INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Memorandum on the Establishment of an International Tribunal

(by Monsieur Victor Bodson)
(LUXEMBOURG)

In this Memorandum I intend to deal with the broad lines only, and shall divide my Note into four parts:

(1) THE CODE TO BE APPLIED

(2) PROSECUTION

(3) COURTS

(4) SENTENCES

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(1) THE CODE TO BE APPLIED: When a complaint has been lodged, a first examination shall decide whether the alleged fact is provided against by international conventions. In case of a negative result, I am in favour of applying the "Jus loci", i.e. the Criminal Law of the Allied country on whose territory the crime has been committed.

If, on the other hand, the crime has been committed in Germany only, German Criminal Law shall be applied.

(2) PROSECUTION: It is important to lay down by what methods the criminals are to be sought out, tried, and punished.

I suggest the establishment of an International Prosecution Office where all complaints would be lodged and which would first of all decide whether the alleged facts are serious enough to justify prosecution. If this be the case, the International Prosecution Office shall issue a warrant for the immediate arrest of the party charged, and proceed with the investigation.

If two or more countries claim the same individual, the International Prosecution Office shall decide, according to the seriousness of the charge, to which country the defendant is to be surrendered.

Preference shall be given to the Allied country on whose territory the worst offence has been committed. The records of the other countries shall be collated, and the defendant shall be tried by one and the same court. If offences have been

committed both in Germany and in an Allied country, the latter shall be given preference.

(3) COURTS: For trials I recommend mixed tribunals depending from an International Court.

Three judges shall deliver judgment. One of them, the President, shall be a national of the country where the crime has been committed, the two others belonging to Allied nations. All three should understand both the language of the country and German. The proceedings shall take place in open court, in the presence of the defendant who shall be allowed a Counsel. The judgment shall be delivered only after hearing all parties, and the grounds for the verdict shall be stated. Nevertheless the proceedings shall be purged of certain delays, and the criminal shall not be allowed to appeal to a higher Court. He shall, however, have the right to claim that his case be re-heard by different judges through cassation.

(4) SENTENCES: The sentence shall be executed in the country where it is passed.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Memorandum on the establishment of an International Tribunal

(Professor S. Glaser)
(POLAND)

In my opinion it would be advisable to adopt national jurisdiction as a principle. International jurisdiction should be established only for special cases where justified by exceptional circumstances.

The reasons justifying national jurisdiction are manifold. First of all it is obvious that the administration of justice for the so-called war-crimes should be very rapid and efficient. The trials in this domain should be closed in a short period after the war is over. This could be done only and exclusively by national courts. The machinery of international tribunals is in its very nature complicated and slow. At any rate the experience in this domain does not encourage optimism. The further reason for such national jurisdiction is to be found in the moral feelings of the now enslaved nations. Beyond doubt one of the main aims of the administration of justice is to satisfy the moral feelings of the nation wounded by the offender. This can be done only if the nation has confidence in the tribunals, and such confidence is only possible where the tribunals are composed of those who belong to the nation itself, who feel with it, who understand its needs, its sentiments, its faith. Finally, we must remember that the administration of justice by national courts is also dictated, undoubtedly, by the interest of justice itself. The so-called principle of immediacy requires that the trial should take place where the crime has been committed, and in such a manner as to enable the judges to hear and see all kind of relevant evidence, and to pass judgment on their own observations. It is understandable that all these conditions require national courts.

There are twofold arguments quoted in favour of international jurisdiction. First of all that the national law of the respective countries would not cover all the wrongs and damage done by the invader. If this is true, and I think it is, the only solution would be to supplement the respective codes in an appropriate manner.

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There are twofold arguments quoted in favour of international jurisdiction. First of all that the national law of the respective countries would not cover all the wrongs and damage done by the invader. If this is true, and I think it is, the only solution would be to supplement the respective codes in an appropriate manner.

Such additions could not be criticized as being a break with the principle "nullum crimen sine lege", because this principle concerns in particular the illegality (lawlessness) of the action performed by the doer, and it is obvious that the crimes committed by the enemy were forbidden, therefore lawless even at the time they were committed, according to national and international law. Apart from this it is worth while mentioning that this argument cited against national jurisdiction, would even if justified, equally apply to international courts because, they too, would have to have new legal basis for prosecution, trial and punishment.

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

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Committee
on Rights of Accused

CONFIDENTIAL

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INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

COMMITTEE ON THE RIGHTS TO BE ACCORDED TO PERSONS SUSPECTED OR ACCUSED OF CRIMES

C O N T E N T S

I. Introductory Note by the Secretary-General. (D.II)

II. Professor Glaser's Questionnaire (D.35).

III. Professor Glaser's Report (D.36)

IV. Draft Statement of Main Principles with Notes (D.37).

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INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

COMMITTEE ON THE RIGHTS TO BE ACCORDED TO PERSONS SUSPECTED OR ACCUSED OF CRIMES

CHAIRMAN: His Excellency Professor S. Glaser, LL.D.,
Polish Minister to the Government of Belgium.

INTRODUCTORY NOTE

by the

Secretary-General.

At the suggestion of the Department of Criminal Science in the University of Cambridge, this subject was included in the Agenda of the Conference held in Cambridge on 14 November, 1941, and Professor Glaser was asked to present an Address upon it to the Conference. As he stated in the opening paragraph of his Address: "Although this problem is certainly not a recent one, but on the contrary has been discussed and considered many times on different occasions, in international conference and congresses, and in particular by the Fifth Committee of the Assembly of the League of Nations, by the Howard League for Penal Reform, the International Penal Law Association, the International Penal and penitentiary Commission, the International Law Association and so on, nevertheless in my opinion this subject was well chosen because it is very topical to-day".* Professor Glaser ended by proposing the following resolution, which was carried unanimously: "That this Conference hereby establishes a Committee to consider the rights which should be accorded to persons suspected or accused of crimes, and to report thereon to the International Commission for Penal Reconstruction and Development"*

In due course a Committee was appointed, under the Chairmanship of Professor Glaser, to investigate the subject and to report to the Commission. It was agreed that the main object of this investigation would be to formulate a code of minimum rules for the treatment of persons suspected or accused of crime; accordingly

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* See Penal Reconstruction and Development, Proceedings of the Conference, held in Cambridge on 14 November, 1941, edited by L. Radzinowicz and J.W.C. Turner, reprinted from the Canadian Bar Review for March, 1942.

Professor Glaser circulated a comprehensive Questionnaire (D.35), which focuses attention on the main aspects of this problem. Those who were invited to provide this information and who acceded to this request were: Mr Terjè Wold, Norwegian Minister of Justice; Professor A.J. Harno, Dean of the College of Law, University of Illinois; Mr A.C.L. Morrison, Chief Clerk Bow Street Police Court; Miss Margery Fry, LL.D., J.P.; Mr C.L. Hodgkinson. Written statements were also sent at a later stage by H.E. the Egyptian Ambassador, Professor Hassan Nachat Pasha and Dr M. de Baer, President of the Belgian Military Court.

After studying the answers to his questionnaire, Professor Glaser drafted his Report (D.36) and his suggestions for a Minimum Code of Rules (D.37). A meeting of Professor Glaser's Committee was held on Thursday, 17 June, 1943 at the British-Norwegian Institute in London. Those present were: Mr Terjè Wold, Norwegian Minister of Justice; Monsieur van Angeren, Netherlands Minister of Justice; Monsieur Gavrilovich, Yugoslav Minister of Justice; Dr Hassan Nachat Pasha, Egyptian Ambassador; Professor S. Glaser, Polish Minister to the Government of Belgium; Professor Cassin and Dr Burnay of France; Dr M. de Baer, President of the Military Court of Belgium; Professor A.L. Goodhart of the University of Oxford; Mr Peter Staboll, Secretary to the Norwegian Ministry of Justice; Mr Andreas Aulie, Norwegian Ministry of Justice; Mr J.C. Maude, K.C.; Miss Margery Fry, LL.D., J.P.,; Mr A.C.L. Morrison, Chief Clerk Bow Street Police Court. The Department of Criminal Science in the Faculty of Law of the University of Cambridge was represented by: Professor P.H.Winfield, Mr J.W.C. Turner (Secretary-General), Dr L. Radzinowicz and Dr R.N. Jackson. The above-mentioned two documents (D.36 and D.37) formed the basis of the deliberations. Each Article of the suggested Minimum Code was discussed in turn and many useful suggestions and amendments were made. It was decided to redraft the Minimum Code in the light of the discussion and to add a short Memorandum. This document (D.38) is before you. It is hoped that it covers the main rules which should be embodied in the criminal legislation of all those States which, notwithstanding the inevitable differences in their economic, social and political structure, yet share a similar conception of criminal justice.

I am sure that all of you will wish me to express to Professor Glaser our thanks for undertaking this task and for the very great amount of time and labour which he has devoted to it.

Cambridge,
July, 1943.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Committee on the Rights to be accorded to Persons suspected or accused of Crimes.

Chairman: His Excellency Professor Dr S. GLASER.

QUESTIONNAIRE

1. What has to be the aim: has the criminal procedure to emphasise the interest of society or should it emphasise the interest of the accused person, or should it be constructed so as to bring about an equilibrium between the two interests?

2. Is it more important to aim at providing that no guilty person should escape, or that no innocent person should be unjustly convicted?

3. If we adopt the last point of view (which in our opinion is the only one consistent with a democratic organisation), is it advisable to accord to accused persons special guarantees in the course of the proceedings? If so, what are the points which should be emphasised especially during the preliminary stages?

4. Should detention before trial be adopted merely as a preventive measure, its purpose being neither the punishment of the individual (for he has not yet been proved guilty), nor the extortion of a confession?

5. If so, what kind of conditions for the application, for the duration, and for the régime, of such detention must be provided in order to protect the accused?

6. In what cases should such detention be applied? Should it be limited to certain offences perhaps in combination with other conditions, e.g., where residence of the accused is unknown, the probability of escape, the probability of influencing evidence, especially by the destruction of the traces of the crime?

7. What should be the maximum of the duration of such detention?

8. Who should be competent to decide if detention should be imposed? Whether only magistrates, excluding the police? Would it be desirable to entrust the decision to a tribunal in public session? If not, would

it, at least, be advisable that prolongation of detention should be ordered only by such a tribunal?

9. Should prison officials constitute a special body under direct judicial control, a body separated completely from the police force?

10. Would it be advisable to entrust supervisory judges with the duty of ensuring that sentences involving deprivation of liberty are carried out in strict accordance with the law?

11. Should the period of detention before sentence form part of the actual sentence, and if so, under what conditions i.e., in every case, or only if for example it exceeds one month, except when the delay was caused by the prisoner?

12. Is it necessary to lay down as a principle that untried prisoners shall in no case be detained together with prisoners whose guilt has been established by the court?

If so, should the two categories be kept in different establishments (i.e., not merely separated in one and the same establishment)?

13. Is it advisable to provide on the one hand for disciplinary punishment of magistrates as well as officials found guilty of abuses in the pre-trial stages of procedure, and on the other to give the man unjustly detained a right to compensation?

14. Is it desirable to enact that the accused person should be brought before the appropriate magistrate with the shortest possible delay, i.e., within thirty hours?

15. Should the nature of the charge against the accused be communicated to him immediately upon arrest, and should he be informed of its exact terms as soon as it is formulated by the prosecution?

16. Should the preliminary stages of procedure, (inquiry, inquest and preliminary examination) be entrusted to a special magistrate, or to the public prosecutor?

17. Should it be prohibited by law to bring the accused before the court hand-cuffed or bound (which places him in a manifest position of inferiority, embarrassing to his defence) - and if so, should it be enacted in effect that "the accused shall appear before the court free and only accompanied by guards to prevent him from escaping" (French Code of Criminal Procedure, Article 310)?

18. Should the accused have the right to see a lawyer as soon as he desires it, and would it be reasonable to require that the interview may be within sight, but not within hearing, of the police or the prison officials?

19. Should legal advice be provided at the expense of the State in every stage of the process if the accused demands it?

20. Should the accused, when necessary, have the services of an interpreter?

21. Should the legal representative of the accused in the preliminary stages of the proceedings have access to the documents and other evidence?

22. Would it be advisable, in order to avoid abuse of the privileges of defence, such as might impede justice, to subject those conducting the defence to some form of disciplinary control? Should a similar control be exercised, on behalf of the accused person, over the prosecution?

23. Is it necessary to lay down as a principle that any statement made by the accused cannot be given in evidence unless it is really a voluntary one?

24. Would it be advisable to put into the criminal code an enactment to the effect that it is an offence to employ moral torture or deceit in order to extract confessions or other statements?

25. Should it be provided by law that the accused should not be obliged to answer any questions, or, perhaps, that he should not be permitted to answer questions which may incriminate him?

26. Should it be provided that no person should be compelled to answer questions except in the presence of his own legal adviser?

27. What importance should be given to a confession? Should, or should not, a confession be treated as regina probationum and as more cogent than any other piece of relevant evidence?

28. Would it be desirable to provide that the accused and his legal representatives should have the right even in the earliest stages of procedure, to call evidence?

29. Should it be lawful in any, and if so in what, cases, to try and to convict a person who is not before the court (for example, because he refuses, or is unable, to return into the jurisdiction)?

30. Should, at any stage of the proceedings, evidence be allowed to be given in the absence of the accused himself or of his legal representative?

31. In cases of appeal by the accused should the court of appeal be empowered to increase the sentence (reformatio in peius)?

32. Should the accused person at all, or any, of the stages of the proceedings have the right to bring before a public tribunal a complaint that his treatment has not been in accordance with the law?

33. What would be the best means of providing guarantees for the preservation of the rights of the suspected or accused person throughout the proceedings against him? In particular:

(a) would it be desirable to embody them in the rules of the constitution?

(b) what kind of international safeguards could be given for the above mentioned rights (e.g., by the mere formulation of an agreed set of "Minimum Rules" for the treatment of accused persons; or by the adoption of such minimum rules through international conventions; or further, by entrusting some international authority with the power of enforcing such rules)?

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

COMMITTEE ON THE RIGHTS TO BE ACCORDED TO PERSONS SUSPECTED OR ACCUSED OF CRIMES

R E P O R T

by

His Excellency Professor S. Glaser, LL.D.,
Polish Minister to the Government of Belgium.

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17 June, 1943.
London.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

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THE RIGHTS to be ACCORDED to PERSONS SUSPECTED or ACCUSED of CRIME

The main purpose of my questionnaire was the elucidation of the following three problems: (1) Should the criminal procedure aim primarily at the protection of the interests of the State, or should it be framed in such a way as to ensure a proper balance between these interests and those of the person accused. If we adopt the latter principle, then: (2) What rights should be accorded to the accused or suspected persons, particularly in the preliminary stages of the proceedings: (3) Can such rights be ensured by law, and if so, in what way? (a) Would it suffice to embody them in the constitution in a form of "minimum rules"; (b) should there be established a special tribunal empowered to exercise a judicial control of the observance of such "minimum rules"; and (c) would it be advisable to provide in addition some kind of international control, such as for instance, the adoption of an international convention, the establishment of an international body empowered with the right of control, etc.

Mr Terje Wold, Professor Albert J. Harno, Miss M. Fry, Mr A.C.L. Morrison and Mr C.L. Hodgkinson were kind enough to answer my questionnaire and I take this opportunity of expressing my best thanks to them for their invaluable help.

