

UNITED NATIONS WAR CRIMES COMMISSION.

CONTROL COMMISSION COURTS IN  
THE BRITISH ZONE OF GERMANY.

Military Government - Germany.

Ordinance No.68 - Control Commission Courts.

Ordinance No.72 - Criminal Procedure in

Control Commission Courts.

Control Commission Courts were established in the British Zone of Germany by Ordinance No.68 (published in the Military Government Gazette Germany, British Zone of Control, Nos. 15 and 17.)

Ordinance No.72 (published in the Military Government Gazette Germany, British Zone of Control No.17), regulated the criminal procedure in these courts.

Both ordinances came into force on the 1st January 1947.

I. Proceeding Events.

Control Commission Courts replaced Military Government Courts.<sup>(1)</sup> The latter were established by Ordinance No.2 issued on 18th September 1944 by General Eisenhower, as Supreme Commander, Allied Expeditionary Force, for the territory occupied by the forces under his command. When, on 14th July 1945 the Commander-in-Chief of the British Zone of Control assumed all authority and power previously possessed and exercised by the Supreme Commander Allied Expeditionary Force within the British Zone, all enactments and orders issued by or under the authority of the Supreme Commander Allied Expeditionary Force and effective within the British Zone of Control on 14th July 1945 were confirmed by Ordinance No.4 of the same date, which provided that they were to continue in force throughout the British Zone until repealed or amended. Thus, Ordinance No.2 which constitutes the legal basis for the Military Government Courts remained in force in the British Zone of Control until it was repealed by Ordinance No.68 (Art.XXVI, paragraph 47).

II. Organisation of the Control Commission Courts.

The Control Commission Courts are:

- (a) the Supreme Court comprising the High Court exercising original criminal and civil jurisdiction and the Court of Appeal, and
- (b) the Summary Courts.

The Control Commission Courts differ considerably in their composition from the Military Government Courts. The members of the Military

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(1) Military Government Courts, their Jurisdiction, Rules of Procedure, etc., have been dealt with in Doc. C.132.

Government Courts are officers of the Allied Forces (Art.IV, paragraph 4 of Ordinance No.2).<sup>(1)</sup> Any judge of the Supreme Court, established by Ordinance No.68, i.e. the Chief Judge, the Judges of the Court of Appeal, and the Judges of the High Court, must be qualified to practice as an advocate in a Court having unlimited jurisdiction either in civil or criminal matters in any part of the British Empire and must have been qualified for not less than 10 years<sup>(2)</sup> to practice as an advocate or solicitor or must have held judicial office there. (Art.IV, paragraph 5 of Ordinance No.68).

A Summary Court consists of a single magistrate. The Ordinance contains no provision with regard to the magistrate's legal qualification.

### III. Jurisdiction of the Control Commission Courts.<sup>(3)</sup>

The Control Commission Courts (like Military Government Courts) have jurisdiction over all persons in the British Zone except persons other than civilians who are subject to Military, Naval or Air Force law and are serving under the command of the Commander-in-Chief of the British Forces of Occupation or any other commander of any forces of the United Nations. (Art.II, paragraph 2 of Ordinance No.68).

They have jurisdiction to try:

- (a) All offences against the laws and usages of war. (Art.III, 3(a));
- (b) All offences under any proclamation, law, Ordinance, Notice or Order issued by or under the authority of the Allied Control Council for Germany in force in the British Zone, or by or under the authority of the Supreme Commander of the Allied Forces or of the Commander-in-Chief. (Art.III, 3(b));
- (c) All offences against German law (Art.III, 3(c)).<sup>(4)</sup>

Ad (a): Jurisdiction over offences against the laws and usages of war is exercised in the British Zone by both the Control Commission Courts and the British Military Courts established under Royal Warrant dated 14th June 1945.<sup>(5)</sup>

The jurisdiction of the British Military Courts is limited to offences against the laws and usages of war. For instance, in trials of members of the staff of concentration camps, British Military Courts can take into account solely offences against allied nationals which were committed during the war. The jurisdiction of Control Commission Courts, on the other hand, covers not only violations of the laws and customs of war, but, as will be shown below, all war crimes in the wider sense of the word. In cases such as the concentration camp cases mentioned before, Control Commission Courts can, therefore, deal also with offences committed before the outbreak of war or against persons who are not allied nationals.

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- (1) Art.IV, paragraph 4 of Ordinance No.2 was amended in the British Zone by Ordinance No.27 of the 30th March 1946 which provided that members of Military Government Courts may also be civilian officers of Military Government.
  - (2) In the case of a "Commissioner of the High Court" a practice of 5 years as an advocate in one of the courts specified in Art.IV, para.5 is sufficient. (Art.IX, para.12 of the Ordinance No.68.)
  - (3) The present paper does not deal with the jurisdiction of the Control Commission Courts in civil matters.
  - (4) Cf. Art.II, para.2 of Ordinance No.2 and Doc.C.132, Section IV.
  - (5) The Army Order No.81/45 (Regulations for the Trial of War Criminals) has been dealt with in Doc.C.131; the first and second amendments to the Army Order No.81/45 (Army Orders Nos. 127/45 and 8/46 have been dealt with in Doc.Misc. No.13.

Ad (b): The jurisdiction of the Control Commission Courts over all offences under any law issued by the Allied Control Council includes the jurisdiction over offences defined in Art. II of Control Council Law No. 10, namely crimes against peace, war crimes, <sup>(1)</sup> crimes against humanity and membership in a group or organisation declared criminal by the International Military Tribunal. <sup>(2)</sup>

Ordinance No. 47 dated 30th August 1946 <sup>(3)</sup> authorises the German Ordinary Courts to exercise jurisdiction over crimes against humanity as far as they were committed by German citizens against other German citizens or Stateless persons. This jurisdiction of the German courts, is, however, not an exclusive one but concurrent with that of the Control Commission Courts (Art. II, paragraph 3(d) of Ordinance No. 20 of 1st January 1946.)

The Control Commission Courts, on the other hand, do not share their jurisdiction over all other crimes against humanity and over crimes against peace with any other court established in the British Zone.

Ad (c): The extent to which German law remained in force after the occupation of Germany by the Allied Forces and especially after the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United Kingdom, the United States of America, the U.S.S.R. and the Provisional Government of the French Republic dated 5th June 1945 <sup>(4)</sup> has been discussed in connection with the Military Government Courts <sup>(5)</sup> which also exercised jurisdiction over offences against German law. (Art. II, 2(c) of Ordinance No. 2).

#### IV. Power to make an Order in the Nature of Habeas Corpus.

Pursuant to Art. VIII paragraph 11. of Ordinance No. 68, Control Commission Courts are empowered to make an order that any person illegally or improperly detained in public or private custody within the limits of the British Zone be set at liberty. A petition for such order is to be heard and determined by a judge of the High Court.

#### V. Criminal Procedure in Control Commission Courts.

The criminal procedure in Control Commission Courts is regulated by Ordinance No. 72 <sup>(6)</sup>. The procedure in Control Commission Courts corresponds in general to that in Military Government Courts. <sup>(6)</sup>

Whereas there is no appeal against the decision of a Military Government Court, Art. XI paragraph 20 of Ordinance No. 68 provides that the Court of Appeal shall review the record of every case in which

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- (1) The jurisdiction of the Control Commission Courts over war crimes, i.e. the violations of the laws and customs of war, is based on Art. III paragraph 3 (a) and (b) of Ordinance No. 68.
  - (2) A paper on the jurisdiction over membership of criminal groups or organisations is in preparation.
  - (3) The text of Ordinance No. 47 has been circulated in Doc. Misc. No. 56.
  - (4) Doc. C. 132, page 4, Art. (iii).
  - (5) The less detailed rules of procedure of the Military Government Courts were repealed by Ordinance No. 72.
  - (6) With regard to the procedure in Military Government Courts and in particular to the rights of the accused, cf. Doc. C. 132, pp 5 - 6.



(a) a sentence of death has been passed<sup>(1)</sup> or (b) a petition for review has been presented by or on behalf of a person convicted by a High Court, or (c) a decision of the High Court is certified by the Registrar of the Supreme Court or a decision of a Summary Court is certified by the Chief Legal Office of a region as fit for review by the Court of Appeal.

Moreover, the Court of Appeal may review from time to time all sentences of penal servitude and imprisonment (Art.XI paragraph 24 of Ordinance No.68).

The record of every case in which a person has been convicted by a Summary<sup>(2)</sup> Court is to be reviewed by an officer appointed for this purpose.

#### VI. The Activities of the Control Commission Courts.

The Secretariat has not yet had at its disposal a comprehensive report on the actual working of the Control Commission Courts. The information so far available shows that at least some trials concerning violations of the laws and customs of war have taken place before Control Commission Courts.<sup>(3)</sup>

Thus, in February and March 1947, the trial of former members of the staff of the Esterwegen Penal Camp accused of causing the death of and ill-treatment of a number of political prisoners mainly of Belgian nationality during 1943/45<sup>(4)</sup> was held before the High Court of Oldenburg.

A number of trials concerning crimes against humanity committed by Germans against Germans or Stateless persons were conducted in the British Zone by Military Government Courts,<sup>(5)</sup> and later by Control Commission Courts.

#### VII. Summary.

The Control Commission Courts established by Ordinance No.68 replaced on the 1st January 1947 the Military Government Courts in the British Zone.

Their jurisdiction covers crimes against peace, war crimes, crimes against humanity and membership in criminal groups or organisations as defined by Control Council Law No.10. Their jurisdiction over war crimes (violations of the laws and customs of war) is concurrent with that of the British Military Courts established under the Royal Warrant of 14th June 1945, and their jurisdiction over crimes against humanity committed by Germans against German citizens and Stateless persons with that of the German Ordinary Courts.

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- (1) No sentence of death must be executed unless and until it is confirmed in writing by the Commander-in-Chief or his deputy (cf. Art.VII, para.11 of Ordinance No.2 which contains a similar provision regarding death sentences passed by Military Government Courts.)
  - (2) Cf. Art.VI paragraphs 9 and 10 of Ordinance No.2.
  - (3) The Military Government Courts established in the British Zone which also exercised jurisdiction over war crimes in the narrower sense of the word, (Cf. Section III above) actually exercised this jurisdiction only exceptionally if at all. The Secretariat has received no report on such trials before Military Government Courts in the British Zone of Germany.
  - (4) Monthly Report of the Control Commission for Germany (British Element) Vol.II, No.6, June 1947.

(Footnotes Continued on Page 5.)



The jurisdiction of Control Commission Courts is not limited to war crimes in the narrower sense of the word (like that of the British Military Courts) and to certain types of crimes against humanity (like the jurisdiction of the German Ordinary Courts) but covers all war crimes in the wider sense of the word. These courts can, therefore, try cases where the accused are charged with war crimes and/or crimes against humanity (such as members of the staff of concentration camps).

A judge of the Supreme Court (Court of Appeal and High Court) must be qualified to practice as an advocate in any part of the British Empire or must have held judicial office there. Such or a similar legal qualification was not required for the appointment as judge of a Military Government Court.

The rules of procedure of the Control Commission Courts provide for an extensive review of the decisions of both the High Court and the Summary Courts. The procedure of the Control Commission Courts differs mainly in this respect from the procedure in Military Government Courts which gives no right of appeal.

The Military Government Courts established in the British Zone dealt with offences against the laws and customs of war only exceptionally if at all. A number of such cases have been tried by Control Commission Courts.

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Footnotes Continued from Previous Page.

- (5) Cf. Col. Rathbone's report in the meeting of the Commission held on the 16th October 1946 (Doc.M.114 page 2, pen ultimate paragraph, page 4 last paragraph and page 5 paragraph 3.) According to Colonel Rathbone's report such trials were held before Military Government Courts "in order that some precedents of sentences might be set for German courts when they take them over."

MISC. No.115.  
9th December, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

PROVISIONS REGARDING THE TRIAL OF  
MEMBERS OF CRIMINAL ORGANISATIONS IN THE  
UNITED STATES ZONE OF CONTROL IN GERMANY.

The trials of members of criminal organisations have been regulated in the British Zone of Control in Germany by Ordinance No.69 (cf. Doc. Misc.No.79).

In the United States Zone, the tribunals established by the "Law for Liberation from National-Socialism and Militarism"<sup>(1)</sup> were entrusted to try such cases.

A copy of the letter of the Office of Military Government for Germany (U.S.) dated 9th April 1947, AG 010.6 (IA) the contents of which were disseminated to all public prosecutors and tribunals established under the Law for Liberation, has been placed at the disposal of the Secretariat by the Office of Military Government for Bavaria, Internal Affairs Division, Special Branch, Public Safety.

The letter is being circulated for the information of the Commission.

" OFFICE OF MILITARY GOVERNMENT FOR GERMANY (U.S.)  
Office of the Military Governor  
AFO 742.

AG 010.6(IA)

9th April 1947.

SUBJECT: Trial of Members of Criminal Organisations  
under the Law for Liberation.

TO : Director, Office of Military Government for Bavaria,  
Office of Military Government for Württemberg-Baden,  
Office of Military Government for Greater-Hesse,  
Office of Military Government for Bremen.

INFO TO: Director, Office of Military Government for Berlin Sector.

1. On the 1st of October 1946, the International Military Tribunal made a decision finding the Leadership Corps of the NSDAP, the SS, the SD and the Gestapo to be criminal organisations.

2. This decision was reached after a lengthy trial. Each of the above organisations was separately represented by eminent German counsel. Tens of thousands of affidavits were put in evidence, over 100 witnesses appeared and gave oral evidence, and several thousand documents were introduced by the prosecution and defence.

3. The purpose of these proceedings was to establish whether or not those organisations were criminal organisations, analogous to criminal conspiracies, organized for the purpose of committing crimes in violation

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(1) A copy of a brochure containing the text of the Law for Liberation enacted by the Land Governments for Bavaria, Greater Hesse and Württemberg-Baden on the 5th March 1946, with annex and regulations, is available for consultation in the Secretariat. (Dr. Mayr-Harting's office, Room 315).

of international law. It was for this reason that the International Military Tribunal excluded from the effect of its findings all persons who had ceased to be members of such organizations prior to the outbreak of the war on 1 September 1939.

4. The International Military Tribunal limited the scope of its findings to selected groups within the membership of the organizations it found to be criminal as follows:

a. The Leadership Corps of the NSDAP. All persons who have been Reichsleiter, Gauleiter, Kreisleiter, Ortsgruppenleiter or Amtsleiter on the staffs of the Reichsleitung, Gauleitung and Kreisleitung who were appointed to or remained in such posts on or after 1 September 1939;

b. The Schutzstaffel (SS). All persons who had been officially accepted as members of the SS, including members of the Allgemeine SS, the Waffen SS the SS Totenkopfverbände, and members of the different police forces who were members of the SS, but excluding persons who were members only of the SS Riding Units, those who were drafted into membership by the State in such a way as to give them no choice in the matter and who had committed no crimes, and those who had ceased to serve in the SS prior to 1 September 1939;

c. The Reichssicherheitsdienst des Reichsführers SS (SD) All members (Angehörige), including all local representatives and agents, honorary or otherwise, and all executive and administrative officials of Aemter III, VI and VII of the Reichssicherheitshauptamt (RSHA) whether they were technically members of the SS or not, but excluding honorary informers (ehrenamtliche Spitzel) who were not members of the SS, members of the Abwehr who were transferred into the SD, and those who had ceased to serve as members of the SD prior to 1st September 1939;

d. The Geheime Staatspolizei (Gestapo). All members (Angehörige), including the Grenzpolizei (Frontier Police), executive and administrative officials of Amt IV of the Reichssicherheitshauptamt (RSHA) or concerned with Gestapo administration in other departments of the RSHA, and all local representatives and agents, but excluding persons employed for purely clerical, stenographic, janitorial or similar unofficial routine tasks, those who were members of the Zollgrenzschutz (Border and Customs Protection) or Geheime Feldpolizei (Secret Field Police) unless also members of the units of the Gestapo described above, and those who had ceased to serve as members of the Gestapo prior to 1 September 1939.

5. The decision of the International Military Tribunal contains a finding that membership in the Corps of Political Leadership, the Gestapo and the SD was at all times voluntary, and that membership in the SS was entirely voluntary until 1940. It recognizes that thereafter some persons were brought into the Waffen SS by conscription and by transfer from other branches of the Armed Forces in a manner which gave them no choice in the matter.

6. The International Military Tribunal found that the machinery of the Corps of Political Leadership of the NSDAP was used for the Germanization of incorporated territories through the elimination of local customs and the detection and arrest of persons who opposed German occupation, and that the Leadership Corps participated in the persecution of the Jews, the administration of the slave labor program and the mistreatment of prisoners of war. With reference to the Gestapo, SD and SS, the Tribunal found that these organizations participated as such in the persecution and extermination of Jews, brutalities and killings in concentration camps excesses in the administration of occupied territories, administration of the slave labor program and mistreatment and murder of prisoners of war. The criminal acts and



purposes of these organizations has been proven and established by a judicial hearing, and in the trial of members of such organizations, the criminal nature of the organization is not an issue and is not open to question.

7. Military Government has decided to entrust the trials of members of criminal organizations to the Public Prosecutors and Tribunals established under the Law for Liberation and, to the extent that this is consistent with the finding of the International Military Tribunal, to permit the substantive and procedural of the Law for Liberation to apply.

8. Upon proof of membership within any of the incriminated groups of the organizations found criminal, a presumption shall arise that the member joined or remained a member with knowledge of the criminal acts and purposes of the organization. This presumption is rebuttable and may be overcome by evidence to the contrary in accordance with Article 34 of the Law. A similar presumption shall arise with reference to the voluntary nature of a respondent's membership in the Waffen SS; those who claim that they were drafted into membership by the State in such a way as to give them no choice in the matter, have the burden of proving such a defence.

9. The youth and Christmas amnesty do not apply to members of the criminal organizations and any Tribunal findings of Lesser Offender or Follower do not have the effect of exempting such respondents from the sanctions provided by the Law.

10. Because the findings of the International Military Tribunal is limited to criminal violations of international law, the finding does not include many of the offences against the German people which are included in the provisions of the Law for Liberation and does not include all of the persons in the categories listed in the Appendix to the Law. In adjudicating cases involving members of criminal organizations, Public Prosecutors and Tribunals will therefore be entitled to consider evidence of other matters germane to its provisions which lie outside the finding of the International Military Tribunal.

11. The provisions of this letter shall be disseminated to all Public Prosecutors and Tribunals through the Ministry of Political Liberation and to all Liaison and Security Offices.

BY DIRECTION OF THE MILITARY GOVERNOR:

G.H. Garde,  
Lieutenant Colonel, AGD.,  
Adjutant General. "

Misc. No. 116.  
9th December, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

PROVISIONS REGARDING CRIMES AGAINST HUMANITY

IN THE UNITED STATES ZONE OF CONTROL IN GERMANY.

The text of Ordinance No. 47 enacted for the British Zone of Control in Germany by which the German Ordinary Courts were authorised to exercise jurisdiction in cases of crimes against humanity committed by persons of German nationality against other persons of German nationality or Stateless persons has been circulated in Doc. Misc. No. 56.

The jurisdiction of the German courts in the United States Zone over the same offences has been the subject matter of a letter from Office of Military Government for Germany (U.S.) dated 23rd August 1947 to Office of Military Government for Württemberg-Baden.

The Secretariat is obliged to the Office of Military Government for Bavaria, Legal Division, for placing at its disposal the letter from this office dated 15th September 1947, to the Minister President of Bavaria which contains a quotation of the relevant parts of the letter of the Office of Military Government for Germany (U.S.), quoted above.

The letter of the Legal Division in Munich is being circulated for the information of the Commission.

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OFFICE OF MILITARY GOVERNMENT FOR BAVARIA  
MUNICH, GERMANY APO 407 US ARMY

JS/AAB/lm

AG 014.1-MGBLCC

15 September 1947.

SUBJECT: Trial of German Courts of Crimes against Humanity.

TO : Minister President of Bavaria  
7, Prinzregentenstrasse, Munich,  
(Attention: Minister of Justice).

1. It has been observed that considerable doubts exist in the minds of German authorities as to the jurisdiction of German courts in cases of crimes against humanity.

2. The following is a quotation of the pertinent parts of a letter from Office of Military Government for Germany (U.S.), dated 25 August 1947 to Office of Military Government for Württemberg-Baden, which reflects Military Government policy in this connection, and which has been authorized to be communicated to you for your information and guidance:

" 2. It appears that in all cases referred to .... the alleged crimes are offences against German law committed by Germans against German victims. Consequently the German courts have jurisdiction in these cases in accordance with letter HQ, USFET, dated 12 January 1946, AG 014.1 GEC-AGO, subject: Amendment to Directive "Administration of Military Government in the U.S. Zone in Germany, 7 July 1945", which provides that German courts will "perform the duty of bringing to justice

Germans or other non-United Nations nationals, other than major war criminals, accused of crimes against humanity, where such crimes are offences against the local law and where the victims of the crimes are of German or other non-United Nations nationality".

3. To enable the German courts to perform that duty effectively, the Land Government of Wuertemberg-Baden has on 31 May 1946 enacted Law No.28 for "the prosecution of national socialist crimes" which in substance restates the provisions of Art.II, Sections 1(c), 4 and 5 of Control Council Law No.10. Identical laws were enacted by Bavaria<sup>(1)</sup> and Hesse and later by Bremen. The enactment of these laws was necessitated by the fact that the German courts were prevented at that time to apply Control Council Law No.10 in view of the provisions of Article VI, Section 10(d) of Military Government Law No.2 which prohibited the German courts to try cases involving the construction of an enactment of Military Government. This prohibition has been removed by Amendment No.2 to Military Government Law No.2, effective 15 October 1946, and from this date the German courts are empowered to apply the provisions of Control Council Law No.10 in all cases which have been properly brought before them, i.e. where the alleged crime against humanity is likewise an offence against German law and was committed by a German or non- United Nations national against Germans or persons of non-United Nations nationality.

