amended by the Berlin Protocol of 6th October, 1945,⁽¹⁾ by virtue of which the semi-colon originally put between "the war" and "or persecutions" was replaced by a comma following the discrepancy which had been found to exist between the originals of Article 6, paragraph (c) of the Charter in the Russian language, on the one hand, and the originals in the English and French languages, on the other, all of which have equal authenticity.

Consequently, the Protocol declares that Article 6 (c) in the Russian text is correct, and that the meaning and intention of the Agreement and Charter require that the said semi-colon in the English text should be changed to a comma, and that the French text should be amended to read as follows:

"LES CRIMES CONTRE L'HUMANITÉ, c'est à dire, l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux, ou religieux, lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime".

The original French text of Article 6 (c) prior to the amendment, was as follows:-

"LES CRIMES CONTRE L'HUMANITÉ: c'est à dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre; ou bien les persécutions pour des motifs politiques, raciaux, ou religieux, commises à la suite de tout crime rentrant dans la compétence du Tribunal International ou s'y rattachant, que ces persécutions aient constitué ou non une violation du droit interne du pays où elles ont été perpétrées."

(1) Protocol Rectifying Discrepancy in Text of Charter, drawn up by the Governments who had concluded the Agreement of 8th August, 1945; published in "Trial of the Major War Criminals before the International Military Tribunal", Vol. I., Official Documents, Nuremberg, 1947.

The corrections made by the Berlin Protocol have an important bearing on the interpretation of the notion of crimes against humanity. The consequence is also that the words "in execution of or in connection with any crime within the jurisdiction of the Tribunal" refer now to the whole text of Article 6 (c). (1)

It has been said at the outset that the Charter is the law by which the Tribunal was bound. The general attitude of the Tribunal in regard to this particular question found its expression in the Judgment which says that "the law of the Charter is decisive, and binding upon the Tribunal." (2) As to the character of the Charter itself the Tribunal made the following declaration, which has already been referred to in part when discussing the legal basis of the Tribunal:

"The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law". (3)

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- (1) See under I (b), Jurisdiction over Crimes against Humanity.
- (2) The Judgment, p. 3.
- (3) Ibid., p. 38.

The Tribunal was of course bound by the law of the Charter also in regard to the definition which the Charter gives both of war crimes and crimes against humanity. (1) This particular question is the subject of some specific and more elaborated statements made by the Tribunal in the Judgment. Before coming however to the exposition of what was the attitude of the Tribunal to the substantive law as laid down in the Charter, it will be necessary to analyse first, but as briefly as possible, the relevant provisions of the Charter and to point out their most characteristic features. For only through the examination of the rules laid down therein and then by contrasting with them the manner in which the Tribunal applied these provisions and the effect it gave them in its considerations and judgment can we find a correct answer to the question to what extent and in what way human rights violated by various crimes are or are not protected by the existing rules of International Law. When discussing the attitude of the Tribunal, we shall take into account only its general considerations, reserving a detailed exposition to a further Section of this part of the Report where the subject of violations of the rights of the victims will be presented.

I. Jurisdiction over offences

a) War Crimes.

In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as lawful members of armed forces, and in contradistinction to all

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The Judgment, p. 64.

sorts of force or means applied by a belligerent against enemy armed forces and other enemy persons or property, and directed to the overpowering of the enemy as well as to the occupying and administering of the enemy territory by all legitimate means, war crimes in the conventional sense are such acts of soldiers or other individuals which constitute violations of the laws and customs of warfare. They include acts contrary to International Law perpetrated in violation of the laws of the criminals's own State, as well as criminal acts contrary to the laws of war committed by order and/or on behalf of the enemy State. Such acts constitute violations of municipal penal laws, of international conventions, and of the general principles of criminal law as derived from the criminal law of all civilised nations. To that extent the notion of war crimes is based on the view that States and their organs are subject to criminal responsibility under International Law.

The right of the belligerent to punish during the war, war criminals as fall into his hands is a well-recognised principle of International Law. It is a right of which he may effectively avail himself after he has occupied all or part of enemy territory, and is thus in the position to seize war criminals who happen to be there. He may, as a condition of the armistice, impose upon the authorities of the defeated State the duty to hand over persons charged with having committed war crimes, regardless of whether such persons are present in the territory actually occupied by him or in the territory which, at the successful end of hostilities, he is in the position to occupy. For in both cases the accused are, in effect, in his power. And although the Treaty of Peace brings to an end the right to prosecute war criminals, no rule of International Law

prevents the victorious belligerent from imposing upon the defeated State the duty, as one of the provisions of the armistice or of the Peace Treaty, to surrender for trial persons accused of war crimes. (1)

In spite of the uniform designation of various acts as war crimes, a number of different kinds and types of war crimes can be distinguished on account of the essentially different character of the acts, namely: a) according to whether these acts have been committed by members of the enemy armed forces or by individuals who belong to or represent enemy authorities other than military, or are acting in the interest of the enemy; b) according to what rights of individual persons or groups of peoples have been violated, and/or what legitimate interests of other belligerents or general interests of the community of nations have been outraged.

It will be observed that, without exception, all the crimes specifically enumerated in Article 6 (b) of the Charter as constituting war crimes in their technical sense, are crimes which constitute attacks on the integrity of the physical being of individuals or groups of people, and of property, thus violating the inherent human rights. But, from the law as stated in that article, and in particular from the words: "Such violations (i.e. of the laws or customs of war) shall include, but not be limited to, ..." it is clear that these crimes are not the only ones which the authors of the Charter had in mind and with which the Tribunal was

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L. Oppenheim, International Law, Vol II., Sixth Edition, Longmans Green & Co., London, 1944, pp.450-458.

As to examples in the past of provisions of the Peace Treaties imposing upon the defeated State the duty to surrender for trial of persons accused of war crimes, see, by this Rapporteur, Historical Survey of the Problem of Violations of Human Rights.

expected to be concerned in the Trial. It follows also that not only crimes of the atrocities type but also violations of any other law or custom of war may be considered war crimes irrespective of whether such crimes might or might not violate certain human rights and if in the latter case they constitute a purely technical offence only.

We shall see later in more detail and in the light of the Indictment and the Judgment what human rights have in fact been violated in connection with specific war crimes committed, and how they have been violated. Here, we are only concerned with the law relating to war crimes. As has already been pointed out the Tribunal considered itself bound by the Charter, in the definition which it gives of war crimes. However, the Tribunal stated that the crimes defined by Article 6 (b) "were already recognised as war crimes under International Law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument".⁽¹⁾

However, when explaining the law of the Charter in connection with the criminality of the planning or waging of a war of aggression, and in particular when dealing with a fundamental principle of all law that there can be no punishment of crime without a pre-existing law, the Tribunal found an opportunity of touching indirectly upon this question and expressed its view in the following way:

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The Judgment, p. 64.

"The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions have been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention." (1)

The Tribunal said further that it must be remembered that International Law is not the product of an international legislature, and that international agreements have to deal with general principles of law, and not with administrative matters of procedure. The Tribunal went on to say that:

"The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference

(1)
The Judgment, p. 40.

"the principles of law already existing". (1)

The Tribunal thought it also important to recall that in Article 228 of the Treaty of Versailles, the German Government expressly recognised the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. (2)

Dealing with the Defence argument that the Hague Convention does not apply in this case, because of the "general participation clause" contained in Article 2 of the Hague Convention of 1907, to which several of the belligerents in the recent war were not parties, (3) the Tribunal expressed the opinion that it was not necessary to decide this question, and added:

"The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war,' which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter."

(1) The Judgment, p. 40.

(2) Ibid., p. 41.

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

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

b) Crimes against humanity. (1)

As has already been pointed out, the Nuremberg Charter is the first international legal enactment which has formulated the

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For a detailed analysis of the notion of crimes against humanity reference is made to the article of E. Schwellb on "Crimes against Humanity", written for The British Year Book of International Law, 1947, and which has been used as the basis for the drafting of this section, with the author's kind permission.

A number of preparatory papers on this subject issued by the Commission for purposes other than this Report have also been utilised.

(2) The Judgment p. 65

definition of crimes against humanity, though the conception of them is not entirely novel.

The provision of sub-paragraph (c) of Article 6 of the Charter appears prima facie to lay down a set of novel principles or, at least, to pave the way for considerable progress in the relationship between the community of nations, its member states and individual citizens of these states, and between International Law and municipal law.

The following three elements of the definitions of crimes against humanity as laid down in Article 6 (c) appear to contain these novel principles:

- (1) "before and during the war",
- (2) "against any civilian population",
- (3) "whether or not in violation of the domestic law of the country where perpetrated".

We shall therefore analyse in more detail each of these elements as they appear from the context of Article 6 (c) as well as in the light of the Judgment pronounced by the Nuremberg Tribunal.

The first principle indicated by the words "before or during the war" apparently implies that International Law contains penal sanctions against individuals, applicable not only in time of war, but also in time of peace. This means that there is in existence a system of international criminal law under which individuals are responsible to the community of nations for violations of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of peoples and of individual persons, i.e. inhuman acts, constitute not only in time of war, but also in time of peace, in certain circumstances, international crimes.

The adoption by the Charter of this principle taken

together with the principle that it is irrelevant whether or not such crimes are committed in violation of the domestic law of the country where perpetrated, has found its expression in the creation of the international judicial organs, (1) which were called upon to determine the guilt or innocence of a certain category of the alleged criminals responsible for the commission of such inhuman acts, thus overriding the national sovereignty and the municipal law of the states of which the perpetrators are subjects and where the crimes had been committed.

However, it must be pointed out at once that this principle finds a considerable limitation in the specific qualification laid down by the provision, as amended by the Berlin Protocol, namely, that in order to constitute crimes against humanity which call for international penal sanction and which are of special concern to the international community, the inhumane acts specifically enumerated in Article 6 (c) must be committed in "execution of or in connection with any crime within the jurisdiction of the Tribunal", i.e. only if it is established that they were connected with a crime against peace or a war crime proper. This qualification constitutes a very important restriction of the scope of the concept of crimes against humanity, which thus, under the Charter, have no independent status, with a further consequence that their greatest practical importance in peace time is seriously affected. (2)

The second principle expressed by the words "against any civilian population" is to the effect that any civilian population is under the protection of international criminal

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- (1) Reference is made here to the Nuremberg and Tokyo Tribunals.
- (2) The position under Law No. 10 of the Control Council of Germany is different.

law and that the nationality of the victims affected is irrelevant. It seems also to imply that such protection has been extended also to cases where the alleged violations of human rights have been perpetrated by a State against its own subjects. The term, therefore, includes crimes both against allied and against enemy nationals.

In particular, it follows that a civilian population remains under the protection of the provisions regarding crimes against humanity irrespective of whether it is a): the population of a territory which is under belligerent occupation which was effected with or without resorting to war (e.g. Austria and parts of Czechoslovakia in 1938 and 1939); or b): the population of other States not under occupation, where armed forces of one belligerent were stationed (e.g. German forces in Italy), or of countries neighbouring on a certain belligerent (e.g. persons who were subject to kidnapping or other violence); or c): the population of a belligerent itself (e.g. German or Italian nationals of the same or different race in their relation to the respective State authorities or other national bodies).

From the words "civilian population" it appears that the term "crimes against humanity" is restricted to inhumane acts committed against civilian populations as distinct from members of the armed forces, which are outside the scope of the provision.

The word "population" appears to indicate that a larger body of victims is visualised and that single or isolated acts committed against individuals should decide on the scope of the concept of crimes against humanity.

A violation of a certain human right protected by Article 6 (c) may or may not simultaneously constitute a violation of the laws and customs of war and therefore a war crime sensu stricto, coming under Article 6 (b). This results from

the fact that the terms "crimes against humanity" and "war crimes" as has already been indicated, overlap to a certain extent. We shall see in more detail later how this particular problem has been dealt with by the Prosecution in the Indictment and by the Tribunal in its Judgment. Here, it will be sufficient to point out the following.

The provision dealing with war crimes (Article 6 (b)) expressly states that its enumeration of specific criminal acts is not exhaustive. No such statement is to be found in Article 6 (c). The wide scope of the term "other inhumane acts" indicates, however, that the enumeration of Article 6 (c) is also not exhaustive at least so far as the substance is concerned.

There are two types of crimes against humanity: crimes of the "murder-type", namely, murder, extermination, enslavement, deportation, and other inhumane acts; and "persecutions". With regard to the latter the provision requires that they must have been committed on political, racial or religious grounds.

The acts of the "murder-type" enumerated in Article 6 (c) as crimes against humanity are similar to, but not identical with, those which are mentioned as war crimes in Article 6 (b).

Murder is included both in the list contained in Article 6 (b) and (c). Extermination, mentioned only in Article 6 (c) is apparently to be interpreted as murder on a large scale (mass murder). The inclusion of "extermination" in addition to "murder" may be taken to indicate that taking part in laying down a policy of extermination and/or other activities in its implementation not directly connected with actual criminal acts of murder, may be punishable as complicity in the crime of extermination.

Whether there is a difference between "deportation to slave labour or for other purposes" as mentioned under (b), and the two separate items "enslavement" and "deportation" mentioned under (c) is difficult to decide at this stage. "Ill-treatment

which is contained in sub-para. (b), has been omitted in sub-para. (c). Whether or not this particular crime falls under "other inhumane acts" depends on the general interpretation of the latter expression.

Finally, the third principle that it is irrelevant whether an offence alleged to be a crime against humanity was or was not committed in violation of the domestic law of the country where perpetrated, means that it is no defence that the act alleged to be a crime against humanity was legal under the domestic law of that country. The exclusion of this plea is closely connected with the provisions of the Charter contained in Article 8 and regarding the defence of superior orders.

We come now to the question of the attitude of the Tribunal to the law relating to crimes against humanity.

As already indicated, the Tribunal stated that it is bound by the Charter, in definition which it gives of crimes against humanity. (1) The general considerations of the Tribunal on the law as to crimes against humanity are contained in the following statement:

"With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany, before the war of 1939 who were likely to be hostile to the Government, was most ruthlessly carried out.

(1) The Judgment, p. 64.

"The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of or in connection with, the aggressive war, and therefore constituted crimes against humanity", (1)

From the above statement it follows that the Nuremberg Tribunal proceeded on the basis of the Berlin Protocol and applied the qualification "in execution of or in connection with any crime within the jurisdiction of the Tribunal" to the whole provision, i.e., both to crimes of the murder type and to persecutions, with the consequences already indicated at the outset of this section.

As will be seen in a separate part of the Report, this statement does not imply that no crime committed before 1st September 1939 can be considered as a crime against humanity.

(1)

The Judgment, p. 65.

Some crimes committed prior to 1st September 1939 have been recognised by the Tribunal as constituting crimes against humanity, i.e. in cases where their connection with the crime against peace was established.

On the other hand, in cases where the commission of inhumane acts charged in the Indictment took place after the beginning of the war and did not constitute war crimes, their connection with the war has been presumed by the Tribunal, and therefore considered as crimes against humanity.

Although in theory it remains irrelevant whether a crime against humanity was committed before or during the war, in practice it is difficult to establish a connection between what is alleged to be a crime against humanity, and a crime within the jurisdiction of the Tribunal, if the act was committed before the war.

c) Crimes against peace.

It has already been pointed out that this particular type of crime, as such is outside the scope of the Report. However, crimes against peace have some definite bearing upon violations of human rights, and for this reason it seems necessary to record here the views of the Tribunal on this point.

When dealing with the question of "the common plan or conspiracy and the aggressive war", the Tribunal declared:

"The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.

"To initiate a war of aggression, therefore, is not only an international crime; it is the supreme inter-

"national crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

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

Later in the Judgment the Tribunal accepted the contention of the Prosecution as to the aggressive character of the seizure of Austria and Czechoslovakia, (2) and made the following statement in regard to the war against Poland:

"The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on the 1st September, 1939, was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity". (3)

It will be observed that in making the above statements the Tribunal touched upon the general effect which the waging of a war of aggression has on violations of human rights. Taking inter alia these consequences into account, the Tribunal thought it justifiable and of primary importance to declare the initiation and waging of wars of aggression as a supreme war crime. This should be construed as meaning a supreme war crime in a wider sense thereby constituting also in a general non-technical sense a

(1) The Judgment, p. 13.

(2) Ibid., pp. 19-22.

(3) Ibid., p. 27.

supreme crime against humanity.