With regard to the first problem their opinion was unanimous; they all affirmed a democratic conception of criminal procedure. As was expected when drawing up my questionnaire, they all emphasised the necessity of preserving a just balance between the interests of Society and the rights of the accused person. The ultimate object of criminal procedure should therefore be not only to ensure the punishment of the guilty, but also to avoid any unjust conviction of the innocent. This point of view is the only one compatible with the present conception of a democratic State and is of great importance to the interests of society. As is well known, the conviction of an innocent person can do infinite damage to these interests by undermining the confidence in the administration of justice and the esteem in which the State and its institutions are held. This explains the apparent paradox quoted by Mr Morrison in his answer "that every obviously guilty man who was acquitted placed the administration of law on a surer foundation." Taking this as a starting point, all my collaborators agreed that during the preliminary stage of proceedings certain rights should be granted to persons suspected or accused of crime. What then are these?

Mr Hodgkinson is certainly right when he says that we should make it a guiding principle that all persons should be presumed innocent until they have been proved guilty beyond reasonable doubt. "Should be presumed innocent" also means, should be treated as innocent. The first question which arises here is that of the so-called detention before trial. Such a measure is the most severe of all preventive conditions foreseen by the legislator in order to prevent the accused evading trial and punishment and to avoid evidence being distorted; it can be of far-reaching consequences for the accused and his future, and should therefore be applied very cautiously. The legislation should pre-determine all conditions necessary for its application, and should provide for their strict observance. These legislative provisions should take into account (1) the kind of detention before trial; (2) the conditions under which it is applied; (3) the duration; (4) the regime; (5) the authority empowered to enforce this measure and the method of procedure.

With regard to (1) it was unanimously agreed that detention before trial should be no more than the means of preventing interference with the course of justice.

As to (2), it was rightly pointed out that this preventive measure was an exception, and justified only by the existence of a real danger that the fact of the accused being at liberty might interfere with the course of justice. The exceptional nature of this measure is emphasised because it means the privation of liberty to somebody not yet convicted, and who may be innocent. In view of this the conditions of the application of this measure should be specified by law as clearly as possible, which means that the discretionary power of the appropriate administrative authorities will be strictly limited. The opinion of those to whom the questionnaire was sent was that it would be inadvisable to restrict its application to any particular crime, that is to say, to specify crimes which justify this preventive measure. It was

rightly pointed out that crimes of the same class may vary in gravity, and that the mere legal description of the crime does not in general constitute sufficient proof of the desirability of detaining the accused person (Mr A.C.L. Morrison). On the other hand it was suggested that an essential condition of detention before trial should be the certainty, or at least a high degree of probability, that the liberty of the accused person would endanger the course of justice. He might abscond, commit suicide, tamper with witnesses or destroy evidence. The fact that the accused may not have any fixed abode should undoubtedly be considered as one of the chief reasons justifying such detention, since it renders it more probable that he may escape. Finally it was emphasised that the application of detention should be dependent upon the fact that certain evidence against the accused relating to the charge in question was available.

I agree with all these suggestions. It seems to me, however, that in cases of minor offences detention before trial should be inadmissible. In other words, I think that that this kind of preventive measure should only be enforced with regard to the more important offences, and in my opinion this should be an essential condition.

As to the duration of this kind of detention, it was stressed that the period between the arrest and the final trial should be as short as possible and that the limit of the detention should be determined by the legislator. This limit should not exceed one month or six weeks; in exceptional cases only should the judge be empowered to extend this period, but even then only within the legislative limits. I see no objection to solving this problem in this way. In this connection, however, two other questions were raised. First, that the accused, if detained, should be brought before the appropriate magistrate with the shortest possible delay; it was suggested that a period of 24 hours would be proper, save when Sunday intervened and then it may be as much as 48 hours. Secondly, that the nature of the charge against the accused should be communicated to him immediately upon arrest. This information should contain, at least, the nature of the allegations, as only then will the accused have a proper chance to prepare his defence.

With regard to regime, it was unanimously stated that the accused, not yet being convicted and therefore presumed innocent, should be subjected to the minimum restriction or privation and should enjoy a special regime as far as possible akin to normal living conditions. In particular it was emphasised that it is most essential that special establishments should be provided for this kind of detention, not just separate wings in prisons, so that the accused should never be kept together with prisoners whose guilt has been established by the court. Furthermore, this kind of establishment should not be called "prison", so that the detained person if acquitted could truthfully say that he had never been in prison. In this connection the question was raised that prison officials should constitute a special body, separated from the police force and independent of police control. The reason for such an arrangement is that the task of each body is substantially different. The Police are primarily interested in obtaining evidence and preparing the case for the prosecution; this explains their tendency to bring pressure to bear upon the accused in order to obtain a confession. The task of the prison officials is and should be the proper custody and care of the accused, which is only possible if they are impartial and in no way interested in the issue of the trial. Moreover, the separation of these two bodies of officials is also necessary because it is recognised that prison officials should be specially qualified. In particular, they should have some knowledge of psychology and be interested in educational matters. Miss Fry made an interesting suggestion that visitors, both official and private, should have access to the detained.

One of the most important problems is that dealt with in No.8 of our questionnaire, i.e. the authority to be empowered to enforce this measure of prevention. In this matter too the opinion of all questioned was unanimous. All agreed first that only magistrates should be empowered to decide upon detention, and secondly that such a decision should be taken in public session. Obviously this applies also to decisions concerning the prolongation of detention and the release on bail. In my opinion, in order better to protect the accused, it would be advisable to give him also the right of appeal to a higher court (second instance), should he consider the decision imposing detention unfounded.

As to the question whether supervisory officers should be entrusted with the duty of ensuring that sentences involving deprivation of liberty are carried out in strict accordance with the law, there was a difference of opinion on two points. Drawing from the experience of his country, the distinguished representative of Norway expressed the view that such control is superfluous; the other experts confirmed the need for this kind of control, but while some wanted it to be in the hands of judges (magistrates), others gave preference to outside authorities.

It was rightly pointed out that as detention before trial means far-reaching privation for the accused, everything possible should be done to prevent any possibility of abuse and that therefore the establishment of such a control would be of great importance. The prison authorities should be open to inspection by persons of unchallenged impartiality and integrity, and there should be no grounds for suspicion of any political influence (Mr A.C.L. Morrison). This last argument is a reason for the suggestion that only outside authorities should be entrusted with such control, which would also inspire greater confidence in the public as to the administration of prisons and their officials. On the other hand, it may perhaps seem superfluous to give additional special powers to magistrates for a further control of prison authorities, if the decision on detention and its prolongation is to rest with magistrates and be subject to the revision of a higher court.

As to the question whether the period of detention before trial should be counted as part of the actual sentence, and if so, under what conditions, the answers were in principle rather in favour of such an arrangement, but differed with regard to details. While Miss Fry and Mr Hodgkinson were in favour of such an arrangement in every case, Mr Weld and Professor Harno advocated certain restrictions: "except when the delay is caused by the prisoner" (Mr Weld): "only when it exceeds thirty days, etc." (Professor Harno). Mr Morrison for his part preferred that the power to decide whether the whole or only half of the period of the pre-trial detention was to count as part of the sentence itself should rest with the judge; and he concludes as follows: "It might be well to enact that the judge should not give effect to such a power except for special reasons to be publicly stated when sentence is pronounced". In my opinion the period of detention before trial should form part of the actual sentence in every case, except when the accused himself causes a delay. I fully appreciate that the conditions of such detention are entirely different from those of detention as punishment. Nevertheless detention before trial undoubtedly means privation of liberty and in spite of the fact that it cannot and should not be considered as a punishment, it is only logical to count this period as part of the sentence. I do not see any reason for leaving this decision to the discretionary power of the judge.

As to the question whether the magistrates and officials found guilty of abuses of the pre-trial stages of procedure should be amenable to disciplinary punishment, I agree with the suggestions that this should be so. The improper conduct or motives of the magistrate or official should of course be established beyond any doubt before a disciplinary punishment is applied. In my opinion such a provision would in no way endanger the principle of the independence of the judiciary, as this principle does not apply and should not apply to any acts of abuse.

The second question in this connection was whether a man unjustly detained should have the right to compensation. This was unanimously answered in the affirmative. I agree with the view that the right of the accused to obtain redress should be completely independent of any action for malicious prosecution or false imprisonment, and that an unjustly detained person should have the right to compensation from public funds; there should be no question of damages against officials or magistrates. The latter might possibly harm the administration of justice, as the fear of liability might stop the necessary action of the officials in charge.

Opinion differed as to the problem of who should be competent to deal with the preliminary stages of procedure: executive authorities, public prosecutors or magistrates? I agree with Mr Morrison that enquiries concerning the commission of a crime and its perpetrator should be left to the executive authorities or to the public prosecutor. It is obvious that, at this stage, these officials should not have the right to establish evidence in a definite form. The later stages of procedure where evidence is prepared for the committal to trial should be in the hands of magistrates. It is very important for the accused to have in these stages the guarantees which are ensured by the independence of the judiciary. The question as to whether it should

be prohibited by law to bring the accused before the court hand-cuffed or bound, and if so, whether it should be enacted that "the accused shall appear before the court free and only accompanied by guards to prevent him from escaping" (as is laid down in the French Code of Criminal Procedure, Code d'instruction criminelle, Article 310) met with a unanimous answer in the affirmative. All the experts agreed that the accused should be free from physical restraint and appear "like a free man". Moreover some of them required the abolition of the Dock, as this handicaps the defence and hinders the easy communication of the accused with his legal adviser. This point does not need to be elaborated.

The same applies to the question concerning the right of the accused to consult a lawyer. The opinion was unanimous that the accused should have the right to see a lawyer as soon as he desires, and that the interview should take place within sight but out of hearing of the police or prison officials.

As to the question whether legal advice should be provided at the expense of the State at every stage of the proceedings, should the accused demand it, two of our experts were for such a provision without any restrictions; the others thought that such a decision should rest with the judges and should apply on grounds of poverty only. When making such a decision the judge should take into consideration all the circumstances of the particular case. It was further suggested that the accused should have the right of appeal to a higher court against the refusal of his application for such legal aid. In my opinion it would undoubtedly be desirable to give poor persons the right to apply for legal advice at the expense of the State at any stage of the proceedings and also the right of appeal to a higher court in the case of refusal.

As to the question concerning interpreters, the opinion was unanimous that the accused should be provided with the services of a competent interpreter if need be.

To a further question as to whether the legal representative of the accused should have access to the documents and other evidence even in the preliminary stages of the proceedings, the answer was in the affirmative, but with certain reservations. It was emphasised that the deciding factor should be the interests of justice. It was agreed that the accused and his legal adviser should have every facility to learn the nature of the charge, and should also have access to any relevant documents to be used as evidence against the accused. On the other hand, however, it was recognised that there may be important reasons for not divulging in the early stages of a prosecution, information contained in such documents. A premature disclosure of such information may hinder the later stages of the prosecution and interfere with the detection of the ultimate truth. I personally agree with Mr Morrison's suggestion that the accused should not have an unrestricted right to inspect documents before they have been put in evidence against him, unless they are the actual subject of the charge.

The question concerning special disciplinary control over defence and prosecution was for the most part answered in the negative. It was stated with regard to persons conducting the defence, since they are members of the legal profession, this is sufficient guarantee against any impropriety in the conduct of proceedings. The same applies to those conducting the prosecution. It seems to me that this view can be accepted if it is borne in mind that any such person is liable to punishment at the hands of the law, should he attempt to interfere with the course of justice.

There were no doubts as to whether it should be adopted as a principle that any statement made by the accused cannot be given in evidence unless it is absolutely voluntary. It was unanimously agreed that any statement made as the result of pressure by way of threat or promise, should be considered null and void. Only a voluntary confession in this sense should be admissible in evidence.

On the question of whether the employment of deceit or of mental or physical torture, in order to extract confessions or other statements, should be enacted in the criminal codes as an offence, only one of our experts was in disagreement. He considered this unnecessary if the law as to the rejection of confessions not made voluntarily be strictly enforced. In my opinion, however, in order to prevent any possibility of the occurrence of such abuses, which are not unusual in certain countries, it would be advisable to include in criminal codes enactments of this kind and not be satisfied with the disciplinary measures only.

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The question of whether the accused may decline to answer any questions and whether such questions as may incriminate him should be permitted was as to the first part answered in the affirmative, while as to the second part opinion was divided. Taking as a guiding principle the view that any pressure upon the accused must be eliminated, it is but a natural consequence that the accused should be free to decline to answer questions put to him by the police or magistrates. In my opinion, even in the case of the accused offering himself as a witness, he should be free to decline to answer any question which might incriminate him. On the other hand, if pressure on the accused is really excluded, I do not see why the legislator should have to forbid any questions, even if the answers should incriminate the accused. As I have already pointed out, any rules of the criminal procedure should take into consideration the observance of a right balance between the interests of truth and justice and the protection of the accused.

With regard to the further question whether a person should not be compelled to answer questions in the absence of his legal adviser, a difference was made between the case of a witness and that of the accused. It seems to me that it was rightly emphasised that so far as accused persons are concerned, this principle should be adopted. The presence of such a legal adviser would safeguard the interests of the accused against any excess of zeal on the part of the questioner who might perhaps exert improper pressure. On the other hand, such a provision if applied to witnesses would certainly, in many cases, hamper the criminal procedure.

As to the question of what importance should be attached to a confession, and in particular, whether a confession should be treated as "regina probationum" and as more cogent than any other piece of relevant evidence, the majority agreed that confession should be considered the best proof of guilt provided that first, it was made voluntarily and secondly, the accused was in full possession of his senses. At the same time it was rightly emphasised that such evidence should always be very carefully examined. If there are any grounds for thinking that the accused imagined he would gain some advantage by making a confession, or that he confessed when his reason was temporarily unbalanced, or that he had some ulterior motive such as the protection of someone else, the confession should be scrutinised and put to all possible tests, just like any other evidence. In my opinion this view should be adopted.

The question whether it is desirable to give the accused and his legal adviser the right to call evidence, even in the earliest stages of procedure, was answered in the affirmative, with one exception. Mr Wold observed that "the relevant tribunal should have the final say in the matter when disagreement arises in this connection". Other experts agreed that the accused should undoubtedly have the right to call evidence not only at the trial, but at any preliminary hearing before magistrates, with a view to committal for trial. Mr Morrison very rightly emphasised that the paramount consideration was that the truth should be discovered; therefore, for this purpose, every witness who could throw light upon the question should be heard, and heard at the earliest convenient opportunity, before recollection had faded. It seems to me that this logical and convincing argument cannot be overthrown.

The next question was concerned with the problem whether, and if so when it should be lawful to try and to convict a person in his absence. On this opinions differed. While two of the experts were against such a procedure the others allowed it but with two provisoes: first, only in minor cases (less important crimes); secondly if the accused consented to be tried in his absence, or if his absence was due to negligence on his part. It seems to me that this is in accordance with the interests both of justice and of the accused himself, and should therefore be adopted.

The next question whether at any stage of the proceedings evidence should be allowed in the absence of the accused himself or his legal adviser was in general negatived. The only exception was Mr Wold's view. He admitted such a provision but only in certain cases, e.g. concerning sexual crimes against a child whose evidence should only be submitted to the judge in private and not to a court in public session. I agree with those who claim that evidence may be allowed in the absence of the accused or his legal adviser only with the express wish of the accused, or if his absence is due to his own fault, and also on application for the issue of a warrant of arrest.