4. It results from the above that where no United Nations nationals are involved a specific authorisation to German courts is necessary only in cases where an alleged crime against humanity is not likewise an offence against German law, for example in certain cases of persecutions or denunciations. However, since it is the present policy of Military Government to let the denazification tribunals deal with those types of offences, no authorisation to the German Ordinary Courts should be given in such cases without prior notification and consent of this office. "

FOR THE DIRECTOR:

JUAN SEDILLO  
US Civilian  
Chief Legal Officer. "

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(1) The text of the "Law concerning the Punishment of National-Socialist Crimes" enacted by the Land Government of Bavaria on 1st May 1946, has been circulated in Document Series No.50.



Germans or other non-United Nations nationals, other than major war criminals, accused of crimes against humanity, where such crimes are offences against the local law and where the victims of the crimes are of German or other non-United Nations nationality".

3. To enable the German courts to perform that duty effectively, the Land Government of Wuerttemberg-Baden has on 31 May 1946 enacted Law No.28 for "the prosecution of national socialist crimes" which in substance restates the provisions of Art.II, Sections 1(c), 4 and 5 of Control Council Law No.10. Identical laws were enacted by Bavaria<sup>(1)</sup> and Hesse and later by Bremen. The enactment of these laws was necessitated by the fact that the German courts were prevented at that time to apply Control Council Law No.10 in view of the provisions of Article VI, Section 10(d) of Military Government Law No.2 which prohibited the German courts to try cases involving the construction of an enactment of Military Government. This prohibition has been removed by Amendment No.2 to Military Government Law No.2, effective 15 October 1946, and from this date the German courts are empowered to apply the provisions of Control Council Law No.10 in all cases which have been properly brought before them, i.e. where the alleged crime against humanity is likewise an offence against German law and was committed by a German or non- United Nations national against Germans or persons of non-United Nations nationality.

4. It results from the above that where no United Nations nationals are involved a specific authorisation to German courts is necessary only in cases where an alleged crime against humanity is not likewise an offence against German law, for example in certain cases of persecutions or denunciations. However, since it is the present policy of Military Government to let the denazification tribunals deal with these types of offences, no authorisation to the German Ordinary Courts should be given in such cases without prior notification and consent of this office. "

FOR THE DIRECTOR:

JUAN SEDILLO  
US Civilian  
Chief Legal Officer. "

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(1) The text of the "Law concerning the Punishment of National-Socialist Crimes" enacted by the Land Government of Bavaria on 1st May 1946, has been circulated in Document Series No.50.

Misc. No. 117,  
11th December, 1947.

UNITED NATIONS WAR CRIMES COMMISSION

POLISH WAR CRIMES LEGISLATION

(The following translations of the Polish Decrees of 27th March, 1947, and 11th April, 1947, were kindly furnished by Colonel Muszkat, Polish Representative on the Commission).

I.

DECREE OF 27th MARCH, 1947

CONCERNING CHANGES IN THE DECREE OF 28th  
JUNE, 1946, ON THE PENAL RESPONSIBILITY FOR  
RENOUNCEMENT OF NATIONALITY DURING THE WAR  
1939 - 1945.

By virtue of Article 4 of the Constitutional Law of 19th February, 1947, concerning structure and scope of the activities of the supreme institutions of the Polish Republic (Official Gazette No. 18 § 71) and, in accordance with the Law of 22nd February, 1947, concerning powers vested in the Government as to the issuing of decrees having the force of Laws (Official Gazette No. 20 § 79), the Council of Ministers, with the concurrence of the National Council, enact the following:

Article 1. Article 17 § 4, of the decree concerning the penal responsibility for renouncement of nationality during the war (Official Gazette No. 41 § 237) will read as follows:

"4. If the indictment is not served before the 31st October, 1947, the person in question will be freed from custody by the prosecutor."

Article 2. The execution of the present Decree is entrusted to the Ministers of Justice, of National Defence, Public Security and Treasury.

Article 3. The present Decree comes into force on the day of its publication.

II

THE OFFICIAL GAZETTE OF THE REPUBLIC OF POLAND

No. 32

16th April, 1947

DECREE OF 11th APRIL, 1947,

CONCERNING CHANGES IN THE DECREE ON THE  
SUPREME NATIONAL TRIBUNAL

By virtue of Article 4 of the Constitutional Law of 19th February, 1947, concerning structure and scope of the activities of the supreme institutions of the Polish Republic and, in accordance with the Law of 22nd February, 1947, concerning powers vested in the Government as to the issuing of decrees having the force of Laws (Official Gazette No. 20 § 79), the Council of Ministers, with the concurrence of the National Council, enact the following:

Article 1. The following changes are being introduced into the consolidated text of the Decree concerning the establishment of the Supreme National Tribunal, issued on 22nd January, 1946, and promulgated by the Minister of Justice on 31st October, 1946 (Official Gazette No. 59 § 327):

I. Article 6 to read as follows:-

"Article 6, item 1. The following crimes are to be within the jurisdiction of the Supreme National Tribunal:-

- (i) Crimes envisaged by the Decree of 22nd January, 1946, concerning responsibility for the defeat of Poland in September, 1939, and for fascist activities in public life (Official Gazette No. 5 § 46).
- (ii) Crimes committed by persons who, in accordance with the Moscow Declaration signed by the United States of America, the U.S.S.R. and Great Britain, will be surrendered to the Polish authorities.

Item 2. The Prosecutor of the Supreme National Tribunal may transfer to the Prosecutors of the District Courts cases as envisaged in para. 1, taking into account, as far as possible, their territorial competence."

II. The words "item 2" following the words "in accordance with article 6" in article 7 to be replaced by the words "para. 2."

III. The previous text of article 11 is to be regarded as the first paragraph, and the following text to be introduced as paragraph 2:

"2. Any records taken within or without the country, by the Polish authorities or by any allied authorities, or



by any private persons acting on their behalf, during the preliminary investigation or any other action taken with a view to establishing the crime or bringing the criminal to justice, may be read at the trial."

Article 2: The execution of the present Decree is entrusted to the Ministers of Justice and of Public Security.

Article 3: The present Decree comes into force on the day of its publication.

The President of the Republic of Poland ... Bolesław Bierut  
The President of the Council of Ministers .. Józef Cyrankiewicz.  
For the Minister of Justice ... .. Leon Chajm.  
The Minister of Public Security ... .. Stanisław Radkiewicz.

UNITED NATIONS WAR CRIMES COMMISSION

MISC. 118  
December 19, 1947.

The following letter received by the Secretary General from Mr. Trygve Lie, Secretary General of the United Nations, is circulated to members for their information.

Ref: 704-1-1

UNITED NATIONS,  
Lake Success,  
New York. U. S. A.

15 December 1947.

Sir:

I understand that the question of the ultimate disposal and custody of the archives of the United Nations War Crimes Commission, when it closes down on 31 March 1948, is being considered and that there has been certain correspondence on this matter between officials of the Commission and of the United Nations Secretariat. In particular, I would refer to your letter of 11 November 1947 to Dr. Egon Schwelb, Assistant Director, Human Rights Division, Department of Social Affairs.

The archives of the Commission are of considerable interest to the Secretariat, and especially to the Human Rights Division and to the Legal Department in connection with tasks entrusted to certain Commissions of the United Nations.

Accordingly, I have the honour to inform you that should the United Nations War Crimes Commission so desire, the United Nations is prepared to assume custody of the archives of the Commission at the time of its closing. I suggest that this question might be discussed between the competent officials of the two Organisations with a view to determining conditions of transfer, including provisions for ensuring the necessary restriction on any material of a confidential or secret nature.

I have the honour to be,

Sir,

Your obedient Servant,

Sgd. Trygve Lie  
Secretary General.

Colonel George A. Ledingham, DSO.MC.  
Secretary General,  
United Nations War Crimes Commission,  
Lansdowne House,  
Berkeley Square,  
London. W.1.

UNITED NATIONS WAR CRIMES COMMISSION. MISC. 119.

PROGRESS REPORT OF WAR CRIMES TRIALS FROM DATA AVAILABLE ON JANUARY 1ST, 1948. 13th January 1948.

| EUROPE: Countries whose reports comprise war criminals only.                 |                    | <u>Cases tried.</u> | <u>Accused involved.</u> | <u>Death.</u> | <u>Imprisonment.</u> | <u>Acquitted.</u> | <u>Remarks.</u> |
|--|--------------------|---------------------|--------------------------|---------------|----------------------|-------------------|-----------------|
| United States.   | USFET)<br>USMET)   | 380                 | 1,400                    | 364           | 831                  | 205               | as at 1. 9.47.  |
| Britain  | BAOR<br>CMF & BTA. | 263                 | 871                      | 206           | 415                  | 250               | as at 1. 1.48.  |
| France   |                    | 101                 | 407                      | 150           | 220                  | 37                | as at 1.12.47.  |
| Greece   |                    | 6                   | 11                       | 3             | 7                    | 1                 | as at 1.10.47.  |
| Netherlands  |                    | 1                   | 1                        | 1             | -                    | -                 | as at 1. 9.47.  |
| Norway   |                    | 16                  | 25                       | 8             | 16                   | 1                 | as at 2. 7.47.  |
| Poland   |                    | -                   | 145                      | 27            | 88                   | 30                | as at 1.11.47.  |
| Yugoslavia.  |                    | 5                   | 79                       | 63            | 16                   | -                 | as at 1. 5.47.  |
| TOTAL:   |                    | -                   | 2,939                    | 822           | 1,593                | 524               |                 |
| EUROPE: Country whose report shows war criminals and collaborators combined. |                    |                     |                          |               |                      |                   |                 |
| Czechoslovakia.  |                    | -                   | 18,496                   | 362           | 13,969               | 4,165             | as at 31,10.47  |
| FAR EAST:  |                    |                     |                          |               |                      |                   |                 |
| United States.   |                    | 202                 | 574                      | 140           | 380                  | 54                | as at 2. 5.47.  |
| Britain  |                    | 375                 | 1,088                    | 299           | 672                  | 117               | as at 1. 1.48.  |
| Australia.   |                    | 259                 | 769                      | 138           | 397                  | 234               | as at 1.12.47.  |
| Netherlands East Indies.   |                    | 117                 | 195                      | 84            | 105                  | 6                 | as at 1. 9.47.  |
| TOTAL:   |                    | 953                 | 2,626                    | 661           | 1,554                | 411               |                 |



Misc. No.120.

6th February, 1948.

UNITED NATIONS WAR CRIMES COMMISSION

CHINESE WAR CRIMES LEGISLATION

Law Governing the Trial of War Criminals,

October 24th, 1946

Corrigenda to Misc. No. 105

(The following translations were kindly made available by Mr. T. C. Lai of the Chinese Embassy in London, who makes it clear, however, that they are not to be regarded as official translations).

1. The present Article XI (page 3 of Misc. No. 105) should be substituted by the following:

ARTICLE X. "War Criminals who are guilty of offences provided against under section I and section III of Article II shall be sentenced to death or life imprisonment".

ARTICLE XI. "War Criminals who are guilty of offences provided against under section I-XV of Article III shall be sentenced to death or life imprisonment; those guilty of offences provided against under section XVI-XXIV of Article III shall be sentenced to death or life imprisonment or imprisonment for a period of 10 years; those guilty of offences provided against under section 25 - 37 of Article III shall be sentenced to life imprisonment or imprisonment for a period over 7 years; those guilty of offences provided against under section 38 of Article III shall be sentenced to life imprisonment or imprisonment for a period over 7 years, and offences of more serious nature shall be punishable by Death."

2. Articles XVIII, XXIX - XXXI and XXXIV were not abrogated, and read as follows:

ARTICLE XVIII. "Three Military Judges will be selected from the various Military Organisations and two will be selected by the Ministry of Justice from Provincial or Municipal Higher Courts.

One or two Military Prosecutors will be selected by the Ministry of Justice from the prosecutors of Provincial or Municipal Higher Courts and one Military Prosecutor will be selected from a Military Organisation."

ARTICLE XXIX. "The Head of the Military Tribunal for the Trial of War Criminals may, before the opening of a session, designate one or two Military Prosecutors to proceed with the preparatory work for the trial of war criminals."

ARTICLE XXX. "In the case of necessity the Military Tribunal for the Trial of War Criminals may appoint three Military Judges and one Military Prosecutor to carry out the trial of war criminals at the place where the war crimes were committed."

ARTICLE XXXI. "When it happens that the Military Tribunal for the Trial of War Criminals has pronounced the verdict "not guilty" or when a Military Prosecutor deems a prosecution unnecessary in any war crime cases, such cases shall be submitted to the Ministry of National Defence for approval within one week of the pronouncement or decision. The Ministry of National Defence may hand the cases back for re-trial or investigation when any doubts exist."

ARTICLE XXXIV. "The responsible organisation for the apprehension, custody, trial, and judgment of War Criminals shall from time to time, report in tabular form all the cases they handle, to the Ministry of National Defence and the Ministry of Justice; the detailed method for such arrangements to be jointly decided by both Ministries."

UNITED NATIONS WAR CRIMES COMMISSION.

MISC. 121.

PROGRESS REPORT OF WAR CRIMES TRIALS FROM DATA AVAILABLE ON FEBRUARY 1ST, 1948.

16th February, 1948.

| EUROPE: Countries whose reports comprise war criminals only.               | <u>Cases tried.</u> | <u>Accused involved.</u> | <u>Death.</u> | <u>Imprisonment.</u> | <u>Acquitted.</u> | <u>Remarks.</u> |
|--|---------------------|--------------------------|---------------|----------------------|-------------------|-----------------|
| United States: USFET)  | 489                 | 1,672                    | 426           | 990                  | 256               | as at 1. 2.48.  |
| USMET)   |                     |                          |               |                      |                   |                 |
| Britain: BAOR  | 269                 | 892                      | 212           | 429                  | 251               | as at 1. 2.48.  |
| CMF & BTA.   |                     |                          |               |                      |                   |                 |
| France:  | 101                 | 407                      | 150           | 220                  | 37                | as at 1.12.47.  |
| Greece:  | 6                   | 11                       | 3             | 7                    | 1                 | as at 1. 6.47.  |
| Netherlands:   | 1                   | 1                        | 1             | -                    | -                 | as at 1. 9.47.  |
| Norway:  | -                   | 63                       | 18            | 37                   | 8                 | as at 1. 1.48.  |
| Poland:  | -                   | 145                      | 27            | 88                   | 30                | as at 15.11.47. |
| Yugoslavia:  | 5                   | 79                       | 63            | 16                   | -                 | as at 1. 5.47.  |
| TOTAL:   | -                   | 3,470                    | 900           | 1,787                | 583               |                 |
| EUROPE: Country whose report shows war criminals & collaborators combined: |                     |                          |               |                      |                   |                 |
| Czechoslovakia:  | -                   | 18,496                   | 362           | 13,969               | 4,165             | as at 31.10.46. |
| FAR EAST:  |                     |                          |               |                      |                   |                 |
| United States:   | 202                 | 574                      | 140           | 380                  | 54                | as at 2. 5.47.  |
| Britain:   | 386                 | 1,136                    | 305           | 711                  | 120               | as at 1. 2.48.  |
| Australia:   | 259                 | 769                      | 138           | 397                  | 234               | as at 1.11.47.  |
| Netherlands East Indies:   | 117                 | 195                      | 84            | 105                  | 6                 | as at 1. 9.47.  |
| TOTAL:   | 964                 | 2,674                    | 667           | 1,593                | 414.              |                 |



MISC. 122.

February 13, 1948.

UNITED NATIONS WAR CRIMES COMMISSION

LAW REPORTS OF TRIALS OF WAR CRIMINALS

FRENCH TRANSLATION

Ambassade de France,  
A Londres.

7th February 1948.

My dear Secretary General:

Since the last Commission meeting of 21st January, I have been in touch with the French authorities concerning the matter, raised during the discussion, of the publication after 31st March 1948, of the remaining volumes of Law Reports of Trials of War Criminals.

As I have already pointed out before the Commission, the French Government share entirely the views expressed by the majority of the members about the desirability of pursuing this task.

The French Government are however of the opinion that, in order to give this publication its full international value, it would be necessary to have it also and simultaneously translated into French.

They point out in that respect that the United Nations Organisation, to which the archives of the Commission will be entrusted, recognises the use of both languages in its daily working practice and that, in-as-much as the above publication may constitute the basis for further studies inside the division of Human Rights, if not for the establishment of an entire jurisdiction, it is particularly important that a French translation should also be available. Moreover the French authorities lay the stress on the fact that as far as such matters as legal publications or commentaries are concerned, the value of the French language has always been universally accepted in international practice and that it would constitute an unfortunate precedent should the above publication depart from this rule, particularly in a matter in which France, as well as other European countries are so closely interested. They finally add that since the Commission had originally thought it appropriate to subscribe to the principle of this translation, it would appear surprising that the task should from now on be pursued in the British version alone, at the risk of losing the benefit which the comparison of both languages can bring about to potential readers.

For all these reasons the French Government would be sincerely desirous, in order to reach a final decision that the matter should be raised again before the Commission and if possible submitted to the attention of the other members before the general discussion is resumed. I should add that if the Commission should accede to the views expressed in this regard by the French Government, the latter would be prepared not only to take their share in the supplementary expenses involved, but also to provide, in Paris itself, for the material task of the translation, under the responsibility of the Commission's staff, and in close collaboration with it.

Sgd. P. Maillard,  
2nd Secretary to the French Embassy,  
French Representative to the U.N.W.C.C.

Colonel Ledingham,  
Secretary General, U.N. War Crimes Commission,  
Lansdowne House,  
Berkeley Square. W.1.

Misc. No. 123.

17th March, 1948.

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Second Supplement to Doc. Misc. No. 94

Compiled by George Brand, LL.B., Legal Officer

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Misc. No. 124.

18th March, 1948.

UNITED NATIONS WAR CRIMES COMMISSION

NETHERLANDS EAST INDIES

WAR CRIMES LEGISLATION

(The following texts of Netherlands East Indies Statute Books Nos. 44, 45, 46 and 74 were made available by Commander Mouton, Netherlands Representative on the United Nations War Crimes Commission).

S T A T U T E   B O O K

of the

N E T H E R L A N D S   E A S T   I N D I E S .  
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1946 No. 44. JUSTICE.   WAR CRIMES .

Definition of War Crimes .

IN THE NAME OF THE QUEEN !

The Lieutenant-Governor-General of the Netherlands East Indies;

To all who shall see this or hear it read, salutations !

Lets it be known:

That He, considering it necessary to establish what are to be considered as war crimes;

In agreement with the Council of Heads of Departments;

Has approved and understood:

Article. 1 .

Under war crimes are understood .acts which constitute a violation of the laws and usages of war committed in time of war by subjects of an enemy power or by foreigners in the service of the enemy, such as:

( 1 - 34 inclusive are the crimes mentioned in the 1919 list as amended by the U.N.W.C.C. )



35. Bad treatment of interned civilians or prisoners.
36. Carrying out of or causing executions to be carried out in an inhuman way.
37. Refusal of aid or prevention of aid being given to shipwrecked persons.
38. Intentional withholding of medical supplies from civilians.
39. Commission, contrary to the conditions of a truce, of hostile acts or the incitement thereto, and the furnishing of others with information, the opportunity or the means for that purpose.

Article 2.

This decree shall be quoted as "Definition of War Crimes Decree".

Article 3.

This decree takes effect from the day following its announcement.

And so that no one can ~~claim~~ ignorance of the same, it is published in the Netherlands East Indies Statute Book.

Done at Batavia, 1st June 1946.

The Lieutenant-Governor-General of the  
Netherlands East Indies,  
H.J. van Mook.

The acting 1st Secretary to the Government,  
E.O. van Boetzelaer.

Issued 3rd June 1946.

The acting 1st Secretary to the Government,  
E.O. van Boetzelaer.

(Lieutenant-Governor-General's Decree No. 2 of 1st June 1946.)

STATUTE BOOK  
of the  
NETHERLANDS EAST INDIES.  
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1946, No. 45. JUSTICE. WAR CRIMES.

War Crimes Penal Law.

IN THE NAME OF THE QUEEN !'

The Lieutenant-Governor-General of the Netherlands East Indies;

To all who shall see this or hear it read, salutations !

Lets it be known:

That He, considering it necessary in the matter of war crimes to declare certain provisions of criminal law to be no longer applicable and to establish a new provision of same;

In agreement with the Council of Heads of Departments;

Has approved and understood:

[ The following paragraph taken from "No. 15031 (N.E.I.), Justice . War Crimes. - Explanation with regard to decrees Nos. 44, 45, 46 and 47-" is inserted here as it concerns article 1 which follows:  
" In spite of the reference to the laws and customs of war in the definition of war crimes and except when a deviation from the general N.E.I. penal code has been established by decree expressly for war crimes, the Netherlands-Indies existing criminal laws (as contained in the 1st book of the N.E.I. penal code ) remain in principle applicable to war crimes. ]

N.B.: The numbered articles given below appear in due course further on.

Article 1.

The following provisions of the (N.E.I.) Penal Code do not apply in respect to war crimes:

BOOK 1:

Part II: Scope of the operation of the legal penal provisions:

" II: Penalties: with the exception of art<sup>s</sup>. 14, 24, 28, 29, 32, 34, 39, and paras 1 and 2 of art. 42.