The question of violations of human rights perpetrated as part of the planning, preparation or conspiracy to wage wars of aggression will be presented in a separate part of the Report.

d) Conspiracy to commit war crimes and crimes against humanity.

A few words on the question of conspiracy, i.e. the doctrine under which it is a criminal offence to conspire or to take part in an alliance to achieve an unlawful object, or achieve a lawful object by unlawful means. The Charter in its Article 6 (a) provides that "conspiracy" to commit crimes against peace is punishable, but contains no such express provision as to a "conspiracy" to commit war crimes or crimes against humanity.

Consequently, the International Military Tribunal allowed in its Judgment a very limited scope to this doctrine and held that, under the Charter, a conspiracy to commit crimes against peace is punishable, and convicted certain of the defendants on that basis; but it declined to punish conspiracies of the other two types as substantive offences, distinct from any war crime or crime against humanity, and expressed the opinion that the provision contained in the last paragraph of Article 6 do not define or add as a new and separate crime any conspiracy except the one to commit acts of aggressive war. In the opinion of the Tribunal the above provision is only designed to establish the responsibility of persons participating in a common plan, and for these reasons the Tribunal decided to disregard the charges of conspiracy to commit war crimes and crimes against humanity. (1)

(1)

The Judgment, p. 44.

II. JURISDICTION OVER PERSONS.

(From Article 6). "Leaders, organisers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan".

(Article 7). "The official position of the defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."

(Article 8). "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires".

(From Article 9). "At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation".

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

As already cited the Nuremberg Tribunal was invested by the Charter with power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the crimes enumerated in Article 6 under (a), (b), and (c).

In accordance with the purpose for which the Tribunal was established the scope of the individuals over which the Tribunal had to exercise its jurisdiction was limited to the major war criminals. This is evident from Articles 1 and 6 of the Charter, which, however, do not contain any definition or

explanation as to who should be regarded as a major war criminal. The only indication in this respect is provided by the Moscow Declaration of the 30th October, 1943, according to which major war criminals are those whose offences have no "particular geographical location". Exactly the same description is used in paragraph 3 of the Preamble and in Article 1 of the London Agreement of 8th August, 1945, which have thus left open to the discretion of the signatory Powers the question which persons should be included in this category of war criminals. In the Indictment lodged with the Tribunal (1) a total of 24 persons were charged at Nuremberg, who, in accordance with Article 14 (b) of the Charter had been designated as major war criminals (2) by the Committee of the Chief Prosecutors of the Signatory Powers.

The opening sentence of paragraph 2 of Article 6 lays down the rule that for acts enumerated in that article as constituting crimes against peace, war crimes and crimes against humanity, there shall be individual responsibility.

On this question the Defence submitted that International Law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that

(1) Indictment presented to the International Military Tribunal sitting at Berlin on 18th October 1945, etc. H.M.S.O. Cmd. 6696.

(2) The names of the 24 defendants are as follows:- Hermann Wilhelm GÖRING, Rudolf HESS, Joachim von RIBBENTROP, Robert LEY, Wilhelm KEITEL, Ernst KALTENBRUNNER, Alfred ROSENBERG, Hans FRANK, Wilhelm FRICK, Julius STREICHER, Walter FUNK, Hjalmar SCHACHT, Gustav KRUPP von BOHLEN und HALBACH, Karl DONITZ, Erich RAEDER, Baldur von SCHIRACH, Fritz SAUCKEL, Alfred JODL, Martin BORMANN, Franz von PAPEN, Artur SEYSS-INQUART, Albert SPEER, Constantin von NEURATH and Hans FRITZSCHE.

All individual defendants named in the Indictment appeared before the Tribunal except: Robert LEY, who committed suicide 25 October 1945; Gustav KRUPP von Bohlen und Halbach, owing to serious illness; and Martin BORMANN, who was not in custody and whom the Tribunal decided to try in absentia.

In the latter case the Tribunal evidently found it necessary, in the interests of justice, to conduct the hearing in his absence, thus availing itself of the right accorded to it by Article 12 of the Charter.

where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. Both these submissions had been rejected by the Tribunal which expressed the opinion that the principle that International Law imposes duties and liabilities upon individuals as well as upon States has long been recognised. In this connection the Tribunal recalled in its Judgment the recent case of *Ex Parte Quirin* (1942, 317 US 1), before the Supreme Court of the United States, in which persons were charged, during the war, with landing in the United States for purposes of spying and sabotage. In this case the late Chief Justice Stone, speaking for the Court, said that from the very beginning of its history that Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals. Chief Justice Stone went on to give a list of cases tried by the Courts, where individual offenders were charged with offences against the laws of nations, and particularly the laws of war. Many other authorities on this matter could have been cited, but the Tribunal was satisfied that there is sufficient evidence to show that individuals can be punished for violations of International Law. After recalling the provisions of Article 228 of the Treaty of Versailles as illustrating and enforcing the view of individual responsibility, the Tribunal concluded with the argument that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (1)

(1) The Judgment, p. 41.

The scope of the individuals liable to prosecution is further determined by the last paragraph of Article 6 of the Charter, which provides that leaders, organisers, instigators and accomplices, participating in the formulation or execution of a common plan or conspiracy to commit any of the crimes enumerated in that Article under (a), (b) and (c) are responsible for all acts performed by any persons in execution of such plan. From this provision stipulating the vicarious liability of leaders, organisers, etc. it appears that the leaders and organisers are also responsible for acts committed by third persons. Nothing is said in this provision about the responsibility of the actual perpetrators, but it seems to be implied that the perpetrators are also criminally responsible though the Charter itself in general and this provision in particular, deals only with persons responsible on a high level. This is borne out by the Control Council Law No. 10, which was promulgated to give effect, inter alia, to the London Agreement of 8th August, 1945.

There is also nothing said in the Charter as to what degree of connection with a crime must be established in order to attribute to a defendant, judicial guilt, i.e. the degree of responsibility of principals, accessories, and accomplices. Nor does the Charter say anything on the very important question of attempts, namely, whether or not an attempt to commit an international crime is in itself a crime. All these questions, in respect of which the International Penal Law is itself most unsettled, have been left open by the Charter.

In one respect only, the degree of individual responsibility for the crimes coming within the jurisdiction of the Tribunal has been defined by the Charter in Article 7, which says that the official position of the defendants, whether as Heads of State or responsible officials in Government Departments,

shall not be considered as freeing them from responsibility or mitigating punishment.

On this particular question and in further elaboration of its argument as to the individual responsibility, the Tribunal expressed the view that the principle of International Law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by International Law and the authors of such acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. As the very essence of the Charter is that individuals in general, and the representatives of a state in particular, "have international duties which transcend the national obligations of obedience imposed by the individual State", the Tribunal took the view that he who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under International Law. (1)

It may be of interest to insert here in this connection a few remarks from Lord Wright's comments, which he wrote on this particular subject. He says:

"The Judgment accordingly is proceeding on the basis of the Community of Nations and on the nature of international law as the law not of one nation but of all, which transcends the law of the particular individual, and the obedience which he owes to his state. The fact that the individual is obeying the national law is no defence if he is charged before the competent Court for violation of the international law. He is thus

(1) The Judgment, p. 42.

"subject to a double set of laws which in certain cases may conflict. He has a divided duty. There is nothing peculiar or unusual in this. In every Federal state the citizen owes obedience to the Federal Law and also to the State or Provincial law, and may be punished if he violates either by the appropriate authority. Federal constitutions generally provide for the dominance of one system of law over the other if they conflict, but generally the areas of each are sufficiently distinct. A British soldier remains subject to his country's laws though he is also subject to Military Law as being a soldier. In the international penal code a man may be held guilty of violating the code though what he does is justified under the National Law. The principle there is similar to what is often referred to as the defence of superior orders." (1)

According to the established principles of International Law, the fact that rules of warfare have been violated in pursuance of orders of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle confer upon the perpetrator immunity from punishment by the injured belligerent. This view is governed by the major principle that members of the armed forces or other authorities are bound to obey lawful orders only and that they cannot therefore

(1)

See Lord Wright's article on "Nuremberg", recently written for "Obiter Dicta", Canadian Law Journal.

escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general principles of humanity. (1)

Accordingly, Article 8 of the Charter lays down the rule that the fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires. It may be pointed out that this rule applies to all acts coming within the notions of crimes against peace, war crimes and crimes against humanity.

On behalf of most of the defendants it was submitted that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. When dealing with this submission the Tribunal stated that it considered the provisions of Article 8 to be in conformity with the law of all nations. The Tribunal added that the true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible. (2)

Finally, there remains the question of groups and organisations of which the individual defendants were members.

Article 9 of the Charter provides that at the trial of any individual member of any group or organisation the Tribunal may declare that the group or organisation of which the individual was a member was a criminal organisation. Such a declaration may have been made by the Tribunal in connection with any act of which the individual may have been convicted.

(1) L. Oppenheim, l. cit.

(2) The Judgment, p. 42

According to Article 10 of the Charter, in cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory has the right to bring individuals to trial for membership of such bodies before national, military or occupation courts. In any such case the criminal nature of the group or organisation is to be considered as proved and shall not be questioned.

The above provision makes it clear that the declaration of criminality against an accused organisation is final, and cannot be challenged in any subsequent criminal proceeding against individual members. The effect of such a declaration is well illustrated by Law No. 10 of the Control Council of Germany, which provides that a member of such an organisation may be punished for the crime of membership by death.

As regards the general attitude of the Tribunal in this respect, it is to be mentioned that the Tribunal considered these provisions as a far-reaching and novel procedure, the application of which, unless properly safeguarded, may produce great injustice. (1) We shall see in one of the subsequent sections in more detail how the law of the Charter was applied by the Tribunal to the organisations alleged by the Indictment to be criminal.

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(1)

The Judgment, p. 66.

III/114
3rd November, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PREPARATORY PAPERS.

INFORMATION ON HUMAN RIGHTS
IN TRIALS OTHER THAN THOSE CONDUCTED BY
THE INTERNATIONAL MILITARY TRIBUNALS.

S U M M A R Y
of the Results of the Research
so far carried out.

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

In common with all parts of the Report on Human Rights in War Crime Trials, the shortage of time has prevented the part dealing with Information on Human Rights in Trials other than those conducted by the International Military Tribunals from being drafted in its entirety.

It has been thought of use, however, to set out in note form, in the present paper, the outcome of the research so far carried out on the part referred to above, following the plan of arrangement suggested by the present Rapporteur in Document III/96. The sections on which work has been completed and papers circulated⁽¹⁾ are indicated, and in relation to the other sections the legal provisions and the Trial Records which have been found to be relevant are set out.

Should it be decided at some future date to complete the research on Human Rights in War Crime Trials it is hoped that the collections of enactments and references to trials set out in the present notes will prove a valuable guide and starting point.

(1) Documents III/96 and III/112, which contain the texts of certain completed parts of the Report.

A. INTRODUCTION.

The introductory pages of the part of the Human Rights Report which deals with trials other than those conducted by the International Military Tribunals have been set out on pages 3-10 of Document III/96.

B. THE RIGHTS OF THE VICTIMS OF WAR CRIMES.

1. Allied Inhabitants of Occupied Territories.

(1) The Rights to Life, Health and Personal Integrity.

A large number of offences for which war criminals have been condemned have constituted violations of the rights to life, health and personal integrity of allied inhabitants of occupied territories. One relevant general provision which was quoted, for instance, in the indictment in the case against Otto Ohlendorf and 24 others, Subsequent Proceedings Case No.9, held before an American Military Tribunal at Nuremberg, is Article 43 of the Hague Convention, which reads as follows:

" The authority of the power of the State having passed de facto into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country. "

The provision most often quoted during war crime trials in this connection, however, is Article 46 of the Hague Convention, perhaps because it forbids more explicitly the types of offences for which the alleged war criminals are brought before the courts. This article reads as follows:

" Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected.
Private property must not be confiscated. "

Article 46 is often quoted, for instance, in concentration camp trials. For example, the prosecutor in the trial of Josef Kramer and 44 others, held before a British War Crimes Court at Lüneburg from 17th September - 17th November 1945 (the Bolson trial), in his closing address, claimed that the inhabitants of occupied territories were protected by Article 46 and went on to quote the text of paragraph

383 of Chapter XIV of the British Manual of Military Law, which bears a strong likeness to the article of the Hague Convention: "It is the duty of the occupant to see that the lives of inhabitants are respected, that their domestic peace and honour are not disturbed, that their religious convocations are not interfered with, and generally that duress, unlawful and criminal attacks on their persons, and felonious actions as regards their property, are just as punishable as in times of peace. " (1)

In the Zyklon B case (the trial of Bruno Tesch and 2 others, held before a British Military Court at Hamburg from 1st - 8th March, 1946) the owner of a firm which arranged for the supply of poison gas to Auschwitz, among other destinations, and his second-in-command were found to have known of the fact that this poison gas was used for killing Allied nationals interned in concentration camps and were sentenced to death. Here again, the prosecution relied upon Art. 46 of the Hague Convention, to which, as the prosecutor pointed out, both Germany and Great Britain were parties.

To quote a trial held in the Far East, it may be pointed out that Art. 46 appears among the provisions said to have been violated by Takashi Sakai, tried by the Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking, on 27th August 1946. This accused was found guilty, inter alia, of inciting or permitting his subordinates to wound non-combatants, to rape, to plunder, to deport civilians, to indulge in cruel punishments and torture, and to cause destruction of property.

Among the many other trials which are relevant in this connection, the following may be mentioned: The trial of Max Pauly and 13 others held at Hamburg from 18th March to 3rd May, 1946, (the Neuengamme Trial), the trial of Hermann Vogel

(1) See War Crime Trial Law Reports published for the United Nations War Crimes Commission by H.M. Stationery Office, London, Volume II, p.105.

and 5 others, held before the Polish Special Criminal Court in Lublin from 27th November - 2nd December 1944 (the Majdanek trial) and the trial of Yamura Saburoh held before the Netherlands Temporary Courts Martial at Balikpapan (N.E.I.) on the 13th September 1946.

France, as an ex-occupied territory, has held a large number of trials for offences committed against civilians, especially offences causing death and personal injury. A large number of reports on such trials are in the custody of the United Nations War Crimes Commission, but the relevant articles of international conventions are not mentioned in the French documents supplied. (cf. Doc.III/96, p.6.) It is clear, however, that the many cases of unjustified killing, wounding, etc. which appear in these trials, would come within the scope of Art.46 of the Hague Convention.

Allegations of terrorism against the civilian population are relevant in this connection. (cf. the Dutch trial mentioned above and the trial of Eberhard von Mackensen and Kurt Maolzer, German nationals, tried by a Military Court for the Trial of War Criminals at Rome on 18th - 30th November 1946.)

Cases of rape fall within this heading. (cf. trial of Hans Muller, held before a Military Tribunal at Angers on 30th November 1945,) and also cases involving medical experiments (cf. the trial of Martin Gottfried Weiss and 39 others held before a General Military Government Court at Dachau from 15th November - 13th December 1945 [the Dachau Concentration Camp trial] and the trial of Erhard Milch before an American Military Tribunal at Nuremberg from 4th February - 16th April 1947 [Nuremberg Subsequent Proceedings Trial No.2].)

In connection with mercy killings, reference should be made to the trial of Otto Sukipp and Kurt Kiehne, General Military Government Court at Ludwigsburg, 9th April, 1946.

(ii) The Right to Freedom of Movement.

Cases involving charges of deportation are relevant in this connection. See for instance the trial by a Chinese Military Tribunal referred to above; see trial of Robert Wagner and 6 others, held before a French Military Tribunal at Strasbourg on the 3rd May 1946; see trial of Wilhelm Artur Konstatin Wagner before the Norwegian Eidsivating Lagmannsrett, from August - October 1946. Slave labour is dealt with in the trial of Erhard Milch, tried by an American Military Tribunal at Nuremberg from 4th February - 16th April 1947, in the trial of Carl Krauch and 22 others which was opened by an American Military Tribunal on Nuremberg on the 14th August 1947 and in the trial of Alfried Krupp von Bohlen und Halbach and 11 others, which will be held at Nuremberg before an American Military Tribunal (Subsequent Proceedings Cases Nos. 2, 6 and 10).