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As to the problem whether in cases of appeal by the accused the court of appeal should be empowered to increase the sentence (i.e. to have the right of reformatio in peius) the answer was unanimously in the affirmative. From the point of view of the ultimate aim of criminal proceedings, which is the establishment of truth, this opinion is certainly justified. If the case is re-opened for trial, and the conclusions drawn from the material evidence as well as the sentence pronounced are questioned, it is logical that the court of appeal should have the power not only to reduce, but also to increase the sentence; provided of course that the case dealt with by this higher court is in every respect the same as that dealt with originally. On the other hand, however, this might deter the accused from making use of his right to appeal and thus damage the cause of justice. Furthermore this attitude is difficult to reconcile with the fundamental idea of a democratic procedure, namely the principle of "favour defensionis". It is for this reason that on the continent, in cases of appeal by the accused, "reformatio in peius" is not allowed. I personally agree with the latter opinion.

The suggestion that the accused should have the right to lodge a complaint before a tribunal that his treatment has not been in accordance with law, met with general approval. Such an arrangement would certainly be an effective guarantee against any abuse in this matter. Even so far as treatment in custody is concerned, it would be more useful to give the accused the right to refer to a judicial tribunal than to an executive authority. I would very strongly urge the introduction of such a legal provision.

As to the last and very delicate problem concerning guarantees for the preservation of the rights of the suspected or accused person in all the stages of the proceedings, it was unanimously agreed that such guarantees should be adopted and that some kind of international safeguard should be ensured. The details of this matter, however, were not discussed.

Professor Barker in his most interesting address on "Declarations of Rights and their bearing on Criminal Science", presented to a meeting of the International Commission of Penal Reconstruction and Development, held in Cambridge in February 1942, distinguishes, in reference to French jurists, two kinds of safeguards of rights. First, such provisions of national law including constitutional law in which it is stated that such-and-such rules should be or have to be observed. Secondly, what he calls the "real guarantees", when the observance of these legal provisions is supervised by special tribunals empowered to abrogate laws contrary to these provisions and to impose punitive sanctions. To such national real guarantees we could add two more of an international character: the establishment of an international court endowed with similar powers and the embodiment into international conventions of the "minimum rules" concerning the rights of the accused.

It seems to me that all these suggestions should be adopted. The above-mentioned rights of the accused should be embodied first of all in the constitution and criminal law of each particular country. In the constitution they should take the form of "the minimum rules". There should be established a double guarantee to safeguard the proper observance of these provisions: one should be of a national, the other of an international character. The first should consist in the establishment of special tribunals of supervision resembling, for instance, those existing in Ireland (High Court) or in Austria and Czechoslovakia (Constitutional Courts). The second should take the form of an international agreement together with an international tribunal, before which any complaints as to the violation of the "minimum rules" could be brought. I attach special importance to this kind of international guarantees as purely national provisions, declarations as well as guarantees are always exposed to the danger of being altered or even abolished altogether.

If we could achieve even a small measure of success an important step would be made towards the improvement of the administration of criminal justice and the better safeguarding of the rights of the persons suspected or accused of crime.

For consideration by the General Purposes Committee, under Item 1, at its meeting at 2.30 p.m. on Wednesday, June 9th, 1943, at 11 Maiden Lane, London, W.C.2.

LONDON INTERNATIONAL ASSEMBLY

Commission I

QUESTIONS CONCERNED WITH THE LIQUIDATION OF THE WAR

WHERREAS the punishment of the authors of this aggressive war and of war crimes has been many times stated as one of the major purposes of this war; and

WHEREAS, on October 7th, 1942, the Lord Chancellor stated that it was proposed to create with the least possible delay a United Nations' Commission for the investigation of war crimes; and

WHEREAS it is desirable that war crimes committed in Allied occupied countries should be tried in those countries; and

WHEREAS it is not desirable that war criminals who are Axis nationals should be tried by their own Courts; and

WHEREAS it is desirable that war crimes committed in Axis territory shall not remain unpunished; and

WHEREAS it is not desirable that the existing jurisdiction of an Allied Municipal Court should be unnecessarily interefered with or curtailed; and

WHEREAS the Heads of Axis States who have tolerated or ordered or taken part in the commission of war crimes should be tried by an International Criminal Court and not by a political body; and

WHEREAS it is necessary that the United Nations adopt the same attitude in regard to the plea of Superior Order in matters of war crimes;

IT IS PROPOSED:

1. That war crimes which come under the jurisdiction of Municipal Courts of the United Nations will in principle be tried by such Courts (either civil, military or mixed), in conformity with the laws of the country concerned;

2. That in any country where this is possible and convenient, the jurisdiction of Municipal Courts (civil, military or mixed) shall, by means of suitable legislation, be extended to crimes committed abroad against their nationals;

3. That an International Criminal Court shall be instituted, and that it shall have jursidiction over the following categories of crimes:

   (a) crimes in respect of which no United Nations' Court has jursidiction (e.g. crimes committed in Germany against Jews and stateless persons and possibly against Allied nationals),

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(b) crimes in respect of which a United Nations' Court has jurisdiction but which the State concerned elects not to try in its own Courts (for reasons such as the following:

where a trial in the country concerned might lead to disturbances,

where a Municipal Court would find it difficult to obtain evidence);

(c) crimes which have been committed or which have taken effect in several countries or against nationals of different countries;

(d) crimes committed by Heads of States;

4. That with regard to the plea of Superior Order, the United Nations shall provide by legislation wherever necessary, that:

(i) an order given by a superior to an inferior to commit a crime is not in itself a defence,

(ii) the Court may consider in individual cases whether the accused was placed in a state of irresistible compulsion and acquit him or mitigate the punishment accordingly,

(iii) the defence that the accused was placed in a state of compulsion is excluded:

(a) if the crime was of a revolting nature,

(b) if the accused was, at the time when the alleged crime was committed, a member of an organisation the membership of which implied the duty to execute criminal orders;

5. That all preparatory measures, national or international, should be taken in the near future in order to allow the punishment of war crimes to take place from the moment when fighting has ceased, and when, according to the Lord Chancellor's statement of October 7th, 1942, the criminals are to be delivered to the Allies.

October 1942.

LONDON INTERNATIONAL ASSEMBLY

CONFIDENTIAL

COMMISSION II ON THE TRIAL OF WAR CRIMINALS

SCOPE AND MEANING OF THE CONCEPTION OF WAR CRIMES

(by . de BAER)

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

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

2. Purpose of the conception of war crimes :

Another preliminary matter which should be made clear is the purpose which we have in view when we draw a line of demarcation between war crimes and other crimes.

It seems that this object is a double one :

(a) to make a list of those crimes which, in the eyes of the whole of mankind appear as being of such a heinous nature, that their punishment is a matter of vital importance for the future existence and for the morality and sense of justice of the human race;
(b) to establish a difference between two sorts of criminals :
- on one hand those who have committed crimes mentioned in the aforesaid list; the demand for the surrender of those accused will be made and backed by the whole of the Forces of the United Nations either (1) before, as a condition of, or (2) by any armistice terms, or (3) afterwards but by operation of such armistice terms,
- on the other hand those criminals, the demand for surrender of whom will be the individual concern of the country which claims jurisdiction to try them. This will not prevent any country from punishing - nor will it curtail any country's right to punish - the perpetrator of any crime as to which its courts have jurisdiction, nor even from obtaining his

surrendor by another country, but such surrendor will be conditionod, not by tho Armistico terms, but by tho provisions of any extradition troaty which may exist botwoon tho two countrios concornod.

3. Definition proposod :

Several definitions of a war crimo have been suggested : The British Manual of Military Law (no.441) defines it "the " technical expression for such an act of enemy soldiers and " enemy civilians as may be visited by punishment on capture " of the offender." Such a definition however is not much more than a truism, and is of no help whatever to a Court which might be called upon to decide whether an act is a crime or not. This "a posteriori" definition was taken from Oppenheim's "International Law." A far more precise definition is given by Professor Lauterpacht in his Memorandum on Punishment of War Crimes : "such offences against the law of war as are " criminal in the ordinary and accepted sense of fundamental " rules of warfare and of general principles of criminal law " by reason of their heinousness, their brutality, their " ruthless disregard of the sanctity of the human life and " personality, or their wanton interference with rights of " property unrelated to reasonably conceived requirements of " military necessity." This excellent definition which would, without a doubt, be a valuable guide for any judge, would, it seems, not suffer much if it were abridged; moreover, in view of what has been said under § 2 (b), it seems that it would be useful to state in our definition of a war crime, something to the effect that the surrender of the criminals, which is to be demanded in the armistice terms, and their punishment are the concern, not of one individual nation alone, but of the United Nations as a whole, representing civilised mankind. Therefore the following definition is submitted : "outrages such as, by " reason of their heinous nature and of the fact that they are " unrelated to reasonably conceived requirements of military " necessity, are regarded as violations of the customs of warfare " and of the general principles of criminal law the punishment " of which is the concern of civilised mankind." To make this more clear I will submit the following definition in French : " des crimes qui, à raison de leur caractère abominable et du " fait qu'ils n'étaient pas nécessités par les opérations " militaires, sont universellement considérés tant comme des " violations des usages de la guerre que comme des crimes de " droit commun, et dont le châtiment importe à l'humanité " entière."

4. Existing lists of war crimes :

Four lists of war crimes are here given as examples :

(a) According to the British Manual of Military Law (nos.442-443) war crimes can be divided into four classes :
- (i) Violations of the recognized rules of warfare by members of the armed forces.
- (ii) Illegitimate hostilities in arms committed by individuals who are not members of the armed forces.
- (iii) Espionage and war treason.
- (iv) Marauding.

We are concerned only with the first class which includes : "making use of poisoned and otherwise forbidden arms and "ammunition; killing of the wounded;refusal of quarter; "treacherous request of quarter; maltreatment of dead bodies "on the battlefield; ill-treatment of prisoners of war; "breaking of parole by prisoners of war; firing on undefended "localities; abuse of the flag of truce; firing on the flag "of truce; abuse of the Red Cross flag and badge, and other "violations of the Red Cross Conventions; use of civilian "clothing by troops to conceal their military character during

"battle; bombardment of hospitals and other privileged "buildings; improper use of privileged buildings for military "purposes; poisoning of wells and streams; pillage and "purposeless destruction; ill-treatment of inhabitants in "occupied territory."

(b) According to Oppenheim-Lauterpacht the following are examples of the more important violations of rules of warfare :

(i) Making use of poisoned, or otherwise forbidden, arms and ammunition, including asphyxiating, poisonous, and similar gases.

(ii) Killing or wounding soldiers disabled by sickness of wounds, or who have laid down arms and surrendered.

(iii) Assassination, and hiring of assasins.

(iv) Treacherous request for quarter, or treacherous feigning of sickness and wounds.

(v) Ill-treatment of prisoners of war, or of the wounded and sick. Appropriation of such of their money and valuables as are not public property.

(vi) Killing or attacking harmless private enemy individuals. Unjustified appropriation and destruction of their private property, and especially pillaging. Compelling the populations of occupied territory to furnish information about the army of the other belligerent, or about his means of defence.

(vii) Disgraceful treatment of dead bodies on battlefields. Appropriation of such money and other valuables found upon dead bodies as are not public property or arms, ammunition, and the like.

(viii) Appropriation and destruction of property belonging to museums, hospitals, churches, schools, and the like.

(ix) Assault, siege, and bombardment of undefended open towns and other habitations. Unjustified bombardment of undefended places by naval forces. Aerial bombardment for the sake of terrorising or attacking the civilian population.

(x) Unnecessary bombardment of historical monuments, and of such hospitals and buildings devoted to religion, art, science, and charity as are indicated by particular signs notified to the besiegers bombarding a defended town.

(xi) Violations of the Geneva Conventions.

(xii) Attack on, or sinking of, enemy vessels which have hauled down their flags as a sign of surrender. Attack on enemy merchantmen without previous request to submit to visit.

(xiii) Attack or seizure of hospital ships, and all other violations of the Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention.

(xiv) Unjustified destruction of enemy prizes.

(xv) Use of enemy uniforms and the like during battle; use of the enemy flag during attack by a belligerent vessel.

(xvi) Attack on enemy individuals furnished with passports or safe-conducts; violation of safeguards.

(xvii) Attack on bearers of flags of truce.

(xviii) Abuse of the protection granted to flags of truce.

(xix) Violation of cartels, capitulations, and armistices.

(xx) Breach of parole.

(c) The Committee of Enquiry of 1919 provisionally suggested the following heads of charges :

(i) Systematic Terrorism in Belgium, France and elsewhere.

(ii) Wanton Devastation, Destruction of Property and Pillage.

(iii) Illegal Levies.

(iv) Illegal Executions.

(v) Deportation of Civil Population in Occupied Territories and Forced Labour.

(vi) Murder of Hostages.

(vii) Indiscriminate Bombardment from the Air.

(viii) Indiscriminate Bombardment from the Sea.

(ix) Illegal Methods of Submarine or other Naval Warfare.

"battle; bombardment of hospitals and other privileged
"buildings; improper use of privileged buildings for military
"purposes; poisoning of wells and streams; pillage and
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(xi) Violations of the Geneva Conventions.

(xii) Attack on, or sinking of, enemy vessels which have hauled down their flags as a sign of surrender. Attack on enemy merchantmen without previous request to submit to visit.

(xiii) Attack or seizure of hospital ships, and all other violations of the Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention.

(xiv) Unjustified destruction of enemy prizes.

(xv) Use of enemy uniforms and the like during battle; use of the enemy flag during attack by a belligerent vessel.

(xvi) Attack on enemy individuals furnished with passports or safe-conducts; violation of safeguards.

(xvii) Attack on bearers of flags of truce.

(xviii) Abuse of the protection granted to flags of truce.

(xix) Violation of cartels, capitulations, and armistices.

(xx) Breach of parole.

(c) The Committee of Enquiry of 1919 provisionally suggested the following heads of charges :

(i) Systematic Terrorism in Belgium, France and elsewhere.

(ii) Wanton Devastation, Destruction of Property and Pillage.

(iii) Illegal Levies.

(iv) Illegal Executions.

(v) Deportation of Civil Population in Occupied Territories and Forced Labour.

(vi) Murder of Hostages.

(vii) Indiscriminate Bombardment from the Air.

(viii) Indiscriminate Bombardment from the Sea.

(ix) Illegal Methods of Submarine or other Naval Warfare.

(x) Destruction of Hospital Ships.
(xi) Wilful or Reckless Bombardment of Hospitals.
(xii) Ill-Treatment of Prisoners of War.
(xiii) Directions to give "No Quarter."
(xiv) Use of Illegal Methods of Warfare.

(d) The (Interallied) Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties drew the following list of war crimes which was included in the Report presented to the Peace Conference on March 29th, 1919:

(i) Murder and massacres - systematic terrorism.
(ii) Putting hostages to death.
(iii) Torture of civilians.
(iv) Deliberate starvation of civilians.
(v) Rape.
(vi) Abduction of girls and women for the purpose of enforced prostitution.
(vii) Deportation of civilians.
(viii) Internment of civilians under inhuman conditions.
(ix) Forced labour of civilians in connection with the military operations of the enemy.
(x) Usurpation of sovereignty during military occupation.
(xi) Compulsory enlistment of soldiers among the inhabitants of occupied territory.
(xii) Attempts to denationalise the inhabitants of occupied territory.
(xiii) Pillage.
(xiv) Confiscation of property.
(xv) Exaction of illegitimate or of exorbitant contributions and requisitions.
(xvi) Debasement of the currency and issue of spurious currency.
(xvii) Imposition of collective penalties.
(xviii) Wanton devastation and destruction of property.
(xix) Deliberate bombardment of undefended places.
(xx) Wanton destruction of religious, charitable, educational and historic buildings and monuments.
(xxi) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew.
(xxii) Destruction of fishing boats and of relief ships.
(xxiii) Deliberate bombardment of hospitals.
(xxiv) Attack and destruction of hospital ships.
(xxv) Breach of other rules relating to the Red Cross.
(xxvi) Use of deleterious and asphyxiating gases.
(xxvii) Use of explosive or expanding bullets and other inhuman appliances.
(xxviii) Directions to give no quarter.
(xxix) Ill-treatment of wounded and prisoners of war.
(xxx) Employment of prisoners of war on unauthorised works.
(xxxi) Misuse of flags of truce.
(xxxii) Poisoning of wells.