[ These deal with the way imprisonment is to be carried out: they have been omitted in this translation.

N.B. Of the penalties mentioned in the N.E.I. penal code only death and imprisonment are applicable as a punishment for war crimes ]

" III: Exclusion of, lessening and increasing the liability to punishment: with the exception of art<sup>s</sup>. 44, 48 and 49;

[ In this part appears art. 51 about superior orders which plea is thus not applicable to war crimes. ]

" IV: Attempt: with the exception of art. 53, para. 1;

Part V : Participation-

- Part V : Participation in punishable acts; with exception of art<sup>s</sup>. 55, 56 and 58;
- " VI : Conjunction of punishable acts; with the exception of art:63, paras. 1 and 2 of art:64, and para. 1 of art: 65, as far as quoted;
- " VII : Lodging and withdrawal of criminal charges which charges can only be prosecuted if a complaint has been lodged by the victim.

Article 2.

The general provisions of the code of military penal law do not apply to war crimes.

[The following supplement No. J.F.6. 1/1/7 belonging to Circular Letter No. 15053 from the Deputy Director of Justice, Batavia, N.E.I., dated 6th September 1946, gives those exceptions of the Penal Code mentioned in article 1 which do apply to War Crimes. It also contains articles 3 - 10 inclusive of the present War Crimes Penal Law Decree (No. 45)]

Summary of General Penal Provisions  
applicable to War Crimes.

- - - - -

Art. 3 War Crimes Penal Law Decree.

The Netherlands East Indies statutory penal provisions with regard to war crimes are applicable irrespective of the place where the crime is committed.

Art. 4 War Crimes Penal Law Decree.

He who is or has been guilty of a war crime shall be punished with: the death penalty or imprisonment for life or imprisonment for at least one day or at the most twenty years.

Art. 44 N.E.I. Penal Code.

- (1) He is not punishable who commits a crime for which in view of faulty mental development or pathological derangement of his mind he cannot be held responsible.
- (2) If it appears that owing to faulty mental development or pathological derangement of his mind he cannot be held responsible for the act committed by him, the judge can order him to be placed in a mental institution for a probationary period not exceeding one year.
- (3) (Has no connection with war crimes).

Art. 48 N.E.I. Penal Code.

He is not punishable who commits a crime under duress.

Art. 49 N.E.I. Penal Code.

- (1) He is not punishable who commits an act to which he has been impelled in the necessary defence of his or another's person, honour or property against immediately threatening unlawful assault.
- (2) The transgression of the limits of necessary self-defence is not punishable if this was the immediate result of a violent emotion caused by the assault.

Art. 58 N.E.I. Penal Code



Art. 58 N.E.I. Penal Code.

Personal circumstances through which liability to punishment is excluded, decreased or increased are only taken into consideration when applying the law in respect to that perpetrator or accomplice directly affected by them.

Article 5 War Crimes Penal Law Decree.

An attempt at or complicity and conspiracy in a war crime are equally punishable with the crime itself.

Art. 53 para. 1. N.E.I. Penal Code

(1) An attempt to commit a crime is punishable when the intention of the perpetrators has made itself known by a start having been made and the crime only not carried through as a result of circumstances independent of their will.

Art. 56 N.E.I. Penal Code.

Shall be punished as accomplices in a crime:

- 1°, those who intentionally assist in the crime;
- 2°, those who intentionally provide the opportunity, means or information for the commission of the crime.

Art. 88 N.E.I. Penal Code.

Conspiracy exists as soon as two or more persons have agreed to commit the crime.

Art. 63 N.E.I. Penal Code.

- (1) If an act comes under more than one penal provision, one only of these provisions shall be applied . . . . .  
(The following words of this paragraph lapse with relation to war crimes in virtue of art. 1 War Crimes Criminal Law Decree).
- (2) If a special penal provision exists for an act which comes under a general penal provision the former only shall be taken into consideration.

Article 6 War Crimes Penal Law Decree.

Penal provisions with respect to war crimes shall in regard to other penal provisions count as special penal provisions in the meaning of art. 63, para. 2, of the Penal Code.

Art. 64 paras. 1 and 2 N.E.I. Penal Code.

- (1) If several acts, although each in itself a crime or a minor infringement, are so connected that they must be considered as one continuous action, only one penal provision shall be applied, this being that whereby the heaviest sentence is given.
- (2) Similarly only one provision shall be applied in a conviction for forgery or the counterfeiting of coins and in the use of the object in respect of which the forgery or counterfeiting of coins was committed.

Art. 65 para. 1 N.E.I. Penal Code-

Art. 65 para. 1 N.E.I. Penal Code.

(1) In a conjunction of more than one act each of which must be considered an act in itself and which produces more than one crime for which similar penalties have been fixed, one penalty only shall be awarded.

Article 7 War Crimes Penal Law Decree.

If a person after having been sentenced to punishment in connection with a war crime is again declared guilty of a war crime committed before that sentence was passed, the previous penalty shall be taken into account in this sense that no other sentence may be pronounced in addition to the death sentence, no temporary imprisonment be awarded as well as imprisonment for life and in the case of temporary imprisonment this may not be for a total duration of more than twenty years.

Article 8 War Crimes Penal Law Decree.

Prosecution in respect of war crimes shall take place on the initiative of the authorities.

Art. 55 N.E.I. Penal Code.

- (1) Shall be punished as the perpetrator of a punishable act:
1. those who commit the act, cause it to be committed or are accessories to it.
  2. those who by gifts, promises, misuse of authority or position, force, threat or deceit or by the provision of opportunity, means or information deliberately provoke the act.
- (2) With respect to the latter, only those acts come into consideration, together with their results, which have been deliberately provoked.

Article 9 War Crimes Penal Law Decree.

He whose subordinate has committed a war crime shall be equally punished for that war crime if he tolerated the commission of it by his subordinate while he knew, or at least must reasonably have supposed, that it was being or would be committed.

Article 1 (Statute Book of the N.E.I. 1947, No.16).

A second paragraph shall be added to art.9 of the War Crimes Penal Law Decree (Stat. Book 1946, No.45) to read as follows:

"2. He whose subordinate, not being a subject of a hostile power or a foreigner in the service of the enemy has committed an act which would have constituted a war crime had the said subordinate possessed the above mentioned qualifications, shall be punished as the author of that war crime if he suffered it to be committed by his subordinate while he knew or at least must reasonably have suspected that it was being or would be committed."

Article 10 War Crimes Penal Law Decree.

1. If a war crime is committed within the framework of the activities of a group of persons in such a way that the crime can be ascribed to that group as a whole, the crime shall be considered to have been committed by that group and criminal proceedings taken against and sentence passed on all members of that group.

2. No penalty shall be imposed on him of whom it is proved that he had no part in the war crime.

The following articles-

[The following articles are those contained in Parts VIII and IX of the Netherlands East Indies penal code which are applicable to war crimes]

Art. 76 N.E.I. Penal Code.

(1) Except for those cases where judicial sentences are susceptible of revision, nobody can again be prosecuted on account of an act which has been irrevocably decided with regard to him by judgment entered by a Netherlands East Indies judge, or by a judge in the Netherlands, Surinam or Curacao.

By Netherlands East Indies judge is understood here the native judges in districts where autonomous rule has been granted to the Indian princes and peoples, as well as in those parts where the Indian population has been allowed to retain its own judicial system.

(2) If the judgment entered is that of another judge, no prosecution of the same person shall then take place with respect to the same act in the case of:

1. an acquittal or dismissal from prosecution;
2. a sentence followed by its being carried out in full, pardon or expiration of the time limit of the punishment.

Art. 86 N.E.I. Penal Code.

Where crime in general or a crime in particular is mentioned, complicity in an attempt to commit that crime is included provided that the contrary does not result from any other provision.

Art. 87 N.E.I. Penal Code.

An attempt to commit an offence exists as soon as the intention of the authors has shown itself <sup>by</sup> starting to carry it out in the sense of art. 53.

Art. 88 bis N.E.I. Penal Code.

Under revolution is understood the destruction or changing by unlawful means of the constitutional government, order of succession to the throne or lawful government of the Netherlands East Indies.

Art. 89 N.E.I. Penal Code.

Reducing to a state of unconsciousness or impotence is placed on a par with the use of force.

Art. 90 N.E.I. Penal Code.

Under severe bodily injury is understood:  
illness or wounding which allows of no prospect of complete recovery  
or by which danger to life arises;  
continued inability to carry out official or professional duties;  
loss of use of any one of the senses;  
mutilation;  
paralysis;  
mental derangement lasting more than four weeks;  
abortion.

( Art<sup>s</sup>. 91 - 95 and 97 - 103 inclusive give further definitions of terms used in the N.E.I. Penal Code. )

Art. 96 N.E.I. Penal Code-



Art. 96 N.E.I. Penal Code.

- (1) Under enemy are included rebels. Also under enemy is included that power with whom there is a threat of war.
- (2) Under war are included hostilities with self-governing communities and civil war.
- (3) Under time of war is included the period during which war is threatening. Time of war is also considered to exist as soon as orders to mobilise the army have been given and for as long as that army is mobilised.

[End of summary]

Article 11.

This decree shall be quoted as "War Crimes Penal Law Decree".

Article 12.

This decree takes effect from the day following its announcement.

And so that no one can claim ignorance of the same it is published in the Statute Book of the Netherlands East Indies.

Done at Batavia, 1st June 1946.  
The Lieutenant-Governor-General of the  
Netherlands East Indies,  
H. J. van Mook.

The acting 1st Secretary to the Government,  
E. O. Van Boetzelaer.

Issued 3rd June 1946.  
The acting 1st Ssecretary to the Government,  
E. O. van Boetzelaer.

( Lieutenant-Governor-General's Decree No. 2 of 1st June 1946.)

STATUTE BOOK  
of the  
NETHERLANDS EAST INDIES.  
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1946, No. 46. JUSTICE. WAR CRIMES.

Legal Competence in respect of War Crimes .

IN THE NAME OF THE QUEEN !

The ~~Lieutenant-Governor-General~~ of the Netherlands East Indies;

To all who shall see this or hear it read, salutations !

Lets it be known:

That he, considering it is necessary to determine the extent to which the ~~Provisions~~ regarding the legal competence of the military judge in the Netherlands East Indies (Statute Book 1934 No. 173) are applicable to war crimes;

In agreement with the Council of Heads of Departments;

Has approved and understood:

[Before giving the translation of the decree which is actually an amendment to Statute Book 1934, No. 173, this latter is given first.]

Netherlands East Indies Statute Book, 1934, No. 173.

Provisions concerning the Legal Competence  
of the Military Judge in the Netherlands East Indies.

~~VII~~ PART.

Legal competence in general belonging to the military judge.

Article 1.

The military judge deals with punishable acts committed by members of the forces apart from exceptions laid down by law, by general administrative measures or by decree.

Article 2.

The military judge also deals with:

1. certain punishable acts committed by those who with respect to such acts are by law, general administrative measure or decree placed on a par with members of the forces;
2. punishable acts committed by those who are in the service of a military force on a war footing, or who accompany or follow it with the approval of the military authorities.

Article 3.

In addition, the military judge, if not already empowered to do so by the two preceding articles, deals with:

1. crimes committed-

1. crimes committed during a war by anyone in a part of the Netherlands East Indies Territory in which a state of siege has been declared in so far as such crimes have been defined in either Part I or Part II in the Second Book of the Penal Code or in the Military Penal Code;
2. punishable acts committed during a war in a part of the Netherlands East Indies Territory in which a state of siege has been declared, whenever the civil judge who should by rights have judged the case is not in a position to do so;
3. punishable acts committed by anybody in enemy territory partially or wholly occupied by the forces if through such acts any Netherlands or Netherlands East Indies interest is or can be harmed, unless the war has ended and the act is not made punishable by the Military Penal Code.

#### Article 4.

Except in the case of Article 3 the military judge does not deal with criminal cases concerning the national resources and leases and local taxes.

#### Article 5.

Except in the case of Article 3 the military judge does not deal with punishable acts committed by members of the forces who are also members of the States General or the House of Representatives in the Netherlands East Indies if these concern activities arising out of such membership, nor does he deal with punishable acts not described in the Military Penal Code, committed by one of the other persons named in article 165 of the Regulation on the judicial organisation.

#### Article 6.

1. The military judge does not preferably deal with punishable acts committed by a person subject to military legal authority in conjunction with another person subject to the legal authority of a civil judge, unless the acts in question have been declared punishable by the Military Penal Code.
2. In the event of a simultaneous prosecution by a military and a civil judge the judge who started the prosecution has exclusive authority.

#### SECOND PART.

Legal Competence of the Supreme Military Court of Justice in particular

#### Article 7.

The Supreme Military Court of Justice deals in the first and last instance with punishable acts committed by members of the forces of a higher rank than captain, and by persons placed on a par with members of the forces with regard to certain acts and who have held such a rank, as well as punishable acts defined in the Military Penal Code committed by one of the persons referred to at the end of article 5.

#### Article 8.

1. The Supreme Military Court of Justice preferably deals in the first and last instance with punishable acts committed by a person subject to the competence of a court-martial in conjunction with a person as referred to in article 7.

2. In the event-

2. In the event of a simultaneous prosecution by the Supreme Military Court of Justice and by a court-martial the judge who started the prosecution has exclusive authority.

Article 9.

The Supreme Military Court of Justice has the final decision in an appeal against a sentence by a court-martial.

THIRD PART.

Competence of Courts-martial in particular.

Article 10.

Subject to that which is laid down in Part II courts-martial deal with punishable acts committed by those who come under the jurisdiction of the military judge.

FOURTH PART.

Relative competence of the Courts-martial.

Article 11.

Ordinary courts-martial deal with:

1. punishable acts committed by persons belonging to one of the garrisons in their venue;
2. punishable acts committed in their venue.

Article 12.

When there is no court-martial competent to judge a punishable act in accordance with the previous article, the court-martial appointed by the Governor-General shall deal with it.

Article 13.

The relative competence of Field-General courts-martial is regulated by the Governor-General's decree appointing those courts-martial or by the decree in which such appointment is ordered.

Article 14.

The relative competence of courts-martial in a town or place actually being besieged or stormed also includes punishable acts committed in that town or place or in its immediate neighbourhood.

Article 15.

The relative competence of courts-martial in a part of the Netherlands East Indies in which a state of war or of siege has been declared is limited to punishable acts committed in that part. It is regulated by the decree appointing those courts-martial.

FIFTH PART.

Special Regulations.

Article 16.-



Article 16.

1. In the event of a simultaneous appointment of more than one court-martial in virtue of the two numbered paragraphs of article 11, that court-martial is exclusively empowered to deal with the case within the jurisdiction of which the punishable acts referred to in para. 1 of that article.
2. In the event of simultaneous action by more than one court-martial and in virtue of the same para. 1. of that article, or by courts-martial named in different articles, that court-martial before which the prosecution was first started is exclusively empowered to deal with the case.

Article 17.

1. By the participation of more than one person in the same punishable act, the authority to deal with one of the authors or accomplices brings with it the authority to deal with the others, apart from the provision in article 8.
2. If the prosecution has been started simultaneously by more than one competent court-martial, that court-martial remains exclusively competent before which the persons responsible as authors are being prosecuted. If such persons are not being prosecuted before the same court-martial, that court-martial remains exclusively competent before which the prosecution of one of these persons has first been started.

Article 18.

Expressions used in this Decree have the same meaning as those appearing in the Military Penal Code.

Final Provision.

Article 19.

1. This decree shall be quoted as "Competence of the Military Judge Decree".
2. It takes effect simultaneously with the Military Penal Code.

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[The decree then reads as follows:]

Article 1.

The Provisions regarding the legal competence of the military judge in the Netherlands East Indies (Statute Book 1934, No. 173) apply to war crimes, with the following alterations:

1. A new paragraph is added to article 3, reading: "4. war crimes, where or by whom committed."
2. In the first paragraph of article 6 the words "or are war crimes" are inserted after the words "Penal Code".
3. In articles 7 and 8 a new clause is inserted after the word "Justice", reading: ", unless it concerns a war crime,".
4. A new paragraph is added to article 11, reading: "3. war crimes, where or by whom committed".
5. In the first paragraph of article 16 the word "two" is preceded by the word "first".

Article 2.-

- 13 -

Article 2.

This decree shall be quoted as "Legal Competence in respect of War Crimes Decree".

Article 3.

This decree takes effect from the day following its announcement.  
And so that no one can claim ignorance of the same, it is published  
in the Netherlands East Indies Statute Book.

Done at Batavia, 1st June 1946.  
The Lieutenant-Governor-General of the  
Netherlands East Indies,  
H.J. van Nook.

The acting 1st Secretary to the Government,  
E.O. van Boetzelaer.

Issued 3rd June 1946.  
The acting 1st Secretary to the Government,  
E.O. van Boetzelaer.

Lieutenant-Governor-General's Decree No.2 of 1st June, 1946.

STATUTE BOOK.  
of the  
NETHERLANDS EAST INDIES.  
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1946, No. 74. JUSTICE. WAR CRIMES.

Proclamation, in a consecutive numbering and under the title of "War Crimes Legal Procedure", of those rules which as a result of the "War Crimes Legal Procedure Decree" are applicable to criminal procedure with respect to war crimes.

Decree No. 1 of 31st July 1946 issued by the Lieutenant-Governor-General of the Netherlands East Indies.

Read: etc.

In view of article 4 of the "War Crimes Legal Procedure Decree" (Statute Book 1946 No. 47);

Is approved and understood:

That it has been decided that the rules which as a result of the "War Crimes Legal Procedure Decree" are applicable to criminal procedure with respect to war crimes and which have been recapitulated in a consecutive numbering under the title of "War Crimes Legal Procedure", the same numerical order as in the "Revised Military Legal Procedure" being followed as far as possible, shall be made known by the following text being placed in the Statute Book of the Netherlands East Indies.

War Crimes Legal Procedure.

FIRST PART.

General Provision.

Article 1.

All objects which can serve to bring the truth to light may be seized by those authorised or ordered to carry out the arrest and the preliminary investigation or who are charged with the general investigation.

SECOND PART.

Chapter 1.

On the General Investigation.

Article 2.

- (1) The prosecutor shall investigate and prosecute before courts-martial all such punishable acts with the examination of which they are charged. The prosecutor shall, if necessary, be assisted by one or more deputy prosecutors who shall exercise their powers under his responsibility and who shall be nominated in the same way as he.
- (2) He may charge prosecutors attached to other courts-martial with the investigation and also the Residents or Assistant-Residents in Java and Madura, the Assistant-Residents in the Principalities and the Heads of the Local Government elsewhere. They are authorised to have the investigation carried out by civil servants and officials in charge of criminal investigations - with the exception of heads of the provincial government

and public officers -



and public officers belonging to the European courts of justice- and also in so far as those particular cases are concerned, those persons charged with the investigation of punishable acts in cases which have been confided to them by virtue of special statutory regulations.

The prosecutors and the officials in question may have the investigation carried out by such persons as they select.

(3) That which is laid down in articles 30 to 70 of the "Revised Military Legal Procedure" with regard to the interrogation by the investigating officer, and in particular the rules concerning the administration of the oath to witnesses, applies equally to interrogations which will take place as a result of this article, on the understanding that the instructions given to the secretary as well as those given to the investigating officer are also carried out by the prosecutor or the authority mentioned in para. 2.

[Here follow the most important articles between art.<sup>s</sup> 30 and 70 of the Revised Military Legal Procedure.]

#### Article 31.

(1) No attempt shall ever be made to obtain a statement of any sort from an accused by the infliction of pain or discomfort or by the threat of same, by the promise of release or mitigation of a sentence or by a catch question, but it may be pointed out to the accused that the judge can punish without a confession and the improbability of the accused's defence may also be indicated to him.

(2) Statements made by the accused, especially those containing a confession, shall be taken down as far as possible in his own words in the official report of the interrogation.

#### Article 32.

Information given by witnesses or their statements and those of experts shall be read out clearly and distinctly to the accused in the presence of the investigating officer and he shall also be shown all documents belonging to his case.

#### Article 33.

The following shall be noted on each document thus shown: "Shown to and seen by the accused N.N. at the interrogation of the . . . ." The secretary shall then add his own signature as a proof that these documents have been seen by and shown to the accused.

#### Article 34.

The accused shall also be clearly asked whether he wishes to raise any objection to the statements of witnesses or experts shown to him or to the documents shown. Any such objection shall be accurately recorded.

#### Article 36.

(1) If an accused wishes to put forward something in his defence or excuse every opportunity shall be given him to do so and he shall be asked to make a statement and also to give the names of witnesses who might know anything about the matter and to mention any circumstance which could help in the tracing of evidence.

(2) Before the final interrogation is concluded the accused shall expressly be asked if he wishes to bring forward anything further in his defence or excuse and if so what, and to say what witnesses he wishes to call for this purpose or what proofs or circumstances he can adduce. The questions and answers shall then be read over to him clearly and slowly.

#### Article 37.-



Article 37.

If the accused refuses to sign the official report of the interrogation a note shall be made to this effect at the end and the interrogation report shall in that case count as legal evidence even without its having been signed by him.

Article 39.

If an accused does not understand Dutch the situation shall be dealt with as laid down in art. 55.

Article 40.

- (1) The witnesses whom the investigating officer or the prosecutor consider should be called shall be interrogated by the investigating officer with regard to the questions which he or the prosecutor wishes to put. Their answers or statements shall be strengthened by oath as laid down in art. 54, unless there is any reason to the contrary, and this evidence put into writing and signed.
- (2) The provisions of the decree on criminal procedure regarding the admission of persons to give evidence or information apply in this case also.