Conditions under which deportation becomes a crime, are set out in the Judgment of the Milch trial. Reference should also be made to the trial of Capt. Eitaro Shinohara and 2 others before an Australian Military Court at Rabaul from 30th March - 1st April 1946.

(iii) The Right to a Fair Trial.

Even members of an underground movement have the right to a fair trial on capture. Many of the trials mentioned under "2. Allied Civilians in Occupied Territories who take up Arms against the Enemy" (see later), are relevant here. The question of the wrongful extension of Nazi law and courts to occupied territories is dealt with in the trial of Josef Altstötter and 15 others, tried by American Military Tribunal at Nuremberg (Subsequent Proceedings Case No.3), and reference should also be made in this connection to the trial of Robert Wagner and 6 others before a French Military Tribunal at Strasbourg on 3rd May 1946.

(iv) Family Rights.

"Family Rights" are specifically protected by Art.46 of the Hague Convention, and many of the offences for which war criminals have been condemned have, in fact, constituted violations of these rights. Examples are provided, for instance, by the splitting up of families for purposes of deportation to slave labour.

In the trial of Heinrich Gerike and 7 others before a British Military Court at Brunswick from 20th March to 3rd April 1946 (the Velpke Children's Home Case), the prosecution relied upon Art.46. In this case, various accused were found guilty of being "concerned in the killing by wilful neglect of a number of children, Polish nationals." It was shown that they were implicated in the establishment and running of a home to which Polish female workers in a district of Germany were forced to send their children, the object being to free the parents for forced labour for the benefit of the German economy. Many of the children died through neglect.

(v) Religious Rights.

It will be noted that "religious convictions and worship" are also protected by Art.46 but very little use has been made in war crime trials of this aspect of the provision.

Violations of religious rights, inter alia, were alleged in the trial of General Tomoyuki Yamashita, tried before an American Military Commission at Manila, Philippine Islands, from 1st October - 7th December 1945. In this case, it was shown that, among the great destruction caused by troops under the accused's command, figured the destruction of religious edifices. Such destruction of religious property may however possibly be better classed under the heading of devastation of property rather than under the heading of violation of individual religious functions.

(vi) Property Rights.

Allegations of violations of property rights have been frequent in war crime trials. Once again, "private property" is specifically mentioned in Art.46.

There are many examples among the trials by French Military Tribunals of the destruction or theft of property in occupied France. Among other trials dealing with destruction of property may be mentioned the trial of Takashi Sakai by the Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking on 27th August, 1946.

The trial of Friedrich Flick and 5 others, before an American Military Tribunal at Nuremberg (Subsequent Proceedings Trial No.5), and the Krupp trial, (Subsequent Proceedings No.10), deal with economic pillage among other matters. Also of interest in the same connection are the Milch trial (Subsequent Proceedings No.2) the trial of Oswald Pohl and 17 others, tried before an American Military Tribunal at Nuremberg (Subsequent Proceedings No.4), and the trial of Carl Krauch and 22 others, which was opened before an American Military Tribunal at Nuremberg on the 14th August 1947 (the I.G. Farben Industrie case, Subsequent Proceedings No.6)

(vii) Civil Rights.

Perhaps cases involving denationalisation would fall under this heading; see for instance the trial of Ulrich Greifelt and 13 others which will be held at Nuremberg before an American Military Tribunal (Subsequent Proceedings No.8) in which the allegations include charges of Genocide. Genocide is also charged in the trial of Otto Ohlendorf and 23 others (the "Einsatzgruppen" trial) which is being held at Nuremberg before an American Military Tribunal (Subsequent Proceedings No. 9). Two further trials which are of interest in this connection are the French trial of Robert Wagner, in which one of the charges concerns recruitment for the benefit of the enemy and also the Trial of Josef Alstötter (Subsequent Proceedings No.3).

2. Allied Civilians in Occupied Territories

who Take up Arms against the Enemy.

Provisions relative to the question of the legal position of allied civilians in occupied territories who take up arms against the enemy are Articles 1 - 3 of the Hague Convention, which provide as follows:

"Art.1. The laws, rights, and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions:-

- (1) They must be commanded by a person responsible for his subordinates;

- (2) They must have a fixed distinctive sign recognisable at a distance;
- (3) They must carry arms openly; and
- (4) They must conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army".

Art.2. The inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly, and if they respect the laws and customs of war.

Art.3. The armed forces of the belligerents may consist of combatants and non-combatants. In the case of capture by the enemy, both have the right to be treated as prisoners of war. "

Trials which are of interest in this connection include the trial of Yamamoto Chusaburo by a British Military Court at Kuala Lumpur on 30th January to 1st February 1946, the trial of Karl Buck and 10 others before a British Military Court at Wuppertal from 6th to 10th May 1946, the trial of Heinrich Klein and 14 others before a British Military Court at Wuppertal from 22nd - 25th May 1946, the trial of General Victor Alexander Friedrich Willy Seeger and 5 others before a Military Court at Wuppertal from 17th June - 11th July 1946, the trial of General Tomoyuki Yamashita, tried by an American Military Commission at Manila from 1st October - 7th December 1945, the trial of Wilhelm List and 11 others before an American Military Tribunal at Nuremberg (Subsequent Proceedings Case No.7), the trial of I/Cpl. Rehei Okmura and 2 others before an Australian Military Court at Rabaul from 13th - 18th December 1945, the trial of Werner Kretzschmar before a French Military Tribunal at Angers on the 27th March 1946 the trial of Johann Genz before a French Military Tribunal at Toulouse on the 16th April 1946, the trial of Richard Wilhelm Hermann Bruns and 2 others before a Norwegian Eidsivating Lagmannsrett on 20th March 1946 and the trial of Kriminalsekretær Willie August Kesting, and Nils Peter Bernhard Hjelmberg by the Gulatings Lagmannsrett in March, 1946, and by the Supreme Court of Norway, July, 1946.

3. Allied Civilians outside Occupied Territory.

On a narrow interpretation, the Hague Convention does not protect civilians outside of occupied territory, since the heading of Section II of the Hague Convention is "Military Authority over the territory of the Hostile State". This interpretation has not, however, prevailed. For instance, in the Hadamar trial, (the trial of Alphonse Klein and 6 others before an American Military Commission at Wiesbaden which was completed on the 15th October 1945,) various accused were found guilty of taking part in the deliberate killing of, among other people, over 400 Polish and Soviet nationals, many if not most of whom were civilians, by injections of poisonous drugs. Here, the fact that the offences took place in Hadamar, Germany, and not in occupied territory, was, of course, treated as entirely irrelevant. Another example among the many in existence, is the Belsen trial. In this trial, the offences committed in Auschwitz and those committed in Belsen were treated by the court as being on entirely the same footing, the fact that Belsen was on German territory and Auschwitz in occupied Poland being treated as beside the point from the legal point of view. In his opening statement in the trial, the prosecutor quoted paragraphs 442 and 443 of the British Manual of Military Law:

- " 442. War crimes may be divided into four different classes:
(i) Violations of the recognised rules of warfare by members of the armed forces...
443. The more important violations are the following ...
ill-treatment of prisoners of war;... ill-treatment of inhabitants in occupied territory..."

The Prosecutor claimed that although the words "inhabitants in occupied countries" were used, it was obvious that they should be extended to "all inhabitants of occupied countries who have been deported from their own country," the deportation, in fact, being a further infringement.

In the trial of Heinrich Gerike and 7 others (the Velpke Children's Home case, to which reference has already been made⁽¹⁾), various accused were found guilty of being concerned in the killing by wilful neglect of Polish children born on German territory.

(1) See p. 6.

Article 46 of the Hague Convention was drafted at a time when deportations for forced labour on the scale carried out by Nazi Germany could not have been contemplated, and strictly speaking, applies only to the behaviour of the occupying power within the occupied territory. Nevertheless, it is clear that the general rule laid down therein must be valid also in respect of inhabitants of the occupied territory who have been sent into the country of the occupant for forced labour, as had mothers of the children who were sent to the Velpke Baby Home, and to the children born to them while in captivity. The prosecutor in this trial pointed out, as did the prosecutor in the Belsen trial, that such deportation was in itself contrary to international law, as was stated in Oppenheim-Lauterpacht, International Law, Vol.II, 6th Edition, on pp.345-6, in the following passage:

"there is no right to deport inhabitants to the country of the occupant, for the purpose of compelling them to work there. When during the World War the Germans deported to Germany several thousands of Belgian and French men and women, and compelled them to work there, the whole civilised world stigmatised this cruel practice as an outrage. "

It could, of course, have been argued by the defence in both the Belsen trial and in the Velpke Baby Home trial that the offence of deportation was committed by persons other than the accused; nevertheless it seems reasonable to assume that the inhabitants of an occupied territory keep their rights under International Law when forced to leave their own country, even though this is not expressly provided in the Hague Convention.

For the rights of deported labour, reference should be made to the Judgment in the Milch trial (Subsequent Proceedings No.2).

4. Non-Allied Nationals.

Enemy nationals are left unprotected in war crime trials proper, by contrast with trials of what are known as "crimes against humanity". For instance, the British Royal Warrant provides, in Regulation 1, that the offences to be tried by British Military Courts shall only be violations of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September 1939.

The question received some discussion during the course of the Belsen trial. On the 3rd October 1945, the defence objected to the proposal of the prosecution to put ⁱⁿ affidavits which included the allegation of an offence committed against a Hungarian girl. Defence Counsel pointed out that the charge against the accused referred to the committing of a war crime which involved the ill-treatment and killing of allied nationals. Counsel also thought that it was within the knowledge of the court that a war crime could not be committed by a German against a Hungarian since the latter would not be an Allied national. The Prosecutor made two points in replying: Hungary, he said, left the Axis before April 1945, and had come on to the Allied side; at that time, therefore, the Hungarians were at least some form of Allies, though Counsel did not know to what extent. A more general point made by the Prosecutor was that what he was trying to prove was the treatment of the Allied inmates of the camp. He thought that he was perfectly entitled to put before the Court evidence of the treatment of other persons in the camp. If there were ten people and he wanted to prove that one of them was badly treated, in the Prosecutor's submission, he was perfectly entitled to prove that the ten were badly treated. The treatment of all the inmates in the camp was relevant to show the treatment of any individual inmate.

The Court decided that the paragraph be included in the evidence before the Court.

(1)
Colonel Smith claimed that only offences against Allied nationals could be regarded by the Court as war crimes, and that "Allied nationals" meant nationals of the United Nations. The term therefore excluded Hungarians and Italians. As has been seen, the Prosecutor

(1) Counsel for the Defendants in general.

himself in effect disclaimed any intention of charging the accused of crimes against persons other than Allied nationals. Both Prosecution and Defence therefore recognised that, under the Royal Warrant, the jurisdiction of British Military Courts is limited to the trial of war crimes proper and excludes crimes against humanity as defined in Article 6(c) of the Charter of the International Military Tribunal. British Military Courts deal with such crimes only if they are also violations of the laws and usages of war.

Nevertheless, it must be added that offences against non-allied nationals do fall within the jurisdiction of some courts other than International Military Tribunals in Nuremberg and Tokyo, for instance, some of the United States Military Commissions appointed for the Trial of War Crimes.

Of these, the narrowest jurisdiction is that vested in the Military Commissions appointed in the Mediterranean Theatre of Operations. In the Mediterranean Regulations (Regulation 1) the expression "war crime" means a violation of the laws and customs of war.

Under the European Directive⁽¹⁾ (paragraph 1a), Military Commissions are appointed for the trial of persons who are charged with violations of the laws or customs of war, of the law of nations or of the laws of occupied territory, or any part thereof. The European Directive adds therefore to the jurisdiction of Military Commissions violations of the laws of nations other than the laws or customs of war, and violations of the local law of the occupied territory. In Regulation 5 of the Pacific September Regulations,⁽²⁾ the offences falling under the jurisdiction of the Military Commissions are described as follows:

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- (1) By command of General Eisenhower, a directive regarding Military Commissions in the European Theatre of Operations was made by an Order of 25th August 1945.
 - (2) Similarly, by command of General McNarney, Regulations for the Trial of War Crimes for the Mediterranean Theatre of Operations were made on the 23rd September 1945 by circular No. 114.

" Murder, torture or ill-treatment of prisoners of war or persons on the seas; killing or ill-treatment of hostages; murder, torture or ill-treatment, or deportation to slave labour or for any other illegal purpose, of civilians of, or in, occupied territory; plunder of public or private property; wanton destruction of cities, towns or villages; devastation, destruction or damage of public or private property not justified by military necessity; planning, preparation, initiation or waging of a war of aggression, or an invasion or war in violation of international law, treaties, agreements or assurances; murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or in connection with any offence within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated; and all other offences against the laws or customs of war; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy. "

(1)

The Pacific Regulations of 5th December, 1945, define the offences to be tried by the Military Commissions in the Pacific Theatre in the following words (Regulation 2(b)):

"(1) Military Commissions, established hereunder shall have jurisdiction over all offences including, not limited to, the following:

- (a) The planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
 - (b) Violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or internees or persons on the seas or elsewhere; improper treatment of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; or devastation not justified by military necessity.
 - (c) Murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime defined herein, whether or not in violation of the domestic laws of the country where perpetrated.
- (2) The offence need not have been committed after a particular date to render the responsible party or parties subject to arrest, but in general should have been committed since or in the period immediately preceding the Mukden incident of 18th September 1931."

(1) "Regulations Governing the Trial of Accused War Criminals", issued by General MacArthur.

In the China Regulations⁽¹⁾ the jurisdiction of the Commission is circumscribed as follows: "The military commissions established hereunder shall have jurisdiction over the following offences: Violations of the laws or customs of war, including but not limited to murder, torture, or ill-treatment of prisoners of war or persons on the seas; killing or ill-treatment of hostages, murder, torture or ill-treatment, or deportation to slave labour or for any other illegal purposes, of civilians of, or in, occupied territory; plunder of public or private property; wanton destruction of cities, towns or villages; devastation, destruction or damage of public or private property not justified by military necessity; murder, extermination, enslavement, deportation or other inhuman acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or connection with any offence within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated; and all other offences against the laws or customs of war; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy. "

In describing the offences subject to trial by Military Tribunals the Regulations used in the Pacific theatre and in China reflect the influence of the Four Power Agreement of 8th August 1945, and particularly of Article 6 of the Charter of the International Military Tribunal annexed to it. Under the Charter the International Military Tribunal has jurisdiction over:

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

(1) A set of Regulations issued for the China Theater on 21st January 1946.

Military Commissions operating under the Pacific Regulations have jurisdiction over all offences, including, but not limited to, the three types of offences enumerated. It is also expressly stated there that the offences need not have been committed after a particular date, but in general should have been committed since or in the period immediately preceding the Mukden incident of 18th September 1931.

Trials held by courts acting under Law No.10 of the Allied Control Council for Germany also, of course, possess jurisdiction over crimes against humanity (and indeed over crimes against peace), as well as over war crimes. (See Dr. Mayr-Harting's section of the Report.) It should be added that paragraph 2 of the Danish Act of 12th July 1946, regarding the punishment of war criminals states that "...This act shall apply ... also to all acts which, though not specifically cited above, are covered by Art.6 of the Charter of the International Military Tribunal...."

Neutral citizens are also, to some degree, protected by war crime trials. For instance, Article 1 of the Norwegian Law of 13th December 1946 on the Punishment of Foreign War Criminals, provides:

" Acts which, by reason of their character, come within the scope of Norwegian criminal legislation are punishable, according to Norwegian law, if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norway or were directed against Norwegian citizens or Norwegian interests. In accordance with the terms of the Civil Criminal Code No.12, paragraph 4, with which should be read No.13, paragraphs 1 and 3, the above provision applies also to acts committed abroad to the prejudice of Allied legal rights or of rights which, as laid down by Royal Proclamation, are deemed to be equivalent thereto." (1)

An explanatory memorandum of the Norwegian Ministry of Justice and Police dealing with this law states that, in referring to rights which are equivalent to Allied rights, the Draftsman had in mind particularly: (a) Danish citizens and their economic interests, and (b) neutral citizens in Norway or other Allied armed forces or persons employed in other Allied war work.

(1) Italics not in the original.

Certain categories of neutral citizens would seem also to be protected by Article 1 of the French Ordinance of 28th August 1944, concerning the prosecution of war criminals, which provides as follows:

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

.....