5. Necessity of a revision :

The savage methods of Nazi barbarity are proving these lists to be incomplete : we do not know yet to what extent the imagination of the Gestapo has devised tortures of a new kind, but some documents, published by Allied Governments, already give us some indication as to the degradation to which not only Axis individuals, but responsible persons of authority have sunk : the Note on "German Occupation in Poland" presented by the Polish Government on May 3rd, 1941, the June 1942 Notes and Declarations of the Czechoslovak Government, and "Two Years of German Oppression in Czechoslovakia," the Molotoff Notes on German Atrocities, the Greek White Paper of January 1942, etc..., are evidence that the existing ideas on war crime have to be revised. On the other

hand, modern warfare, and namely aerial warfare which affects not only the fighting forces but the whole civilian population, had led us to modify our conception of war crimes so as to exclude from it some acts which, in the last war, were definite violations of the then existing rules of war. The same can be said about sea warfare : the bombing of ships by aircraft cannot be preceded by a timely warning and has become, however deplorable this may be, one of the usual methods of sea warfare. Finally, it more and more stands out that whereas the subordinates who are charged with the carrying out of some criminal orders may have some responsibility and incur some liability for the way in which they have executed them, the main guilt rests upon those in whom the orders originated, and these should not escape punishment, however exalted may be their rank or position.

6. A suggested provisional list :

It is submitted that in drawing this list we keep in view, rather than crimes as defined by any specific criminal law, any acts which come under the proposed definition, whether they are punishable by all - or by some - municipal laws, or not. It seems that four categories of crimes can be submitted for consideration : (a) illegal warfare, (b) killing, unrelated to military events, (c) acts which by their nature endanger the life of the person to whom they are applied, (d) grievous bodily harm or torture. The acts included in these four categories are almost indistinguishable from each other as to their heinousness : inflicting torture is no better than outright murder, and acts such as a mass deportation or segregation in inhuman and unhealthy conditions,or an act such as the Roumanian Col. Nikolaesku's who, in his order n°.24220 ordered all foodstuffs and clothing to be taken from the population, which was left to die by starvation and exposure, are not less cruel than killing by shooting.

In the first category : illegal warfare, might be included :

(i) Making use of poisoned or otherwise forbidden arms and ammunition, including asphyxiating, poisonous, and similar gases or methods.
(ii) Attacks of hospital ships.
(iii) Refusal of quarter.
(iv) Killing of the wounded.
(v) Use of civilians as a screen for troops, or for clearing minefields or removing mines, or for any other work immediately connected with actual fighting.

In the second category : killing unrelated to military events :

(i) Common murder - or mass murder.
(ii) Putting hostages to death.
(iii) Execution ordered by a court which was either (a) composed of persons some of whom have no authority to sit in it, or (b) without jurisdiction as to the person or the act, or (c) imposing a sentence in violation of the law.
(iv) Causing death by wilful starvation of populations, by excessive removal of foodstuffs or by depriving persons of shelter, clothing and/or other means of sustenance.
(v) Causing death of civilians or prisoners of war by compelling the sick and wounded to work.
(vi) Causing death of survivors by giving orders destined to prevent the saving of their lives, when such saving was possible.

In the third category : acts which by their nature endanger the life of the person to whom they are applied :

(i) Compulsory enlistment of civilians in enemy forces,

or in dangerous war work.
(ii) Inhuman internment of segregation.
(iii) Mass deportation.
(iv) Abduction of women with the object of prostitution.

In the fourth category : grievous bodily harm or torture, physical or moral :
(i) Serious ill-treatment of wounded or prisoners of war.
(ii) Torture of civilians in any form.
(iii) Abduction of children.

7. It will be noticed that I have tentatively left out of this enumeration crimes such as looting, arson, wanton destruction, forced labour, bombardment of undefended places and hospitals, destruction of merchant and fishing ships, etc.., and even the crime of rape. It is not, I repeat it, that I feel no horror for those crimes, but that, for practical purposes, the demand for surrender of criminals in the Armistice should be limited to the most heinous and objectionable crimes. As to the crimes cited in this paragraph, it goes without saying that those who have committed them will, if they can be traced, be surrendered and tried by the usual channels.

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

CONFIDENTIAL

LONDON INTERNATIONAL ASSEMBLY

COMMISSION II ON THE TRIAL OF WAR CRIMINALS

THE PUNISHMENT OF WAR CRIMINALS

Memorandum by Dr. Bohuslav Ečer,
Barrister-at-Law, and Deputy Mayor of Brno

On October 8th, 1942, the newspapers published a declaration by Mr. Summer Welles, according to which the inter-Allied Commission dealing with war crimes "will deal chiefly with people directly responsible for war atrocities", and it still remains a question "whether Hitler will be one".

This declaration arouses the impression that certain politicians in the United States of America do not regard the launching of a war of aggression, nor hence, a war of aggression in itself, as a crime, but only the "atrocities" committed in the course of the war, and that the penal responsibility of Hitler, not only for the war, but even for "war atrocities" is doubtful.

We must dispose of this confused thinking and remove all such doubts.

In 1919 the "Commission for War Responsibilities", - the historical predecessor of the Commission now being considered, - in its report of March 24th, intended for the preliminary meetings of the Peace Conference, unanimously adopted a point of view which can be summed up as follows : a war of aggression, although morally to be condemned, is not prohibited under international law. It is a legal course of action. There is no law under the terms of which war is a criminal offence and punishable as such. Consequently, any attempt to apprehend and punish those to whom the war is due, is at variance with the two classic and fundamental principles of penal justice : nullum crimen sine lege et nulla poena sine lege (there is no crime if there is no law against it, and there is no punishment if there is no law which provides it).

In 1914 this war was correct from a juridical point of view, but it would be wrong in 1939/42, for since then, the juridical position underlying the criminal character of a war of aggression has radically changed : the Briand-Kellogg Pact denounces a war of aggression. It is true that the Pact is not couched in the terms of a penal code. Its wording is adjusted to the technique demanded by the setting up of standards of international law. In spite of this defect in its wording, however, its purpose is clear if, without any quibbling about the phraseology and seek to establish its spirit, contents and aim, it prohibits aggressive warfare, which it declares illegal and denounces as criminal. Briand rightly declared on August 28th, 1928, on the occasion of the signature of the Pact, and with the enthusiastic approval of all the representatives of the signatory countries that war of such a kind was now at last stripped of all legal attributes, that henceforward it was stigmatised as illegal and outlawed, and that anyone who declared such a war would be a criminal.

M. Descamps, a Belgian expert in international law, and a representative of his country at many international negotiations, expressed himself to the same effect. In his opinion, what the Pact achieved was "thorough, complete and absolute condemnation of war as an institution" (the only exception being war as a legitimate means of defence, or as an implement of sanctions imposed by the

League of Nations).

Mr. Georges Scelle, the French expert in international law, said that the Kellogg Pact did away with the right to make war (except in the two cases just mentioned), and that its thesis has met with an acceptance wide enough to render any recourse to aggressive warfare an international crime. Other experts in international law who have expressed the same point of view could be quoted, but the wording of the Pact and its interpretation by the three above-mentioned authorities will, I think, suffice to enable us to reach the following conclusion :

1. Aggressive warfare, in itself, even if waged without "atrocities" and in full compliance with the conventions of The Hague and Geneva, is a crime.

2. Those who launched an aggressive war by seizing Czechoslovakia on March 15th, 1938, and attacking Poland on September 1st, 1939, and their accomplices are criminals who can and must be apprehended, tried, sentenced and punished. Those people consist of Hitler, the Government of the Third Reich and their accomplices. Their penal responsibility is beyond all doubt. The Briand-Kellogg Pact satisfies the first condition for the establishment of their penal responsibility : nullum crimen sine lege.

The questions which now remain are :

(a) What penalties should be inflicted upon them?

(b) What tribunals should try them?

I refrain from any attempt to answer those two questions, which I hope to make the subject of a more detailed exposition. Within the limits of this statement I can venture only on the following comments :

The condemnation of aggressive warfare by the Briand-Kellogg Pact does not provide for any sanctions. This is a short-coming. The Pact does not satisfy the second classic condition of penal law : nulla poena sine lege.

How is this short-coming to be remedied? It was the famous German jurist Ihering who indicated the means of doing so when he said that in the case of any outrageous crime it must be punished irrespective of whether the appropriate penal law can be discovered.

Thus, Ihering concedes that an outrageous crime, - and surely the present war is the most outrageous of crimes, - should be denounced and punished even without the existence of any relevant law at the time when it was committed. We do not need to go as far as Ihering in this respect, for at the time when the present war was launched, there existed an international standard, an enactment of international law which prohibited it. The only detail left unspecified was the penalty. This can be done ex post without inflicting any injustice upon those responsible for the war and their accomplices, by arranging that the tribunal which tries them is authorised to pass sentence "by analogy", an authority which, in certain cases, even what are known as classic penal codes impart to the judge.

But by analogy with what crime(s) are those responsible for the present war to be tried? If aggressive warfare is prohibited as an international crime, the operations which it involves,- even though they are free from atrocities, - comprise, in accordance with the penal codes of all the countries which have been attacked and invaded, one long series of such offences as murder, robbery,

arson, etc.. etc.. In nearly all courts the penalty for those crimes on a large scale is death.

If Hitler and his henchmen are condemned to death as the instigators of the present total war, will anyone venture to suggest that an injustice has been committed? Or will anyone maintain that Hitler's responsibility admits of doubt?

As regards the question of what tribunal should try and sentence those responsible for the present war, I limit myself, for the time being, to reply without any detailed comment : a high international tribunal composed of judges representing all the countries at war with Germany, and to this tribunal all the countries concerned will assign their penal jurisdiction for this special case.

This tribunal should not be set up after the victory, but, for reasons which I should prefer to elucidate on another occasion, it should be set up forthwith, in order to sit in judgment upon an outrageous crime, shamelessly avowed, and to pass sentence on those who committed it, so that after this war the only thing left would be to implement the s entence.

The juridical position of the problem presented by "war atrocities" is very simple. These are crimes in accordance with the penal code of each of the countries attacked andinvaded by Germany. The criminal character of these acts has never been in doubt, and in 1919 the "Commission for War Responsibilities" which was then set up, unanimously passed a resolution which was recorded in its above mentioned report, and which is fully applicable to present conditions : "Every belligerent country is entitled, in accordance with its own legislation, to set up a civil or military court, for the purpose of trying cases of this kind."

In my opinion these national tribunals should likewise be set up forthwith, to sit in judgment upon outrageous crimes which have not been denied by their perpetrators and for which there is ample confirmatory evidence, - such crimes as the utter destruction of the villages of Lidice and Lezaky, and similar enormities in Poland, Jugoslavia and elsewhere. These tribunals should deal also with other crimes, the perpetrators of which are definitely known. These tribunals should pass sentence on those criminals forthwith, and in accordance with the codes of the countries against which their crimes were committed. There is no juridical obstacle to this procedure, - on the contrary, there are several reasons in favour of it. After the victory, the only remaining task will be to put these sentences into effect.

Hitler's responsibility for "war atrocities" is a matter which does not admit of any doubt. He ordered them to be perpetrated as one of the logical means of waging total warfare. This question cannot remain an "open" one for a single moment.

In conclusion, I should like to say that never in our history has there been such an eager craving for justice as there is today. This craving is perhaps even stronger than the desire for food. To satisfy this moral need is just as urgent a task as that of satisfying material needs. I may add, too, that no new order is possible before the site upon which we desire to construct it has been properly cleansed.

Human society, then, which has been attacked, maimed and outraged by criminal aggressors is entitled to bring them to trial and to inflict due penalties upon them. Nor is this all : its duty is to do so, for if it does not, it will itself suffer the penalty of destruction. There is a Brahmin adage which says :

"The universe would lapse into chaos if punishment failed in its duty."

That is why we must not repeat the mistakes which were made in 1919. If the nations were again disillusioned in this way, the results would, this time, be far more serious.

October 10th, 1942.

CONFIDENTIAL 29.3.1943.

LONDON INTERNATIONAL ASSEMBLY

COMMISSION I. FOR QUESTIONS CONCERNED WITH THE LIQUIDATION OF THE WAR

L'ORDRE SUPERIEUR ET LES CRIMINELS DE GUERRE ALLEMANDS

(Par Dr. B. ECER)

Introduction.

1. Le but de mon rapport :

(a) Répondre à la question : quelle valeur juridique peut être attribuée à l'excuse de l'ordre supérieur dans la défense d'un Allemand qui a commis un ou des crimes de guerre.

(b) Contribuer par cette réponse à la formation d'une attitude commune des juristes alliés qui pourrait trouver son expression juridique soit dans une convention internationale (comme la norme du droit international pour la Cour Criminelle Internationale à créer), soit dans l'adaptation de la législation nationale dans les pays où cette législation n'est pas suffisante ni assez claire.

2. Difficulté :

Il y a lieu de faire face à une difficulté d'ailleurs générale partout où l'on aborde le problème de la punition des auteurs de cette guerre et des crimes de guerre.

La difficulté consiste dans le fait que les notions, principes et normes du droit positif international ou national, se trouvent en opposition vis-à-vis d'une réalité moralement et juridiquement bouleversée par le nazisme et la guerre totale. Les forces criminelles ont brisé les cadres du droit positif.

J'indique cette difficulté générale pour élucider le terrain et pour montrer dans mes conclusions et dans la proposition finale certains moyens qui permettent de surmonter cette difficulté en ce qui concerne le problème partiel qui est le sujet de mon rapport.

CHAPITRE I.

L'essence du problème de l'ordre supérieur et sa solution dans le droit positif.

Je me réfère au rapport de MM. de Baer et de Moor en ce qui concerne les détails. Je ne désire qu'ajouter :

1. Un ordre criminel du supérieur est une exception dans les pays civilisés; il provoque un conflit entre deux devoirs : obéir à la loi ou obéir à l'ordre. Pour le subordonné la situation de la contrainte morale est créée.

2. Le législateur se trouve dans ce cas là dans un dilemme : quelle obéissance doit avoir la priorité?

3. La solution de ce conflit dans les codes pénaux des diverses nations n'est pas uniforme. Grosso modo on peut distinguer trois systèmes de solutions :

(a) L'ordre du supérieur est une excuse absolue si certaines conditio formelles sont remplies. C'est, par exemple, le système du Code Militaire britannique.

(b) L'ordre du supérieur est une excuse relative, c'est-à-dire en général l'ordre du supérieur excuse, mais cette excuse est inadmissible si le supérieur a ordonné un crime évident. C'est le système, par exemple, du Code Militaire tchécoslovaque et du Code Militaire allemand cité par M. de Baer dans son rapport (art. 47).

(N.B. Cette disposition allemande n'est pas une disposition nazie! Elle a été reprise de la République de Weimar à cause de la méfiance envers l'armée.)

(c) L'ordre du supérieur ne constitue en règle aucune excuse. Exceptionnellement il est un fait justificatif à condition que le subordonné ait été amené expressément à l'état de contrainte irrésistible. C'est le système, par exemple, du droit pénal général tchécoslovaque.

(N.B. En ce qui concerne les droits pénaux belge et hollandais voir le rapport de MM. de Baer et de Moor.)