Article 46.

- (1) If civilian witnesses do not appear in answer to their summons the investigating officer can again request that they be summoned and can order that they be brought before him immediately or at a later date.
- (2) The authority receiving the request shall comply with it and with the order.

Article 47.

The commanding officer to whom the formal request is sent shall if necessary send the military witness required to the place stated, taking all suitable precautions.

Article 50.

The investigating officer shall:

- a. thoroughly impress it upon each witness before the interrogation begins that it is his duty to speak the whole truth without aggravating, magnifying, detracting from or minimising it, <sup>and</sup> without concealment or suppression;
- b. remind him in so far as is necessary of the importance of the oath, the consequences of perjury, and the punishment of all false evidence;
- c. interrogate the witnesses, each separately and one by one, without the one seeing or hearing what was testified by the other or himself referring to this;
- d. make a separate document for each witness, thus not placing the answers of several witnesses next to or under the questions, even if the same questions be put to several witnesses;
- e. have the witnesses' answers written down <sup>as far as possible</sup> in their own words and with the least possible alteration of style or way of expression;
- f. ask each witness at the end of his interrogation if he knows of anything further with regard to the case on which he has been examined and which and which might be of interest to justice.

at the end of -

- g. at the end of each interrogation have the questions and answers, or the statement made by the witness, read out clearly and slowly by the secretary.

Article 51.

The witness shall then sign the answers or statements read over to him after they have been approved of by him or altered or added to according to his wish. If he is unable to write he shall put his fingerprint, a cross or any other sign, and the secretary shall then add his declaration that it was put there in his presence.

Article 52.

If a witness alters an answer given by him, or anything in a statement he has made, it shall not be crossed through or rendered illegible, but the investigating officer shall have the recantation and the way in which the former answer or statement made by the witness has been altered or explained be recorded by the secretary.

Article 53.

If the recantation, addition or explanation occurs during an interrogation this shall be noted down where it takes place; if it happens while the statement is being read over aloud, at the close; but if it occurs after the signature has been appended it shall be written under this and shall be signed again as before.

Article 54.

Unless there is any reason to the contrary the witnesses, having signed, shall swear an oath in front of the investigating officer, in accordance with their religion, that they have spoken the whole truth and nothing but the truth. A note to this effect shall be made at the bottom of the statement and this latter then signed by the investigating officer and the secretary.

Article 55.

If a witness does not understand Dutch the investigating officer shall employ an interpreter.

Article 56.

This interpreter shall swear an oath in front of the investigating officer in accordance with his religion that he will faithfully acquit himself of the task to which he has been called and will not reveal anything of it to others.

Article 57.

The investigating officer shall, if he thinks it might be of use or if the prosecutor desires such a confrontation, interrogate the accused at the same time as one or more witnesses, or with other accused, or interrogate the witnesses in front of each other.

Article 58.

These confrontations shall take place for the purpose of enquiring further into the truth when statements made by two or more authors or accomplices during their interrogation differ considerably, and also if the statements of witnesses and answers of the accused do not agree on important points.

Article 59.-

Article 59.

This confrontation shall take place in the following manner: if an accused continues to deny the truth of one or more facts or circumstances about which he has already been interrogated and the investigating officer has ordered a confrontation, the latter shall first ask the accused in general terms if he wishes to acknowledge the truth of the fact or of other facts which he has denied up to now.

Article 60.

Should the accused then decline or answer in an unsatisfactory way, a witness shall be brought in and the accused asked if he knows that person and if so, what his name is and where he lives; if he says he does not know the person the latter shall then if it seems suitable be advised to make himself known by mentioning this or that circumstance.

Article 61.

The accused shall then be asked if he knows of any reason why the judge should not consider this person a trustworthy witness, or if he has reason to suppose that the said person might wish to aggravate the situation for him or prejudice him in any way contrary to the truth, any such reason to be given at once.

Article 62.

The investigating officer shall try to bring about a lengthy discussion between the witness and the accused in order to find out the truth by this means.

Article 63.

What occurs as a result of the previous article shall again be recorded by the secretary, both any circumstances that the witness may mention as further confirming or clarifying his previous statement in respect to the point in question and also the answers given to this by the accused together with any reasons advanced by the latter or his appeal to facts as proving his innocence or forming an excuse for him.

Article 64.

After this has been read aloud the witness shall be asked if he wishes to alter or add anything to his statement and then in the manner laid down in art. 54 he shall swear the oath.

Article 65.

Only after the witness has sworn the oath as mentioned above shall the accused be asked if he still wishes to alter or add to anything in his statement.

Article 66.

After that dealt with in the two previous articles has been recorded at the conclusion of the confrontation, the official statement shall be signed by the accused and the witness as well as by the investigating officer and the secretary.

Article 67. -



Article 67.

- (1) Other witnesses shall be dealt with individually in the same way.
- (2) The confrontation of witnesses with each other shall take place in accordance with articles 59 to 66.

Article 68.

If an accused refers to one or more witnesses with whom he has been confronted during the interrogation the investigating officer shall question such in front of him.

Article 69.

The confrontation with co-authors or accomplices shall take place in the same way as that with witnesses, except that they shall not be required to swear the oath.

Article 70.

If any subject in the first and second chapter of this Part has not been provided for, the procedure prescribed in the decree for penal procedure may be followed as far as compatible with the military legal procedure.

[Here end the extracts from the "Revised Military Legal Procedure" ]

Article 3.

The prosecutor, together with persons selected by him, is at all times authorised to enter any place for the purpose of viewing the local situation or inspecting any object.

Article 4.

- (1) The prosecutor in his official capacity or at the request of the accused may appoint one or more experts to advise or assist him and can if necessary instruct such to hold any enquiry asked for by him and to furnish him with a report accompanied by the reasons for their findings. The enquiry shall be held in the presence of the prosecutor if he thinks it necessary.
- (2) Before starting operations the experts shall swear an oath in front of the prosecutor in accordance with their religion that they will give him a report according to their conscience.
- (3) The same person can be heard both as witness and expert. In that case he shall also swear the oath proper to witnesses before making his statement.

Article 5.

- (1) The prosecutor can order an accused who is not under arrest to appear before him in order to be heard. The accused is then obliged to comply, otherwise the prosecutor can order that he be brought before him or arrested.
- (2) When an accused is under arrest he shall be brought before the prosecutor under proper escort at each interrogation and shall be taken back in the same manner.

Article 6.

When the accused is not under arrest the prosecutor shall be empowered to put him under arrest after any hearing whenever he thinks circumstances demand this.

Article 7.-



Article 7.

The powers granted to the prosecutor in articles 5 and 6 can also be exercised under his supervision by anyone who has been charged with the investigation.

Article 8.

In the event of the accused being under arrest the prosecutor can order his discharge from arrest after any hearing.

SECOND PART.

Chapter 2.

On committal for trial by court-martial and on counsel for the defence.

Article 9.

- (1) Committal for trial by a court-martial, which is the basis for proceedings following on it, shall take place by order of the prosecutor given in writing. The order shall, in addition to the surname and first name or names of the accused mention if possible the corps or unit to which he belongs and the rank or position which he has held in it. The order shall contain the offence with which he is charged, together with the approximate time and place where it is said to have been committed and the circumstances in which it was alleged to have been carried out, and also the day and hour fixed for the trial.
- (2) The order, accompanied by a translation in the accused's native tongue and giving if possible the names of witnesses or experts summoned or to be summoned by the prosecutor, shall be handed to the accused by a process-server or servant of the public authorities at least eight days before the trial.

Article 10.

- (1) On the form serving legal notice of the order for committal for trial by a court-martial it shall be stated that in the hearing of his case the accused will be assisted by a counsel chosen by or assigned to him.
- (2) The selection of counsel may not delay the trial.
- (3) If the president of the court-martial gives permission more than one counsel may appear.
- (4) A counsel shall be assigned to the accused unless the latter has given notice at least four days before the trial that he will be assisted by one of his own choice. The accused also reserves the right to choose his own counsel even after one has been assigned to him. If a counsel chosen by him appears for the accused no other shall appear against the latter's will.
- (5) The following may be chosen as counsel: barristers practising in the Netherlands East Indies, officers of the army and navy unless serving on the court-martial as member or secretary, retired officers of the army or navy and, further, any person who has been given permission by the president of the court-martial to appear as counsel in the case in question.
- (6) The assigning of counsel is done by the president of the court-martial. Any person can be assigned as counsel who has declared his willingness to appear as such. Should no person considered suitable by the president present himself, the commanding officer of the garrison of that place where the court-martial sits shall, at the request of the president, appoint an army officer to appear for the accused.
- (7) The secretary of the court-martial shall immediately inform the accused that a counsel has been assigned to him and shall also inform the counsel concerned without delay.

Article 11.-

Article 11.

If the accused is under arrest the counsel chosen by or assigned to him shall have access to him until sentence has been passed and promulgated by the court-martial and, apart from the necessary supervision, shall be allowed to speak with him alone and as often as he wishes.

Article 12.

- (1) Counsel may inspect the documents in the possession of the prosecutor and, if he so wishes, obtain copies of them, this in so far as the court-martial considers the furnishing of same to be necessary and without the proceedings being delayed thereby. These copies shall be paid for by the accused or supplied free if, in the opinion of the court-martial, the accused is a person without means. In the latter case the cost of the copies shall be considered as legal expenses.
- (2) The points mentioned in the first paragraph shall be decided in the sentence.

SECOND PART.

Chapter 3.

Composition of courts-martial.

Article 13.

The Governor-General shall decide where courts-martial are to be established and what the venue of such courts shall be.

Article 14.

- (1) The court-martial shall consist of a civil lawyer as president and four members appointed by the commander of the garrison. These members must be officers and, subject to that which is laid down in article 29 and the last paragraph of article 28, must belong to the garrison of the place where the court-martial is established.
- (2) The members shall as a rule remain in office for at least one year, subject to the provision laid down in article 30.
- (3) The following shall not be appointed:
  1. officers who have not yet reached the age of twenty-five,
  2. officers of the rank of 2nd Lieutenant and also reserve officers unless the latter have also been officers of the regular army.

Article 15.

Deviating from article 14 the Director of Justice may appoint an officer of an Allied force as a member of a definite court-martial dealing with certain cases or groups of cases. In a further departure from article 14 the Director of Justice, in agreement with the Commanders in Chief of the Army or Navy, may appoint an officer of the air force, navy or fleet air-arm as member of a court-martial dealing with certain cases or groups of cases. In such cases the president of the court-martial shall determine which member of the court-martial is to be replaced by the said officer. The provisions of article 14 do not apply to such officer.

Article 16.

When the activities of the court require this a civil lawyer may temporarily be appointed to the court-martial in the capacity of president-extraordinary. His task shall then be assigned to him by the Governor-General.

Article 17.-

Article 17.

- (1) The president of the court-martial, who must have attained the age of twenty-five, shall be appointed by the Governor-General.
- (2) The same provisions are valid with regard to suitability for appointments in the Netherlands East Indies, which appointments may not be filled by non-graduates or undertaken by civil servants as a secondary occupation (Further details are omitted in the translation of this article)

Article 18.

- (1) The president of the Supreme Military Court of Justice of the Netherlands East Indies is empowered, after first having heard them, to issue a warning in writing to those presidents of courts-martial who fail to respect the dignity of their office or who are guilty of negligence in the observance of the same or are guilty of a breach of the prohibitive provisions as set out in articles 9 or 21 of the regulation with respect to the juridical organisation and administration of justice in the Netherlands East Indies, as also in articles 20 or 32 of this present procedure.
- (2) This warning shall be recorded by the clerk of the Supreme Military Court of Justice in a register kept for this purpose. In this register shall also be recorded the suspension from office of and severe rebuke administered to any such presidents of courts-martial as shall have been decided upon at a meeting of the president, the prosecutor and vice-presidents of the Supreme Military Court of Justice and transmitted to the presidents of the courts-martial.

Articles 19 - 22.

(Deal with costumes to be worn by officials of the courts-martial and provisions in case of the absence of the president as well as the supplying of a deputiser for the latter.)

Article 23.

- (1) The functions of public prosecutor at a court-martial shall be carried out by a civil lawyer who must have attained the age of twenty-five. He shall be appointed by the Governor-General.
- (2) When the activities of the court demand this a civil lawyer can be temporarily employed as special prosecutor and his task assigned to him by the Governor-General.
- (3) If necessary the prosecutor shall be assisted by one or more deputy prosecutors who will exercise their powers under his responsibility and be appointed in the same way as he.

Article 24.

Paragraphs 2 and 3 of article 17, article 18, paragraph 1 of article 19, also article 21 apply equally to the prosecutor.

Article 25.

- (1) The commanding officer of the garrison in the place where the court-martial has its seat shall also appoint an officer to be the secretary of the court-martial.
- (2) The president of the court-martial is charged to keep strict watch on the discharge by such of his duties as secretary.

Article 26.

The provost-sergeant of the place where the court-martial sits shall

act as process-server



act as process-server or sheriff's officer for the same. He escorts the arrested persons to and from the court and does all the summoning and serving of writs with which he has been charged by the court-martial or the prosecutor on those persons whom he has arrested or will have to arrest as a result of instructions received from the Governor-General.

Article 27.

The president and members of a court-martial, together with the prosecutor and secretary of the same, may not stand in the first four degrees of blood-relationship to each other or in relationship by marriage.

Articles 28 - 30.

[ Deal with the protocol and deputies in cases of absence of court-martial-officials ]

Article 31.

All business transacted and everything done each day by the court-martial shall be accurately recorded in the minutes.

SECOND PART.

Chapter 4.

Rights and duties of the courts-martial mentioned in the previous chapter.

Article 32.

The president and members shall never reveal what should remain secret. They shall especially not reveal the opinion of their fellow-members nor their own.

Article 33.

- The following shall not be permitted to be present at the deliberations:
- those who stand in a blood-relationship of six degrees or less to the accused or who are related to him by a present or past marriage;
  - those who have given any counsel or advice in the accused's case, or who are already acquainted with it through being <sup>the</sup> remitting authority or the investigating officer;
  - those who unwittingly, thoughtlessly or indirectly have received gifts, presents or donations or promises of the same from or on behalf of the accused, at the time the case being dealt with had already been or probably would be brought before the court-martial, even were such gifts to consist of the most insignificant presents of food or drink, should there be the slightest reason to suppose that they were made with a view to influencing the accusation.
  - those who have brought a suit against the accused before any judge.

Article 34.

Should they discover that others have received any presents on their behalf or have been given presents for their sake, or that they themselves have thoughtlessly or unwittingly accepted such, they shall immediately inform the court-martial of the fact and either return the presents if possible or refund the value of them in such manner as shall be approved of by the court-martial.

Article 35.-

Article 35.

When it is doubtful whether the case which has arisen falls within the category of those referred to above or when the president or a member stands in any relationship to the accused not previously mentioned but on account of which he wishes to be released from taking part in the case, such as for reasons of close friendship, hostility or great interest in the case, the court-martial shall, after having applied article 21 and para. 1 of article 30, give its decision in the matter, the person concerned not being present.

Article 36.

In this connection the court-martial shall see that no one is released from trying a case without very good reason, but shall at the same time take care that any appearance of lack of impartiality is avoided.

Article 37.

The president or a member released from a case at his own request or on the grounds of a relationship of any sort shall not be permitted to be present at further deliberations on the case.

Article 38.

Also if a defendant has any reason to think that the president or one of the members of a court-martial might not be a suitable judge in his case on the grounds of hatred, enmity or for any other reason, he shall be allowed to place the reasons for his objection with due respect before the court-martial and request a challenge.

Article 39.

In that case the person challenged must leave the court-martial and the legitimacy of the reasons for the objection shall be considered after article 21 or para. 1 of article 30 has been applied.

Article 40.

If the reasons for the objection are found to be insufficient, the person objected to shall again take his seat on the court-martial.

Article 41.

When the reasons for the objection are found to have been grounded the substitute for the person objected to shall take part in the hearing of the case.

Article 42.

All sealed letters sent to the court-martial shall be opened by the president and the court be informed of their contents at its first meeting.

Article 43.

It is the duty of the president and all the members to be present at the meeting unless prevented by sickness or any other legitimate obstacle or excused by the president on account of important reasons.

Article 44. -

Article 44.

The president shall decide in what order the cases are to be heard and shall see that each is done speedy and full justice.

Article 45.

- (1) The defending counsel, chosen or assigned, is empowered to produce at the sitting everything that can be considered to have any relation to article 33, the prescribed procedure in general and the defence of the accused.
- (2) Paragraphs 2 and 3 deal with the prescribed costume of a barrister or defence counsel and disciplinary measures to be taken in the case of misconduct on counsel's part ).

Article 46.

- (1) In cases being dealt with by the court-martial all documents handed in by both sides must be read at the sitting unless it has been unanimously agreed that the verbatim reading of one or other can be omitted without prejudice and the accused and his counsel consent to this.
- (2) Unless they have been read out before the court, and subject to that laid down in the last sentence of the previous paragraph, no attention shall be paid on pain of nullity to any documents to the detriment of the accused.
- (3) Neither the president nor any member shall accept any documentary evidence except that which has been lodged in the proper way.

SECOND PART.

Chapter 5.

On the investigation of the case at the sitting.

Article 47.

- (1) The hearing of the case by the court-martial during a sitting shall take place in public on pain of being declared null and void, unless the court for important reason of public order or decency, which reason must be stated in the minutes, orders that it be wholly or partially heard in camera.
- (2) For reasons of military discipline or subordination, which reasons must be recorded in the minutes, the court-martial can wholly or partially forbid the presence during the hearing of any case of any soldier below a certain rank. The presence of a minor can also be wholly or partially forbidden in the general interest.

Article 48.

- (1) The president of the court-martial shall direct the examination at the sitting and give the necessary orders. He must see that no questions are put with the intention of obtaining statements which cannot be said to have been made freely.
- (2) The president shall maintain order during the sitting. If the accused makes a disturbance and is warned in vain by the president, the court-martial may order his removal from the auditorium and, if necessary, his detention in custody while the sitting takes place. The hearing of the case shall then proceed as if the accused were present, counsel for the accused continuing his defence. If a witness, expert, interpreter or any other person present creates a disturbance or gives signs of approval or disapproval and is warned in vain by the president or does not follow the president's order to leave the court, the latter may order him to be

removed and kept-



removed and kept in custody while the sitting lasts.

(3) The secretary of the court-martial shall keep minutes of the sitting in which everything bearing on the case shall be recorded as it occurs. These minutes shall be approved by the president and secretary; paragraphs 2 and 3 of article 139 are equally applicable here, on the understanding that by oldest member is understood the oldest member who judged the case.

Article 49.

- (1) If the accused is under arrest it shall be decided at the first sitting of the court-martial, in accordance with the prosecutor's recommendation, whether the nature and circumstances of the case demand that he be kept under arrest during the proceedings or not.
- (2) The court-martial may also order the accused to be discharged from arrest during the course of the proceedings whether the prosecutor recommends this or not.
- (3) Should the court-martial discharge the accused from arrest the prosecutor shall immediately take the necessary steps to this effect.

Article 50.

If the accused is under arrest he shall whenever his presence is necessary be brought before the court-martial under close guard and be taken back in the same manner.

Article 51.

- (1) If the accused is not under arrest the court-martial may order him to appear before it whenever his presence is necessary. It is then the duty of the accused to obey, but should he not do so the court-martial can order that he be produced or arrested.
- (2) The court-martial can also during the course of the sitting, if circumstances such as fear that he escape make this advisable, order the arrest of the accused whether this is recommended by the prosecutor or not.
- (3) Orders for the arrest shall <sup>be</sup> executed by the prosecutor immediately after they have been issued.

Article 52.

If an accused fails to appear before the court-martial the inquiry can be continued by the latter in his absence provided that this is possible in the opinion of the court-martial and does not harm the interests of the accused.

Article 53.

- (1) As far as possible the inquiry shall be continued during the sitting without interruption. If the sitting is interrupted or suspended the reason for this shall be noted in the minutes.
- (2) In all cases where the inquiry is interrupted or is suspended for a certain length of time, the verbal announcement by the president to all witnesses, experts and interpreters present, of the time when they must again be present at the sitting shall count as a sitting.

Article 54.

- (1) The president shall open the inquiry by having the case called. He shall then ask the accused his first name or names, surname, age, place of birth, profession and where domiciled and charge him to pay attention to what he is about to hear.

(2) When the sitting -



- (2) When the sitting has started the prosecutor shall inform the court of the charge brought against the accused and then state his case.
- (3) The president shall then ask the accused if he confesses or denies the facts he is alleged to have committed.
- (4) Both the prosecutor and the accused shall state what witnesses have been summoned by them and who they wish to have heard. They can also request that witnesses who have come forward voluntarily be heard.

Article 55.

- (1) The president shall then order the witnesses to retire from the court-room and to remain in the room reserved for them until such time as they shall be called in to testify. In special cases the president, with the consent of the prosecutor, may allow a witness to withdraw until a certain time before making his statement.
- (2) If necessary the president shall take steps to prevent the witnesses communicating with each other before they have given their evidence.

Article 56.

The president shall then proceed with the examination of the accused and witnesses in any order or sequence which seems advisable to him.

Article 57.

- (1) When the accused is being examined every endeavour shall be made to find out whether his statement rests on his own knowledge or not.
- (2) After the accused has made his statement the members of the court-martial and the prosecutor shall be allowed to question him. Counsel for the defence may request the president to put certain questions to the accused. Questions may also be put to the accused during the further course of the trial.
- (3) The president can prevent that any question be answered.
- (4) If the statements made by the accused during his examination at the sitting agree with those he made during the general investigation, the minutes of the sitting may refer to the investigation report.