Relevant in this connection also is the trial of Johann Schwarzhuber and 15 others, tried before a Military Court at Hamburg from 5th December, 1946 - 3rd February, 1947, (the Ravensbruck Concentration Camp trial).

Of some interest in connection with the requirement that a breach of the laws and usages of war can not involve offences by enemy nationals against enemy nationals, is the question whether territory can be annexed while war is still in progress. Thus, in the Belsen trial, the defence claimed that a number of the victims of atrocities committed in Belsen and Auschwitz had ceased to be Allied nationals and had become German subjects as a result of the annexation of their Homelands by Germany. The prosecution replied that before it was possible for a country to be annexed, the war must be ended. While a war was still in progress, the citizens were entitled to the protection of the Hague Convention.

Oppenheim-Lauterpacht, International Law, Vol.I, Fifth Edition, p.450, states that the act of forcibly taking possession of a part of an enemy's territory during the continuance of war, "although the conqueror may intend to keep the conquered territory and therefore to

annex it, does not confer a title so long as the war has not terminated either through simple cessation of hostilities or by a treaty of peace. Therefore, the practice, which sometimes prevails, of annexing during a war a conquered part of enemy territory cannot be approved. For annexation of conquered enemy territory, whether of the whole or of part, confers a title only after a firmly established conquest, and so long as war continues, conquest is not firmly established.

This doctrine was underlined in the judgment of the International Military Tribunal at Nuremberg where it was stated:

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

The same problem was touched upon in the Milch trial.

5. Armed Forces.

Very few trials have so far been brought to the attention of the United Nations War Crimes Commission in which allegations of violations of laws and customs of war, designed to protect the fighting forces against illegal means of warfare, have been the subject of trials.

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

In the trial of S.S. Brigadeführer Kurt Meyer, held by a Canadian Military Court at Aurich from 10th - 28th December, 1945, it was alleged, inter alia, that the accused, in violation of the laws and usages of war, during the fighting in 1943 - 1944, in Belgium and France, "incited and counselled troops under his command to deny quarter to allied troops," and this was one of the charges on which Meyer was found guilty. Nevertheless, it is doubtful whether such offences should be classified as offences against the members of armed forces or offences against prisoners of war. They are of course specifically prohibited by Article 23(d) of the Hague Convention which provides:

"Article 23. In addition to the prohibitions provided by special Conventions, it is particularly forbidden;

(d) To declare that no quarter will be given;"

6. Prisoners of War.

Cases concerning offences against prisoners of war and against inhabitants of occupied territories form the two main categories of war crime trials.

(i) Interpretation of the term "Prisoner of War".

Under this heading, the following questions, among others, should be examined:

(a). The interpretation of the Hague and Geneva Conventions so as to cover crimes committed not in camps, but on the line of march.

Trials which are relevant to this point include the trial of Arno

Hearing, held before a British Military Court at Hannover from 24th - 26th January 1946, in which a member of a guard company was accused of ill-treating members of the British army and other British and Allied nationals while on the march with a column of prisoners of war from Marienburg to Brunswick. The accused was found guilty, the prosecutor having submitted that the column of march described in the trial was to all intents the same and in the same position as a Prisoner of War Camp. All the duties set out in the Geneva Prisoner of War Convention fell on the shoulders of the accused.

Reference should also be made to the trial of Capt. Shoichi Yamamoto and 10 others, Japanese nationals, tried by an Australian Military Court from 20th - 27th May 1946 at Rabaul.

(b) The Application of the Hague and Geneva Conventions to crimes committed against Prisoners of War in Concentration Camps.

During the course of the Belson trial, Col. Smith (Defence Counsel) pointed out that in one of the instances charged, where victims were prisoners of war, a British subject who had been captured as a prisoner of war was transferred to the concentration camp. This was a clear international wrong, but the wrong consisted in ceasing to treat him as a prisoner of war, in taking him out of the camp where he was protected by the Geneva Convention, and putting him in a concentration camp where he was exposed to the same treatment as any other inmate. The responsibility rested with those who sent him to Auschwitz or Belson, but the responsibility of the people at Auschwitz and Belson was the same in regard to that man as to any other inmate. Counsel did not know whether they even knew he was a prisoner of war. In any case they had no option but to treat him as anyone else.

In his closing address, the Prosecutor claimed that Colonel Smith had suggested that the crime involved was the moving of the prisoner of war from the prisoner of war camp into the concentration camp and that anything which happened to him thereafter was thereby excused. The Prosecutor found it difficult to accept the suggestion that if a man were ill-treated in a prisoner of war camp that was a

war crime, but if the ill-treatment took place outside in the street or in a concentration camp, it was not. (1)

(c) The interpretation given to Article 23(c) (2) of the Hague Convention.

The Hague Convention was drafted long before the possibility of airmen escaping from aircraft by parachute was thought of; nevertheless, the article of the Convention has, of course, been interpreted to cover baled-out airmen, whether captured by the enemy armed forces or by enemy civilians. Reference should be made in this connection for instance, to the trial of Josef Hangobl before an American Military Commission at Dachau on the 18th October 1945, and to the trial of Alfred Koller before an American Intermediate Military Government Court at Ludwigsburg on the 2nd April 1946. In connection with the application of this article and of the Geneva Conventions to paratroops, see the trial of Hans Wichman before a British Military Court at Hamburg on the 29th November 1945 and the trial of Heinrich Klein and 14 others before a British Military Court, at Wuppertal from 22nd to 25th May, 1946, and also the trial of Kurt Student, before a British Military Court, at Luneberg, Germany, from 6th - 10th May, 1946.

(d) The question whether members of Resistance Movements become Prisoners of War on Capture.

See for instance, the reference made under Allied Civilians in Occupied Territories who take up Arms against the Enemy; see also Trial of Carl Bauer and 2 Others before a French Military Tribunal at Dijon, of which the judgment was delivered on the 18th October 1945, the trial of Heinrich Sasse and 3 others, before a French Military Tribunal at Bordeaux, of which the judgment was delivered on the 15th April 1946 and the trial of Johann Genz, held before a French Military Tribunal at Toulouse, of which the judgment was delivered on 16th April, 1946.

(e) The Question of the circumstances in which Prisoners of War could be treated as suspected war criminals.

See trial of General Victor Alexander Friedrich Willy Seeger and 5 others, held before a British Military Court at Wuppertal from 17th June - 11th July, 1946.

(1) In so far as it did not arrive at a special finding regarding the victim in question, who was mentioned on the Beslen Charge Sheet the Court would appear to have rejected Colonel Smith's argument.

(2) See pp. 25 - 26.

(ii) A General Provision Protecting Prisoners of War

One general provision protecting prisoners of war is Article 18 of the Geneva Prisoners of War Convention, which provides that:

"Each Prisoner of War Camp shall be placed under the authority of a responsible officer..."

This article was quoted, for instance, by the prosecutor in the trial of Arno Heering, held before a British Military Court at Hannover, from 24th - 26th January, 1946.

(iii) The Right to Life and Health.

Numerous provisions of the Hague and Geneva Conventions attempt to secure for prisoners of war their rights to life and health.

These may be divided into two categories:

- (a) Those aimed at maintaining general minimum conditions conducive to life and health and placing on the authorities holding prisoners, a duty to maintain prisoners of war. This class includes the following, all of which have been quoted in actual war crime trials:

Hague Convention, Article 4:

"Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses and military papers, remain their property.

Hague Convention, Article 7:

"The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In default of special agreement between the belligerents, prisoners of war shall be treated, as regards rations, quarters and clothing, on the same footing as the troops of the Government which captured them."

Geneva Prisoners of War Convention, Article 2:

"Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them.

They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity.

Measures of reprisal against them are forbidden."

Geneva Convention, Article 3:

"Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex.

Prisoners retain their full civil capacity."

Geneva Convention, Article 4:

"The detaining Power is required to provide for the maintenance of prisoners of war in its charge..

Differences of treatment between prisoners are permissible only if such differences are based on the military rank, the state of physical or mental health, the professional abilities, or the sex of those who benefit from them."

Geneva Convention, Article 7:

"As soon as possible after their capture, prisoners of war shall be evacuated to depots sufficiently removed from the fighting zone for them to be out of danger.

Only prisoners who, by reason of their wounds or maladies, would run greater risks by being evacuated than by remaining may be kept temporarily in a dangerous zone.

Prisoners shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone....."

Geneva Convention, Article 9:

"Prisoners of war may be interned in a town, fortress, or other place, and may be required not to go beyond certain fixed limits. They may also be interned in fenced camps; they shall not be confined or imprisoned except as a measure indispensable for safety or health, and only so long as circumstances exist which necessitate such a measure.

Prisoners captured in districts which are unhealthy or whose climate is deleterious to persons coming from temperate climates shall be removed as soon as possible to a more favourable climate.

....."

Geneva Convention, Article 10:

"Prisoners of war shall be lodged in buildings or huts which afford all possible safeguards as regards hygiene and salubrity.

The premises must be entirely free from damp, and adequately heated and lighted. All precautions shall be taken against the danger of fire.

As regards dormitories, their total area, minimum cubic air space, fitting and bedding material, the conditions shall be the same as for the depot troops of the detaining Power."

Geneva Convention, Article 11:

"The food ration of prisoners of war shall be equivalent in quantity and quality to that of the depot troops.

Prisoners shall also be afforded the means of preparing for themselves such additional articles of food as they may possess.

Sufficient drinking water shall be supplied to them. The use of tobacco shall be authorised. Prisoners may be employed in the kitchens.

All collective disciplinary measures affecting food are prohibited."

Geneva Convention, Article 12:

"Clothing, underwear and footwear shall be supplied to prisoners of war by the detaining Power. The regular replacement and repair of such articles shall be assured. Workers shall also receive working kit wherever the nature of the work requires it.

In all camps, canteens shall be installed at which prisoners shall be able to procure, at the local market price, food commodities and ordinary articles.

The profits accruing to the administrations of the camps from the canteens shall be utilised for the benefit of the prisoners."

Geneva Convention, Article 13:

"Belligerents shall be required to take all necessary hygienic measures to ensure the cleanliness and salubrity of camps and to prevent epidemics.

Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness.

In addition and without prejudice to the provision as far as possible of baths and shower-baths in the camps, the prisoners shall be provided with a sufficient quantity of water for their bodily cleanliness.

They shall have facilities for engaging in physical exercises and obtaining the benefit of being out of doors."

Geneva Convention, Article 14:

"Each camp shall possess an infirmary, where prisoners of war shall receive attention of any kind of which they may be in need. If necessary, isolation establishments shall be reserved for patients suffering from infectious and contagious diseases.

The expenses of treatment, including those of temporary remedial apparatus, shall be borne by the detaining Power.

Belligerents shall be required to issue, on demand, to any prisoner treated, an official statement indicating the nature and duration of his illness and of the treatment received.

It shall be permissible for belligerents mutually to authorise each other, by means of special agreements, to retain in the camps doctors and medical orderlies for the purpose of caring for their prisoner compatriots.

Prisoners who have contracted a serious malady, or whose condition necessitates important surgical treatment shall be admitted, at the expense of the detaining Power, to any military or civil institution qualified to treat them."

Geneva Convention, Article 17:

"Belligerents shall encourage as much as possible the organisation of intellectual and sporting pursuits by the prisoners of war."

Geneva Convention, Article 25:

"Unless the course of military operations demands it, sick and wounded prisoners of war shall not be transferred if their recovery might be prejudiced by the journey."

Geneva Convention, Article 27:

"Belligerents may employ as workmen prisoners of war who are physically fit, other than officers and persons of equivalent status according to their rank and their ability."

.....

Non-commissioned officers who are prisoners of war may be compelled to undertake only supervisory work, unless they expressly request remunerative occupation."

.....

Geneva Convention, Article 28:

"The detaining Power shall assume entire responsibility for the maintenance, care, treatment and the payment of the wages of prisoners of war working for private individuals."

Geneva Convention, Article 32:

"It is forbidden to employ prisoners of war on unhealthy or dangerous work."

Conditions of work shall not be rendered more arduous by disciplinary measures."

Geneva Convention, Article 33:

"Conditions governing labour detachments shall be similar to those of prisoners-of-war camps, particularly as concerns hygienic conditions, food, care in case of accidents or sickness, correspondence and the reception of parcels."

Every labour detachment shall be attached to a prisoners' camp. The commandant of this camp shall be responsible for the observance in the labour detachment of the provisions of the present Convention."

It will be noted, of course, that Articles 14 and 25 are also relevant in connection with the rights of the sick and wounded (see p. 34).

Examples of trials in which these articles have been quoted and in which the rights of prisoners of war to life and health have been vindicated, are the following: Trial of Martin Gottfried Weiss and 39 others, before an American General Military Government Court at Dachau, from 15th November - 13th December 1945, (the Dachau Concentration Camp case), the trial of Maj.Gen. Otsuka and 43 others before an American Military Commission at Singapore from 8th August - 10th October 1946,

the trial of Giulio Oldani, an Italian national, tried before an American Military Commission at Florence from 31st October to 7th November 1946; the trial of Oswald Pohl and 17 others, before an American Military Tribunal at Nuremberg (Subsequent Proceedings Case No.4); the trial of Friedrich Flick and 5 others, before an American Military Tribunal at Nuremberg (Subsequent Proceedings Case No.5); the trial of Carl Krauch and 22 others before an American Military Tribunal at Nuremberg (the I.G. Farben Industrie case), (Subsequent Proceedings No. 6); the trial of Josef Altstötter and 15 others, before an American Military Tribunal at Nuremberg, (Subsequent Proceedings Case No. 3); the trial of Alfried Krupp von Bohlen und Halbach, before an American Military Tribunal at Nuremberg, (the Krupp case), (Subsequent Proceedings No. 10); the trial of Capt. Wadami Shirozu and 35 others, before an Australian Military Court, from 2nd to 18th January 1946 at Ambon and from 25th January to 15th February 1946 at Morotai; the trial of Lt. Taisuke Kawazumi and 8 others, before an Australian Military Court at Morotai from 5th - 14th February 1946; the trial of Erich Killinger and 4 others before a British Military Court at Wuppertal, from 26th November to 3rd December 1945; the trial of Arno Heering, before a British Military Court at Hannover from 24th to 26th January 1946 and the trial of Kurt Student before a British Military Court at Luneberg from 6th to 10th May 1946.

(b) Those aimed at ensuring that prisoners of war are not exposed to unnecessary danger, or wounded or killed without due cause. The following articles of this class have been quoted in war crime trials;

Hague Convention, Article 6:

" The State may employ the labour of prisoners of war other than officers, according to their rank and capacity. The work shall not be excessive, and shall have no connection with the operations of the war.

..... "

Hague Convention, Article 23:

" In addition to the prohibitions provided by special Conventions, it is particularly forbidden:

.....

- (c) To kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion;
- (d) To declare that no quarter will be given;"

.....

Geneva Convention, Article 31:

" Work done by prisoners of war shall have no direct connection with the operations of the war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units.

..... "

Article 32 of the Geneva Convention, which has been quoted above, is also relevant in this connection.

Trials in which these articles have been quoted and in which these rights have been vindicated, are the following: United States trial of General Tomohuki Yamashita, (see above), United States trial of Tikitaki Yaichi before a Military Commission at Yokohama on 7th March 1946; trial of Genji Matsuda and Jeichi Kuwashima, before an American Military Commission at Shanghai from 5th - 13th September 1946; trial of Tomoki Nakamura, before an American Military Commission at Yokohama from 18th September to 28th December 1946; trial of Hiroshi Fujii, a Japanese national before an American Military Commission at Yokohama from 28th September to 31st December 1946; trial of Giulio Oldani, an Italian national before an American Military Commission at Florence from 31st October to 7th November 1946; trial of Erhard Milch, (Subsequent Proceedings case No. 2); trial of Oswald Pohl and 17 others, (Subsequent Proceedings No. 4); trial of Friedrich Flick and 5 others, (Subsequent Proceedings No. 5); trial of Carl Krauch and 22 others (Subsequent Proceedings No. 6); trial of Alfried Krupp von Bohlen und Halbach and 11 others (Subsequent Proceedings No. 10); trial of General Anton Dostler, before an American Military Commission, Rome from 8th to 12th October 1945; trial of Otto Sandrock and 3 others (the "Almelo Trial") before a British Military Court at Almelo, Holland, from 24th to 26th November 1945; the trial of Rear-Admiral Nisuke Masuda and 4 others, before a United States Military Commission at Kwajalein Island, Marshall Islands, from 7th - 13th December 1945, (the "Jaluit Atoll Case"); the

the trial of Leo Rosenau, before a British Military Court at Hanover on the 13th August 1946, and the trial of Kurt Student before a British Military Court at Luneberg from 6th to 10th May, 1946.