Mais tous les systèmes des codes pénaux des différents pays sont basés sur une supposition commune : que le subordonné est contraint contre sa volonté d'exécuter un ordre criminel. Dans ce cas là il est un instrument du supérieur. Par contre s'il est moralement d'accord avec l'ordre criminel, il n'est plus un instrument impunissable, mais un co-auteur ou au moins un complice.

CHAPITRE II.

Une réalité nouvelle.

J'arrive maintenant aux crimes commis par les Allemands.

Ici je suis obligé de sortir du point de départ suivant : c'est un fait fondamental que le régime Nazi a créé une situation morale inouïe et imprévue par les codes pénaux classiques et par la doctrine pénale classique, une situation dans laquelle il n'y a pas seulement des individus criminels, mais de larges catégories entières du peuple qui sont d'avance d'accord avec tous les crimes, qu'elles acceptent les ordres criminels non comme une contrainte mais au contraire comme une chose naturelle correspondant à leur propre volonté criminelle et pervertie. C'est le cas du peuple allemand. Si nous sortons de ce fait historique, il sera plus facile de surmonter les difficultés indiquées ci-dessus et d'y trouver une solution exigée par cette nouvelle réalité morale et sociologique.

CHAPITRE III.

Les criminels volontaires.

Les crimes de guerre sont exécutés de la part des Allemands :

A. par les formations du mouvement nazi, c'est-à-dire le parti nazi N.S.D.A.P. - S.A. (Sturmabteilungen) - S.S. (Schutzstaffeln) - Waffen S.S.;

B. par l'appareil civil de l'Etat (policier - notamment la Gestapo - , administratif et judiciaire);

C. par l'armée.

Il faut naturellement se rendre compte du fait que l'appareil de l'Etat (civil et militaire) n'est pas encore complètement nazifié. Le nazisme y domine naturellement toutes les positions importantes.

Donc il y a lieu d'examiner chacune de ces catégories séparément. Il faut examiner le recrutement de leurs membres, leurs principes d'organisation et leur but, car il est évident que l'excuse de l'ordre supérieur a une valeur toute différente dans la défense d'un Himmler que dans la défense d'un soldat "Hirnschal".

La base de mon examen sont les documents suivants :

1. Organisationsbuch der N.S.D.A.P., édition 1940. Editeur : Reichsorganisationsleiter der N.S.D.A.P. Livre contenant les règlements d'organisation du parti. (Citation : Org.)

2. Die S.A. Geschichte, Arbeit, Zweck u. Organisation der Sturmabteilungen des Führers u. der Obersten S.A. Führung. Auteur : Dr. Ernst Bayer, édition 1938 - Berlin. Livre contenant l'histoire, le travail, le but et l'organisation des troupes d'assaut du Führer et du commandement des S.A. (Citation : S.A.)

3. Die S.S., Geschichte, Aufgabe u. Organisation des Schutzstaffeln der N.S.D.A.P. Auteur : Gunter d'Alauen . Livre contenant l'histoire, la tâche et l'organisation des troupes de protection du parti national-socialiste. (Citation : S.S.)

4. Grundfragen der deutschen Polizei, Berlin 1936. (Les questions principales de la police allemande.) Ensemble des rapports de Frank, Himmler, Best et Höhne. (Citation : Frank).

5. Die deutsche Polizei. (La police allemande.) Auteur : Dr. Werner Best, S.S. Brigade-Führer, actuellement Ministre du Reich à Copenhague, édition Darmstadt 1941. (Citation : Best).

6. Staats u. Verwaltungsrecht im dritten Reich. (Droits constitutionnel et administratif dans le IIIe Reich.) Auteur : Dr. Otto Meissner u. Dr. Georges Kaisenberg, édition Berlin 1935. (Citation : Meissner).

ad. A. Les formations nazies.

1. Le parti.

Chaque Allemand dont le sang est pur et qui n'appartient pas à une loge de francs-maçons, peut devenir membre du parti national-socialiste (Org. p. 5). Chaque membre du parti nazi peut quitter volontairement le parti (Org. p. 6).

Les devoirs d'un membre du parti nazi sont énumérés à la page 7 de Org. Le plus grand devoir, l'obéissance absolue au Führer et aux autres chefs du mouvement, est basé sur deux principes : (a) le Führer a toujours raison, (b) le droit est ce qui est utile au mouvement national-socialiste et par cela à l'Allemagne (Org. p. 7).

Donc l'adhésion au parti national-socialiste est tout à fait volontaire. Quand un Allemand entre dans le parti il accepte d'avance le devoir d'exécuter chaque ordre de son supérieur sans distinction avec une obéissance aveugle. Mais il peut échapper à cet esclavage criminel en quittant le parti!

2. Die S.A. (Sturmabteilung).

Le chef de l'Etat-Major des S.A., Victor Lutze, a écrit pour la brochure des S.A. citée ci-dessus, une introduction dans laquelle il souligne l'adhésion absolument volontaire à la S.A., de sorte que chaque Allemand qui devient membre de la S.A. ne dit pas "ich muss" (je dois) mais "ich will" (je veux).(S.A. Introduction.) Le principe d'une fidélité et obéissance inconditionnelles est souligné partout dans les ouvrages concernant les S.A. (par ex. : S.A. p. 12).

Les membres de la S.A. sont désignés comme soldats politiques qui font service absolument volontairement. A la page 31 de la brochure

S.A. l'auteur souligne que de grands efforts et de grands succès sont possibles par un dévouement personnel sur la base d'une adhésion volontaire. Il souligne que la loi du service volontaire est la clef même de l'organisation et du travail des S.A. Le même principe est accentué dans le "Organisationbuch" : l'adhésion à la S.A. est en principe une adhésion volontaire (p. 365, Org.). On devient membre de la S.A. par un acte volontaire, on peut la quitter également par une décision volontaire. Le statut de la S.A. donne à chaque membre le droit de quitter la S.A. quand il pense qu'il ne peut plus être d'accord avec la ligne des S.A. ou quand il est d'avis qu'il n'est plus capable de remplir les devoirs qui lui sont imposés par cette adhésion à la S.A. (Org. p. 367).

Donc la S.A. est une organisation politique para-militaire avec des membres volontaires qui ont la possibilité de quitter les S.A. Par leur adhésion volontaire ils acceptent d'avance volontairement et généralement le devoir d'exécuter tous les ordres des dirigeants, Hitler à la tête, sans distinction, même si les ordres sont criminels ou non. Mais il peut échapper à ce devoir criminel en quittant la S.A.

3. Die S.S. (Schutzstaffeln).

La S.S. est une troupe d'élites dont le but original en 1925 était la protection personnelle du Führer et la protection des réunions du parti. En 1929 Himmler est devenu le chef suprême des S.S. Après 1933 le S.S. est devenu l'instrument du Führer pour la lutte spéciale contre l'ennemi interne. L'adhésion au S.S. est aussi volontaire, (Org. p. 418, S.S. p. 23) mais les candidats sont choisis selon des principes très sévères (S.S. p. 18). Le candidat doit avoir toutes les qualités exigées par le racisme (S.S. 11-13). La discipline est des plus rigoureuses (S.S. 13). Un S.S. man est prêt à exécuter chaque ordre du Führer ou du supérieur aveuglement (Org. p. 418). L'homme des S.S. doit être un fanatique (S.S. p. 13), il doit faire preuve d'un dévouement envers le Führer non seulement inconditionel, mais le plus inconditionnel (S.S. p. 11.) Parmi les S.S. il y a deux groupes spéciaux militairement équipés : celui qui est intituló "Totenkopfstandarde" qui est une formation S.S. destinée à la garde des camps de concentration, et le "Verfügungstruppe" formation chargée de missions "spéciales", des massacres, des tortures, etc...

Donc la S.S. est une organisation para-militaire (avec deux groupes militaires) soi-disant d'élite pour la lutte contre l'ennemi interne et pour la protection personnelle du Führer. L'adhésion y est volontaire, mais en devenant volontairement un S.S. man, on accepte d'avance le plus strict devoir d'exécuter chaque ordre, même l'ordre de commettre le pire crime, devant lequel un S.A. man peut-être reculerait. Il peut l'éviter en quittant la S.S. Cette possibilité est plus restreinte chez les S.S. que chez les S.A. La Gestapo recrute ses membres dans les formations S.S.

4. Waffen S.S.

Cette organisation fut créée vers 1936 comme une formation tout à fait militaire du parti Nazi. La Waffen S.S. est devenue une armée spéciale avec sa propre artillerie, aviation, tanks, etc... Elle est indépendante de l'armée mais subordonnée au haut commandement. C'est une organisation pour la protection du régime dans des situations graves ou désespérées soit sur le champ de bataille, soit à l'intérieur du pays. L'adhésion y est volontaire comme pour les S.A. et S.S. L'obéissance y est celle de la S.S.

ad. B. L'appareil civil de l'Etat.

1. La police.

Dans la police il y a des agents qui ne sont pas encore nazis,

mais en général on peut dire que la police est en majorité nazifiée, et que la police politique, la Gestapo, est exclusivement composée des membres des S.S.

Les principes qui dominent toutes les actions de la police allemande sont les suivants :

(a) Frank a déclaré que le fait que Himmler est en même temps chef de toute la police allemande et des S.S. signifie que le travail de la police ne souffrira pas des traditions du droit du passé, le droit n'étant pour la police allemande aucune charge (Frank, p. 1).

(b) Himmler a déclaré en 1936 que le travail policier a été commencé sans regard au droit (Frank, p. 1).

(c) Höhne, professeur de droit et officier de S.S. a déclaré en même temps que le plus grand obstacle pour le travail de la police étaient les dispositions du droit sur la protection d'individus. Ces dispositions étaient insupportables pour la Gestapo et on les a écartées par la suppression des droits constitutionnels. Le Nazisme a libéré la police des chaînes juridiques et introduit un "nouveau principe". (Frank, p. 2.)

(d) Walter Best, actuellement Ministre allemand à Copenhague a écrit dans son livre sur la police allemande, cité ci-haut, que la police allemande est dirigée par les principes fondamentaux du Nazisme, qui sont : (1) le peuple est la réalité de la vie humaine (Best p. 14), (2) au maintien du peuple, il faut sacrifier l'individu (Best p. 14), (3) la volonté du Führer est une loi sans distinction sous quelle forme cette volonté ait été exprimée, soit sous la forme d'une loi écrite ou d'une ordonnance, ou d'un ordre concret (Best p. 21), etc...

Il faut ajouter que Best a défendu le "droit" du peuple allemand d'exterminer les peuples et les races étrangères.

Donc la police allemande se compose des membres volontaires avec le but de combattre les criminels et spécialement les "criminels politiques par tous les moyens, avec une seule limite : la réflexion consciencieuse de la Gestapo! (Best, p. 45.) Le policier allemand peut se libérer de cet esclavage par sa démission.

2. L'administration civile.

Les positions importantes dans l'appareil d'état sont tenues par les Nazis, c'est-à-dire que les hauts fonctionnaires du parti nazi sont en même temps hauts fonctionnaires de l'Etat, mais cette union personnelle de l'Etat et du parti réalisée dans les positions élevées n'est pas encore réalisée dans toutes les positions inférieures de l'appareil civil de l'Etat. Il y a peut-être des fonctionnaires et des agents civils qui ne sont pas Nazis. Pour le fonctionnaire et l'agent civil l'ordre du Führer sans distinction de la forme, est obligatoire textuellement (Meissner, p. 138). Les droits de l'individu n'ont jamais une importance essentielle pour les fonctionnaires civils allemands (Meissner, p. 139). Donc l'adhésion à l'appareil civil de l'Etat est volontaire. L'agent et le fonctionnaire qui y entrent et y restent, acceptent d'exécuter chaque ordre, criminel ou non. Ils sont d'accord au préalable avec le crime. Ils peuvent éviter cette conséquence par leur démission.

3. La Justice.

Le principe d'indépendance des juges est établi, mais c'est une apparence. Les juges qui sont nazis sont obligés de respecter les décisions du parti et depuis le 26 avril 1942 le Führer a le "droit" d'intervenir dans la justice allemande selon sa volonté. Le juge peut naturellement éviter des crimes qui lui sont ordonnés s'il quitte le service. Il en a la faculté. Donc le juge allemand qui passe des jugements criminels, le fait volontairement.

4. L'armée.

L'adhésion à l'armée n'est pas volontaire, mais forcée. Le code militaire allemand n'impose pas au militaire une obéissance inconditionnelle, totale et absolue, comme par exemple le statut des S.A. et S.S. Il impose au militaire une obéissance limitée (voir le rapport de M. de Baer).

La raison de cette différence entre l'obéissance militaire et l'obéissance dans les S.S. et S.A. est probablement justifiée par la méfiance du nazisme envers l'armée. Ainsi un soldat allemand peut refuser un ordre criminel qu'un supérieur lui a donné.

CHAPITRE IV.

Les conclusions et la solution proposée.

A. Les conclusions.

Je laisse à part la question de Hitler et de son Gouvernement. Il est clair que l'excuse de l'ordre du supérieur n'est pas possible ici En ce qui concerne les membres des diverses formations nazies, de l'appareil civil d'Etat et de l'armée, on peut faire les conclusions suivantes :

1. Les membres du N.S.D.A.P., des S.A. - S.S. - Waffen S.S. - Gestapo - ont d'avance accepté la responsabilité pour l'exécution de tous ordres même criminels. Par leur adhésion formelle et volontaire ils ont manifesté leur propre volonté criminelle. Pour eux il n'y a aucune contrainte morale s'ils reçoivent un ordre criminel. Ils sont co-auteurs parce que le crime est voulu par eux-mêmes en accord avec le supérieur. La situation juridique de ces Allemands est similaire à celle de ceux qui deviennent volontairement membre d'un gang criminel. Les crimes qui leur sont ordonnés et exécutés par eux sont leurs propres crimes!

2. Les agents et fonctionnaires de l'appareil civil - policier, administratif et judiciaire - de l'Etat allemand qui ne sont pas - de leur volonté - en même temps membres des organisations et formations nazies énumérées sub. 1. portent eux aussi la responsabilité de leurs crimes commis sur l'ordre d'un supérieur. Car ils font leur service volontairement et ils pouvent démissionner. Une démission peut naturellement avoir pour eux des conséquences matérielles graves. Le danger de ces conséquences ne peut pas constituer un état de détresse ou de nécessité vis-à-vis des crimes odieux ("infamous" a dit le Lord Chancelier le 10 mars 1943), de sorte que l'ordre supérieur pourrait excuser tels crimes. Mais à l'agent ou au fonctionnaire d'Etat ou au juge qui ont refusé d'adhérer au parti nazi et ses formations, un courage ne peut pas être dénié. C'est le signe d'un état moral différent de celui d'un nazi. Ici la présomption d'un accord préalable avec les crimes ne serait pas justifiée. Par conséquent un agent, fonctionnaire ou juge non-nazi qui a commis un crime de guerre sur l'ordre du supérieur devrait être autorisé de se défendre par l'excuse de l'ordre du supérieur à condition qu'il puisse prouver qu'il a commis le crime dans l'état d'une contrainte vraiment irrésistible (p. ex. : sous la menace de mort soit contre lui-même soit contre sa famille). La Cour compétente décidera selon les circonstances concrètes de chaque cas. Il est impossible de les connaître et de les énumérer d'avance. On peut trouver dans la jurisprudence de chaque pays un assez grand nombre de précédents qui pourraient servir de guide.