Article 58.

- (1) Each witness shall be heard in the absence of the others unless the president, whether or not at the demand of the prosecutor or at the request of the accused, considers it advisable to confront one or more of them.
- (2) The president can order the accused to leave the court so as to question one or more witnesses in his absence. In that case the accused, on pain of nullity, shall immediately be informed of what has happened while he was not present and only then shall the inquiry be proceeded with.

Article 59.

- (1) The president shall ask the witness his first names and surname, profession, place of domicile and also whether he is a blood-relation of or kin to the accused and if so in what degree.
- (2) The witness shall then be questioned.

Article 60.

- (1) When making a statement the witness must as far as possible expressly give the reasons for his knowledge.
- (2) After the witness has made his statement members of the court-martial and the prosecutor may question the accused. The accused may then request the president to put certain questions to the witness and the

witness can also-

witness can also be questioned during the further course of the proceedings.

- (3) The president can prevent that any question be answered.
- (4) If the statements made by the witness during his examination at the sitting agree with those made by him during the general investigation, the minutes of the sitting may refer to the investigation report.

#### Article 61.

- (1) Unless there is any reason to the contrary answers and statements made by a witness during the sitting shall be strengthened by him on oath sworn before the president as laid down in article 54 of the Revised Military Legal Procedure.
- (2) The provisions of the decree on criminal procedure with regard to the admission of persons to give evidence or information are equally applicable here.

[ N.B.: For article 54 Revised Military Legal Procedure see under art: 2 ]

#### Article 62.

After the witness has made his statement he shall remain in the court-room unless in special cases the president allows him to retire, ordering him if necessary to be present again in the court-room at a certain time.

#### Article 63.

If a witness who has taken the oath during the preliminary investigation dies, or in the opinion of the court-martial does not need to appear at the sitting, his former statement can be noted as having been made there.

#### Article 64.

- (1) With the exception of that laid down in article 60, paragraph 1, that which is laid down in this chapter regarding witnesses and their statements is equally applicable to experts, except that before starting operations the experts shall swear an oath in accordance with their religion that they will give the court a report in accordance with their conscience.
- (2) Statements and reports made by experts shall be accompanied by their reasons for same.
- (3) The same person can be heard as witness and expert. In that case he shall also swear the oath proper to witnesses before making his statement.

#### Article 65.

No attention shall be paid on pain of nullity to any documents which might be detrimental to the accused unless they are read out or a short summary of their contents given.

#### Article 66.

- (1) If an accused does not understand Dutch the inquiry shall not take place without an interpreter being present.
- (2) If a witness does not understand Dutch, his examination shall not take place without an interpreter being present.
- (3) Before an interpreter starts his activities he shall swear an oath according to his religion that he will well and truly acquit himself of the task to which he has been called and not reveal anything connected with it to others.

(4) In cases where-

(4) In cases where an interpreter is needed on behalf of an accused no attention shall be paid on pain of nullity to anything said or read out at the sitting which might be detrimental to the accused unless it is also interpreted for him.

Article 67.

The president shall, if necessary, show the accused and witnesses objects which have been produced as exhibits and shall question them about these.

Article 68.

- (1) If the court-martial considers it necessary to have an inspection on the spot or hear witnesses elsewhere than in the court-room, it can suspend the case for this purpose, and order that the sitting be temporarily transferred to that spot.
- (2) The court-martial is empowered to enter any place, as also are such persons whom it may appoint.

Article 69.

- (1) If from the inquiry circumstances become known which were not announced in the charge appearing in the decree convening the court-martial and which as a result of the law could mean a severer sentence being imposed, the prosecutor is then empowered to bring this charge verbally.
- (2) If apart from the case mentioned in the previous paragraph the prosecutor considers that the charge should be altered he is empowered to do so even should it result in changing the charge of a non-punishable act into that of a punishable act.
- (3) The prosecutor shall inform the accused of the altered charges mentioned in the previous paragraphs after which the president shall give the accused an opportunity to express himself there about, failing which the court-martial may pay no attention to the altered charges.
- (4) If the accused can convince the court-martial that owing to the alterations made a postponement is necessary in the interest of his defence, the inquiry shall be suspended for a certain length of time.

Article 70.

- (1) After the examination has ended the prosecutor may address the court and after having read it aloud shall present his demand to the court-martial. [In Dutch Law the prosecutor demands that a certain sentence be pronounced by the court.] If a punishment or measure is asked for the demand shall describe it and also state what punishable act has been committed.
- (2) The accused may then reply to this [in most cases the accused will leave this to his counsel], the prosecutor may answer, and the accused shall in every case be allowed the last word.
- (3) If after this witnesses or experts are again heard or documents read out once more, or the accused interrogated further, the prosecutor and counsel for the defence may speak again immediately after this as prescribed above.

Article 71.

- (1) Everything authorised to the accused in this chapter is also authorised to his counsel.
- (2) If any subject has not been provided for in this chapter the relevant procedure prescribed in the decree for criminal procedure may be followed in so far as it agrees with the provisions of military legal procedure.

SECOND PART.-



SECOND PART.

Chapter 6.

On illegal proceedings against fugitives.

Article 72.

An investigation may be started with regard to an accused who is a fugitive.

SECOND PART.

Chapter 7.

On the evidence of punishable acts.

Article 73.

The provisions of common law concerning the evidence of punishable acts shall apply in criminal cases dealt with by a military judge, except that:

1. the individual testimony of a soldier, or ex-soldier concerning a crime against subordination committed against him may count as full evidence of guilt.
2. a sentry who puts forward a plea which on the grounds of one of the articles 48 - 51 of the criminal code would exclude an act committed by him from punishment, shall be considered to have acted lawfully until the contrary has been made acceptable.
3. among written documents shall be understood statements or reports by public officials or legal bodies in the Netherlands, Surinam or Curaçao, in so far as such documents according to the law of that land are recognised as written documents in criminal cases, also all those which in accordance with article 7 of the Revised Military Legal Procedure are made out on oath of office by an officer or warrant officer.

Article 74.

Deviating from article 73 the judge may recognise as legal evidence all documents produced at the sitting and all statements wherever made and ascribe to them such conclusive force as he thinks they may possess if, in his opinion, the particular circumstances under which the war crime was committed or in which a piece of evidence would have to be furnished would form an obstacle to the further production of evidence or would result in an inadmissible delay in the termination of the case should this further evidence have to be produced.

SECOND PART.

Chapter 8.

On the sentences and the carrying out of same.

Article 75.

- (1) The court-martial shall proceed to pass and promulgate sentence within fourteen days after the close of the inquiry at the sitting.
- (2) The court-martial shall deliberate the charge mentioned at the foot of the order of convocation, and about what has or has not been proved

during the invest-



during the investigation at the sitting regarding the acts, the qualification of the same, that which has been proved as to the guilt of the accused, and what punishment or punishments prescribed by the law are to be awarded.

(3) If a verdict of guilty is brought in, the punishment appointed for that act shall be awarded,

(4) The court-martial shall acquit the accused if it has not been convinced by the legal evidence that the act with which he is charged was committed by him, or thinks that the act or acts are not punishable, or considers on other grounds that no right to criminal proceedings exists in this case.

Article 76.

The president of the court-martial shall put the question of the verdict to each member, starting with the youngest and giving his own opinion last.

Article 77.

After this the president shall arrive at his conclusion according as to whether there is unanimity or a clear majority, or according to that demanded by the nature of the case and the provisions of the law.

Article 78.

The judgment shall next be framed in agreement with the conclusion arrived at by the president, and then summed up and confirmed by the court-martial.

Article 79.

(1) The judgment shall contain the name and surname of the accused, his age, place of birth, office held by him and his regimental roll number.

(2) The reason for the verdict must be given and the offence stated, together with any circumstances which in accordance with the law give rise to a severer or a lighter punishment being awarded. If in connection with the same offence a disciplinary punishment has already been inflicted this must be mentioned in the judgment.

(3) It must further contain the decision come to by the court-martial in connection with the points mentioned in article 75 and also; in case sentence is passed, those articles of the law being applied and the punishment or punishments to which the accused is sentenced.

(4) It shall also contain the names of those by whom it was passed, together with the reasons which may make it impossible for one or more of them to be present when sentence is promulgated or to sign the judgment, and also the name of the secretary who was present in the council-room and when sentence was promulgated.

(5) The decisions concerning all the accused implicated in the same case and, as a result, sentenced at the same time, shall be comprised in one and the same judgment.

Article 80.

[Deals with <sup>the</sup> handing back of objects which have served as evidence]

Articles 81 - 84.

[Lay down formalities in case of a death sentence]

Article 85.

(1) All sentences must be pronounced publicly in the presence of the

prosecutor and-

prosecutor and in full court-martial by the president of the court which has passed the sentence.

- (2) The presence of the accused is not requisite when sentence is pronounced. If sentence is passed during his absence the secretary of the court-martial shall immediately send him a true copy of the sentence and shall make a note at the foot of the sentence that this has been done.
- (3) If the court-martial considers it necessary or desirable it may order that the sentence be also read out at such place as it may order and by that authority which it shall appoint.

Article 86.

- (1) Sentences shall be executed as soon as possible after they have been promulgated unless the condemned person expressly desires that the execution be postponed while a petition for mercy is being considered.
- (2) In this latter case the condemned person may present an open petition for mercy or have it presented by the secretary of the court-martial within eight days of sentence having been pronounced.
- (3) The secretary shall carefully note the day on which such a petition was sent in and shall inform the prosecutor of the same.
- (4) ☒ Deals with the forwarding of the request ☒
- (5) The presentation in good time of a petition for mercy shall result in the execution being postponed.
- (6) Subject to that which is laid down in the following paragraph the court-martial, the prosecutor and the Supreme Court shall advise on the petition for mercy.
- (7) The attorney-general shall be heard by the Supreme Court with regard to the petition for mercy:
  1. if it concerns a death sentence;
  2. if the court considers that important questions of policy in regard to prosecutions make such desirable and
  3. if the attorney-general has previously informed the court of his desire to this effect.
- (8) and (9) ☒ Give further formalities to be observed ☒
- (10) If the petition is rejected, the carrying out of the sentence shall take place as soon as possible.
- (11) Deviating from that laid down in this article in this respect, the putting into effect in time of war of sentences which do not carry the death penalty shall not be postponed by the presentation of a petition for mercy.

Article 87.

- (1) If the condemned person has not sent in a petition for mercy as mentioned in para.1, article 86 or if, having stated his wish to do so, he has not sent it in or caused it to be sent in within the time limit specified in para.2 of the same article, the carrying out of the sentence where the death penalty is concerned shall be postponed by the judicial authorities so as to enable the Governor-General to grant a pardon.
- (2) ~~To that effect~~ the secretary of the court-martial shall send the relevant documents in the case to the Supreme Court of Justice of the Netherlands East Indies, and this shall then proceed to act as prescribed in the preceding article.
- (3) Paragraphs 9 and 10 of the preceding article both apply equally here.

Article 88.

- (1) The execution of the sentence shall be done by or by order of the prosecutor whose duty it will be to see that the letter of the judgment is strictly adhered to.
- (2) To this end the secretary of the court-martial shall send the prosecutor an extract of the judgment containing the name, surname, place of birth, age, military charge and registered number of the accused, the

decision arrived at-

decision arrived at by the court-martial, date on which the decision was made, names of the judges giving judgment and day on which sentence was promulgated.

SECOND PART.

Chapter 9.

On the costs.

Article 89.

[ Deals with costs ]

SECOND PART.

Chapter 10.

On the aid to be granted in the execution of sentences,  
decisions and pay - warrants .

Article 90.

[ Deals with the above. ]

THIRD PART.

On field general courts-martial.

Article 91.

In time of war the Governor-General can appoint one or more field general courts-martial, or he may charge the commanding officer to make such an appointment, either for the duration of the war or for a certain length of time, or whenever the needs of the service may call for the same. Such a court-martial can also be appointed outside the territory of the Netherlands East Indies in time of war.

Article 92.

These courts-martial shall consist of three members, the president included, all officers.

Article 93.

The president must always be a senior officer.

Article 94.

(1) The president and members of the field general court-martial <sup>may be chosen from all troops or corps</sup> belonging to the army corps, or from the general staff or other corps belonging to the army, if the duties of the army corps do not permit of the requisite number of officers for the court-martial being withdrawn from active service with the corps.

(2) Article 15 applies equally here.

Articles 95 and 96.

[ Deal with the seat of the field general courts-martial ]

Article 97.

That laid down in this procedure for ordinary courts-martial is

equally applicable



equally applicable to field general courts-martial unless otherwise laid down in this part and in so far as it is in accordance with what has been decreed in this part.

Articles 98 - 100.

[ Deal with the appointment of prosecutors etc. ]

Article 101.

Before they can be executed all sentences pronounced by the field general court-martial shall be presented to the commanding general in order to obtain a fiat of execution.

Article 102.

- (1) As soon as the fiat of execution mentioned in the previous article has been granted, sentences passed by the field general courts-martial shall be promulgated and, attention being paid to that laid down in article 87, put into effect.
- (2) If in time of war contact with the Governor-General is completely cut off and the commanding general considers the carrying out of a sentence where the death penalty has been imposed to be imperative, this may be proceeded with without the Governor-General having had the opportunity of showing clemency.

Article 103.

The original sentence with all the documents belonging to them shall nevertheless be sent to the Supreme Military Court of Justice as soon as possible so that they may be kept in the record-office of the same.

Article 104.

- (1) If the commanding general has reasons for not granting the fiat of execution of a sentence passed by the court-martial, he shall inform the court-martial of his objection to the said sentence so that it may consider the matter further and, should it agree, alter the sentence accordingly.
- (2) In case the court-martial decides that it must uphold the sentence as passed the commanding general may suspend its execution on his own responsibility, but he must bring this fact to the attention of the Governor-General as quickly as possible.
- (3) In the event of the Governor-General judging that the sentence ought to be carried out he shall return it to the commanding general with orders to provide it with his fiat of execution. If on the other hand he also shall object, or if the case seems to him a doubtful one, he shall send the sentence with the documents of the trial to the Supreme Military Court of Justice which shall deal with the matter and pronounce on it as it thinks fit.

Article 105.

It shall be the obligation of the field general courts-martial to see that the field general prosecutor carries out his duties in a proper fashion and should he prove to be lacking in this respect to bring the fact to the notice of the commanding general as speedily as possible. It will be the duty of the latter to report the same at once to the Governor-General who will proceed to take suitable measures.

FOURTH PART.

On temporary courts-martial-



On temporary courts-martial.

Article 106.

- (1) The commanding officer can appoint a temporary court-martial in any territory where a state of siege has been declared. This shall consist of three officers under his command and including the president who must be a senior officer if possible. Such a court-martial can also be appointed in time of war outside Netherlands East Indies territory by a military authority empowered to do so by the army commander.
- (2) Article 15 applies here equally.

Article 107.

- (1) He shall also appoint someone to carry out the functions of prosecutor and if possible a lawyer shall be selected for this purpose. The prosecutor shall if necessary be assisted by one or more deputy prosecutors who shall exercise their powers under his responsibility and be appointed in the same way as he.
- (2) Should there be no officer or non-commissioned officer suitable to be appointed by the commanding officer as secretary the prosecutor shall act in this capacity also. A corporal does not come under the term non-commissioned officer mentioned in this paragraph.

Article 108.

The commanding officer shall, immediately <sup>if possible</sup>, inform the Governor-General and the Supreme Military Court of Justice of this appointment.

Articles 109 - 114.

[ Give similar provisions for temporary courts-martial as laid down in articles 91 - 108 for field general courts-martial ]

FIFTH PART.

On prosecutors and secretaries attached to military courts-martial.

Articles 114 - 117.

[ Deal with appointments and duties of the above. ]

Article 118.

The prosecutors, under the general supervision of the Attorney-General together with that of the commanding officer in the military command in which the court-martial is set up and the officer commanding the garrison of the residency in which it sits, shall supervise those military penal establishments which are to be found within their jurisdiction and see that detained persons and prisoners are kept safe, properly treated and provided with what is necessary, and that the provost-sergeant acts in accordance with the law.

[ The rest of the articles deal with administrative duties, oaths, etc. ]

By order of the Lieutenant-Governor-General of the  
Netherlands East Indies,  
The acting 1st Secretary to the Government,  
E.O. van Boetzelaer.

Issued the 3rd August 1946.  
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Index-

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Index-

I N D E X.

War Crimes Legal Procedure.  
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FIRST PART.

General provision

article:  
1

SECOND PART.

Chapter 1.

On the general investigation

2.

Chapter 2.

On committal for trial by court-martial and on counsel  
for defence

9.

Chapter 3.

Composition of courts-martial

13.

Chapter 4.

Rights and duties of the courts-martial mentioned in  
the previous chapter

32.

Chapter 5.

On the investigation of the case at the sitting

47.

Chapter 6.

On legal proceedings against fugitives

72.

Chapter 7.

On the evidence of punishable acts

73.

Chapter 8.

On the sentences and carrying out of same

75.

Chapter 9.

On the costs

89.

Chapter 10.

On the aid to be granted in the execution of sentences,  
decisions and pay-warrants

90.

THIRD PART.

On the field general courts-martial

91.

FOURTH PART.

On temporary courts-martial

106.

Fifth Part -



FIFTH PART .

|  |      |
|--|------|
| On prosecutors and secretaries attached to military courts-martial | 114. |
|--|------|

SIXTH PART

|   |      |
|---|------|
| Oath (promise) for the president and members of the court-martial, the prosecutor and the secretaries | 145. |
|---|------|

|                 |      |
|-----------------|------|
| Final provision | 153. |
|-----------------|------|

-----

FIFTH PART .

|  |      |
|--|------|
| On prosecutors and secretaries attached to military courts-martial | 114. |
|--|------|

SIXTH PART

|   |      |
|---|------|
| Oath (promise) for the president and members of the court-martial, the prosecutor and the secretaries | 145. |
|---|------|

|                 |      |
|-----------------|------|
| Final provision | 153. |
|-----------------|------|

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UNITED NATIONS WAR CRIMES COMMISSION.  
PROGRESS REPORT OF WAR CRIMES TRIALS FROM DATA AVAILABLE ON MARCH 1ST, 1948.

MISC. 125.  
 March 22nd, 1948.

| EUROPE: Countries whose reports comprise war criminals only.               | Cases tried | Accused involved | Death | Imprisonment. | Acquitted. | Remarks.        |
|--|-------------|------------------|-------|---------------|------------|-----------------|
| United States: USFET)  | 489         | 1,672            | 426   | 990           | 256        | as at 1. 3. 48. |
| USMET)   |             |                  |       |               |            |                 |
| Britain: BAOR  | 274         | 909              | 214   | 437           | 258        | as at 1. 3. 48. |
| CMF & BTA  |             |                  |       |               |            |                 |
| France:  | 117         | 427              | 151   | 234           | 42         | as at 1. 2. 48. |
| Greece:  | 6           | 11               | 3     | 7             | 1          | as at 1. 6. 47. |
| Netherlands:   | 2           | 2                | 2     | -             | -          | as at 1. 3. 48. |
| Norway:  | 74          | 74               | 18    | 48            | 8          | as at 1. 3. 48. |
| Poland:  | -           | 296              | 75    | 173           | 48         | as at 1. 1. 48. |
| Yugoslavia:  | 5           | 79               | 63    | 16            | -          | as at 1. 5. 47. |
| TOTAL:   | -           | 3,470            | 952   | 1,905         | 613        |                 |
| EUROPE: Country whose report shows war criminals & collaborators combined: |             |                  |       |               |            |                 |
| Czechoslovakia:  | -           | 18,496           | 362   | 13,969        | 4,165      | as at 1.11. 46. |
| FAR EAST:  |             |                  |       |               |            |                 |
| United States:   | 202         | 574              | 140   | 380           | 54         | as at 2. 5. 47. |
| Britain:   | 388         | 1,143            | 305   | 718           | 120        | as at 1. 3. 48. |
| Australia:   | 259         | 769              | 138   | 397           | 234        | as at 1. 3. 48. |
| Netherlands East Indies:   | 175         | 308              | 102   | 199           | 7          | as at 1. 3. 48. |
| TOTAL:   | 1,024       | 2,794            | 685   | 1,694         | 415        |                 |

NOTE: In the statistical report for last month (Misc. 121) the figure for the accused involved (Europe) should have been 3,270 not 3,470.



30th April, 1948.

THE DEVELOPMENT OF THE CONCEPT OF  
CRIMES AGAINST PEACE.(x)

By Dr. J. Litawski.

C O N T E N T S

- (i) Early Attempts to limit the right of war.
  - 1. The Place of War in International Law.
  - 2. The Hague Conventions.
  - 3. The "Bryan Treaties".
- (ii) Recommendations of the Commission of Fifteen.
  - 1. Responsibility of the Authors of the First World War.
  - 2. The Problem of Retribution for Acts which provoked the First World War and accompanied its Inception.
  - 3. The American Reservations.
- (iii) The Paris Peace Conference.
  - 1. The Versailles Treaty and the Arraignment of the Kaiser.
  - 2. Failure to implement Article 227.
- (iv) The Developments during the inter-wars period.