The above are, of course, only examples of this type of trial, since cases involving allegations of the killing or wounding of prisoners of war, probably form the largest category of trials.

Two trials in which the prohibition contained in Article 23(d) of the Hague Regulations was referred to, are the trial of S.S. Brigadeführer Kurt Meyer before a Canadian Military Court at Aurich, from 10th to 28th December 1945, and the trial of Karl Maria von Behren before a British Military Court at Hamburg on 28th to 31st May 1946.

(iv) The Right to Integrity of the Person.

General articles protecting this right are the Hague Convention, Article 4 and Article 23(c) (see back), and the Geneva Convention, Articles 2 and 3, (see back).⁽¹⁾

These provisions have been quoted in numerous trials, particularly where obvious ill-treatment of prisoners of war is involved. In the nature of the offences alleged, no such comparatively detailed regulations are required to prohibit these offences as are required to protect the health of prisoners of war. (The latter must include, for instance, provisions relating to food and clothing, hygiene, washing facilities, provisions for physical exercise, etc.)

Examples of trials which are relevant in this connection, include various of the concentration camp cases. Reference can also be made to the trial of Takashi Sakai, before a Chinese War Crimes Military Tribunal of the Ministry of National Defence at Nanking on the 27th August 1946, the trial of Karl-Hans Hermann Klinge, before the Supreme Court of Norway on the 27th February 1946, the trial of S.S. Brigadeführer Kurt Meyer (see above)⁽¹⁾ and the trials of Erich Killinger and 4 others, Arno Heering, and Willi Mackensen, before British Military Courts (see above)⁽¹⁾; the trials of Giulio Oldani, before an American Military Commission (see above)⁽¹⁾; Nuremberg Subsequent Proceedings Cases Nos. 2, 3 and 4; the French trial of Richard Raith before a Military

(1) N.B. It is intended to supply cross-references, in such instances as this, in the text to be sent to the United Nations. The desirability of sending part of the present paper to the record before the remainder was quite completed has so far prevented full cross-references from being made.

Tribunal at Nancy, of which judgment was delivered on the 18th May 1946; trial of Heinrich Housch, before a French Permanent Military Tribunal at Metz on the 7th November 1946, and the trial of Pierre Humbart before a French Permanent Military Tribunal at Metz on the 9th January 1947.

It is, perhaps, relevant to include here cases illustrating the prohibition of the infraction of excessive punishment on prisoners of war. The relevant articles are:

Geneva Convention, Article 46:

"Prisoners of war shall not be subjected by the military authorities or the tribunals of the detaining Power to penalties other than those which are prescribed for similar acts by members of the national forces.

Officers, non-commissioned officers or private soldiers, prisoners of war, undergoing disciplinary punishment shall not be subjected to treatment less favourable than that prescribed, as regards the same punishment, for similar ranks in the armed forces of the detaining Power.

All forms of corporal punishment, confinement in premises not lighted by daylight and, in general, all forms of cruelty whatsoever, are prohibited.

Collective penalties for individual acts are also prohibited."

Geneva Convention, Article 54:

"Imprisonment is the most severe disciplinary punishment which may be inflicted on a prisoner of war.

The duration of any single punishment shall not exceed thirty days.

..... "

Relevant trials include United States trial of Giulio Oldani, and British trial of Arno Heering. (see above.)

A trial illustrative of the prohibition contained in Article 2 of the Geneva Convention, concerning ^{the} exposing of prisoners of war to insults and public curiosity, is the trial of Lt. Gen. Kurt Maeltzer, before an American Military Commission at Florence from 9th to 14th September, 1946.

(iv) The Right to Freedom of Movement.

Reference is made to Document III/96, pages 3 - 4 for certain material relating to the shooting of prisoners of war while trying to escape. A prisoner of war must not, of course, be shot for attempting to escape.

Article 50 of the Geneva Convention, provides as follows:

" Escaped prisoners of war who are re-captured before they have been able to rejoin their own armed forces or to leave the territory occupied by the armed forces which captured them shall be liable only to disciplinary punishment.

Prisoners who, after succeeding in rejoining their armed forces or in leaving the territory occupied by the armed forces which captured them, are again taken prisoner shall not be liable to any punishment for their previous escape. "

Relevant trials are: trial of Sub.Lt. Matagi Honji and P/O Eizo Kurokawa, before an Australian Military Court at Morotai on the 18th February 1946; trial of Capt. Hyotaro Yamamoto and 12 others, before an Australian Military Court at Rabaul from 3rd - 6th May 1946 and the trial of Capt. Toma Ikeba and 3 others, before an Australian Military Court at Rabaul from 15th to 16th May 1946.

Further, the defence that the "prisoner was shot while trying to escape" cannot be pleaded successfully if the only purpose of his escape was to save himself from being killed, contrary to international law; see trial of Johann Melchior and Walter Hirschelmann before an American General Military Government Court at Ludwigsburg from 22nd to 24th January 1946.

The Geneva Convention provides, in Article 13, that prisoners of war "shall have facilities for engaging in physical exercises and obtaining the benefit of being out of doors". The Hague Convention provides, in Article 5, that:

" Prisoners of war may be interned in a town, fortress, camp, or other place, and are bound not to go beyond certain fixed limits; but they cannot be placed in confinement except as an indispensable measure of safety, and only while the circumstances which necessitate the measure continue to exist. "

This last pair of provisions seems to fall more naturally under the heading "Right to Freedom of Movement" than does the previous discussion of the position regarding prisoners who attempt to escape. Nevertheless, the legal position regarding prisoners who try to escape has some interest and this section would seem to be the most appropriate one in which to include a reference to the point.

Further
/ trials illustrative of the protection of the right of freedom of movement of prisoners of war are the following: the trial of Colonel Stefano Orfalo, an Italian national, before a British Military Court at

Afragola on 20th and 21st May 1946; the Dachau Concentration Camp case; the American trial of Johann Melchior and Walter Hirschelmann, (see above); Subsequent Proceedings cases Nos. 2, 3, 4 and 10, and the Canadian trial of Johann Neitz before a Military Court at Aurich from 15th to 25th March, 1946.

(v) The Right to Fair Trial

A number of provisions deal with the right to fair trial. The Geneva Prisoners of War Convention provides as follows in Articles 60 to 67, which comprise the contents of the section headed "Judicial Proceedings":

Article 60:

"At the commencement of a judicial hearing against a prisoner of war, the detaining Power shall notify the representative of the protecting Power as soon as possible, and in any case before the date fixed for the opening of the hearing.

The said notification shall contain the following particulars:

- (a) Civil status and rank of the prisoner.
- (b) Place of residence or detention.
- (c) Statement of the charge or charges, and of the legal provisions applicable.

If it is not possible in this notification to indicate particulars of the court which will try the case, the date of the opening of the hearing and the place where it will take place, these particulars shall be furnished to the representative of the protecting Power at a later date, but as soon as possible and in any case at least three weeks before the opening of the hearing."

Article 61:

"No prisoner of war shall be sentenced without being given the opportunity to defend himself.

No prisoner shall be compelled to admit that he is guilty of the offence of which he is accused."

Article 62:

"The prisoner of war shall have the right to be assisted by a qualified advocate of his own choice, and, if necessary, to have recourse to the offices of a competent interpreter. He shall be informed of his right by the detaining Power in good time before the hearing.

Failing a choice on the part of the prisoner, the protecting Power may procure an advocate for him. The detaining Power shall, on the request of the protecting Power, furnish to the latter a list of persons qualified to conduct the defence.

The representatives of the protecting Power shall have the right to attend the hearing of the case.

The only exception to this rule is where the hearing has to be kept secret in the interests of the safety of the State. The detaining Power would then notify the protecting Power accordingly."

Article 63:

"A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

Article 64:

"Every prisoner of war shall have the right of appeal against any sentence against him in the same manner as persons belonging to the armed forces of the detaining Power."

Article 65:

"Sentences pronounced against prisoners of war shall be communicated immediately to the protecting Power."

Article 66:

"If sentence of death is passed on a prisoner of war, a communication setting forth in detail the nature and the circumstances of the offence shall be addressed as soon as possible to the representative of the protecting Power for transmission to the Power in whose armed forces the prisoner served.

The sentence shall not be carried out before the expiration of a period of at least three months from the date of the receipt of this communication by the protecting Power."

Article 67:

"No prisoner of war may be deprived of the benefit of the provisions of article 42 of the present Convention as the result of a judgment or otherwise. " (1)

Any trial in which the allegation is made that prisoners were shot without cause is, of course, an illustration of the violation of the right to a fair trial. In some cases, however, the right to a fair trial has been discussed in further detail. Reference is made to the following

- (1) Article 42 lays down the right of prisoners of war to make petitions to the captor authorities and to bring the notice of the protecting Power to such petitions.

trials; the trial of Karl-Hans Hermann Klinge, before the Supreme Court of Norway on the 27th February 1946; the trial of Karl Adam Golke and 13 others before a British Military Court at Wuppertal from 15th to 21st May 1946; the trial of Heinrich Klein and 14 others before a British Military Court at Wuppertal from 22nd to 25th May 1946; the trial of General Victor Alexander Friedrich Willy Seeger (see above); the trial of General Tomoyuki Yamashita (see above); the trial of Jitsuo Dato and 7 others before an American Military Commission at Shanghai, from 1st to 22nd July 1946; the trial of Tanaka Hisakasu and 5 others, before an American Military Commission at Shanghai from 16th to 31st August 1946; the trial of Shigeru Sawada and 3 others, before an American Military Commission at Shanghai from 27th February - 15th April, 1946 and also the trial of Oswald Pohl and 17 others, (Subsequent Proceedings Case No. 4.

The above trials show, inter alia, that all types of prisoners, even captured guerrillas are entitled to some form of trial before being subjected to execution or severe punishment.

(vi) Religious Rights.

The religious rights of a prisoner of war are protected by Hague Convention, Article 18 and Geneva Convention, Article 16. These provide as follows:

Hague Convention, Article 18:

" Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of their own Church, on the sole condition that they comply with the police regulations issued by the military authorities. "

Geneva Convention, Article 16:

" Prisoners of war shall be permitted complete freedom in the performance of their religious duties, including attendance at the services of their faith, on the sole condition that they comply with the routine and police regulations prescribed by the military authorities.

Ministers of religion, who are prisoners of war, whatever may be their denomination, shall be allowed freely to minister to their co-religionists. "

Article 18 of the Hague Convention appears among those whose violations is alleged in the Subsequent Proceedings trials against Carl Krauch and 22 others, and Alfred Krupp von Bohlen und Halbach and 11 others, (Nos. 6 and 10.)

In the trial of Oswald Pohl and 17 others, (Subsequent Proceedings Case No.4), it is alleged, inter alia, that Geneva Convention, Article 16 was violated by various of the accused.

(vii) Property Rights.

Article 4 of the Hague Convention provides that all the personal property of prisoners of war, "except arms, horses and military papers, remain their property". Article 6 of the Geneva Convention provides as follows:

"All personal effects and articles in personal use - except arms, horses, military equipment and military papers - shall remain in the possession of prisoners of war, as well as their metal helmets and gas-masks.

Sums of money carried by prisoners may only be taken from them on the order of an officer and after the amount has been recorded. A receipt shall be given for them. Sums thus impounded shall be placed to the account of each prisoner.

Their identity tokens, badges of rank, decorations and articles of value may not be taken from prisoners. "

Examples of the protection of these rights are afforded by the trials of Giulio Oldani, and of Oswald Pohl and 17 others, (Subsequent Proceedings No. 4), (see above).

(viii) Civic Rights.

Article 3 of the Geneva Prisoners of War Convention lays down: "...prisoners retain their full civil capacity". It has been impossible, however, so far, to find a trial which would throw light on the significance of this provision.

(ix) The Right not to be put to Slavery.

Article 27 of the Geneva Convention provides:

" Belligerents may employ as workmen prisoners of war who are physically fit, other than officers and persons of equivalent status according to their rank and their ability.

Nevertheless, if officers or persons of equivalent status ask for suitable work, this shall be found for them as far as possible.

Non-commissioned officers who are prisoners of war may be compelled to undertake only supervisory work, unless they expressly request remunerative occupation. "

Nevertheless, there are limits to the extent to which the labour of prisoners of war may be used by the capturing power. Trials which

are relevant in connection with the right of prisoners of war and others not to be put to slavery include the trials of Erhard Milch, Josef Altstötter and 15 others, and of Oswald Pohl and 17 others, (Subsequent Proceedings Cases Nos. 2, 3 and 4).

5. The Sick and Wounded.

Special provision is made for the protection of the sick and wounded by the Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Of this Convention, the following articles have been quoted in war crime trials:

Article 1:

"Officers and soldiers and other persons officially attached to the armed forces who are wounded or sick shall be respected and protected in all circumstances; they shall be treated with humanity and cared for medically without distinction of nationality, by the belligerent in whose power they may be.

Nevertheless, the belligerent who is compelled to abandon wounded or sick to the enemy, shall, as far as military exigencies permit, leave with them a portion of his medical personnel and material to help with their treatment."

Article 19:

"As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the medical service of armed forces.

Nevertheless, in the case of countries which already use, in place of the Red Cross, the Red Crescent or the Red Lion and Sun on a white ground as a distinctive sign, these emblems are also recognised by the terms of the present Convention."

Article 20:

"The emblem shall figure on the flags, armlets, and on all material belonging to the medical service, with the permission of the competent military authority."

Article 22:

"The distinctive flag of the Convention shall be hoisted only over such medical formations and establishments as are entitled to be respected under the Convention, and with the consent of the military authorities. In fixed establishments it shall be, and in mobile formations it may be, accompanied by the national flag of the belligerent to whom the formation or establishment belongs.

Nevertheless, medical formations which have fallen into the hands of the enemy, so long as they are in that situation, shall not fly any other flag than that of the Convention.

Belligerents shall take the necessary steps, so far as military exigencies permit, to make clearly visible to the enemy forces, whether land, air, or sea, the distinctive emblems indicating medical formations and establishments, in order to avoid the possibility of any offensive action. "

In Article 2 of the Convention it is stated that:

" Except as regards the treatment to be provided for them in virtue of the preceding article, the wounded and sick of an army who fall into the hands of the enemy shall be prisoners of war, and the general provisions of international law concerning prisoners of war shall be applicable to them.

Belligerents shall, however, be free to prescribe, for the benefit of wounded or sick prisoners, such arrangements as they may think fit beyond the limits of the existing obligations."

Examples of the protection of the rights of the sick and wounded are provided by the trial of Kurt Meyer before a Canadian Military Court at Aurich from 10th to 28th December 1945; the trial of Capt. Wadami Shirozu and 35 others before an Australian Military Court from 2nd to 18th January 1946 at Ambon and from 25th January to 15th February 1946 at Morotai; the trial of Lt. Taisuke Kawazumi and 8 others before an Australian Military Court at Morotai from 5th to 14th February 1946; the trial of Hiroshi Funii, before an American Military Commission at Yokohama from 28th September to 31st December 1946; and the trial of Kurt Student before a British Military Court at Lunenburg from 6th to 10th May 1946.

6. Medical Personnel.

Provision is made for the safeguarding of the personal security of medical personnel by Articles 6 and 9 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, which provide as follows:

Article 6:

" Mobile medical formations, that is to say, those which are intended to accompany armies in the field, and the fixed establishments of the medical service shall be respected and protected by the belligerents."

Article 9:

"The personnel engaged exclusively in the collection, transport and treatment of the wounded and sick, and in the administration of medical formations and establishments, and chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war.

Soldiers specially trained to be employed, in case of necessity, as auxiliary nurses or stretcher-bearers for the collection, transport and treatment of the wounded and sick, and furnished with a proof of identity, shall enjoy the same treatment as the permanent medical personnel if they are taken prisoners while carrying out these functions."

It will be noted that medical personnel are not to be treated as prisoners of war on capture.

Reference is made in this connection also to the trial of Kurt Student, mentioned above.