3. Le membre des forces armées n'est pas en général un volontaire. Il est obligé de servir. De son adhésion aux forces armées on ne peut rien conclure à l'égard de son état moral. Il est obligé d'obéir à l'ordre. Mais d'autre part il est protégé contre l'obéissance à l'ordre criminel par la disposition du Code Pénal Militaire citée dans le rapport de M. de Baer. S'il obéit à l'ordre criminel, il est même punissable. L'excuse de l'ordre supérieur ne joue pas en principe.

Mais si un militaire non-nazi est forcé de commettre un crime par l'ordre de son supérieur sous la menace de mort immédiate, l'excuse pourrait être invoquée s'il prouve la contrainte irrésistible. La Cour compétente décidera comme dans les cas sub. 2.

4. Enfin pour éviter tout malentendu je tiens à souligner que :

(a) les crimes commis sans l'ordre soit par les Nazis soit par les non-Nazis sont en dehors de mon rapport;

(b) l'adhésion volontaire au parti nazi et ses formations est un indicateur objectif d'un état moral (subjectif), mais rien de plus.

B. La solution proposée.

De mon rapport et de ses conclusions résulte la solution suivante du problème :

L'ordre du supérieur ne doit constituer en principe et en général aucune excuse pour les criminels de guerre allemands. Cette excuse est par conséquent inadmissible :

(i) Absolument :

(a) si le criminel accusé était membre du N.S.D.A.P. - S.A. - S.S. - Gestapo - Waffen S.S. sans distinction du degré de son crime, sans distinction si l'accusé a commis ce crime comme membre d'une unité nazie ou comme membre de l'appareil d'état politique, administratif, judiciaire ou comme membre des formations armées;

(b) si le crime commis par un non-Nazi était odieux ("infamous").

(ii) Relativement :

si le criminel accusé, n'étant pas de sa volonté membre d'une organisation énumérée ci-dessus, a commis un crime de guerre non-odieux dans l'état de contrainte irrésistible créée par l'ordre criminel du supérieur.

Un tel accusé peut faire valoir cette excuse et c'est la Cour compétente qui décidera selon des circonstances concrètes si l'ordre du supérieur est ou non dans ce cas là un fait justificatif.

CONFIDENTIAL

LONDON INTERNATIONAL ASSEMBLY

COMMISSION I. FOR QUESTIONS CONCERNED WITH THE LIQUIDATION OF THE WAR

116, Eaton Square, S.W.1.

14th April, 1943.

SUPERIOR ORDER.

The answers which I have received up-to-date reflect a great variety of views.

1. First of all I would like to remind the Members that it was understood, at the meeting of March 15th that a discussion would lead nowhere if we did not all decide to approach the subject from the same angle : at our first meeting the majority decided that I would draft a proposal based on the idea that Superior Order is a defence, and that I would then try and state the exceptions, i.e. the particular cases in which it is not a defence.

This I did.

At the end of our second meeting, after a long discussion, it seemed to appear that the Commission now felt that Superior Order is never a defence.

I then wrote my letter of April 8th drawing your attention to the consequences which this last view would involve.

In this paper I am dividing the opinion of the members into :

I. Those who feel that Superior Order is a defence, but that there are exceptions to that rule;

II. Those who feel that it is not a defence, but who allow exceptions to that principle ; and

III. Those who feel that Superior Order is never a defence, for war crimes.

2. Several Members have expressed the idea that the admission of the defence should be left entirely to the Court. All Courts have the power to decide whether a defence is a good one or not, and by saying that the decision on the principle should be left to the Court we are not contributing to solve the question. Moreover if each individual court is left to decide this question of principle, many different conflicting solutions will be given to it, whereas unity is the aim we should have in view.

The Commission will of course conform to the decision of its majority, but I would like to point out that what we are precisely expected to do, is to state some legal principles which, if they were internationally agreed upon, would serve as a guide to the Courts, so that the jurisprudence of the Courts would reach some sort of harmony in respect of Superior Order.

3. The third point I would like to make is that opinions such as : "In respect of war crimes.....etc." (all of which are heinous and revolting) "Superior Order shall be a defence except..... in the case of a heinous or revolting crime", seem to me to include a contradiction. If there is none, would the proposers please make a concrete discrimination between the crimes which are "revolting" and those that are not.

4. Finally we have Mr. Latey's proposal which I assume to be :

(a) SUPERIOR ORDER is - and can never be - a defence,

(b) on the other hand we should revise and restrict our list of war crimes, so that it includes only a few of the most heinous and major crimes.

This proposal certainly deserves consideration. In view of its discussion, perhaps Mr. Latey will select from our list those particular major war crimes which he has in view.

5. Should any of the Members wish, either to revise their own opinion, or to propose amendments to any of the enclosed proposals, I will be grateful if they will do so before SATURDAY, 24th instant.

I wish to thank the members who have contributed, for their

kind collaboration.

I. MEMBERS WHO FEEL THAT SUPERIOR ORDER IS A DEFENCE, BUT THAT THERE ARE EXCEPTIONS TO THAT RULE.

IT IS PROPOSED :

that, in respect of war crimes, the list of which has been previously adopted,

SUPERIOR ORDER shall be considered as a defence, except :

CHAIRMAN's SUGGESTION :
(a) when the act charged was in excess of - or not covered by - the order given,
or(b) when the person who executed the order was in such a position that he had the time and the opportunity to question its lawfulness and to exercise some discretion as to its execution,
or(c) when the person who executed the order was at the time, or afterwards became, a member of an organisation instituted with a view to the commission of such acts as are considered heinous by the majority of the civilised nations.

M. ROLIN's SUGGESTION :
(a) (like the Chairman's suggestion),
or(b) (like the Chairman's suggestion),
or(c) when the accused person has been ordered to commit the crime in his capacity of member of an organisation of which he has become or remained a member knowing that this membership implied the execution of criminal orders,
or(d) when the act charged was of a heinous nature.

DR.LEHMANN'S SUGGESTION :
(a) (like the Chairman's suggestion),
or(b) when the accused knew or must be presumed to have known that the order had for its object or related to the committing of a crime, or an obvious and flagrant breach of the laws of war,
or(c) when the accused executed the order in his capacity as a member of an organisation of which he had become or remained a member knowing that such membership implied the execution of orders having for their object or relating to the committing of crimes.

CZECH SUGGESTION No. 2 :
In order to make the Czech proposal (signed by Messrs BENES, CISAR, ECER and SLAVIC) fit in with the general frame, the Chairman has redrafted part of it in the following way :

- when the accused executed the order in a state of irresistible compulsion; such compulsion however cannot be said to have existed :
(1) when the crime was of a revolting nature,
or (2) when the person who executed the order was at the time or afterwards became a member of an organisation, the membership of which he must have known to imply the duty to execute criminal orders.

LORD MAUGHAM'S SUGGESTION :
(a) in the case of Generals and those of a superior rank,
or(b) (like the case (a) of the Chairman's suggestion),
or(c) (like the case (b) of the Chairman's suggestion).

DR. BISSCHOP'S SUGGESTION : (1) when the intellectual development of the person who received the order and executed it justifies the presumption that he fully understood the criminal purport of it and agreed with it and voluntarily obeyed it,
or(2) when a general order is given and the details of its execution are left to the person who performs the act.
or(3) when the act which constitutes the crime was in excess of - or not covered by - the order given,
or(4) when the person who executed the order was in such a position that he had the time and the opportunity to question its lawfulness and to exercise some discretion as to its execution,
or(5) when the accused person has been ordered to commit the crime in his capacity of member of an organisation of which he has become or remained a member knowing that this membership implied the execution of criminal orders.

DR. WINKEL'S SUGGESTION : (a) (like the case (c) of Mr. Rolin's suggestion),
or(b) when the act charged was a war crime, unless committed under coercion.

DR. de MOOR'S SUGGESTION : (a) when the Axis subordinate is considered to be aware that the order concerned a common or a war crime, if the subordinate is doing his service voluntarily, that means : if he is or if he has been a member of the N.S.D.A.P., of the S.A., of the S.S., of the Gestapo or of the Waffen S.S.,
or(b) every Axis subordinate, who is not a member of those Nazi formations, is also considered to be aware that the order concerned a common or a war crime, but that he even then can appeal to the plea of superior order in so far as he can prove that he committed the crime in a state of irresistible compulsion.

MR. S.N.GHOSE SUGGESTION : (a) when the charges brought against an accused are considered heinous by the majority of the civilised nations,
or(b) (like case (a) of the Chairman's suggestion),
or(c) (like case (b) of the Chairman's suggestion),
or(d) when the person who executed the order was at the time, or afterwards became a member of an organisation association with which implied the execution or commission of heinous acts or orders.

II. MEMBERS WHO FEEL THAT SUPERIOR ORDER IS NOT A DEFENCE, BUT WHO ALLOW EXCEPTIONS TO THAT PRINCIPLE.

IT IS PROPOSED :

that, in respect of war crimes, the list of which has been previously adopted,

SUPERIOR ORDER shall not be an absolute defence :

MR. VERNON GATTIE'S SUGGESTION : The Court may acquit the accused person or mitigate the punishment imposed where the circumstances attending the carrying out of the order in question were such as in the opinion of the Court justify such acquittal or mitigation.

M. MATTHIEU'S SUGGESTION : SUPERIOR ORDER shall not be considered as a defence ;

However, the Courts may take into account the amount of discrimination and discretion the person who executed the order was in a position to exercise as to such execution.

III. MEMBERS WHO FEEL THAT SUPERIOR ORDER IS NEVER A DEFENCE FOR WAR CRIMES

CZECH SUGGESTION No. 1 : (Messrs. BENES, CISAR, ECER and SLAVIC)

SUPERIOR ORDER is not a defence.

MR. LATEY's SUGGESTION : I strongly urge that we very carefully revise our list of war crimes and make it a principle that to charges of such War Crimes SUPERIOR ORDER shall be NO DEFENCE.

CONFIDENTIAL

LONDON INTERNATIONAL ASSEMBLY

COMMISSION I. FOR QUESTIONS CONCERNED WITH THE LIQUIDATION OF THE WAR

PRELIMINARY REPORT ON THE PLEA OF SUPERIOR ORDER

(by Dr.J.M.de MOOR)

The problem of the plea of superior order has two special aspects :

I. JUS CONSTITUTUM.

The Sub-Committee on the Defence of Superior Order of the Cambridge Committee concerned with crimes against international public order considered especia lly the "jus constitutum".

They sent a questionnaire to all the members of the Committee, and received many answers.

Unfortunately the Report of that Sub-Committee has not yet been finished, and I have no right to publish the answers, with the exception of two of them, viz. those of Dr. de Baer and of myself.

Therefore to this short introduction I join :

(a) the questionnaire,
(b) the answers of Dr. de Baer,
(c) the answers of myself.

As a result of the joint answers on the questionnaire it can be said that generally speaking the existing national regulations are fairly satisfactory. The judges have a great deal of liberty on this point, and in my opinion, if a general principle is given for the jurisdiction by the International Criminal Court, the National Courts will follow readily.

II. JUS CONSTITUENDUM.

It will be necessary for the new International Criminal Court to give some general rules on the Defence of Superior Orders.
But I think that these ought to be not too strict, and not too much elaborated, whereas its details will be expressed in a natural way in the jurisprudence of the Court.

Two general principles will be sufficient :
(a) The defence of superior orders will not be recognised where the perpetrator was aware, or could be aware, that his deed was infamous.
(b) The prosecution shall include not only the high-placed individuals who inspired and directed the crimes, but also those who have organised them and taken a responsible part in carrying them out.

These principles have of course to be elaborated, but they may be useful as a basis for a preliminary discussion.

For the other points I refer to the appendices.

APPENDIX I.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

COMMITTEE CONCERNED WITH CRIMES AGAINST INTERNATIONAL PUBLIC ORDER

Sub-Committee on the Defence of Superior Orders.

CONFIDENTIAL

LONDON INTERNATIONAL ASSEMBLY

COMMISSION I. FOR QUESTIONS CONCERNED WITH THE LIQUIDATION OF THE WAR

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APPENDIX I.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

COMMITTEE CONCERNED WITH CRIMES AGAINST INTERNATIONAL PUBLIC ORDER

Sub-Committee on the Defence of Superior Orders.

Dear Member,

It will be of great assistance to the Sub-Committee if you will be good enough to prepare a statement as to the position of the law of your country on the following questions :

(1) to what extent does the criminal law of your country recognise the plea of superior orders as a justification for illegal acts?

(2) to what extent, if any, does your military law differ in this respect from the general criminal law of your country?

(3) what qualifications, if any, with reference to the lawfulness of superior orders, does the law of your country recognise with regard to the duty of the soldier to obey the orders of superior officers?

(4) is there any information available with regard to the practice, during the first World War, of the military courts of your country with respect to the plea of superior orders put forward by members of enemy armed forces accused of a war crime?

Yours sincerely,

J.M. de MOOR.

APPENDIX II.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

COMMITTEE CONCERNED WITH CRIMES AGAINST INTERNATIONAL PUBLIC ORDER

Sub-Committee on the Defence of Superior Orders.

I. To what extent does the criminal law of your country recognise the plea of superior orders as a justification for illegal acts?

In the Belgian criminal law the general principle on the matter is stated in art. 70 and 71 of the Penal Code which are worded as follows :

"Article 70. Il n'y a pas d'infraction lorsque le fait était ordonné par la loi et commandé par l'autorité."

There is of course no difficulty when the act was allowed by law and ordered by the authorities. The difficulty begins when one must make a choice between obeying the law and obeying the authorities and for private persons the general rule is that when such a choice must be made it is the law that must be obeyed. But for persons who by their position have a duty to obey their superior, such conduct is not always practicable . The rules by which they are to be governed in such a case are the following :

The seat of the matter of superior orders is in art. 66, section 3 of the Penal Code : according to this provision the person who gives an order to commit an offence is a partner in the offence :

"seront punis comme auteurs d'un crime ou d'un délit :..... ceux qui,
"par.....abus d'autorité ou de pouvoir.....auront directement
"provoqué à ce crime ou à ce délit."

so that the person in whom the illegal order originated is punishable in the same way as the person who executed the order.

There is however no liability unless the crime was committed or at least attempted. Moreover the person who gave the order is not liable unless he had in view the specific crime which was, in fact, committed; not only must the order refer to the species of crime which was, in fact, committed (so that a person ordering a theft will not be liable for a murder which might have been committed on that occasion, likewise a person who gave the order to poison another would not be a partner in the crime

if the victim had been stabbed), but the person who gave the order (of murder for instance) must have willed the death of the specific person whose death was intended. (E.g. : A. gives B. the order to kill X.; whilst doing this B. kills Y.; A. will not be liable for the death of Y.)

From this follows that the order must have been a special order (e.g. to kill a specific individual) and that, as a rule, a general order (e.g. to kill "anybody") would not be construed as criminal.

A superior order is, in some instances, a form of compulsion or coercion. As to coercion the Belgian law provides :

"Article 71. Il n'y a pas d'infraction lorsque l'accusé ou le prévenu
"..... a été contraint par une force à laquelle il n'a pu
"résister."

In other words there can be no offence committed when the agent acted under such compulsion that he was unable to resist. The question of knowing whether the compulsion was sufficiently serious is a matter of fact which must in each particular case be decided by the court : liability shall be incurred unless compulsion was of such a nature that resistance was humanly impossible. Coercion can of course be either physical or moral. Moral coercion can be exercised by the fact of a superior giving an order to a subordinate ; if the offender gives evidence that he acted only upon an order of his superiors, for matters which were within their sphere of authority, and for which they had power to give him orders, and his duty was to obey, only those who have ordered the act will be punishable, and the person who executed the order cannot be punished. This principle is stated in art. 152 and following, and in art. 260 of the Penal Code.