(International Declarations on the illegality and criminality of wars of aggression).
- (v) Definition and Interpretation of "Crimes against Peace".
  - 1. The Nuremberg Charter and Judgment.
    - (a) Crimes against Peace as Supreme War Crimes.
    - (b) Analysis and Definition of Crimes against Peace.
    - (c) Wars in Violation of International Treaties.
    - (d) Illegality and Criminality of a War of Aggression, and International Character of the Crimes.
    - (e) Various Forms of Crimes against Peace.
    - (f) Various Forms of Participation in the Crimes.
  - 2. The Tokyo Charter.
- (vi) Endorsement and Affirmation by the United Nations.
- (vii) Conclusions.

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(x) This Paper has been written as an article for the HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENTS OF THE LAWS OF WAR to be published in London, in June, 1948.

(1) Early Attempts to limit the right of war.

1. The Place of War in International Law.

The idea of the elimination of wars as a means of the settlement of inter-state disputes, and to a certain extent of including the launching of an aggressive war among the offences for which the responsible States should be held liable can be traced back to ancient times. The centuries-long developments (1) resulted, generally speaking, in the formulation of two mutually inconsistent doctrines: the first, chronologically earlier, which differentiated between just and unjust wars and aimed at establishing the right and duty of States to punish the initiation of the latter, as well as crimes incidental to the war; the second, which proclaimed an absolute sovereignty of States and consequently a freedom from punishment of individuals responsible for offences committed in the name of the State in connection with launching and conducting the war. (2) The controversial issues between these doctrines produced a kind of compromise: on the one hand the right to initiate war was generally accepted as one of the rights of the sovereign States; on the other, the principle was adopted recognising the right to punish crimes committed during war.

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(1) The doctrines of: Plato, Vol. V, St. Augustin; St. Thomas of Aquinas; Machiavelli (1469-1527); Il Principe; Fr. Victoria (1526-1546), De iure Belli Hispanorum in barbaros; Fr. Suarez (1548-1617), Disputationes; A. Gentili (1552-1608), De iure Belli; Grotius (1583-1645), De iure belli ac pacis; S. Puffendorf (1632-1694), De iure naturae et gentium; E. Vattel, Le droit des gens (1758).

(2) The Peace Treaties of Utrecht (1713), of Aquisgrano (1748), and of Paris (1763), contain explicit provisions regarding amnesty for persons who are considered today as war criminals.

Accordingly, the institution of war fulfilled in International Law two contradictory functions. In the absence of an international organ for enforcing the law, war was a means of self-help for giving effect to claims based, or alleged to be based on International Law. This conception of war was intimately connected with the differentiation between just and unjust wars. At the same time, however, this differentiation was clearly rejected in the conception of war as a legally recognised instrument for challenging and changing rights based on the existing state of International Law. In the absence of an international legislature war fulfilled the function of adapting the law to changed conditions. Moreover, war was recognised as a legally admissible instrument for attacking and altering existing rights of States independently of the objective merits of the attempted change, and International Law did not consider as illegal a war admittedly waged for purposes of gaining political or other advantages. It rejected, to that extent, the distinction between just and unjust war which was in law a natural function of the State and a prerogative of its uncontrolled sovereignty. (1)

## 2. The Hague Conventions.

The Hague Conferences of 1899 and 1907 and the movement for the pacific settlement of international disputes marked the beginning of the attempts to limit the right of war both as an instrument of law and as a legally recognised means of changing legal rights.

The contracting Powers of Hague Convention No. I of 1907 (2) agreed, in Article 9, that in the case of disputes arising

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(1) See Oppenheim, lit. cit., p. 145.

(2) Convention for the Pacific Settlement of International Disputes Cmd., 4175, 1914.



out of differences of opinion on points of fact and involving neither honour nor vital interests, which the parties could not settle by diplomatic negotiations, they should, so far as circumstances allow, institute an International Commission of Inquiry to elucidate the facts underlying the difference by an impartial and conscientious investigation. The duty of such a Commission is to investigate the circumstances of the case, and issue a report "limited to a finding of fact" which in no way can have "the character of an Arbitral Award"; the parties are entirely free as to the effect to be given to its finding (Article 35). These stipulations are still in force as between the parties to the Convention, and have also been used as a model in drafting some of the recent conciliation treaties.

The Second Hague Conference also agreed upon Convention No. III. Relative to the Opening of Hostilities. In Article I of this Convention "The Contracting Powers recognise that hostilities between them must not commence without a previous and explicit warning, in the form of either a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of War". This Convention had a clearly limited scope. The failure to observe its provisions does not render war illegal; neither does it take away from the hostilities thus commenced the character of war. The value of this Convention has suffered much diminution inasmuch as a number of States, intent upon the formal appearance of a breach of these obligations have avoided the practice of opening hostilities, indistinguishable adopted from warlike operations, without actually declaring war. (1) Thus, the wars of Italy with Abyssinia in 1935, of Japan with China in 1937, of Germany with Poland in 1939, of Russia with Finland in the same year, and of Japan with the United States in 1941, opened

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(1) See Oppenheim, lit.cit., p. 236.

without any formal declaration of war.

At the same time a more direct attempt was made to limit the right of war by Hague Convention No. II <sup>(1)</sup> This Convention was agreed upon with the intention of preventing armed conflicts between nations originating in a pecuniary dispute respecting contract debts claimed from the Government of one country by the Government of another as due to its subjects or citizens. <sup>(2)</sup> Subject to certain exceptions, Article 1 of the Convention prohibited recourse to armed force as a legal remedy for enforcing obligations in respect of contracts of that nature.

A similar attempt at the legal limitations or prohibitions of recourse to war is evidenced by Hague Conventions V and XIII. <sup>(3)</sup> The incidents which occurred during the South African and Russo-Japanese Wars gave occasion for the Second Hague Conference of 1907 to bring the question of neutrality within the range of its deliberations. Article 1 of the Convention declares that the territory of neutral Powers is inviolable. When specifying the rights and duties of the neutral Powers and of belligerents (Articles 2-4) the contracting Parties also provided that a neutral Power must not allow any of the acts contrary to the status of neutrality and enumerated in Articles 2-4, to occur on its territory, <sup>(4)</sup> but agreed at the same time that the fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act (Article 10).

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(1) Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, *Cmd.* 4175, 1914.

(2) See the Preamble to the Convention.

(3) Convention V respecting the Rights and Duties of Neutral Powers and Persons in War on Land, *Cmd.* 4175, 1914.

Convention XIII respecting the Rights and duties of Neutral Powers in Maritime War, *ibid.*

(4) See Article 5 of Hague Convention V.

Moreover, some of the above Hague Conventions agreed upon at this Conference, although they do not directly concern neutral Powers, had been of great importance to them, and to the question of the limitation of conducting war. Thus Convention VII, relative to the Conversion of Merchant-ships into Warships, indirectly concerns neutral trade as well as Convention VIII, relative to the Laying of Automatic Submarine Contact Mines, and Convention XI, relative to certain Restrictions on the Exercise of the Right of Capture. By Convention XII, the Conference agreed upon the establishment of an International Prize Court to serve as a Court of Appeal from decisions of the Prize Courts of either belligerent which concerned the interests of neutral Powers or their subjects.

### 3. The "Bryan Treaties".

A further attempt to introduce a check on the right of war was made by the so-called "Bryan Treaties", which imposed upon the parties the duty not to begin hostilities prior to the report of the Permanent Commissions of Inquiry. These Commissions, which are different from the International Commissions envisaged by Hague Convention I, were constituted to deal with differences between the United States of America and a great number of other States by the series of so-called Bryan Arbitration Treaties signed in Washington in 1914. These treaties were not all identical, but had the following features in common:

The contracting Parties agreed to refer all disputes which diplomatic methods had failed to adjust, to a Permanent International Commission for investigation and report, and they agreed not to begin hostilities before the report was submitted. The report had to be completed within one year, unless the parties limited or extended the time by mutual agreement. The parties, having received the report, were at liberty to take such action as they might think fit.

Most of these treaties are still in operation, and in 1928-1929 the United States concluded a further number of such treaties.



The points in which they mark an advance upon the provisions of Hague Convention I can be summarised as follows: first, that there is no exclusion of disputes affecting honour and vital interests; secondly, that the Permanent Commissions of Inquiry are constituted in advance and are available when disputes arise, whereas the International Commissions under the Hague Convention are constituted ad hoc when required; and thirdly, that the principle of the moratorium appears in the undertaking not to resort to hostilities before the publication of the report. (1)

It is quite clear that these attempts to limit the right of war as an instrument of the law were mainly procedural, and that the Hague Conventions and the "Bryan Treaties" took for granted the legality of war; but from motives both of humanitarianism and mutual prudence, they went so far in the direction of limiting the methods of opening hostilities and conducting war (2), as to be the signposts on the road towards a growing conviction that aggressive war must one day be abolished. (3)

A further, though unsuccessful, step in this direction was taken by the Commission of Fifteen appointed by the Preliminary Peace Conference at the end of the First World War in 1919.

(ii) Recommendations of the Commission of Fifteen.

1. Responsibility of the Authors of the First World War.

The Commission of Fifteen, after having examined a number of

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(1) See Oppenheim, lit.cit. p. 16.

(2) As already cited in Chapter II "Care was taken in Hague Convention (IV) to provide that 'until a more complete code of laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience'".

(3) See Sheldon Glueck, The Nuremberg Trial and Aggressive War, the Harvard Law Review, Vol. LIX, No. 3, 1946, p. 439.

official documents relating to the origin of the First World War, and to the violations of neutrality and of frontiers which accompanied its inception, determined that the responsibility for it lay wholly upon the Powers which declared war in pursuance of a policy of aggression, the concealment of which gave to the origin of that war the character of a dark conspiracy against the peace of Europe.

This responsibility rested first on Germany and Austria, secondly on Turkey and Bulgaria. The responsibility was made all the graver by reason of the violation by Germany and Austria of the neutrality of Belgium and Luxembourg, which they themselves had guaranteed. It was increased, with regard to both France and Serbia, by the violation of their frontiers before the declaration of war. (1)

After having recorded all the relevant events relating to the outbreak of the war the Commission came to the following conclusions:

A. As to the premeditation of the war.

(a) "The war was premeditated by the Central Powers together with their Allies, Turkey and Bulgaria, and was the result of acts deliberately committed in order to make it unavoidable".

(b) "Germany, in agreement with Austria-Hungary, deliberately worked to defeat all the many conciliatory proposals made by the Entente Powers and their repeated efforts to avoid war".

B. As to the violation of the neutrality of Belgium and Luxembourg.

(c) "The neutrality of Belgium, guaranteed by the Treaties of the 19th April, 1839, and that of Luxembourg, guaranteed by the Treaty of the 11th May, 1867, were deliberately violated by Germany and Austria-Hungary". (2)

2. The Problem of Retribution for Acts which provoked the First World War and accompanied its Inception.

The following were the views expressed by the Commission on this

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(1) and (2) See, Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission on Responsibilities, Conference of Paris, 1919, Carnegie Endowment for International Peace, Pamphlet No. 32, Chapter I.

highly important subject:

"The premeditation of a war of aggression dissimulated under a peaceful pretence, ~~then~~ suddenly declared under false pretexts, is conduct which the public conscience reproves and which history will condemn, but by reason of the purely optional character of the Institutions at The Hague for the maintenance of peace (International Commission of Enquiry, Mediation and Arbitration) a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorised to consider under its Terms of Reference.

"Further, any enquiry into the authorship of the war must, to be exhaustive, extend over events that have happened during many years in different European countries, and must raise many difficult and complex problems which might be more fitly investigated by historians and statesmen than by a tribunal appropriate to the trial of offenders against the laws and customs of war. The need of prompt action is from this point of view important. Any tribunal appropriate to deal with the other offences to which reference is made might hardly be a good court to discuss and deal decisively with such a subject as the authorship of the war. The proceedings and discussions, charges and counter-charges, if adequately and dispassionately examined, might consume much time, and the result might conceivably confuse the simpler issues into which the tribunal will be charged to enquire. While this prolonged investigation was proceeding some witnesses might disappear, the recollection of others would become fainter and less trustworthy, offenders might escape, and the moral effect of tardily imposed punishment would be much less salutary than if punishment were inflicted while the memory of the wrongs done was still fresh and the demand for punishment was insistent.

"We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal.

"There can be no doubt that the invasion of Luxembourg by the Germans was a violation of the Treaty of London of 1867, and also that the invasion of Belgium was a violation of the Treaties of 1839. These



Treaties secured neutrality for Luxembourg and Belgium, and in that term were included freedom, independence and security for the population living in those countries. They were contracts made between the High Contracting Parties to them, and involve an obligation which is recognised in international law.

"The Treaty of 1839 with regard to Belgium and that of 1867 with regard to Luxembourg were deliberately violated, not by some outside Power, but by one of the very Powers which had undertaken not merely to respect their neutrality, but to compel its observance by any other Power which might attack it. The neglect of its duty by the guarantor adds to the gravity of the failure to fulfil the undertaking given. It was the transformation of a security into a peril, of a defence into an attack, of a protection into an assault. It constitutes, moreover, the absolute denial of the independence of States too weak to interpose a serious resistance, an assault upon the life of a nation which resists, an assault against its very existence while, before the resistance was made, the aggressor, in the guise of temptor, offered material compensations in return for the sacrifice of honour. The violation of international law was thus an aggravation of the attack upon the independence of States which is the fundamental principle of international right.

"And thus a high-handed outrage was committed upon international engagements, deliberately, and for a purpose which cannot justify the conduct of those who were responsible.

"The Commission is nevertheless of opinion that no criminal charge can be made against the responsible authorities or individuals (and notably the ex-Kaiser) on the special head of these breaches of neutrality, but the gravity of these gross outrages upon the law of nations and international good faith is such that the Commission thinks they should be the subject of a formal condemnation by the conference."<sup>(1)</sup>

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(1) See Reports of the Commission of Responsibilities, lit.cit., Chapter IV (a)

The Commission therefore arrived at the following conclusions:

(a) "The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.

(b) "On the special head of the breaches of the neutrality of Luxembourg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.

(c) "On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxembourg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts.

(d) "It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law. (1)

### 3. The American Reservations.

The American Representatives, while concurring in the conclusions of the Commission quoted above under A(a) and (b), and in the process of reasoning by which they were reached and justified, believed however that it was not enough to state or to hold with the Commission that 'the war was premeditated by the Central Powers', that 'Germany, in agreement with Austria-Hungary, deliberately worked to defeat all the many conciliatory proposals made by the Entente Powers and their repeated efforts to avoid war', and to declare that the neutrality of Belgium, guaranteed by the Treaty of the 19th of April, 1839, and that of Luxembourg, guaranteed by the Treaty of the 11th of May, 1867, were deliberately violated by Austria-Hungary. They were of the opinion that these acts should have been condemned in no uncertain terms and that their perpetrators should have been held up to the execration of mankind. (2)

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(1) See Reports of the Commission of Responsibilities, lit.cit., Chapter IV(a)

(2) See Reports of the Commission of Responsibilities, lit.cit., Annex II, Section I.

The American Delegation was also in thorough accord with the views expressed, and stated by the Commission in the conclusions quoted above under sub-section 2 (a) and (b) and regarding the question of retribution for acts which provoked the world war. The Americans accepting each of those statements as sound and unanswerable, were nevertheless unable to agree with the third of the conclusions, that under 2 (c), which put forward the proposal to adopt special measures and to create a special organ in order to deal with the authors of the acts which brought about the war and those which accompanied its inception.

The Americans believed that this conclusion (that under 2 (c)) was inconsistent both with the reasoning which preceded it and with the first and second conclusions (2(a), (b)). They observed that, if the acts in question were criminal in the sense that they were punishable under law, they did not understand why the report should not advise that these acts be punished in accordance with the terms of the law. If, on the other hand, there was no law making them crimes or affixing a penalty for their commission, they were moral, not legal, crimes, and the American Representatives failed to see the advisability or indeed the appropriateness of creating a special organ to deal with the authors of such acts. In any event, the organ in question should not have been a judicial tribunal. (1)

In order to meet the evident desire of the Commission that a special organ be created, the American Delegation proposed that the Commission on Responsibilities should recommend that a Commission of Inquiry be established "to consider generally the relative culpability of the authors of the war". The Commission, however, failed to adopt this proposal.

With the fourth and final conclusion which declared it to be "desirable that for the future penal sanctions should be provided", the American Representatives found themselves to be in substantial accord. They believed that any nation going to war assumes a grave responsibility, and that "a nation engaging in a war of aggression commits

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(1) . See Reports of the Commission on Responsibilities, lit.cit., Annex II, Section IV.



a crime". They held "that the neutrality of nations should be observed, especially when it is guaranteed by a treaty to which the nations violating it are parties, and that the plighted word and the good faith of nations should be faithfully observed in this as in all other respects". At the same time, "given the difficulty of determining whether an act is in reality one of aggression or of defence, and given also the difficulty of framing penal sanctions where the consequences are so great or may be so great as to be incalculable", they hesitated as to the feasibility of this conclusion, from which, however, they were unwilling formally to dissent.(2)

(iii) The Paris Peace Conference.

1. The Versailles Treaty and the Arraignment of the Kaiser.

It is to be remembered that the Commission of Fifteen, while recoiling from the charge of crime and from a trial before a court, nevertheless recommended that "it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts", and declared it to be "desirable that, for the future, penal sanctions should be provided for such grave outrages against the elementary principles of international law".

Around the table of the Paris Peace Conference the controversy was again raised; however, the authors of the Versailles Treaty overruled the American and Japanese objections, and recognised the principle that the Head of a State may be arraigned for an offence against international law, namely, for the breach of a treaty. Accordingly the Conference approved of an appropriate provision which was inserted in the Peace Treaty as Article 227 which reads as follows:

"The Allied and Associated Powers publicly arraign Wilhelm II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

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(1) Ibid., Annex II, Section IV.

"A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers, namely, the United States, Great Britain, France, Japan and Italy.

"In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

"The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial." (1)

When the German Delegation to the Peace Conference protested, in connection with this and other penal stipulations of the Draft Treaty, that the proposed peace would be a peace of violence and not of justice, the Allied and Associated Powers formally stated that in their view the war, which began on August 1st, 1914, was "the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilised, has ever consciously committed", and "a crime deliberately plotted against the life and liberties of the peoples of Europe". They therefore regarded the punishment of those responsible as essential on the score of justice. At the same time, however, the Allied Powers made it clear that "the public arraignment under Article 227 framed against the German ex-Emperor has not a juridical character as regards its substance, but only its form. The ex-Emperor is arraigned as a matter of high international morality, the sanctity of treaties and the essential rules of justice. The Allied and Associated Powers have desired that **judicial** forms, a judicial procedure and a regularly constituted tribunal should be set up in order to assure to the accused full rights and liberties in regard to his defence, and in order that the judgment should be of the utmost solemn judicial character." (2)

Thus, it was made quite clear that the arraignment of the Kaiser was not based on a charge of a violation of the existing law,

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(1) See The Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles, June 28th, 1919.

(2) See the "Reply of the Allied and Associated Powers to the Observations of the German Delegation and the Conditions of Peace", Paris, June 16th, 1919, H.M. Stationery Office, Misc. No. 4. (1919).

but that he had been charged, according to what the authors of the Treaty considered to be the then existing state of international law, with offences against moral, not legal provisions. Nevertheless, Article 227 of the Versailles Treaty may be regarded as the precursor of Article 6 (a) of the Nuremberg Charter and of Article 5 (a) of the Tokyo Charter respecting crimes against peace, with the important distinction that the crimes against peace under these two Charters are not merely contraventions of a moral code, but violations of legal provisions.

2. Failure to implement Article 227.

Article 227 of the Versailles Treaty came into force on January 10th, 1920; in the meantime the ex-Kaiser Wilhelm II sought refuge in Holland. On January 16th, 1920, the Secretary-General of the Peace Conference addressed a letter to the Dutch Minister, signed by Clemenceau, asking for the handing over of the ex-Kaiser. The letter enumerated several crimes committed by the Germans during the war, 1914-1918, and added: "De tous ces actes, la responsabilité au moins morale, remonte jusqu'au chef suprême qui les a ordonnés ou qui a abusé de ses pleins pouvoirs pour enfreindre ou laisser enfreindre les règles les plus sacrées de la conscience humaine".

On January 24th, 1920, M. Loudon, Minister of the Dutch Government replied to M. Millerand, the French Prime Minister and Minister for Foreign Affairs in a letter in which he stated as follows:

- (a) that Holland is not a party to Art. 227 of the Treaty of Versailles;
- (b) that Holland could not accept the international duty "of associating herself with an act of high international politics of the Powers";
- (c) should, however, the League of Nations establish an international body competent to decree in a case of war on facts qualified as crimes and provide sanctions beforehand - Holland will adhere to this;
- (d) the letter invokes the fact that Holland has "de tout temps" been "une terre de refuge pour les vaincus des conflits internationaux".

The legal foundations of the refusal contained in the letter of the Dutch Government were as follows:



(a) Article 4 of the Dutch Constitution provides for equal protection for both Dutch and foreigners on Dutch soil; this was laid down in the Law of 6th April, 1875, revised 15th April, 1886, on which extradition treaties with France (1895), England (1898) and the United States (1887), were concluded.

(b) In view of the above, the request for extradition must have been formulated in accordance with the laws and treaties of Holland.

(c) The crime for which extradition had been sought was qualified: "L'offense suprême contre la morale internationale et l'autorité des traités... ne figure pas dans les nomenclatures des infractions pénales insérées dans les lois de Hollande ou les traités par elle conclus". The Dutch Government could not have rendered legal help for the repression of an act which was not punishable even according to foreign law.

(d) The political character of the crimes did not qualify the case for extradition.