7. Captured Spies.

Articles 29 and 30 of the Hague Convention makes the following provisions relating to captured spies:

Article 29:

" A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Accordingly soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army for the purpose of obtaining information are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians entrusted with the delivery of despatches intended either for their own army or for the enemy's army, and carrying out their mission openly. To this class likewise belong persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory.

Article 30:

A spy taken in the act shall not be punished without previous trial."

Trials which are relevant in this connection are the "Almelo Trial" (mentioned above); the trial of Werner Rohde and 8 others before a British Military Tribunal at Wuppertal from 29th May - 1st June 1946; the trial of Karl Maria von Bohren before a British Military Court, at Hamburg, from 28th to 31st May 1946; and the trial of Lt.Gen. Takeo Ito and 8 others before an Australian Military Court at Rabaul on the 24th May, 1946.

0. SPHERES IN WHICH THE RIGHTS OF THE ACCUSED
AND THE RIGHTS OF THE VICTIMS MAY BE SAID TO
HAVE CONFLICTED AT THE TIME OF THE OFFENCE.

1. Extent of Responsibility of a Commander
for Offences Committed by his Troops.

The text of this part of the Report is contained in Doc. III/112
pages 1 - 34.

2. Other Degrees of Liability.

It would not be entirely irrelevant to include at this point some investigation of the various ways in which alleged war criminals may be found guilty of offences which constitute violations of human rights. Such liability may attach to various other categories of persons apart from the person who actually shoots the prisoner of war or strikes a concentration camp inmate. The following paragraphs set out some of the categories whose legal status will be investigated here.

(1) Persons who keep watch while a crime is committed.

Trials which are relevant in this connection are: the trial of Karl Adam Golkel and 13 others, before a British Military Court at Wuppertal, from 15th to 21st May 1946; and the trial of Werner Rohde and 8 others, before a British Military Tribunal at Wuppertal, from 29th May to 1st June 1946.

In both of these trials, the offences alleged and proved was the illegal killing of a prisoner of war, but the various accused were not all implicated in the same way. For instance, some of them were shown to have stood by while prisoners were shot or injected with a lethal drug. The Judge Advocate acting in the second of the trials, in dealing with the meaning of the term "concerned in the killing", which appeared in the charge, explained that to be concerned in a killing it was not necessary that a person should actually have been present. None of the accused was actually charged with killing any of the victims concerned. If two or more men set out on a murder and one

stood half a mile away from where the actual murder was committed, perhaps to keep guard, although he was not actually present when the murder was done, if he was taking part with the other man with the knowledge that that other man was going to put the killing into effect, then he was just as guilty as the person who fired the shot or delivered the blow.

(ii) Persons who pass on orders from above.

There have also been cases in which an accused has been found guilty of offences although he was only implicated in the crime insofar as he passed on to his subordinates orders for its perpetration which he had received from his superiors.

(iii) Persons who participate in lynching.

There have also been cases in which various accused have contributed to the killing of a victim without it being clear which one actually delivered the fatal shot or blow. Thus, the Essen Lynching Case, (trial of Erich Hoyer and 6 others before a British Military Court for the trial of War Criminals at Essen from 18th - 22nd December 1945), involved neglect of allied prisoners of war on the part of a German private who had the duty to act as their escort, and lynching on the part of German civilians who took part in their killing. It was shown that as the prisoners of war were marched through one of the main streets of Essen, the crowd round them grew bigger and started hitting them and throwing stones and sticks at them. When they reached the bridge, the captives were eventually thrown over the parapet. One was killed by the fall, others were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.

It was the submission of the prosecution that every person who, following the incitement to the crowd to murder these men, (given by Captain Hoyer, another of the accused who was found guilty⁽¹⁾), voluntarily took aggressive action against any one of the three airmen, was guilty in that he was concerned in the killing. It was impossible to separate any one of these acts from another; they all made up what is known as lynching. From the moment they left those barracks, the men were doomed

(1) See p. 40.

and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men.

The military escort was sentenced to imprisonment for 5 years for refraining from interfering to protect the captives under his charge. Three of the civilians accused in the trial were sentenced to death by hanging and sentences of imprisonment for life and for 10 years; they were found guilty because each one of them had, in one form or another, taken part in the ill-treatment which eventually led to the deaths of the victims, although against none of these accused had it been exactly proved that he had individually shot or given blows which caused the deaths.

In the trial of Hans Renoth and 3 others before a British Military Court at Elten from 8th to 10th January 1946, Hans Renoth, Hans Pelgrim, Friedrich Wilhelm Grabowski and Paul Herman Nisko, at the time of the alleged offence, two policemen and two customs officials respectively, were accused of committing a war crime, "in that they at Elten, Germany, on 16th September 1944, in violation of the laws and usages of war, were concerned in the killing of an unknown Allied airman, a prisoner of war". All pleaded not guilty.

It was alleged that a British pilot crashed on German soil, and after emerging from his machine unhurt was arrested by Renoth, then attacked and beaten with fists and rifles by a number of people including the other three accused. Renoth stood aside for a while then shot the pilot.

All the accused were found guilty. Renoth was sentenced to death by hanging, and Pelgrim, Grabowski and Nisko to imprisonment for 15, 10 and 10 years respectively. The sentences were confirmed and put into effect.

Here, as in the Essen Lynching Case, several persons who contributed to the deaths of a prisoner of war were all held responsible for his murder, though not punished alike.

(iv) Instigators.

Short of actually ordering offences, an accused may be found guilty because of his having, in some way, instigated its perpetration. Thus, in the Essen Lynching Case, referred to above, the prosecution alleged that Heyer had given to the escort instructions that they should take the prisoners to the nearest Luftwaffe unit for interrogation. It was submitted by the Prosecution that this order, though on the face of it correct, was given out to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. It was alleged that he had ordered the escort not to interfere in any way with the crowd if they should molest the prisoners.

Hauptmann Heyer admittedly never struck any physical blow against the airmen at all. His part in this affair was an entirely verbal one; in the submission of the Prosecution this was one of those cases of words that kill, and he was as responsible, if not more responsible, for the deaths of the three men as any one else concerned.

The Prosecutor expressly stated that he was not suggesting that the mere fact of passing on the secret order to the escort that they should not interfere to protect the prisoners against the crowd was sufficiently proximate to the killing, so that on that alone Heyer was concerned in the killing. The Prosecutor advised the Court that, if it was not satisfied beyond reasonable doubt that he had incited the crowd to lynch these airmen, he was then entitled to acquittal, but if the Court was satisfied that he did in fact say these people were to be shot, and did in fact incite the crowd to kill the airmen, then, in the submission of the Prosecution, he was guilty.

The Prosecution referred to the rule of British law in which an instigator may be regarded as a principal. The same held good in this case if a man incited someone else to commit a crime and that crime was committed. Although the person who incited was not present when the crime was committed, he was triable and punishable as a principal and it made no difference in this respect whether the trial took place under

British law or under the Regulations for the trial of war criminals.

The Court sentenced Heyer to death by hanging.

(v) Common Design and the General Principles of Liability

The paragraphs set out above are not intended to exhaust all aspects of complicity in war crimes. For instance, it has not been possible, due to shortage of time to deal with the many interesting discussions, which have taken place during various trials, on the question of the liability of persons who commit crimes while acting in pursuance of a common plan or design. (See for instance the Belsen Trial, the Trial of Martin Goltfried Weiss and 41 Others before a Military Government Court at Dachau, Germany, from 15th November to 13th December, 1945, (the Dachau Trial) and the Trial of Hans Altfuldich and 60 Others before a Military Government Court at Dachau, Germany, from 29th March to 11th May, 1946, (the Mauthausen Trial)).

Further, the general principles governing the liability of accessories and of aiders and abettors have often been discussed during trials. (See for instance the Trial of Franz Schonfeld and 9 Others before a British Military Court, Essen, from 11th to 26th June, 1946.

(vi) Persons guilty of Attempted crime

Some recognition has been given to the possibility that a person may be guilty of a war crime even, though he merely attempted to commit an offence and the offence was never completed. Thus, article 4 of the Norwegian Law of 13th December, 1946, on the punishment of foreign war criminals, provides that:

"The attempted commission of any crime referred to in Article No. 1 of the present law is subject to the same punishment as an accomplished act. Complicity is likewise punishable."

Again, Article 13(1) of a Yugoslav Law of August 25th, 1945, which provides for the trial of war criminals and traitors, lays down that:

"An attempt to commit acts outlined in this Law shall be punishable as a complete criminal act."

Under the Dutch Extraordinary Penal Law Decree of December 22nd, 1943, (Statute Book D. 61), an attempt to commit a war crime is equally punishable with the crime itself.

Regarding the degrees of implication in war crimes, Brigadier General Telford Taylor, in his address to the 5th International Criminal Law Congress, said:

"Now this concept of conspiracy, at bottom, is merely one manifestation of a problem which is basic in all systems of penal law; what degree of connection with a crime must be established in order to attribute, to a defendant, judicial guilt? Other manifestations of this same question are the doctrines of principals, accessories, and accomplices, and of attempts.

International penal law with respect to this question is most unsettled. Take, for example, the doctrine of attempts. Neither the Hague and Geneva Conventions, nor the London Charter, nor Law No. 10 mention attempts. Does it follow that an attempt to commit an international crime is not itself a crime? I should not think so. Let us assume that a soldier is about to shoot an unarmed and innocent prisoner of war, but is himself captured with his pistol poised just in time to prevent the shooting. I believe that, under internal or international penal law, he could be rightly accused of the attempted murder of a prisoner of war."

3. Superior Orders.

The text of the section on Superior Orders, is contained on pages 35 to 56 of Doc. III/112. The trials referred to in those pages do not, of course, by any means exhaust the instances in which the defence of superior orders has received the attention of counsel, Judge Advocate and the various courts trying war criminals.

4. Legality under Municipal Law.

The sense of duty to obey the law of one's country is likely to be more abiding than the sense of duty towards the orders of a superior officer, but is probably in many circumstances less intense. Here again, however, the path of absolute justice has not always been easy to find.

The municipal enactments quoted in connection with superior orders (see document III/112, pages 35-37) are, in a sense, all relevant in this connection, and in fact, the Belgian law of 20th June, 1915, relevant to the competence of Military Tribunals in the matter of war crimes actually includes the words: "The fact that the accused acted in accordance with the provisions of enemy laws or regulations" in setting out the circumstances which cannot be regarded as a reason for justification of crimes.

Article 3 of the French Ordinance of 28th August, 1944, has a similarly worded provision.

Again, Article 13(1) of a Czechoslovak Law of January 24th, 1946, relating to the punishment of war criminals and traitors, states that:

"Acts punishable under this law are not justified by the fact that they were ordered or permitted by the provisions of any law other than Czechoslovak Law or by organs set up by any state authority other than the Czechoslovak, even if it is claimed that the guilty person regarded these invalid provisions as legal".

acts were justified in their own municipal law received consideration in the Belsen trial. In his argument in defence of all the accused, Colonel Smith submitted that wherever there was a conflict between International Law and the law of a particular country it was the duty of the citizen of that country to obey his national law. For that there was overwhelming legal authority from which he selected two cases. The first was that of Mortenson v. Peters heard in 1906 in the Scottish High Court of Justiciary (8 Sessions Cases, 93: 43 Scottish Law Reports 872). The British Parliament had passed an Act prohibiting certain forms of fishing in the whole of the Moray Firth in Scotland, including a considerable area beyond the recognised limits of territorial waters. A Norwegian fished outside territorial waters, but within the area covered by the Statute. He was convicted in a Scottish Court and the High Court of Justiciary on appeal unanimously hold that they were not concerned as to whether the Statute violated International Law or not. The Law of the land, expressed in an Act of Parliament, was binding on the court and they had to uphold the conviction. Counsel commented that if Parliament inadvertently overstepped the limits of International Law that was a matter not for the individual citizen or judge, or policeman, but for discussion between the governments concerned.

The facts of the second case, Fong Yare Ting v. United States (93,149 United States Reports 698) heard by the Supreme Court, were that Congress

passed legislation restricting Chinese immigration in direct violation of a Treaty with China. The decision was that the provisions of an Act of Congress passed in the exercise of its constitutional authority must, if clear and explicit, be upheld by the Courts, even in contravention of the stipulations of an earlier Treaty.

The attitude of the German Courts was exactly the same. The principle that where there was a conflict between International Law and Municipal Law the citizen was bound to obey his Municipal law did not diminish the responsibility of the State towards the offended State for its failure to make its internal law correspond with its international obligations.

Applying this argument to the facts of the present case, Counsel suggested that insofar as the accused obeyed orders, all these orders were legal. There had been in Germany a most extraordinary situation in which there was not and could not normally be any conflict between a legal executive order and one illegal in the sense that a law did not permit it. In the very first stages of Hitler's regime the Reichstag abandoned all its powers and Hitler became the Executive and Legislator in one. Not only did Hitler himself combine all these powers but he also delegated them to certain persons who were directly responsible to him. The orders of each of these had the force of law within his limits, and among their number was Himmler. By various stages, Himmler became head of the police, including the Gestapo and the S.S., and in 1943 he became Minister of the Interior. Under the German legal framework he could issue an order which as such had the force of law. That was reinforced by a law of 10th February 1936 which put the Gestapo and, in fact, all police activities beyond the reach of the law insofar as they were of a political nature. The substance of it was that no action undertaken by the Gestapo or by any police, insofar as it had a political character, was subject to any control of the courts; and, Counsel commented, the word "police" had a wide meaning in German. Neither could any police action be questioned by anybody except at the peril of his life. Counsel could not produce a law

legalising the gas chambers at Auschwitz, but submitted that all that was needed was an order from Himmler saying: "Have a gas chamber". That order was a law which every German had to obey insofar as it concerned him. In the case of the average German it was impossible to have the kind of conflict which might arise in England, where a man might question the order of his superior officer and say: "You cannot give me that order under the Army Act. "

In his closing statement, the prosecutor did not deal with the principle involved but simply pointed out that Colonel Smith had suggested that a decree gave absolute power to the competent authority, so that any order that Himmler gave automatically became law, whereas an examination of the Decree showed that it did nothing of the kind. What the Decree in fact did was simply to say that cases against certain privileged bodies would be tried not in the ordinary courts but in the courts of those privileged bodies. It gave the S.S., amongst other people, immunity from trial in an ordinary Court for matters which they considered to be matters of politics. Therefore, if the crime against German Law which they committed was one which Himmler himself was condoning, in all probability they would be absolved from responsibility. That was the most that could be said. Could these acts be said to be done under cover of authority when they were kept secret even in Germany, and when any records that were kept were covered by the words "Special Treatment"? In his submission, there was no pretence of legality about this procedure. Everyone in the camps knew that the daily murders were wrong.

In finding 30 of the accused guilty, the court clearly rejected this argument put forward by the defence.

Also relevant in this connection is the trial of Robert Hölzer, Walter Weigel and Wilhelm Ossenbach before a Canadian Military Court at Aurich, from 25th March to 6th April 1946.

Insofar as the cases involving denial of justice involved the simple application of the German law, such cases are relevant here.

5. Necessity.

Dealing with the plea of Necessity, Oppenheim-Lauterpacht, International Law, Vol.II, 6th Edition (Revised), pp.183-184, states:

" As soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions, except in the case of reprisals as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his other subjects. In accordance with the German proverb, Kriegsraison geht vor Kriegsmanier (necessity in war overrules the manner of warfare), many German authors before the World War were already maintaining that the laws of war lose their binding force in case of extreme necessity. Such a case was said to arise when violations of the laws of war alone offers, either a means of escape from extreme danger, or the realization of the purpose of war - namely, the overpowering of the opponent. This alleged exception to the binding force of the law of war was, however, not at all generally accepted by German writers.... The proverb dates very far back in the history of warfare. It originated and found recognition in those times when warfare was not regulated by laws of war, i.e. generally binding customs and international treaties, but only by usages (Manier, i.e. Brauch).... In our days, however, warfare is no longer regulated by usages only, but to a greater extent by laws - firm rules recognised either by international treaties or by general custom. These conventional and customary rules cannot be overruled by necessity, unless they are framed in such a way as not to apply to a case of necessity in self preservation Article 22 of the Hague Regulations stipulates distinctly that the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in case of necessity. What may be ignored in the case of military necessity are not the laws of war, but only the usages of war. "

The plea of Military Necessity was raised in the trial of Gunther Thiele and Georg Steinert before a United States Military Commission at Augsburg on 13th June 1945.