Article 152 provides that :

"Si l'inculpé justifie qu'il a agi par ordre de son supérieur
"pour des objets du ressort de celui-ci et sur lesquels il lui
"était dû obéissance hiérarchique, les peines portées par les
"articles précédents seront applicables seulement aux supérieurs
"qui auront donné l'ordre."

"Article 260. Lorsqu'un fonctionnaire ou officier public, un
"dépositaire ou agent de la force publique aura ordonné ou
"fait quelque acte contraire à une loi ou à un arrêté royal,
"s'il justifie qu'il a agi par ordre de ses supérieurs, pour
"des objets du ressort de ceux-ci et sur lesquels il leur
"était dû une obéissance hiérarchique, il sera exempté de
"la peine, elle ne sera, dans ce cas, appliquée qu'aux
"supérieurs qui auront donné l'ordre."

From this follows that, according to ordinary Belgian criminal law, any public officer or civil servant or soldier who does an act which is contrary to law cannot be punished if he can prove that he acted on superior order, provided that the act which was ordered was (1) one which was within the field of competence of the superior who gave the order, and (2) one in respect of which the person who carried out the order had the duty to obey.

It has been held by the Belgian Court of Errors (Cassation belge 27.7.1891. Pas. 1891, vol I, p.228) that this article covers any illegal act whether it be a trespass, a misdemeanour or even a felony, provided the other requirements of article 260 are fulfilled.

The principle of the non-liability of the inferior who has carried out a superior order has thus been extended to its extreme limit by Belgian jurisprudence. In practice, the Belgian Courts have never been called upon to decide in a case where a heinous felony had been committed, and it is very doubtful whether, in such a case, the ruling of the Cour de Cassation would be upheld.

(N.B. The person who has committed an act contrary to law must, in some cases, after having obeyed his superior, denounce the fact to the competent authorities, otherwise he may be held personally liable for the offence which he has, by order, committed.)

Conflits of duty may of course arise in some of these cases, but the Penal Code neither defines nor considers conflicts of duty as such.

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II. To what extent, if any, does your military law differ in this respect from the general criminal law of your country?

(a) There is no fundamental difference between the military law (Code Pénal Militaire) and the general criminal law. If anything, the military law more specifically upholds the duty of the soldier to obey the orders of his superior officer, provided the order is one which concerns a military service. In this respect, art. 28 of the Military Penal Code provides :

"Le militaire qui refusera d'obéir aux ordres de son supérieur "ou s'abstiendra à dessein de les exécuter, lorsqu'il est "commandé pour un service, sera puni de destitution s'il est "officier, de l'emprisonnement militaire de trois mois à "trois ans s'il est sous-officier, caporal-brigadier ou "soldat."

In time of war, or in the presence of the enemy, the punishment is more severe and can even be death. When the refusal to obey is made by more than three soldiers it is described as a revolt.

(b) As to the Discipline Regulations (Règlement de discipline) it is provided in art. 3 that :

"Tout militaire est obligé, dans le service d'obéir promptement "et sans répliquer aux ordres de ses supérieurs et de les exécuter "fidèlement, sauf le droit d'en porter ensuite ses plaintes, "lorsqu'il se trouve lésé. La discipline faisant la force princi- "pale des armées, en service (x) il importe que tout supérieur exige "et obtienne de ses subordonnés une obéissance entière et une "soumission de tous les instants; que les ordres soient exécutés "littéralement, sans hésitation ni murmure; l'autorité qui les "donne en est responsable et la réclamation n'est permise à "l'inférieur que lorsqu'il a obéi."

So that here again the rule is fundamentally the same : complete obedience is required, orders should be executed, the inferior may only lodge a complaint after he has executed the order, and the superior is responsible for the consequences. But this only applies to acts which are comprised within the scope of military duties, i.e. "on service."

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III. What qualifications, if any, with reference to the lawfulness of superior order, does the law of your country recognise with regard to the duty of the soldier to obey the orders of superior officers?

One may say that any order which is not connected with the service must not be carried out, a fortiori when such order is illegal.

It is obvious, for instance, that if a superior gave to an inferior an order such as "shoot yourself" or "pull out one of your teeth or "marry this woman" such an order, as it is not connected with any military duty, should not be carried out. (Goedseels Droit Pénal Nos. 81-82.) A Flanders Court Martial (C. de G. Fl. Or. 14 avril 1900 P.P. 1900-520) held that an inferior must carry out a superior order, provided that the order concerns a military duty, but that this rule applies to any military duty, whatever it may be.

The Cour Militaire of Belgium upheld this principle in a decision delivered on 23rd August, 1907 (Rev. Dr. Pénal 1908 p. 133) and the Cour de Cassation did the same. (Pas. 1878.I.384 and Pas. 1879,I.34.) On August 10th, 1901, the Antwerp Court Martial (Pas. 1902.III.94) held the same view when it decided that a soldier who had refused to comply with the order of an officer who commanded him to sign a legal document had committed no offence, on the ground that signing a document is not a military duty. In the same connection, a quartermaster-sargeant would be justified in refusing to comply with an order given to him by the company Commander to the effect of falsifying the company's accounts in view

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(x) Un militaire est en service lorsque, revêtu de son uniforme ou en costume civil, il remplit ou se trouve dans l'obligation de remplir un des devoirs militaires de son grade ou de sa fonction.

of concealing a deficit (Goedseels loc. cit. 82).

From this may be drawn the conclusion that, in Belgian military law, when given by a superior officer,

- an order which concerns neither the military service nor a military duty, need not be obeyed, (C.M. 6 mars 1916 aff. Davidts.)
- an order which is directly concerned with military service or a military duty, must be obeyed even if it is unlawful (Goedseels loc. ct. 82).

There is in the Belgian Code, no provision similar to art. 47 of the new German Military Penal Code of Dec. 1st, 1940 (R.B.G.L.- I-1347).

As has been said above, the only requirement is that the order must be connected with the service. It is, of course, for the Court to decide whether the order was - or not - connected with the military service or duty. In time of war an order to kill civilians would probably be construed as an order relating to a military duty. There is no doubt that members of a firing squad could not be prosecuted for having obeyed a superior order. Liability would probably depend on the respective situations of the persons who gave - and who executed - the order, and on the amount of discretion which the latter could reasonably be expected to exercise.

There are no special legal qualifications with respect to the lawfulness of the order, so that the rules laid down in the answer to question 1 are applicable. But of course the order must be a command to do (or not to do) a specific act and not merely a request or an advice. The form of the order is immaterial, it may be given in writing or by word of mouth; the question of deciding what is an order belongs to the court. It is probable that a court would not consider words such as "houses may be looted" or "prisoners may be killed" as an order, but rather as an option or permission. On the other hand a specific prohibition such as "no prisoners shall be made "would most certainly be construed as an order to kill prisoners.

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IV. Is there any information available with regard to the practice, during the first World War, of the military courts of your country with respect of the plea of superior orders put forward by members of enemy armed forces accused of a war crime.

There is no information available on that subject. I know of no members of enemy armed forces accused of a war crime who were tried during the first World War by the military courts of Belgium. The only German who was indicted (N.C.O. Randohr) was tried by the Supreme Court of Leipzig - and was acquitted - the question of superior order was not raised in this case.

M. de BAER.
August 22nd, 1942.

APPENDIX III

Questions I and III.

In Dutch law these points are covered by Section 114, sub-sections 1 and 2, and Section 1 of the Military Criminal Code, and by Sections 40 and 43 of the Civil Criminal Code.

These sections read as follows :

"Section 114 sub-sections 1 and 2 of the Military Criminal Code :
A member of the armed forces who refuses, or deliberately omits to obey an order given him by a superior officer, or who arbitrarily exceeds the same, is guilty of deliberate disobedience, and shall be liable to imprisonment not exceeding one year and nine months.
If the fact is committed in time of war, he shall be liable to imprisonment not exceeding four years.

"Section 1 of the Military Criminal Code :
In applying the present code regard shall be had to the provisions of the ordinary criminal code, including the ninth chapter of the First Book, except in cases where the civil and military codes differ (C.C.C.91).

"Section 40 of the Civil Criminal Code :
No one shall be liable to punishment for committing an offence under the influence of irresistible compulsion.

"Section 43 of the Civil Criminal Code :
No one shall be liable to punishment for committing an offence while executing an order given by a competent authority.
An order not given by a competent authority shall not exempt from punishment, unless the subordinate believed in good faith that it was given by a competent authority, and unless its execution lay within the sphere of his normal duties. "

Question II.

There is no difference between the military and the civil code. In this respect the military code is based entirely on the ordinary criminal law.

Question IV.

The Netherlands have no experience of this matter dating from the first World War.

The above provisions of Dutch law illustrate the possible conflict between the duty of obedience incumbent on all members of the armed forces, and the responsibility of the citizen for his acts, even when performed at the command of a superior authority. From this no one can be wholly relieved, as even soldiers and public functionaries remain responsible human beings, and do not become mere instruments in the exercise of their duties.

The military and civil codes take note of the conflict; hence the restrictions to be found in the various legal enactments with regard to the duty of obedience to superior orders on the one hand, and the immunity from punishment or grounds for justification on the other.

Thus Section 14 of the Netherlands Military Criminal Code states with regard to the duty of obeying an order given by a superior officer that such an order must be obeyed if given in the interest of the service, but not, if it merely affects the private interest of the superior officer. In the latter case, according to Van Dijk's Commentary on the Netherlands Code (Military Criminal), a subordinate can refuse to obey. In doing so he acts on his own responsibility. He cannot plead afterwards that he erred in good faith.

Moreover the authority of a superior officer to give the order in question must ultimately be based on a "legal enactment", whilst the order itself must be reasonable and equitable.

As a rule, however, it cannot be left to the discretion of a subordinate to decide whether an order is lawful and reasonable, and the superior must be held liable for having issued it. But this principle is not intended to lead to blind obedience. In special cases an order may be disregarded with impunity on the ground that its execution would violate another duty, would prove injurious to another interest, or would expose the subordinate to punishment.

The subordinate has on occasions not only the right to disregard an order. It may be his duty to do so, for instance if, in carrying out the order, he would commit an indictable offence, or in other words, in the case of an order which the superior officer was not authorised to give.

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The subordinate has on occasions not only the right to disregard an order. It may be his duty to do so, for instance if, in carrying out the order, he would commit an indictable offence, or in other words, in the case of an order which the superior officer was not authorised to give.

This brings us to the second aspect of the problem, namely the plea of superior orders as a ground for justification or immunity. With regard to this Dutch law expressly stipulates that an order must have been given by a competent person, or by a person whom the subordinate regarded in good faith as competent, and that its execution was within the sphere of the normal duties of the subordinate. In practice the court will naturally take into account the difficulty of the subordinate in a decision, and the compelling authority of the superior officer. Accordingly, the court will generally be inclined to assume good faith on the part of the subordinate, unless there is sufficient proof to the contrary. The court has even greater liberty of action in cases where the subordinate pleads irresistible compulsion (Section 40, Netherlands Military Criminal Code). Both these sections, 43 (lawful order) and 40 (irrisistible compulsion) are expressly declared applicable in Section 1 of the Netherlands Military Criminal Code.

In the case of acts which clearly violate unchallenged rules of international law, it will in my opinion be impossible to assume that the subordinate believed in good faith that the superior officer was competent to order their commission. In this case it will generally be impossible to speak of irrisistible compulsion, unless a refusal to obey would place the life or the safety of the subordinate in immediate and serious jeopardy.

In every case of this kind the courts will necessarily have substantial liberty of action. An International Criminal Court may find it possible to give a lead and to create a measure of unity. To this end, some general rules and principles along the lines indicated above, to be embodied in the general armistice terms, may prove of value.

Dr. J.M. de MOOR.

ADDITIONAL NOTE

by M. de BAER.

I. COMPARISONS WITH OTHER LAWS :

1. In British Military law :

According to the British Manual of Military law Chapter XIV, section 443, soldiers who commit war crimes under order are not war criminals and cannot be punished by the enemy.

2. In German Military law : (Militärstrafgesetzbuch 10.10.1940)

(a) as a rule the superior alone is responsible for the execution of the order (art. 47),
- the inferior may be punished as well when either :
  (i) he has acted in excess of the order,
  (ii) he has acted with knowledge that the order was one to commit a criminal action,
- when the inferior's guilt was not considerable, no punishment is necessary,

(b) incitement, even if it is unsuccessful, is punishable (art.115-116),

(c) misusing one's authority to compel another to commit a crime is also punishable (art. 114).

II. DRAFT RESOLUTION ON PARTICIPATION IN WAR CRIMES :

WHEREAS this Commission has defined the crimes which should be considered

as "war crimes", the punishment of which is the concern of the United Nations; and

WHEREAS it is necessary to define the conditions in which those who have participated in such crimes should be punished;

IT IS PROPOSED :

I. that, in respect of the "war crimes" the list of which has been previously adopted :

1. conspiracy to commit any such crime, provided that the crime has been committed or attempted;
2. (a) incitement to commit any such crime, provided that the crime has been committed or attempted;
   (b) direct public incitement to commit such crime, whether the crime has been committed or attempted or not;
3. giving another the order to commit any such crime, provided that the order has been executed in whole or in part;
4. executing another's order to commit any such crime, except when it was humanly impossible to do otherwise, taking into account :
   (a) the degree of unlawfulness of the order or its contrariness to the customs of war;
   (b) the knowledge which the executor could reasonably be expected to have of such unlawfulness or contrariness;
   (c) the difference in rank and position between the persons who have respectively given and executed the order;
   (d) the amount of discrimination and discretion the person who executed the order was in a position to exercise as to such execution;
5. wilful and actual participation in any such crime;
6. assistance, knowingly given, towards the commission of any such crime;

- shall make the author liable to the same penalties as the actual perpetrator of such crime.

II. Superior order shall however not be treated as a defence :

1. when the order did not relate to a military duty;
2. when the act charged was in excess of .. and not covered by the order given;
3. when the act was obviously and flagrantly in violation of all recognised laws and customs.

CONFIDENTIAL

LONDON INTERNATIONAL ASSEMBLY

COMMISSION I. FOR QUESTIONS CONCERNED WITH THE LIQUIDATION OF THE WAR

A NOTE ON THE JURISDICTION OF MILITARY COURTS CONCERNING WAR CRIMES, AND ON ART. 228-230 of the VERSAILLES TREATY

(By M. de BAER)

The opinion has been voiced that, as the provisions of Art.228-230 of the Versailles Treaty were not carried out, they were not "given a chance to prove their merits", consequently it has been suggested that a scheme similar to that of the Versailles Treaty might be an adequate means of punishing war criminals after this war.

It is therefore not out of place to examine the provisions in question, and the discussions which led to their adoption.

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In order to provide for the punishment of the war criminals, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (Commission of XV) had proposed in 1919 that each belligerent should charge his own Courts (military or civil) with judging incriminated persons who should fall into his power. As to the other persons accused of war crimes, it proposed the creation of an International Criminal Court.

Here are the terms of this suggestion which was carried by all the members of the Commission except the American and the Japanese :

Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in Chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoners or have otherwise fallen into its power. Each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of such cases. These courts would be able to try the incriminated persons according to their own procedure, and much complication and consequent delay would be avoided which would arise if all such cases were to be brought before a single tribunal.