On February 15th, 1920, a new note was addressed to the Dutch Government: The note used the terms "Les droits et les principes de l'humanité", it stressed the fact that the refusal of the Dutch Government would create an unfortunate precedent which would undermine the procedure of international tribunals against "highly placed" culprits. The note called upon Holland to revise their view expressed in the previous letter.

On March 6th, 1920, the Dutch Government sent another reply referring to reasons explained in their previous letter. (1)

The result was that the ex-Kaiser was not handed over, and remained in Holland unaffected by the laws and stipulations of the Versailles Treaty. The decision of the Dutch Government met with strong criticism and was disapproved of by the majority of writers. However, this decision was to a large extent due to the wrong formula adopted by the Allied and Associated Powers when arraigning the ex-

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(1) For the text of these letters, see Revue du Droit International, 1920, Vol. 8, p. 40. As to the legal aspects of the case see also M. Lachs, War Crimes, An Attempt to Define the Issues, London, 1945, p. 57-8.

Kaiser, and then requesting his extradition. The Powers claimed him, without qualifying his deeds from a strictly legal point of view, for "moral responsibility", which is not a legal term at all, and for "the laws and principles of humanity" which were not recognised legal terms either. This was a perfect excuse for Holland to refuse his extradition. (1)

(1) As to the historical precedents of the Heads of State having been personally visited by punishment for violation of a treaty, and of international trials of persons charged with offences which today would fall within the notion of crimes against peace, the following may be said:

(a) In 1268 Conrad V (Conradin the Boy), the last representative of the third Hohenstauffen dynasty of Holy Roman Emperors (1138-1254) who tried to pursue the policy of his predecessors of submitting other States to his rule, after having been defeated by Charles d'Enghien was put by the Pope before a Tribunal, charged with the initiation of an unjust war, found guilty and executed in Naples in that year.

(b) On an international scale, the trial of Sir Peter of Hagenbach, henchman of the Duke of Burgundy, at Breisach in 1474 by a Tribunal which was composed of judges delegated by the Allies in the war against Burgundy, may claim to be a forerunner of the proceedings at Nuremberg. Although this was a case in which war crimes in the wider sense of the term, as used in the Charter of the Nuremberg Tribunal, have come before an international bench, the crimes preferred against Peter of Hagenbach would be called today crimes against humanity. (See article by G. Schwarzenberger, A Forerunner of Nuremberg, the Breisach War Crimes Trial of 1474, the Manchester Guardian, September 28th, 1946).

(c) The last memorable occasion on which a Head of State was called upon to answer for a violation of an international treaty was in 1815, when, after having been formally declared by the Congress of Vienna to be an international outlaw for having invaded France in violation of the Treaty of Paris of 1814, Napoleon was actually deported to St. Helena.

By the Convention of April 11th, 1814, entered into between Austria, Prussia, Russia and Napoleon, the latter agreed to retire to Elba. After his escape and re-entry into France with an armed force, the Congress of Vienna on March 13th, 1815, issued a Declaration that by having violated his agreement Napoleon had "destroyed the sole legal title upon which his existence depended...placed himself outside the protection of the law, and manifested to the world that it can have neither peace nor truce with him". The Powers declared that Napoleon had put himself outside "civil and social relations, and that, as Enemy and Perturbator of the World, he has incurred liability to public vengeance". Had the Powers followed the recommendation of Field Marshal Blücher, Napoleon would then have been shot on sight as one who, under the above Declaration, was an "outlaw". But after Napoleon's surrender to the British, a Convention was entered into on August 2nd 1815, by which Napoleon was "considered by the Powers...as their Prisoner", his custody to be "specially entrusted to the British Government", the "choice of the Place and of the measures which can best secure the object of the present stipulation" being "reserved to His Britannic Majesty". (Quotation cited by S. Glueck, lit.cit.p.399).

The exile of Napoleon is of course an example of a summary "disposal of the case presented by notorious enemies of international law" by an "execution" or "political" action only, without any trial at all and without any consideration whatsoever of whether the act of the offender had or had not previously been prohibited by some specific provision of international penal law.

(iv) The Developments during the inter-  
Wars period. (1) .

Although throughout the quarter-century between the two World Wars attempts to limit the right of war were witnessed, to mention for example the provision for a moratorium in regard to all wars, and a definite deprivation of members of the League of Nations of the right of war in some cases (Articles 12 and 13 of the Covenant of the League), nothing so specific was done by the nations of the world for the implementation of the recommendations of the Commission of Fifteen as to provide "penal sanctions" for acts "provoking" the war. At the same time, however, many determined efforts were made to declare "wars of aggression" as illegal as well as to declare them an international crime.

The following solemn international pronouncements are evidence of these desires and of some of these efforts.

(1) Article 1 of the abortive Treaty of Mutual Assistance of 1923, solemnly declared "that aggressive war is an international crime", and that the Parties would "undertake that no one of them will be guilty of its commission". (2) About half of the 29 States who replied to a submission of the draft treaty wrote in favour of accepting the text. A major objection was that it would be difficult to define what act would comprise "aggression" rather, than doubt as to the criminality of aggressive war.

(2) The Draft Treaty of Disarmament and Security Prepared by an American Group and considered by the Third Committee of the Assembly of the League of Nations, 1924, Article 1 of which provided that "the High Contracting Parties solemnly declare that aggressive war is an international crime", and "severally undertake not to be guilty of its commission", while Article 2 provided that "A State engaging in war for other than purposes of defence commits the international crime described in Article 1". (3)

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(1) For a detailed exposition of the developments of that period and prior to the enactment of the Charters of the International Tribunals see: Chapters IV and V of this History.

(2) Records of the Fourth Assembly, Plenary Meetings, League of Nations Official Journal (Special Supplement No. 13, 1923), p. 403.

(3) Records of the Fifth Assembly, Meetings of the Third Committee, League of Nations Official Journal (Special Supplement No. 26, 1924), Annex 4.



(3) Similar terms were used in the Preamble to the abortive Geneva Protocol for the Pacific Settlement of International Disputes of 1924. This Preamble also solemnly asserted that a war of aggression constitutes a violation of... the solidarity of the members of the International community, and "an international crime". It went on to say that the Parties were desirous of "ensuring the repression of international crimes". (1) Giving effect to this desire Article 6 provided that the sanctions of Article 16 of the Covenant of the League should be applicable to a State resorting to war in disregard of its undertakings under the Protocol. Although it never came into force, it "did express the strong attitude of leading jurists and statesmen of most of the nations of the world regarding both the illegality and the criminality of aggressive war".

(4) In September 1927, at the instance of the Polish Delegation, the Assembly of the League of Nations adopted a resolution expressing the conviction that 'a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime', and declaring that 'all wars of aggression are, and shall always be, prohibited,' and that 'every pacific means must be employed to settle disputes of every description, which may arise between States. (2) The resolution was adopted unanimously, thus showing how strong was the conviction "that the time had arrived, in the affairs of States and their peoples, to call a spade a spade".

(5) An authoritative expression of American opinion on aggressive war was made on 12th December, 1927, when Senator William E. Borah introduced in the Senate a resolution, the last in a long series since 1922, of which a pertinent provision was "That it is the view of the Senate of the United States that war between nations should be outlawed as an

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(1) Records of the Fifth Assembly, League of Nations Official Journal (Special Supplement No. 23, 1924), 498.

(2) Records of the Eighth Assembly, Plenary Meetings, p. 24.

institution or means of the settlement of international controversies by making it a public crime under the law of nations." (1)

(6) In February 1928 the Sixth Pan-American Conference of twenty-one American Republics held at Havana adopted a resolution declaring that as "war of aggression constitutes an <sup>al</sup> international crime against the human species... all aggression is illicit and as such is declared prohibited." (2)

(7) All these attempts received an authoritative and practically universal expression in the General Treaty for the Renunciation of War (Briand Kellogg Pact or "Pact of Paris"), signed in Paris on 27th August, 1928 (3) which is now binding upon over sixty States, and to which Germany was the first signatory. The Pact condemned recourse to war **for** the solution of international controversies, renounced it as an instrument of national policy, and bound the signatories to seek the settlement of all disputes or conflicts, of whatever nature or whatever origin they may be, by pacific means only.

Thus, the signatories of the Pact have renounced the right of war both as a legal instrument of self-help against an international wrong and as an act of national sovereignty for the purpose of changing the existing rights. However, as the signatories have renounced recourse to war only in their mutual relations it follows that resort to war still remained lawful, but only:

- (a) as a means of legally permissible self-defence;
- (b) as a measure of collective action for the enforcement of international obligations by virtue of existing instruments like the Covenant of the League;
- (c) as between signatories of the **Pact** and non signatories;
- (d) as against a signatory who has broken the Pact by resorting to war in violation of its provisions. Thus when Great Britain and

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(1) Quoted by S. Glueck, lit.cit., p. 412.

(2) Quoted partly by S. Glueck, lit.cit., p. 411 and partly by Oppenheim, lit.cit., p. 148.

(3) Treaty Series, No. 29, (1929), Cmd. 3410.

France declared war upon Germany in September 1939 that declaration was fully in accordance with the obligations of the Pact in view of the invasion of Poland by Germany and the resulting war between these two States. (1)

The conclusion of the Briand-Kellogg Pact created a long-lasting controversy as to its interpretation, namely, whether the contracting Parties have really meant to agree that aggressive war is not only illegal but also and above all an international crime. Whatever may be the views as to the legal effects of this Pact, it is at least evident from the numerous expressions of international opinion and agreements referred to above, that long before the outbreak of the Second World War the time had arrived in the life of civilised nations when an international custom had developed to hold aggressive war to be an international crime. In the words of Article 38 of the Statute of the Permanent Court of International Justice, such a custom, like any other in the international field, may be considered "as evidence of a general practice accepted as law".

All these solemn expressions of the conviction of civilised States regarding the need for conciliation, for the settlement of international disputes by pacific means only, for the renunciation of war as an instrument of national policy, and, logically, for the recognition that aggressive war is an international crime, greatly re-inforce whatever inference to that effect is derivable from the Briand-Kellogg Pact itself. They may be regarded as powerful evidence of the existence of a widely prevalent juristic climate which has energised a spreading custom among civilised peoples to regard a war of aggression as not simply "unjust" or "illegal" but downtright criminal. (2) Every recognition of custom as evidence of law must have a beginning some time; and there has never been a more justifiable stage in the history of international law than the present, to recognise that by the common consent

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(1) See Oppenheim, lit.cit., p. 149-150

(2) See S. Glueck, lit.cit., p. 412.



of civilised nations as expressed in numerous solemn agreements and public pronouncements the instituting or waging of an aggressive war is an international crime. (1)

That exactly the same views were prevailing amongst the authorities of the Parties responsible for the enactment of the Charter of the International Military Tribunal at Nuremberg is shown by the report submitted on 7th June, 1945, to the President of the United States by the American Chief of Counsel for the prosecution of the major war criminals of the European Axis. Justice Robert H. Jackson there said: "It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal". Speaking of the alleged "retroactive" nature of a trial and punishment for the launching of legally prohibited (i.e. aggressive) warfare, Justice Jackson argued:

"International law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to new situations. Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct". (2)

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(1) See S. Glueck, lit.cit., p. 418.

(2) Report of June 7, 1945, by Justice Robert H. Jackson, reprinted in the American Journal of International Law, Vol. 39, 1945.

The Nuremberg Charter is an international act which definitely provided the last link in the developments outlined in the preceding sections, namely, it not only authoritatively rendered aggressive war an international crime, but made it in addition a crime punishable by an international tribunal. (1)

(v) Definition and interpretation of  
"Crimes against Peace".

A. The Nuremberg Charter.

Article 6 of the Charter of the International Military Tribunal at Nuremberg, annexed to the Agreement of the Four Powers of 8th August 1945 (2) provides that the Tribunal established for the Prosecution and Punishment of the Major War Criminals of the European Axis:

"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:

(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.....

(c) Crimes against humanity....."

(a) Crimes against Peace as Supreme War Crimes.

Thus the authors of the Charter have given a leading place to sub-paragraph (a) referring to Crimes against Peace. This was the expression of the firmly held view, that the crimes against peace enumerated in Article 6 of the Charter take precedence before any other international crime to be tried by the Tribunal, and that they constitute "the supreme international crime".

This logically, technically and legally obvious conclusion, derived from the analysis of Article 6, found confirmation in the Nuremberg Judgment. When dealing with Count One of the Indictment (Common Plan or Conspiracy) and Count Two (Aggressive War; Crimes against Peace),

(1) As to the contribution of the United Nations War Crimes Commission to the development of the concept of crimes against peace, see Chapter VIII.

(2) Misc.No. 10/1945, Cmd. 6668, p.5.

the Tribunal stated:

"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 international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole". (1)

This statement of the Tribunal, describing crimes against peace as supreme international crimes, and the order in which various forms of war crimes have been enumerated in Article 6 of the Charter are of paramount importance to international law. The Charter contains a comprehensive enumeration of war crimes and together with the Judgment establishes a hierarchy in war crimes, never before attempted by an authoritative international legal body. This seems to be due to the circumstance, that acts contained in Article 6 (a) of the Charter have usually in the past been separately discussed, analysed and defined, by mostly ad hoc created bodies, guided as much by political as legal considerations (2), while acts listed under sub-paras (b) and (c) of Article 6 of the Charter, have been considered technical and legal problems, firmly embodied in positive international law and requiring only definition, elaboration and adaptation to new circumstances.

The great importance of the form adopted in Article 6 of the Charter and of the above quoted statement of the Tribunal consists inter alia in:

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(1) Misc. No. 12 (1946), The Judgment, p. 13.

(2) See: a) Convention of 11th April 1814, and the decision of the Congress of Vienna, 13th March, 1815, on sanctions against Napoleon.

b) Recommendations of the Commission of Fifteen appointed by the Preliminary Peace Conference, 1919.

c) The Briand-Kellogg Pact for the Renunciation of the War.

d) The Draft Treaty of Mutual Assistance of 1923.

e) The "Geneva Protocol" of 1924.

f) The Declaration concerning Wars of Aggression of the Third Committee of the Assembly of the League of Nations of 24th September, 1927.

g) Resolutions of the Pan-American Conference of 18th February, 1928, and of various other international conferences.



- (a) placing the charges contained in sub-para. (a) of Article 6 on a purely legal level;
- (b) Establishing the supreme character of Crimes against Peace, as compared with other war crimes;
- (c) underlining of a close de facto link between all three forms of war crimes.

(b) Analysis and definition of Crimes against Peace.

As already stated, crimes against peace are defined in the Charter as; "...planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances," and also as: "...participation in a common plan or conspiracy for the accomplishment of any of the foregoing".

At first sight it becomes obvious, that the authors of the Charter distinguished between planning of a war of aggression and participation in a common plan or conspiracy.

The Indictment presented to the International Military Tribunal on 18th October, 1945 (1) confirms this differentiation. The defendants are first accused under Count One of "a common plan or conspiracy to commit, or which involved the commission of crimes against peace, war crimes, and crimes against humanity, as defined in the Charter...", and then under Count Two of "participation in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties..."

Before proceeding any further with the analysis of the above mentioned differentiation it seems necessary to remark, that the Tribunal

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(1) The Indictment, p. 3.

in the Judgment (1) rejected the charges of conspiracy to commit war crimes and crimes against humanity included in Count One of the Indictment and in accordance with the letter of Article 6 of the Charter limited the charges of conspiracy to the commission of crimes against peace as formulated in sub-para. (a) of Article 6.

This decision of the Tribunal makes the distinction between conspiracy and actual planning of a war of aggression of even greater importance. It shows that the Tribunal did not consider the difference to be of a purely technical character applying to all kinds of war crimes. The Tribunal tried the defendants under Counts One and/or Two on the merits of their deeds, within the limitations set down in sub-para (a) of Article 6 of the Charter, applying to crimes against peace only. It further considered that the difference between conspiracy and actual planning was one of substance and also of degree and that there were two different crimes against peace.

This is particularly obvious from the following text of the Judgment: "Count One of the Indictment charges the defendants with conspiring or having a common plan to commit crimes against peace. Count Two of the Indictment charges the defendants with committing specific crimes against peace by planning, preparing, initiating and waging wars of

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(1) "Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides:

"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 the execution of such plan".

"In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war." (The Judgment, p. 44).

aggression against a number of other States." (1)

Thus the Tribunal considered that the common plan or conspiracy was a general crime against peace, which consisted in conspiring, making long-term plans and arrangements for waging wars of aggression in the future. All ideological, political, economic and military preparations of Nazi Germany, which aimed at the setting up of the political, economic and military might of the State, indispensable for the waging of wars of aggression and deliberately made by the participants in the conspiracy with a view to waging such wars, came under Count One.

For instance, a general plan of rearmament, with a view to conducting an aggressive war in the future comes under Count One. This is best illustrated by the statement made by Hitler at the conference of the Supreme Commanders, of 23rd November, 1939. He declared inter alia: "...but I wasn't quite clear at that time, whether I should start first against the East and then in the West or vice versa...Basically I did not organise the armed forces in order not to strike. The decision to strike was always in me. Earlier or later I wanted to solve the problem". (2)

The making of specific plans and preparations, as well as the actual waging of aggressive wars against specific States came under Count Two.

Thus, Hitler's declaration at the meeting of the Commanders-in-Chief of 22nd August, 1939, announcing his decision to make war on Poland at once and giving final instructions as to the way in which the campaign should be conducted (3), is a typical example of a specific planning and preparing of an aggressive war against a specific country and constituting a crime against peace under Count Two. The analysis of the sentences pronounced against the individual defendants indicted under Counts One and Two gives an indication<sup>of</sup> how the Tribunal appraised the difference between common conspiracy, and planning and waging of an aggressive war.

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(1) The Judgment, p. 12 and 13.

(2) The Judgment, p. 15.

(3) The Judgment, p. 24 and 25.



GOERING has been convicted under both Counts. The Tribunal stated: "...he was largely instrumental in bringing the National Socialists to power in 1933..." (Charge under Count One), and further: "Shortly after the Pact of Munich he announced that he would embark on a five-fold expansion of the Luftwaffe and speed rearmament with emphasis on offensive weapons". (Count One). The Tribunal stated further: "He commanded the Luftwaffe in the attack on Poland and throughout the aggressive wars which followed" (Count Two), and further "...was active in preparing and executing the Yugoslav and Greek campaigns". (Count Two). (1)

The case of FRICK is very instructive. He was acquitted under Count One and found guilty under Count Two. The Tribunal <sup>thus</sup> gave the reasons for his acquittal: "Before the date of the Austrian aggression Frick was concerned only with domestic administration within the Reich. The evidence does not show that he participated in any of the conferences at which Hitler outlined his aggressive intentions. Consequently the Tribunal takes the view that Frick was not a member of the common plan or conspiracy to wage aggressive war as defined in this Judgment". (2) The wording of the following passage of the Judgment clearly shows what the Tribunal considered to be Frick's crime under Count Two: "...Frick devised an administrative organisation in accordance with wartime standards. According to his own statement, this was actually put into operation after Germany decided to adopt a policy of war." (3)

As further proofs of Frick's guilt the Tribunal mentioned inter alia the signing by him of the law uniting Austria with the Reich, the signing of the laws incorporating into the Reich the Sudetenland, Memel, Danzig, the Eastern Territories, Eupen, Malmedy and Moresnot, and the participation in the administration of the territories occupied by Germany in the war.

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(1) The Judgment, p. 84 and 85.

(2) The Judgment, p. 99.

(3) The Judgment, p. 99.

STREICHER was also acquitted under Count One. The Tribunal said: "There is no evidence to show that he was ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the formation of policies which led to war. He was never present, for example, at any of the important conferences when Hitler explained his decisions to his leaders...In the opinion of the Tribunal, the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war as that conspiracy has been elsewhere defined in this Judgment". (1)

The Tribunal acquitted FUNK under Count One, but recognised his guilt under Count Two. The Tribunal said: "Funk became active in the economic field after the Nazi plans to wage aggressive war had been clearly defined", (2) and further, gave the reasons for the verdict on both Counts: "Funk was not one of the leading figures in originating the Nazi plans for aggressive war. His activity in the economic sphere was under the supervision of Goering as Plenipotentiary General of the Four Year Plan. He did, however, participate in the economic preparation for certain of the aggressive wars, notably those against Poland and the Soviet Union, but his guilt can be adequately dealt with under Count Two of the Indictment". (3)

SCHACHT was indicted and acquitted under Counts One and Two. The Tribunal brought forward most characteristic and enlightening reasons: "It is clear that Schacht was a central figure in Germany's rearmament programme, and the steps which he took particularly in the early days of the Nazi régime, were responsible for Nazi Germany's rapid rise as a military power. But rearmament of itself is not criminal under the Charter. To be a crime against peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars". And further: "Schacht was not involved in the

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(1) The Judgment, p. 100 and 101.

(2) The Judgment, p. 102

(3) The Judgment, p. 103.

planning of any of the specific wars of aggression charged in Count Two. His participation in the occupation of Austria and the Sudetenland (neither of which are charged as aggressive wars) was on such a limited basis that it does not amount to participation in the common plan charged in Count One. He was clearly not one of the inner circle around Hitler which was most closely involved with this common plan". (1)

It has to be mentioned that the Soviet member of the International Military Tribunal in his dissenting opinion on the case of Schacht based on the evidence submitted to the Tribunal, declared: "Therefore, Schacht's leading part in the preparation and execution of the common criminal plan is proved". (2) He did not make, however, any distinction between charges under Counts One and Two and did not challenge the decision of the Tribunal on any point of law.