The accused, a German Army Lieutenant and Grenadier respectively, were charged with a violation of the Laws of War. The specification against Thiele alleged that he "did, at or near Billingsbach, Germany, on or about 17th April 1945, wrongfully and unlawfully order that ... an American prisoner of war, be killed, which order was then and there executed by a member of his command." It was alleged that Steinert "did, at or near Billingsbach, Germany, on or about 17th April, 1945, wrongfully and unlawfully kill" the same named prisoner of war.

Both accused pleaded not guilty.

It was shown that a United States officer was wounded and taken prisoner by members of the command of Lieutenant Thiele. Captain Bohwaben, the Battalion Commander and superior officer of Lieutenant Thiele, sent an order to Lieutenant Thiele to kill the prisoner. Lieutenant Thiele then ordered Grenadier Steinert to do the killing, and Grenadier Steinert carried out this order. The accused were, at the time of the offence, part of a German unit which was closely surrounded by United States troops, from whom the Germans were hiding.

The court rejected the plea raised by the defence that the acts of the accused were legal because based on military necessity.

The accused were sentenced to death by hanging. On the recommendation of his Staff Judge Advocate, however, the appointing authority commuted the sentences to terms of imprisonment for life.

The Norwegian Law of 13th December 1946, on the punishment of foreign war criminals, makes the following provision:

Article 5:

"Necessity and superior order cannot be pleaded in exculpation of any crime referred to in No. 1 of the present law. The court may, however, take the circumstances into account and may impose a sentence less than the minimum laid down for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted." (1)

Other trials which are relevant are the Milch trial, (Subsequent Proceedings No.2), the Dachau Concentration Camp trial; the trial of Mineno Genji, before a United States Military Commission at Yokohama, on 25th June 1946; the trial of Lt. Comd. Naomichi Suzuki and Lt. Yoshio Nara before an Australian Military Court at Rabaul on 26th April 1946; trial of Capt. Shoichi Yamamoto and 10 others before an Australian Military Court at Rabaul from 20th to 27th May, 1946; the Neuengamme Concentration Camp trial (mentioned previously); and the trials of General Victor Alexander Friedrich Willy Seeger and 5 others and the Ravensbruck Concentration Camp Trials, also mentioned previously.

In the Masuda trial, (see Doc. III/112, pp.43 et seq.), none of the accused explicitly pleaded military necessity as such as a defence. The evidence given by Masuda before his suicide, however, contained the passages: "Day by day the general trend of the war was getting more

(1) Article VIII of the Chinese Law of October 24th, 1946, Governing the Trial of War Criminals provides, inter alia, that the circumstance that war crimes were committed out of political necessity shall not exonerate the offenders. Under Article 40 of the Netherlands Penal Code, which is applicable to war crime trials, however, an act is not punishable if "forced by necessity".

grave for the Japanese, therefore we decided that it was impossible to find any way to send the prisoners of war back to Truk or to Japan in spite of our earnest desire to do so..... Every day the enemy's air attacks were so fierce we began to realize it was difficult to continue detaching guard to protect the prisoners and to keep them provided". The Judge Advocate stated: "...it is inferred strongly in the Admiral's report that the fliers were executed because an American invasion of Jaluit was imminent. Even the accused would have to admit that that would be without justification". It is hard to conceive in what circumstances the military situation would justify the killing of prisoners of war. It is interesting also to note that it has been argued (in note 1 to p. 185 of Oppenheim-Lauterpacht, International Law, 6th Edition (Revised)), that the Hague Regulations were drawn up in the light of military necessities, and that due allowance was given to the latter in framing the Convention.

6. Reprisals

It has sometimes been pleaded on behalf of the persons accused of committing war crimes that acts proved against the defendants were justified as constituting reprisals. For instance, in the Dostler trial,⁽¹⁾ defence counsel quoted that part of the well-known passage from Oppenheim-Lauterpacht, International Law, 6th Edition, Volume II, p. 453, on superior orders which runs as follows:

"Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime".

Professor Lauterpacht has elaborated this view somewhat in the course of an article entitled: The Law of Nations and The Punishment of War Crimes in The British Yearbook of International Law for 1944 (pages 58 - 95).

(1) Trial of General Anton Dostler, Before a Military Commission at Rome, from 8th - 12th October, 1945.

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Part of his passage on The Effect of the Operations of Reprisals runs as follows:

"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 the force of this latter consideration may become considerably impaired - though never totally eliminated - when the act has been ordered, or - presented 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 utterly and palpably contemptuous of law and humanity alike, 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 invariably be expected in cases where the soldier or officer is confronted with a command ordering an act admittedly illegal and cruel 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 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."

Judge Larssen, delivering the judgment of the Norwegian Supreme Court on the appeal of Kriminalsekretær Bruns and two others against the death sentences passed on them by the Eidsivating Lagmannsrett on March 20th, 1946, made certain remarks which throw light on the question of the admissibility of the defence of legitimate reprisals. Judge Larssen said that it had not been established that the acts of torture of which the accused had been found guilty had been carried out as reprisals. Reprisals were generally understood to aim at changing the adversary's conduct and forcing him to keep to the generally accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such. During the whole of the occupation there was no indication from the German side to the effect that their acts of torture were to be regarded as reprisals against the Underground Military Organisation/ (to which the victims had belonged). They appeared to be German police measures designed to extort during interrogations information which could be used to punish people or could eventually have lead to real reprisals to stop activities about which information was gained. The method of 'verschärfte Vernehmung' was nothing but a German routine police method and could, therefore, not be regarded as a reprisal.

In Judge Larssen's opinion it was not, therefore, necessary to deal with the question whether the various acts of the Military Organisation were contrary to International Law and whether as such they justified reprisals.

Brigadier-General Telford Taylor, United States Chief of Counsel for War Crimes, in the speech to which reference has already been made (see p.41), in dealing with reasons why the rules of warfare are not more highly respected to-day, said that:

"Another reason is that the partial codifications of the laws of war are silent or ambiguous on many important matters. The Hague Conventions, for example, say nothing explicit about the taking or execution of hostages in occupied territories; international penal law on this subject can be, and is, applied to-day where it is quite clear that atrocities quite beyond the bounds of military necessity have been committed, but in closer cases we are left largely to the speculations of legal scholars, without much practical guidance. From the standpoint of internal penal law, we are not much better off. The American military manual, for example, tells us that hostages may be executed, but does not give the soldier much guidance as to when and under what circumstances such executions may be legitimate. The internal military law of other important countries is silent on this fundamental question. "(1)

It will, of course, be remembered that the Geneva Prisoners of War Convention, Article 2, forbids the taking of reprisals against prisoners of war.

Other trials which are relevant are the trial of Wilhelm List and 11 others, (Subsequent Proceedings No.7); British trials of Karl Maria von Behren and of General Seeger and 5 others, (mentioned previously) and the trial of Eberhard von Mackensen and Kurt Maelzer, tried by British Military Court at Rome from 18th to 30th November 1946.

7. The Defence of Mistake of Law.

In general, mistake of law is not regarded as an excuse.

It is a rule of English law that ignorance of the law is not an excuse: Ignorantia juris nominem excusat. There is some little indication, however, that this principle, when applied in war crime trials, is not regarded universally as being in all cases strictly enforceable. Thus, Oppenheim-Lauterpacht, International Law, 6th Edition (Revised), pp.452-3, states that "a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact ... that [a member of the armed forces] cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received."

In the trial of Karl Buck and 10 others before a British Military Court at Wuppertal, from 6th to 10th May 1946, the Judge Advocate, in his summing up, said that the Court must ask itself: "What did each of these accused know about the rights of a prisoner of war? That is a matter of fact upon which the court has to make up its mind. The court may well think that these men are not lawyers: they may not have heard either of the Hague Convention or the Geneva Convention; they may

(1) Italics inserted.

not have seen any book of military law upon the subject; but the court has to consider whether men who are serving either as soldiers or in proximity to soldiers know as a matter of the general facts of military life whether a prisoner of war has certain rights and whether one of these rights is not, when captured, to security for his person. It is a question of fact for you."(1)

In the Trial of Heinz Eck and Four Others by a British Military Court, Hamburg, 17th - 20th October, 1945, (The Peleus Trial), four of the accused relied on the plea of superior orders against a charge of killing the survivors of a sunken ship. Professor Wegner, Defence Counsel for the accused as a whole, pointed out that many rules of International Law were rather vague and uncertain. Could one decide to find an individual guilty of having violated a rule of International Law if the States themselves had always quarrelled about that rule, its meaning and bearing, if they had never really approached recognising it in common practice and hardly knew anything precise concerning it? If the States did not know, how could the individual know? Counsel then went on to claim that confusion existed in many branches of International Law including that relating to superior orders.

In his summing up the Judge Advocate said: "It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. If this were a case which involved the careful consideration of questions of international law as to whether or not the command to fire at helpless survivors struggling in the water was lawful, you might well think it would not be fair to hold any of the subordinate accused in this case responsible for what they are alleged to have done."

(He then went on: "But is it not fairly obvious to you that if in fact the carrying out of Eck's command involved the killing of these helpless

(1) Italics inserted.

survivors, it was not a lawful command, and that it must have been obvious to the most rudimentary intelligence that it was not a lawful command, and that those who did that shooting are not to be excused for doing it upon the ground of superior orders?")

For another instance in which the defence has not proved successful, see the Canadian trial of Robert Hölzer and Two Others, mentioned above.

8. The Defence of Mistake of Fact

Mistake of fact may, however, constitute a defence just as it may in a trial before the ordinary municipal courts.

In the trial of Karl Buck and Ten Others, the counsel acting for the accused in general pointed out that in Germany there has been not only courts-martial but also "so-called S.S. and police courts for German persons and members of the S.S." He claimed that the interrogations of the victims⁽¹⁾ by one Kommandeführer Ernst, on whose reports Dr. Isselhorst acted in deciding on the fate of the victims, constituted a trial by the Security Police. The accused, who obeyed the latter, had had no other information on the matter than that the prisoners had been tried and condemned, and had acted on that assumption. They had "neither the sense for technicalities nor the mental abilities to look deeper into this case". The prosecutor, on the other hand, submitted that the obliteration of all traces of the crime and the steps taken by the accused to suppress all knowledge of the crime belied any contention that they thought that they were performing a legal execution. Lawful executions did not take place in woods, nor were those shot buried in bomb craters with their valuables, clothing and identity markings removed.

To the Judge Advocate there seemed to be

(1) The victims were British and United States prisoners of war, and certain French nationals.

no evidence that the victims were ever tried before a Court. Dr. Isselhorst had said that they were sentenced by decision of Ernst and "not through a court". If his evidence was believed, they were condemned as a result of an administrative decision and not after a trial.

Assuming that co-operation between certain of the victims and the Maquis was not contrary to the laws and usages of war and assuming that the original Führerbefehl⁽¹⁾ was contrary to International Law, the question whether or not the deceased had ever been subjected to trial to find whether they came within the scope of the latter would hardly seem relevant to the question of the legality of the executions. On the other hand, could it have been shown that a bona fide impression had existed in the minds of the accused that the execution was the consequence of a trial in which the victims had been legally condemned to death, the plea of mistake of fact, which the defence raised, might well have been effective. In the circumstances of the case, however, the Court did not see fit to allow it.

Also relevant are the following: the trial of Sub-Lt. Hideo Katayama and 2 others before an Australian Military Court at Morotai from 25th to 28th February 1946; trial of Capt. Toma Ikeba and 2 others before an Australian Military Court at Rabaul on 14th and 15th May, 1946; the Neuengamme Concentration Camp trial; the trial of Josef Muth and 5 others before a British Military Court at Wuppertal on 4th and 5th June 1946; the trial of Heinrich Klein and 14 others before a British Military Court at Wuppertal on 22nd to 25th May 1946; and the trial of Karl Maria von Behren mentioned above.

9. Self Defence

Not unnaturally, a plea of self defence may also be successfully put forward in suitable circumstances in war crime trials.

Trials which are relevant in this connection are: the trial of Yamamoto Chusaburo before a British Military Court at Kuala Lumpur on 30th January and 1st February 1946 (plea unsuccessful); the trial of Erich Weiss and Wilhelm Munde before an American General Military

(1) See Document III/112, pp. 50 - 51. The Defence claimed that there was evidence that the victims of the shooting had established such contact with the Maquis and with "Terrorists" as to bring them within the scope of the Führerbefehl, and that a "security police case" preceded the execution.

Court at Ludwigsburg on 9th and 10th November 1945 (plea successful); the trial of Georg Hitzer before an American General Military Government Court at Ludwigsburg on 11th March 1946 and the Canadian trials of Johann Neitz and Robert Hölzer and 2 others, mentioned previously.

D. RIGHTS OF THE ACCUSED

AT THE TIME OF TRIAL.

The text of the section on the rights of the accused at the time of trial is contained in Document III/112, pp.57 - 84.

III/115.
6th November 1947.

HUMAN RIGHTS REPORT: PRELIMINARY PAPERS.
INFORMATION ARISING FROM TRIALS HELD BY
FRENCH COURTS.

Rapporteur, Dr. R. Zivković.

The information contained in this document arises from trials of war criminals and of quislings and traitors held by French courts.

It is submitted for insertion in the appropriate parts of the Report, where it can be conveniently split according to the subject and merged with the texts prepared by other rapporteurs.

Notes on Sources.

War Criminals.

1. The French authorities have submitted up to date documents concerning a total of 136 completed trials of war criminals held before French military Tribunals.

The main bulk of these Trials contains information of little interest for the Report. It deals with clear war crimes cases of a common type, whose protection in international law is undisputed and is exemplified in numerous trials of both the distant and most recent past. The French Trials under review concern mainly criminal acts such as murder, ill-treatment or torture, and offences of a less brutal character, such as pillage. The victims of these crimes include the civilian population and members of the armed forces, mostly of French, but also of other allied nationality. The human rights involved, whose protection in positive law is amply evidenced by the above trials, include the right to life, the right to health and bodily integrity, the right to fair trial and the right to property.

There are only comparatively few trials which contain information of particular interest. These concern less orthodox types of offences, and/or implicate victims or accused whose legal status is worth being noted in connection with the question of the jurisdiction of the Courts. A number deal with circumstances affecting the question of the personal guilt of the accused, such as with violations committed in the course of alleged reprisals and upon superior orders. They are dealt with in the first part of this document.

Quislings.

2. No official documents concerning the trial of quislings and traitors by the French courts have been submitted to the United Nations War Crimes Commission., excepting incidental cases included in the war crimes trials of no value for the report.

However, it has been possible to obtain an unofficial account of the trial of Pierre Laval, published in the form of a book which almost exclusively reproduces a verbatim record of the proceedings of the Court. (1) The perusal of this record has proved that Laval's trial is of limited value to the Report. The main object of the Trial was the treasonable activity of the accused, taken in itself, so that the prosecutor and the Court focussed their proceedings upon the count of high treason, relegating to a secondary plane such violations of human rights as had been committed by the defendant incidental to his treasonable acts.

To the extent to which such violations were considered by the Court, and only for the sake of putting this on record, they are dealt with in the second part of this paper.

An obvious gap in the sources of information available in connection with the trial of quislings and traitors in France

(1) Collection des grands procès contemporains publiée sous la direction de Maurice Gargon, Le Procès Laval, Compte-rendu sténographique, Editions Albin Michel, Paris, 1946.

concerns the trial of Maréchal Pétain. A book similar to the one regarding Laval has been published, but is out of print for the time being. One is left to wonder whether this trial is of more significance to the Human Rights Report than Laval's trial.

PART I.

WAR CRIMINALS.

The Wagner Case.

3. The trial which contains the most interesting information is that of Robert Heinrich Wagner, former Gauleiter of Alsace, and of several other Germans, (1) prosecuted with him.

Charges.

4. Wagner was indicted and convicted on four counts: for having "provoked Frenchmen to bear arms against France"; for having enlisted French nationals in the armed forces of a foreign power at war with France"; for violations of "individual freedom"; and for "complicity in murder". The first two counts fall in line with the offence of "compulsory enlistment of soldiers among the inhabitants of occupied territory" as formulated in the list of war crimes drawn up by the 1919 Commission on Responsibilities. Violations of "individual freedom" were exemplified in mass deportations of Alsacians and Jews from Alsace. And finally, the charge of "complicity in murder" was submitted: (a) for "judicial murders" of French nationals who resisted enlistment in the German army and were tried as deserters; (b) for the killing of French and other allied nationals in other connections.