DOENITZ was acquitted under Count One and declared guilty under Count Two. The Tribunal gave the decision in the following terms: "Although Doenitz built and trained the German U-boat arm, the evidence does not show he was privy to the conspiracy to wage aggressive wars or that he prepared and initiated such wars. He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced...Doenitz did, however, wage aggressive war within the meaning of that word as used by the Charter...It is clear that his U-boats, few in number at the time, were fully prepared to wage war". (3)

VON SCHIRACH was acquitted under Count One. The Tribunal said: "Despite the warlike nature of the activities of the Hitler Jugend, however, it does not appear that von Schirach was involved in the development of Hitler's plan for territorial expansion by means of aggressive war, or that he participated in the planning or preparation of any of the wars of aggression." (4)

VON PAFEN was acquitted under Counts One and Two. The decision

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(1) The Judgment, p. 106.

(2) The Judgment, p. 136.

(3) The Judgment, p. 107.

(4) The Judgment, p. 113.



of the Tribunal was given, inter alia, in the following terms: "The evidence leaves no doubt that von Papen's primary purpose as Minister to Austria was to undermine the Schuschnigg régime and strengthen the Austrian Nazis for the purpose of bringing about the Anschluss. To carry through this plan he engaged in both intrigue and bullying. But the Charter does not make criminal such offences against political morality, however bad this may be. Under the Charter von Papen can be held guilty only if he was a party to the planning of aggressive war. There is no showing that he was a party to the plans under which the occupation of Austria was a step in the direction of further aggressive action, or even that he participated in plans to occupy Austria by aggressive war if necessary. But it is not established beyond a reasonable doubt that this was the purpose of his activity, and therefore the Tribunal cannot hold that he was a party to the common plan charged in Count One or participated in the planning of the aggressive wars charged under Count Two." (1)

The Soviet member of the Tribunal again challenged the decision in von Papen's case, but did not support his opinion by any legal consideration. He limited himself to the statement that the defendant supported the Nazi régime in Austria, but did not attempt to prove the only point of legal importance, and namely, whether von Papen participated in the common plan and conspiracy for the bringing about of a war of aggression or whether he participated in the actual planning and waging of such a war. (2)

The Tribunal's decision in the case of SEYSS-INQUART is characteristic. The Tribunal acquitted him under Count One, but declared him guilty under Count Two. The Tribunal did not give reasons for this acquittal and we can only infer the motives from the general statement of the Tribunal. This says that "Seyss-Inquart participated in the last

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(1) The Judgment, p. 120.

(2) The Judgment, p. 138.

stages of the Nazi intrigue, which preceded the occupation of Austria..." (1) The question of timing and the circumstances that the occupation of Austria is not considered by the Tribunal as an aggressive war within the meaning of the Charter seem to have played the decisive role. Seyss-Inquart has not been considered guilty of common conspiracy or plan for the waging of aggressive wars, because this involves close collaboration over a long period with the close group of Nazi ringleaders, who were making general preparations for the waging of aggressive wars. As the Judgment says, Seyss-Inquart joined the Nazi Party on 13th March 1938, and even then he remained in Austria and did not participate in any of the conferences at which Hitler's policy for the future was outlined. On the other hand, Seyss-Inquart helped Hitler in his offensive against the independence of Czechoslovakia. (2) Thus the Tribunal found him guilty under Count Two.

Another interesting argument was brought forward by the Tribunal in support of the decision to acquit SPEER under Counts One and Two. The Tribunal said: "The Tribunal is of opinion that Speer's activities do not amount to initiating, planning, or preparing wars of aggression, or of conspiring to that end. He became the head of the armament industry well after all the wars had been commenced and were under way. His activities in charge of German Armament Production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war as charged under Count One or waging aggressive war as charged under Count Two." (3)

The Tribunal also acquitted defendants FRITSCH and BORMANN under Count One and stated that neither of them reached a sufficiently high position to be admitted into the close ring of the Nazi leaders and

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(1) The Judgment, p. 120 and 121.

(2) The Judgment, p. 120

(3) The Judgment, p. 122.

to take part in the common plan or conspiracy. (1) The decision with regard to Fritsche was challenged by the Soviet member of the Tribunal on the ground that Fritsche's position as Head of the German Press was such that he was directly involved in the preparation and conduct of aggressive warfare. (2)

(c) Wars in Violation of International Treaties.

Sub-para. (a) of Article 6 of the Charter enumerates "war of aggression" and "war in violation of international treaties, agreements and assurances". The Indictment says: "...the defendants planned, prepared, initiated and waged wars of aggression which were also wars in violation of international treaties, agreements and assurances." (3) Appendix C. to the Indictment enumerates the international agreements violated.

The Nuremberg Judgment does not dwell on the problem of "wars of aggression" and "wars in violation of international treaties". The Tribunal said: "The Charter defines as a crime the planning or waging of war that is a war of aggression or a war in violation of international treaties. The Tribunal has decided that certain of the defendants planned and waged aggressive wars against twelve nations, and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also 'wars in violation of international treaties, agreements and assurances.' These treaties are set out in Appendix C. of the Indictment. Those of principal importance are the following". (4) The Tribunal then quoted two Hague Conventions of 1899 and 1907 relative to the settlement of international disputes, the Versailles Treaty, the Briand-Kellogg Pact and various

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(1) The Judgment, p. 127-130

(2) The Judgment, p. 138-140.

(3) The Indictment, p. 3.

(4) The Judgment, p. 36.



treaties of mutual guarantee, arbitration and non-aggression entered into by Germany with other powers.

The attitude of the Tribunal seems to have been dictated by purely practical considerations. From the point of view of the task allotted to the Tribunal, it was irrelevant to analyse the question in detail, as it was obvious that all aggressive wars waged by Germany were also wars in violation of international bilateral or multilateral treaties. The conventional basis of the crimes was considered as established beyond any doubt.

There may be also another reason for such an attitude. The Charter seems to lay all the emphasis on "aggressive wars" as being criminal of themselves and to consider the conventional basis as secondary and subsidiary. The Tribunal seems to have followed the Charter and did not attach too great an importance to the conventional side. In theory it is possible that some country may plan or wage a war of aggression which would not be a war in violation of international treaties. Nevertheless such a war would be, according to the Charter, considered a crime against peace. According to the Charter and the International Military Tribunal it is considered that a crime against peace consists in planning, preparing, initiating or waging of a war of aggression, whether or not it is at the same time a war in violation of international treaties, agreements and assurances; or participation in a common plan or conspiracy for the accomplishment of any of the foregoing. As aggressive war the Tribunal seem to have considered all warlike activities, not in justified self-defence or in execution of an order of a supreme world authority punishing an aggressor, directed by the attacking country against the attacked country against her will and meeting with her resistance, whether or not a formal state of war has been declared between the two countries concerned.

(d) Illegality and Criminality of a War of Aggression, and International Character of the Crimes.

The legal position created by the Charter in this respect does not leave any room for doubt. Article 6 of the Charter says:

"The following acts, or any of them, are crimes coming within the

jurisdiction of the Tribunal..." (1)

The Judgment states: "The Charter makes the planning of a war of aggression or a war in violation of international treaties a crime;..." (2) The Tribunal made also clear on what foundations its power to apply the law of the Charter was based. It said in the Judgment: "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.

"The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law". (3)

The international character of crimes against peace must be based on the customary recognition among civilised nations in the modern era that aggressive war is illegal and criminal. There is ample proof that civilised States have during the present century considered that unjustified war (not in self-defence, or in execution of an order of a supreme world authority, demanding punishment of an aggressor), was so dangerous a threat to the survival of mankind that it must be branded and treated as criminal. It has been shown that the States have repeatedly entered into agreements expressing such conviction. In each of those instances a very large number of countries representing the overwhelming majority of all countries of the world and including,

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(1) Cmd. 6668, p. 5.

(2) The Judgment, p. 38.

(3) The Judgment, p. 38.

in most cases, aggressor countries of the last war signed and adopted those documents. On the criminal character of aggressive war under international customary law in the inter-wars period the Tribunal expressed its view as follows: "In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing". (1)

Thus the international character of the crime of the war of aggression has been judicially established beyond any doubt. This is also based on the factual changes which occurred during the present century and especially since the First World War. The development of technology in the present epoch assumed such proportions that there is a constant threat that any local conflict may extend into a world conflagration, threatening all countries of the world and even the very survival of mankind.

(e) Various Forms of Crimes against Peace in the Judgment.

The Tribunal used in the Judgment various expressions to describe the warlike steps taken by Nazi Germany. The word "invasion" is used with regard to Austria, Denmark, Norway, Belgium, the Netherlands and Luxembourg; (2) "seizure" with regard to Czechoslovakia; (3) "aggression" with reference to Poland, Yugoslavia and Greece; (4) "aggressive war" with reference to the U.S.S.R.; (5) and, finally, "war" with regard to the United States. (6)

It seems obvious that in using those different denominations the Tribunal was guided by different factual and legal circumstances

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(1) The Judgment, p. 39.

(2) The Judgment, p. 17, 27, 30.

(3) The Judgment, p. 19.

(4) The Judgment, p. 22.

(5) The Judgment, p. 33.

(6) The Judgment, p. 35.



accompanying each aggressive act. The proof is, inter alia, provided by the use of the expression "aggressive war". Only once the Tribunal used this expression, and namely with regard to the German attack on the U.S.S.R., but at the same time considered that all above mentioned aggressive acts of Germany, with the exception of the invasion of Austria and the seizure of Czechoslovakia, were acts of aggressive war in the broader sense of this word and within the meaning of the Charter.

With regard to Austria and Czechoslovakia the Tribunal stated in the Judgment that "His participation (of Schacht) in the occupation of Austria and the Sudetenland (neither of which are charged as aggressive war) was..." (1) The Tribunal has evidently considered in both these cases that, as the occupation of the countries concerned did not meet with any or any major resistance, and formally was carried out either on the "invitation" of the country concerned, as in the case of Austria, (2) or in consequence of international agreements, as in the case of Czechoslovakia, (3) it would have been legally impossible to consider those acts of themselves as acts of aggressive wars. That is why those defendants who had taken part in the planning and carrying out of the occupation of both countries have not been sentenced, with respect to their participation in those acts, under Count Two, but only under Count One.

As to all other acts of German aggression, the Tribunal considered them as acts of aggressive war, but used different denominations. This seems to be based on technical and legal differences, and in the first place on two circumstances: the extent of armed resistance encountered, and whether or not from the legal point of view a technical state of war existed between the countries concerned. The Tribunal also carefully examined the facts, establishing in each case, that Germany's action was not dictated by self-defence, but by the desire to extend her aggressive bases, and her "Lebensraum" in order to advance her aggressive policy.

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(1) The Judgment, p. 106.

(2) With the agreement of Seyss-Inquart, then Chancellor of Austria, The Judgment, p. 19.

(3) Fact of Munich and the agreement signed by Hacha in Berlin, The Judgment, p. 21.

The stronger denomination "aggression" seems to have been used in the cases of Poland, Yugoslavia and Greece, because of the extent of armed resistance encountered, and because of the political and diplomatic circumstances which accompanied and preceded those attacks. In the cases of Belgium, the Netherlands, Luxembourg, Denmark and Norway the expression "invasion" seems better to illustrate the more easy progress of German forces. The denomination "aggressive war" in the case of the U.S.S.R. carries a particular emphasis and seems to have been applied because of the well known and unique circumstances in the political, diplomatic and military domain which accompanied Germany's attack on the U.S.S.R.

The expression "war against the United States" deserves particular attention. It is understandable that the Tribunal could not from the technical point of view, use such terms as "invasion", "aggression", or "aggressive war". The war between Nazi Germany and the United States was the consequence of a formal declaration of war by Germany and was neither preceded nor accompanied by aggressive military acts. Nevertheless the Tribunal justly considered that this was a case of an indirectly aggressive war, in the broader meaning of the term, as it is used in the Charter, and thus motivated its opinion: "And when Japan attacked the United States fleet in Pearl Harbour and thus made aggressive war against the United States, the Nazi Government caused Germany to enter that war at once on the side of Japan by declaring war themselves on the United States." (1)

(f) Various Forms of Participation in the Crimes.

The first two paragraphs of Article 6 of the Charter affirm the principle of international law as to the individual responsibility, a principle which in the past met often with objections. Article 6 declares that for any of the acts enumerated therein there shall be individual responsibility. This is also applicable to crimes against

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(1) The Judgment, p. 36.

peace. It further states that the "Tribunal shall have the power to try and punish persons who, acting as individuals or as members of organisations, committed any of the crimes coming within the notions of crimes against peace, war crimes and crimes against humanity. (1)

Article 6 of the Charter also contains in fine the following paragraph: "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 the execution of such plan".

These various forms of participation in the crimes against peace are repeated by the Indictment. They are obviously enumerated in the declining order of importance. The meaning of each term should be appraised in relation to the crimes contained in the Charter, and not in the ordinary meaning of the word. Thus, it should be understood "leader in the conspiracy", and not "leader of the National Socialists". For example, Goering can be considered to be a leader, both, in the ordinary meaning of the word, and in the meaning derived from the text of the Charter. On the other hand, von Schirach, who was a leader of the Nazi Youth, has not been tried by the Tribunal as leader in the common plan or conspiracy, but the Tribunal examined his role as of an organiser and accomplice.

The Tribunal did not define in the Judgment the forms of participation in the crime of each individual defendant, but in the analysis of the activities of each defendant it is possible to arrive at the right conclusions by applying ordinary standards adopted by municipal penal courts.

For instance, the Tribunal defined Hess' leading position in the common plan in the following manner: "As Deputy of the Führer, Hess was the top man in the Nazi Party with responsibility for handling all Party

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(1) For the presentation of the developments in the doctrines of individual responsibility of ministers, of Acts of State, and of immunity of heads of State, see Chapter X of this History.



matters, and authority to make decisions in Hitler's name on all questions of Nazi leadership" and further: "...In these positions, Hess was an active supporter of preparations for war". (1) The description often used by the Tribunal in denoting the activities of an accomplice can be illustrated by the case of Ribbentrop: "Ribbentrop attended the conference on 20th January, 1941, at which Hitler and Mussolini discussed the proposed attack on Greece,..." (2)

In a few instances we come across statements defining instigators. So with regard to Raeder the Tribunal said: "The conception of the invasion of Norway first arose in the mind of Raeder and not that of Hitler". (3)

As to the knowledge on the part of the defendants at Nuremberg, some people maintain that it is a bad thing to have held them responsible for acts of which they did not know in advance that they would be punished as crimes. In our opinion the question of penalty as such seems to be irrelevant, but it is certainly essential that they should have realised, at the time of the commission of the acts, in what their activities consisted and their illegal and criminal character.

The Tribunal thus defined its attitude to this problem: "Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and business men. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing." (4)

There can be no doubt, that the defendants realised in what their activities consisted and that their acts would be considered illegal and criminal by the whole civilised world. Members of the inner circle of the Nazi Government knew that Germany had solemnly assured her

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(1) The Judgment, p. 86.

(2) The Judgment, p. 89.

(3) The Judgment, p. 111.

(4) The Judgment, p. 43 and 44.

neighbours of peaceful and friendly intentions by signing several treaties. They also knew that Germany's unprovoked attacks upon her peaceful neighbours constituted wars of aggression. They knew that such wars had been declared illegal and outlawed by the great majority of civilised States, including Germany. They knew that numerous international agreements, declarations and pronouncements had declared such actions to be international crimes. They finally knew, that the leaders of the United Nations had declared their determination to punish those crimes.

B. The Tokyo Charter.

Article J of the Charter of the International Military Tribunal at Tokyo (1), established for the punishment of the Far Eastern war criminals, provides that the Tribunal:

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

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

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

In spirit the afore-quoted rules are in harmony with, and a replica of, the corresponding provisions of the Nuremberg Charter (Article 6). However, there are certain verbal differences which raise interesting points in regard to the unity and clarity of substantive international penal law.

The point raised by the above definition of crimes against peace is that, whereas, the Nuremberg Charter declares the "waging of a war of aggression" to be <sup>a</sup> criminal act without making reference to or drawing a distinction between wars launched with or without a proper "declaration", the Far Eastern Charter specifically treats as criminal the

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(1) Special Proclamation of the Supreme Commander for the Allied Powers establishing an International Military Tribunal for the Far East, Tokyo, 19th January, 1946.

"waging of a declared or undeclared war of aggression".

The effect of the latter definition is to make it expressly clear that to precede the initiation of war by its formal declaration as required by the Hague Conventions, does not deprive such a war of its criminal nature if it is "aggressive".

In this connection it is important to note that the difference between the two Charters is purely verbal, in the sense that Article 5 (a) of the Far Eastern Charter contains additional specification which is, however, implied in the definition given in the Nuremberg Charter.

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

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

In this connection it is convenient to point out that it is precisely in the irrelevance of a declaration of war that lies the main feature of the development of international law as formulated in the two Charters and as established by the Judgment of the Nuremberg Tribunal. Prior to the signing of the Briand-Kellogg Pact of 1928 and to the interpretation of its meaning in international law by the Nuremberg Tribunal, no violation of international law could be claimed once a war had been launched in compliance with the conventions referred to above, however aggressive such a war might have been. Today, the position is in a sense reversed. No compliance with these conventions can confer legality to a war which is aggressive.

Yet, however clear this issue may be, there remains the technical aspect which is not unimportant. In formulating rules of



international war as they develop in an uncodified system with all that such a situation implies, particularly with the co-existence of Treaties which are or which might be regarded as conflicting, it is undoubtedly preferable to proceed by means of express terms rather than by way of implication.

It may be observed that the Nuremberg Tribunal did not enter into the question of "declared" and "undeclared" wars, probably for the very good reason that all wars waged by Nazi Germany were in fact both aggressive and launched without declarations. The Tribunal contented itself by ascertaining this fact in each case, and proceeded directly on the grounds of such concrete circumstances.

It is thus possible to conclude that the differences appearing in the texts of Articles 5 (a) and 6 (a) of the two Charters are purely verbal and that they did not affect the substance of the law governing the jurisdiction of the Far Eastern Tribunal over crimes against peace in comparison with the Nuremberg Charter.

It would appear, however, that such differences in texts of law dealing with subjects of the same nature and enacted separately only for reasons of geographical and executive convenience are liable to create uncertainty, and should, whenever possible, be avoided.

(vi) Endorsement and Affirmation by the United Nations.

At its forty-sixth Plenary Meeting on 31st October 1946, the General Assembly of the United Nations referred to the Sixth Committee the question of the implementation by the General Assembly of its obligation "to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law". The Sixth Committee referred the matter to a Sub-Committee, which had also before it, a resolution proposed by the delegation of the United States relating to the principles of international law recognised by the Charter of the Nuremberg Tribunal (A/O.6/69).

The majority of the Sub-Committee agreed, not only that a Committee should be appointed to consider the proper methods of implementing the obligation of the General Assembly under Article 13 of the Charter, but

that that Committee should give priority to plans for the formulation of the principles of the Charter of the Nuremberg Tribunal, and of the judgment of that Tribunal, in the context of a general codification of offences against the peace and security of mankind or of an International Criminal Code. The Sub-Committee felt that this view was strengthened by the fact that similar principles had been adopted in respect of the trials of the major war criminals in the Far East.

The Sub-Committee's report (A/O.6/116) was adopted by the Sixth Committee (1) which recommended to the General Assembly the adoption of an appropriate resolution.

In implementing the above recommendation, the General Assembly of the United Nations adopted, at its 55th Plenary Meeting on 11th December 1946, two resolutions, namely, a general Resolution on the Progressive Development of International Law and its Codification, and a Resolution on the Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal.

In the latter resolution (2) the General Assembly recognised the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a. of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification; and took note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on August 8th, 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19th January, 1946. Therefore the General Assembly:

"AFFIRMS the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal;

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- (1) See the Report of the Sixth Committee (A/236/ dated 10th December 1946)  
(2) See, General Assembly Journal No. 75, Supplement A-64, Add. 1, pp. 944-946.

"DIRECTS the Committee on the codification of international law established by the resolution of the General Assembly of December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal".

Following the recommendations contained in the above Resolution the problem of formulation of the Nuremberg principles has become the subject of further considerations and studies by the appropriate organs of the United Nations. (1)

(vii) Conclusions.

The work done in the field of international law by the victorious United Nations and embodied in the Four Power agreement for the Prosecution and Punishment of the Major War Criminals, and further developed by the International Military Tribunal is of momentous importance. The Tribunal was fully conscious that its task was not limited to the solution of the problems which it was directly facing, namely, the punishment of the German major war criminals but that its work would be of fundamental importance for the future development of international law. The Tribunal stated in the Judgment that the Charter is the expression of international law existing at the time of its creation and to that extent is itself a contribution to international law.

Thus the Tribunal made it clear that the law of the Charter was declaratory of existing international customary law and would be applicable to any future transgressor. This means that aggressive war involves personal responsibility of the leaders of the aggressor States, similar to the responsibility for war crimes in the technical meaning of the term.

But the Agreement of 8th August, 1945, entrusted the Tribunal with the trial and punishment of the major war criminals of the European

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(1) For the provisions regarding crimes against peace in the Peace Treaties of 1947, see Section A above of this History, dealing with the Development of the Concept of Crimes against Humanity.



Axis. It was an ad hoc Tribunal and no second Tribunal has been set up under the Agreement.

It is obvious, that much more has to be done, than what has been achieved up till now. It is true that the foundations have been firmly laid down, but the erection of the whole building of peace protecting measures of international law has hardly begun.

This requires further legislative work based on the Charter and the findings of the Tribunal, development of the principles enunciated in those documents, the entrusting of the application of adopted principles to a supreme judicial body, and, finally, the most difficult task of making sure that effective sanctions would be applied to any future transgressor.