(1)

References to documents of French trials are made by giving numbers of the Registry of the United Nations War Crimes Commission. The trial of Wagner bears the number FR.47. The judgment was pronounced by the Military Tribunal at Strasbourg on 23rd April 1946.

Genocide.

5. Most of these charges, apart from being dealt with separately, were also presented in a general statement of the Prosecutor. This statement contains certain elements connected with the crime of "genocide" as defined in the resolution adopted by the General Assembly of the United Nations on 11th December 1946 (1) and as prosecuted before the Nuremberg Tribunal against the Major German War Criminals under Article 6 (c) of the Nuremberg Charter. (2) The prosecutor did not make of this statement a separate charge, neither did he make reference to genocide, but he submitted it as the general criminal policy pursuant to which the defendant perpetrated most of the above crimes in order to achieve a complete Germanisation of Alsace.

The following are some typical passages from the Indictment in this connection:

(1) Cf. United Nations, Resolutions adopted by the General Assembly during the Second Part of its First Session from 23rd October to 15th December 1946, Lake Success, New York, 1947, p. 188-189, Resolution No. 96, declaring the following:

"Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings... The General Assembly, therefore, affirms that genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds - are punishable".

(2)

Cf. Indictment of the prosecutors, Count Three, (a), para. 2, where it is stated:

"They conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups,..."

... "French inscriptions disappeared even in villages; personal names were germanised, French monuments were taken away or destroyed;...the French language was eliminated both from administrative institutions, and from public use; German racial legislation was introduced,...Jews were expelled as well as nationals whom the German authorities treated as intruders. The property of political associations and Jewish property were confiscated as well as property acquired after 11th November 1918... Nazi tuition was immediately introduced in schools and universities...only Germans had the right to teach;.. In 1941 the French franc was withdrawn; compulsory labour was introduced...Various decrees made applicable German penal and civil law, economic and financial legislation, and special laws relating to political crimes...From August 1942...military service was made compulsory...Wagner decided to transfer Alsatians inside the Reich. Over 40,000 were interned in the camp of Schirmerk...Numerous young men were shot for having refused to serve in the Wehrmacht. When the resistance to the compulsory military enlistment grew, Wagner did not hesitate to victimise the families which were deported to Germany. He interfered with the administration of justice, giving orders as to the punishments the prosecutors had to request and the judges had to impose in cases considered to be particularly serious".

The Specific Crimes.

6. The conviction of Wagner for compulsory enlistment and for deportation of those resisting it and of their families, as well as of the Jews, shows no feature of particular interest, apart from the fact that in this case, as in all other trials held by French Courts, the accent was more on the violation of the general provisions of the French penal code, than on the laws of war. It is due to this fact that Wagner was found guilty, on the one hand, of having "provoked Frenchmen to bear arms against France," and of having "enlisted Frenchmen in the German armed forces while Germany was at war with France", and on the other hand, of having "arbitrarily deprived Frenchmen of their freedom". All these qualifications formally fit with the French national law as contained in the Penal Code and as interpreted and developed for the purpose of war crimes trials in the Ordinance of 28th

August, 1944. (1)

7. The conviction of Wagner for the "judicial murder" of French nationals is, in contrast with the other charges, a comparative novelty both in national and international law, and his case is in this respect a good instance and illustration.

The Court established that on several occasions Wagner violated the right to fair trial of French citizens who did not comply with compulsory enlistment in the German forces. On all these occasions the violation was committed in that Wagner instructed the prosecutors what punishment to request and imposed upon the judges the sentence to be pronounced by them in the trial of such French citizens. In one of two specific cases submitted, concerning a Théodor Witz, the officer in charge of the prosecution was of the opinion that the offence deserved 8 years imprisonment. This prosecutor went on leave and was replaced by another who, jointly with the President of the Court, acted upon Wagner's instructions. The result was that the defendant was sentenced to death and executed.

Similar acts were established in the second case, involving 14 accused, who attempted to escape from Alsace to Switzerland, including two minors of 18, and who were all sentenced to death and executed when Wagner interfered.

By admitting the above cases as representing "illegal trials" and convicting Wagner on this count, the Court's sentence was pronounced for the violation of two fundamental rights: the right to fair trial of any individual, however guilty, and the right to independent courts of law belonging to any occupied country under international standards of justice.

(1)

The technique chosen in the said Ordinance was to qualify specific acts otherwise recognised as war crimes under the rules of international law as being covered by French national law. This was done in particular by expressly extending the scope of the national law to such acts as could raise doubts or uncertainty within the meaning of the provisions of the Penal Code and the Code of Military Justice. See Art. 2 of the Ordinance.

Other Cases.

8. A number of French trials throw light upon certain questions which are of more importance within the field of human rights whose protection in international penal law is not doubtful, than for the problem of what human rights are in fact protected. They can be grouped as follows:

Reprisals:

9. In a number of trials, various crimes were perpetrated by German soldiers allegedly as a "reprisal" for offences committed by French nationals against members of the German forces. These crimes were generally of the "murder" type, and the French nationals whom the Germans treated as having provoked "reprisals" were mostly members of the French Resistance Movement, who often conducted military operations against the German units stationed in France. The victims were invariably French local inhabitants, quite innocent of the alleged offences which were committed by members of the Resistance Movement.

In all these cases, the French Tribunals found the accused guilty of acts "not justified by the laws and customs of war" and condemned them to heavy penalties, including capital punishment.

The following trial can be regarded as a pattern case (1):

On 20th August, 1944, members of the French Forces of the Interior (FFI), attacked St. Girons and on this occasion engaged a battle against a German column in the neighbourhood of a village called Rimont. The inhabitants of the village formed a "home guard" of 23 men and had the assistance of 3 Spaniards, members of the FFI. This small force resisted the advance of the German troops for several hours and then retreated, while a large

(1)

Trial of Lt. HELFER and 5 others. Judgment pronounced by the Military Tribunal at Toulouse on 16th April 1946. Fr. 45.

number of inhabitants took refuge in the nearby woods. When entering the village the German commanding officer gave orders to set on fire the houses and to shoot all civilians over 14 years of age. 152 houses were burnt down out of a total of 169, and 9 civilians were captured and shot on the spot. In addition to this two old men, of 70 and 72 years of age, were deliberately killed while trying to get out of the village. During the trial it was established that none of the victims took part in the armed resistance.

Although the French Tribunals do not furnish in their Judgments an account of the reasons for which they have found a defendant guilty in the given set of circumstances, the sentences in this type of case imply the following conclusions:

(1) In all cases under review there were in fact no "reprisals" in the proper sense, but merely arbitrary acts of revenge against co-nationals of those who fought against members of the occupying forces. This is an important distinction since it is always possible to label atrocities as lawful reprisals, as this was done in innumerable instances by the Germans both during the first (1) and the second world war,

(2) The French Tribunals presumably recognised fully the status of lawful belligerents to members of the French Resistance Movement under the terms of Article 1 of the Hague Regulations, and treated their acts against the German forces as military operations conducted within the limits of the laws and customs of war. Such acts could consequently not represent a valid ground for reprisals, unless the French combatants themselves were guilty of an offence, which was in no case under review invoked in defence of the accused. In the above instance, the

(1)

Cf. Oppenheim-Lauterpacht, International Law, Vol. II, 6th Edition, p. 447, n. 1.

recognition was implicitly extended to the ad hoc "home guard" constituted by the villagers.

(3) Presumably in no cases were the acts against the Germans committed by individuals not entitled to the status of belligerents under the Hague Regulations. This presumption is important since it could be open to discussion whether reprisals in the proper sense could not be lawfully undertaken against non-combatants were serious offences against the security of the occupying forces perpetrated by the civilian population proper. (1)

10. Although the issue mentioned in the preceding paragraph under (1) stands out clearly in the face of facts, it is surprising to find that in many cases the French Tribunals make an improper use of the term "reprisals".

So, for instance, in one case (2) the following is said in the Indictment: "In reprisals for the death of S. D. Arnold (a Gestapo man) killed by the Resistance, Dr. Jeeve (a German) ordered the execution of 7 Frenchmen. The execution took place on 10th August 1944...". In another case (3) more than 20 defendants were indicted inter alia for complicity in "putting to death" French nationals "as reprisals" for the fighting of the French Resistance Movement. Such references are to be found in many other trials under review in this document.

In all such cases, the number of the French victims was deliberately much higher than the number of the Germans who lost their lives as a result of the Resistance fighting. Yet, it is a generally admitted rule that in order to obtain recognition for

(1).

Of, for instance Oppenheim-Lauterpacht, op. cit. p. 449, where it is stated: "There is no doubt that Article 50 of the Hague Regulations, enacting that no general penalty, pecuniary or otherwise, may be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible, does not prevent the burning by way of reprisals, of villages or even towns, for a treacherous attack committed there on enemy soldiers by unknown individuals, and, this being so, a brutal belligerent has his opportunity" Italics are introduced.

(2) Trial of G. SCHONHEITER. Judgment pronounced by the Military Tribunal at Lyon on 17th August 1945. FR. 8.

(3) Trial of F. HOLSTEIN and 23 others. Judgment pronounced by the Military Tribunal at Dijon on 3rd February, 1947. FR. 95.

acts undertaken in reprisal as valid in international law, such acts must not be excessive when compared with the acts which provoked reprisals. (1) In the above instances, there was always an utter disproportion to the detriment of the French, which alone is sufficient to make these acts invalid as lawful "reprisals".

The only explanation is that the French prosecutors and tribunals used the term in a non-legal sense, and when doing so, wanted to convey only the fact of "revenge" taken against innocent people.

The notion of "combatant".

11. In connection with the issues mentioned in para. 9 under (2) and (3) it is worth noting that in two other trials, one of which was also connected with alleged reprisals, French tribunals had specific cases of irregular combatants whom they recognised as members of lawful belligerent units, entitled to the protection of the laws and customs of war..

(1) In one case (2) a detachment of German marines captured three Frenchmen wearing mainly civilian clothes, but having some distinctive military signs as part of their garments, or on the garments themselves. One or two had a French tri-colour band around the arm as worn by members of the FFI and one wore an American military cap. The three men were captured in the course of combats between German units and regular French troops assisted by members of the FFI. All were shot without trial and without having committed any offence apart from the fact that they fought with arms against German units. The Tribunal found the defendants guilty of "murdering three prisoners

(1) Cf. Oppenheim-Lauterpacht, op. cit. §. 249, p. 448-449.

(2) Trial of Col. G. BAUER and 2 others. Judgment pronounced by the Military Tribunal at Dijon on 18th October, 1945. FR. 12.

of war" and condemned them to various penalties, one of them to death. In doing so the Tribunal apparently admitted the argument of the prosecution that what mattered more than the fact that the three captured men wore some distinctive signs, was the fact "that troops of the FFI were resisting for a whole day against the...(German) column, alongside with regular French troops, with the knowledge of the Germans; that they were fighting against invading troops without having had the time to organise themselves and that, consequently, they were covered by the IV Hague Convention...". This was a reference to Art. 2 of the Hague Regulations, which covers civilians "of a territory not under occupation", who take up arms to resist the invading troops without having had time to organise themselves in accordance with Art. 1, if they carry arms openly, and if they respect the laws and customs of war". In this case the Tribunal established in addition that the chief defendant tried to invoke the right to "reprisals" by submitting in his defence that he had ordered the shooting of captured French combatants only if they resumed fighting.

(2) In the second case (1) two members of the French Resistance Movement attacked a small German outpost with the intention of making prisoners and bringing them to their headquarters. They failed and were instead captured themselves, one of them having been wounded. Both had civilian clothes, but one wore a tricolour band around his arm and a tricolour badge in his buttonhole. The accused denied having noticed these distinctive signs and invoked in his defence an order by Hitler to shoot summarily all irregular combatants. The Tribunal found the defendant guilty of manslaughter "not justified by the laws

(1) Trial of Lt. W. Kretzschmar. Judgment pronounced by the Military Tribunal at Angers, on the 25th March 1946, FR. 41.

and customs of war" and condemned him to death. It is to be assumed that the Tribunal admitted the Prosecutor's plea which was entirely based on the existence of the distinctive tri-colour signs and that, as in the previous case, it treated the victims as prisoners of war entitled to the protection of international law.

12. The above two trials are an illustration of the ways in which it is possible to interpret the meaning of Article 1 and 2 of the Hague Regulations, and to extend recognition to human rights in war time in cases where a narrow interpretation would have led to the opposite result.

Superior orders.

13. In several trials French tribunals dealt with the plea of superior orders. In a number of cases they dismissed it altogether and did not admit it in mitigation of punishment.

In one case ⁽¹⁾ the accused was a low-ranking member of the Gestapo (Rottenführer) charged with having personally executed a number of Frenchmen. In one instance he killed the victim by making him walk in front of him and by shooting him in the back while walking. In another instance he was a member of a firing squad which used Bren guns to kill the victims, all of whom were executed only in revenge for the death of a Gestapo man, being themselves completely innocent of any offence. In both instances the accused committed the crimes on the orders of his superior officers. The Tribunal found him guilty without extenuating circumstances and sentenced him to death.

In the case mentioned above, para. 11, under (1), the chief defendant pleaded not guilty of having put to death

(1)

Trial of G. Schonheiter. Judgment pronounced by the Military Tribunal at Lyon on 17th August, 1945. FR. 8.

captured members of the FFI, by referring to an order of Hitler of April 1944 that all irregular combatants should be shot when captured. However, at the same time the defendant admitted that in his personal opinion this order ought not to have been carried out against combatants with whom the fight had been going on for a day, as was the case in this trial. The Court dismissed the plea and condemned the defendant to death for having ordered the killing of the three prisoners.

14. In other cases French Tribunals admitted the plea of superior orders in mitigation of punishment.

In the trial of Wilhelm KALK (1) the defendant was charged with having taken part in the killing of a Frenchman, agent of the Resistance Movement, and for having attempted to kill on the same occasion another man. Kalk heard of this agent by accident, learning of his existence in a café. He informed his superiors, who decided to send a patrol of 30 men to arrest the agent. The latter learned of the Germans' intention and tried to escape by motor-cycle with one of his friends. While turning with the vehicle in a street, both ran into members of the German patrol. Kalk recognised the agent and started shooting on his own initiative and without giving any warning. The agent was fatally wounded and died a few minutes later. His companion escaped by throwing himself on the ground and pretending to be dead. He was arrested and several months later released.

Kalk pleaded "not guilty", contending that he had acted on the orders of his superior officer, a lieutenant, who was prosecuted with him at the same time. The Tribunal found that there was no evidence to prove that the lieutenant was involved in the case, but apparently took note of the fact submitted in the

(1)

Trial of W. KALK and E. STOCK. Judgment pronounced by the Military Tribunal at Bordeaux on 27th May, 1947. FR. 125.

Indictment that there were superior officers who decided upon the operation against the agent, and that there were instructions to shoot at him if he tried to escape. The lieutenant was acquitted. Kalk was found guilty of murder, presumably on account of the fact that he shot at the victim without warning, and guilty of attempt to murder the other man. He was sentenced with extenuating circumstances to penal servitude for 20 years.

15. The trials described in para. 13 are particularly good illustrations of the cases in which the courts deem it justified not to admit the plea of superior orders in mitigation of the punishment. In both instances cited the crimes were of a heinous character; in one case a Gestapo man took part in the killing of people who were avowedly considered by the Germans themselves as innocent; in the other case the victims were French FFI combatants cold-bloodedly put to death as soon as they were captured. In both cases there was nothing to show that the perpetrators had to act under the impact of direct pressure from their superiors or of danger to their own lives. Neither was there anything to indicate that they could not realise the inhumane nature of the orders, or that they had to consider their execution as being imposed by belligerent necessity. The Judgment passed on these cases by dismissing altogether the plea of superior orders in face of all these circumstances is consistent with the general opinion of authoritative writers in this field. (1)

The trial considered in para. 14 is an illustration of the fact that national courts exercise their power to admit the plea of superior orders within the same limits as those set forth in the Nuremberg Charter (Art. 8), the Tokyo Charter (Art. 6)

(1) Cf. for instance H. Lauterpacht, The Law of Nations and the Punishment of War Crimes, British Year-Book of International Law, 1944, p. 73-74 and 76.