There remains however, a number of charges :

(a) Against persons belonging to enemy countries who have committed outrages against a number of civilians and soldiers of several Allied nations, such as outrages committed in prison camps where prisoners of war of several nations were congregated or the crime of forced labour in mines where prisoners of more than one nationality were forced to work;

(b) Against persons of authority, belonging to enemy countries, whose orders were executed not only in one area or on one battle front, but whose orders affected in conduct of operations against several of the Allied armies;

(c) Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention should constitute a defence for the actual perpetrators);

(d) Against such other persons belonging to enemy countries as, having regard to the character of the offence or the law of

any belligerent country, it may be considered advisable not to proceed before a court other than the high tribunal hereafter referred to.

For the trial of outrages falling under these four categories the Commission is of opinion that a high tribunal is essential and should be established according to the following plan :

(1) It shall be composed of three persons appointed by each of the following governments : The United States of America, the British Empire, France, Italy and Japan, and one person appointed by each of the following governments : Belgium, Greece, Poland, Portugal, Rumania, Serbia and Czechoslovakia. The members shall be selected by each country from among the members of their national courts or tribunals, civil or military, and now in existence or erected as indicated above.

(2) The tribunal shall have power to appoint experts to assist it in the trial of any particular case or class of cases.

(3) The law to be applied by the tribunal shall be "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience."

(4) When the accused is found by the tribunal to be guilty, the tribunal shall have the power to sentence him to such punishment or punishments as may be imposed for such an offence or offences by any court in any country represented on the tribunal or in the country of the convicted person.

(5) The tribunal shall determine its own procedure. It shall have power to sit in divisions of not less than five members and to request any national court to assume jurisdiction for the purpose of inquiry or for trial and judgment.

(6) The duty of selecting the cases for trial before the tribunal and of directing and conducting prosecutions before it shall be imposed upon a Prosecuting Commission of five members, of whom one shall be appointed by the Governments of the United States of America, the British Empire, France, Italy and Japan, and for the assistance of which any other government may delegate a representative.

(7) Applications by any Allied or Associated Government for the trial before the tribunal of any offender who has not been delivered up or who is at the disposition of some other Allied or Associated Government shall be addressed to the Prosecuting Commission, and a national court shall not proceed with the trial of any person who is selected for trial before the tribunal, but shall permit such person to be dealt with as directed by the Prosecuting Commission.

(8) No person shall be liable to be tried by a national court for an offence in respect of which charges have been preferred before the tribunal, but no trial or sentence by a court of an enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States.

CONCLUSIONS

The Commission has consequently the honour to recommend :

1. That a high tribunal be constituted as above set out.
2. That it shall be provided by the treaty of peace :

(a) That the enemy governments shall, notwithstanding that peace may have been declared, recognize the jurisdiction of the national tribunals and the high tribunal, that all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity shall be excluded from any amnesty to which the belligerents may agree, and that the governments of such persons shall undertake to surrender them to be tried.

(b) That the enemy governments shall undertake to deliver up and give in such manner as may be determined thereby :

(i) The names of all persons in command or charge of or in any way exercising authority in or over all civilian internment camps, prisoner of war camps, branch camps, working camps and

"commandoes" and other places where prisoners were confined in any of their dominions or in territory at any time occupied by them, with respect to which such information is required, and all orders and instructions of copies of orders or instructions and reports in their possession or under their control relating to the administration and discipline of all such places in respect of which the supply of such documents as aforesaid shall be demanded;

(ii) All orders, instructions, copies of orders and instructions, General Staff plans of campaign, proceedings in naval or military courts and court of inquiry, reports and other documents in their possession or under their control which relate to actions or operations, whether in their dominions or in territory at any time occupied by them, which shall be alleged to have been done or carried out in breach of the laws and customs of war and the laws of humanity;

(iii) Such information as will indicate the persons who committed or were responsible for such acts or operations;

(iv) All logs, charts, reports and other documents relating to operations by submarines;

(v) All orders issued to submarines, with details or scope of operations by these vessels;

(vi) Such reports and other documents as may be demanded relating to operations alleged to have been conducted by enemy ships and their crews during the war contrary to the laws and customs of war and the laws of humanity.

3. That each Allied and Associated Government adopt such legislation as may be necessary to support the jurisdiction of the international court, and to assure the carrying out of its sentences.

4. That the five states represented on the Prosecuting Commission shall jointly approach neutral governments with a view to obtaining the surrender for trial of persons within their territories who are charged by such states with violations of the laws and customs of war and of the laws of humanity.

This proposal was discarded in favour of a suggestion made by the two American members of the Commission, that all war criminals should be judged by military courts, and that where several nations were concerned, members of these courts should amalgamate in order to form one international military tribunal.

The American members, Robert Lansing and James Brown Scott, based their proposal on five assumptions, which read as follows :

1. That the military authorities, being charged with the interpretation of the laws and customs of war, possess jurisdiction to determine and punish violations thereof;
2. That the military jurisdiction for the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offences is exercised by military tribunals;
3. That the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offence was committed on the territory of the nation creating the military tribunal or when the person or property injured by the offence is of the same nationality as the military tribunal;
4. That the law and procedure to be applied and followed in determining and punishing violations of the laws and customs of war are the laws and the procedure for determining and punishing such violations established by the military law of the country against which the offence is committed; and
5. That in case of acts violating the laws and customs of war involving more than one country, the military tribunals of the countries affected may be united, thus forming an international tribunal for the trial and punishment of persons charged with the commission of such offences.

The American delegation took great pains to prevent the adoption of the plan of the majority of the Commission : they submitted a lengthy memorandum of reservations to refute the arguments of that majority. The portion of Lansing's scheme which concerns war criminals was accepted as a whole. It is with some reluctance that I venture to criticise that memorandum, drafted by lawyers and statesmen as eminent as Lansing and Scott, but as the scope of military law is confused and little known it may be of some use if I attempt to dispel some of the obscurity.

A system such as Lansing's could conceivably have been based either on international law or on a survey of the various national laws of the countries in which it was intended to operate.

Lansing's system was based on American and international law, and ignored the legal systems of any of the European countries in which it was to function.

It is understandable that the admiration which the Americans have for their own Constitution - which is undoubtedly a masterpiece - makes them inclined to consider it as applicable to the whole world. It was an American who said : "What is law for the American States is good enough for the rest of the world" and Lansing's statement : "What is true of the American States must be true of this looser union which we call the society of nations" is very much to the same effect.

Consequently Lansing's memorandum of objections against the system proposed by the majority of the Commission of XV was mainly based on American conceptions and precedents. When he says for instance that the idea of an international criminal court entirely lacks precedents he means "American" precedents, for such precedents have existed, namely in Egypt, where mixed courts with criminal jurisdiction have been functioning for many years. And the reason why he was averse to the creation of such a Tribunal was that it would be "contrary to an express clause of the Constitution of the United States", thereby meaning, I presume, the XIVth Amendment. Lansing admittedly based his whole reasoning on the assumption that the leading American case of United States v/Hudson (7 Cranch 32) decided in 1812, was applicable to the whole world. In this case it was held that no act is a crime unless "the legislative authority has first made it a crime, affixed a penalty to it and declared the court that shall have jurisdiction of the offence", and from this rule Lansing drew the conclusion that, because the waging of war had not been previously declared a crime, the Kaiser could neither be tried nor punished.

There was another American precedent which prevented Lansing from agreeing to the Kaiser's trial, it was the Schooner Exchange v/Mac Fadden Case (7 Cranch 116) in which the Supreme Court of U.S.A. had decided about the year 1810 that a Chief of State was exempt of judicial process.

The recommendation which led to the drafting of Article 228 of the Versailles Treaty was also admittedly based on an American precedent, that of Henry Wirz, Commandant of the Confederate prison of Andersonville, Georgia, who was tried by a military Commission in Washington and executed in 1816.

In this connection it is interesting to note that the Supreme Court of U.S.A. has on more than one occasion declared some rules to be of universal application when in reality they were not recognised outside the boundaries of the United States. I will mention the leading cases of Coleman v/Tennessee (97.U.S. 509), Dow v/Johnson (100.U.S. 158), Freeland v/Williams (131.U.S. 405) and others, in which the principle that local courts have no jurisdiction to try a punishable crime committed by members of the invading army, either during or after an enemy occupation, was declared to be a principle of public international law. (Finch, in

A.J.I.L. 1920, p. 218 & 233.) It is unnecessary to remind European lawyers that European Courts, and namely French Courts have consistently held the opposite view, which was also affirmed, as early as 1880 by the Institute of International Law. In Europe it has been many times held and it is recognised doctrine that whereas courts of the invaded country are momentarily precluded from exercising jurisdiction upon members of the invading army, this jurisdiction exists nevertheless, dormant, and as soon as the obstacle of enemy occupation has been removed, the courts regain possession of their rights, and are competent to try enemy civilians or soldiers who have committed crimes upon their territory at the time when the enemy was in occupation of the country.(x)

Before going any further it is proper to examine what Lansing meant by the words "the laws and customs of war" for this expression has different meanings :

1. It would be reasonable to assume that what was meant by this expression was "the internationally accepted laws and customs of war". The only written laws of war are agreements such as the Geneva and Hague Conventions, they are the only ones that have been internationally accepted, but it would be <u>impossible</u> for any Continental court, civil or military, to apply those laws, because they do not provide any penalties : they say what acts are crimes but they do not say how they can be punished. As to the unwritten customs of war they are imprecise and vague and vary from one country to another : the methods adopted by Germany in respect of the occupied countries are certainly very wide apart from ours; shooting of hostages, incorporation of civilians in German armies, etc.. are not within our conception of proper behaviour towards populations which might temporarily come under our power. It is therefore not in this sense that the expression was meant.

2. Some lawyers hold that this expression simply means "martial law". According to the Encyclopedia Britannica, martial law has at least four different meanings, but, in most Continental countries, martial law has no existence at all : it is simply the absence of law, or rather the arbitrary will of the military commander : In case of emergency in a hostile country, when his troops are in danger, it is for the military commander to take, under his own responsibility, any measures he may think fit, even shoot civilians at sight. It is by application of such "martial law" that in Belgium, in 1914, the Germans pretending that they had been attacked by francs-tireurs, ordered the machinegunning of hundreds of innocent civilians. Likewise, German military courts in occupied countries proceeding on the spot in a summary way, every day sentence inhabitants rightly or wrongly accused of having assaulted or endangered their troops or their administration. <u>That</u> is what is called "martial law". But it is not law, not any more than the "law of the jungle" is a law, and in no event, by no stretch of imagination could it be applied, after the war is over and when the urgency has passed, to persons who have committed crimes previously, during an occupation! It is certainly not that kind of "law of war" that Lansing had in view when, in 1919, he was considering the ways to punish crimes which had been committed two, three or five years before.

(x) By an extension of this principle, German soldiers were tried by French courts of the unoccupied region during the war, as well as after the war by courts of the region that had been occupied : cfr. Renault : 25 Revue Générale de Droit International Public, p.18; Mérignhac : 24 Revue Générale de Droit International Public, p. 35 (the sentence of Rennes, February 26th, 1915, and the cases cited in James W. Garner, 14, A.J.I.L. pp.83 & 84). All European jurists agreed on that principle, but not all French jurists agreed on the right of <u>military</u> courts to assume jurisdiction

3. What Lansing seems to have meant by "the laws and customs of war" is the American "Rules of Land Warfare".

It is incredible that, after the last war whereas all the European members of the Commission of XV were in perfect agreement as to the technical way by which it was possible, according to their own laws, to ensure, in their own countries, the punishment of war criminals who had tortured and killed their own people, the Statesmen of Versailles discarded their scheme in favour of a plan proposed by two outsiders, who had no knowledge of the law or conditions of the countries in which the plan was to be carried out, who based that plan on their own native law, and whose country, not having been the victim of one single war crime had no interest in the question. Is it a wonder that the plan was not practicable? The lesson which is to be drawn from this experience is that if a legal scheme is to function properly in certain countries, the adjustment of the technical details of that scheme should be left to lawyers of those countries.

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I will now take Lansing's five points one by one; I have no doubt that they apply in America, but I believe them to be contrary to the principles accepted in most European countries :

1. That the military authorities, being charged with the interpretation of the laws and customs of war, possess jurisdiction to determine and punish violations thereof.

Are the military authorities charged with the interpretation of the laws of war? They are charged with the conduct of the war, the direction of operations, the enforcement of their own national rules and regulations, which is quite a different matter. These rules are in England the British Manual of Military Law, in America the Rules of Land Warfare, in France the Code de Justice Militaire, etc.... As long as they apply these rules, no criticism can be applied to them. But soldiers are not lawyers and cannot be expected to know or interpret international laws and conventions : that is eventually the business of lawyers, courts, or judges.

Military courts in general are, as a rule, merely charged with applying the criminal and disciplinary laws, rules and regulations of their own country to their own soldiers who may have committed offences, and in some cases to civilians (who have committed crimes such as treason or spying, or who are subject to trial by a military tribunal); exceptionally, in the event of occupation, they are competent to deal with inhabitants who have committed offences interfering with the rights or the safety of the Forces of Occupation. (x) In most European countries military courts (Courts Martial) are, moreover, not military authorities, but judicial authorities upon whom is conferred the duty of judging military matters. When they are on the Bench the members act as judges and not as subordinates of the military commander; they enjoy full independence, in the same way as ordinary courts, and are accountable only towards their own conscience. Military courts have their own rules and procedure : in U.S.A. these are laid down in the Manual for Courts Martial, in Belgium in the Code de Procédure Pénale Militaire, and so on.

Violations of the laws of war, or "war crimes" are in most cases common crimes punished by the law of the country where they were committed : murder of civilians, shooting of hostages, rape and abduction of women, deportations etc... are all crimes defined by ordinary criminal law which should primarily be tried by the Courts of the place where they were committed.

(x) Elbridge Colby in 17. A.J.I.L. pp. 113-114; Dig. Op. J.A.G. 1912, pp. 140-141-143; Grafton v. U.S., 206, U.S. 333; Manual for Courts Martial 1921, p. 26 cited by Colby. See also Militärstrafgesetzbuch 10.10. 1940 § 161.

2. That the military jurisdiction for the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offences is exercised by military tribunals.

I doubt whether it can be held as a general rule, in most European countries, that the trial and punishment of persons accused of war crimes is exercised by military courts : as a rule these courts have jurisdiction only upon the members of their own forces, and not upon enemy soldiers, except in the case when, having been made prisoners of war, they commit an offence whilst being prisoner; this jurisdiction has in some cases been extended by French Courts to offences committed prior to capture but not without much opposition and justified criticism, for military courts are courts of exception whose scope should be limited to cases in respect of which jurisdiction has been expressly conferred upon them. It is true that the British Manual (Ch. XIV, sect. 449) provides that charges of war crimes may be dealt with by military courts, but section 449 is part of the "means of securing legitimate warfare" and does not seem applicable in the case of an "occupation of enemy territory", where other rules are provided (see namely sect. 364). The rule that international law does not allow an occupier to seize and try by his military courts an inhabitant for crimes which he might have committed previously was recognised in art. 6 of the Armistice terms of November 11th, 1918. Even the German law (Militärstrafgesetzbuch 10.10.1940, art. 161) merely provides that :

"Anyone who, in foreign territory occupied by German troops, commits, against German troops or against their auxiliaries, or against any authority instituted by the Führer, an act punishable by the laws of the Reich, shall be punished exactly as if he had committed it in German territory," thereby refusing the jurisdiction of military courts to : (a) offences committed in foreign territory not occupied by German troops, (b) offences committed against ordinary civilians and (c) acts forbidden by the "laws of war" but not punishable by German law.

3. That the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offence was committed on the territory of the nation creating the military tribunal or when the person or property injured by the offence is of the same nationality as the military tribunal.

In most European countries, the jurisdiction of a military tribunal over a war criminal is not acquired when the offence was committed on the territory of the nation creating the military tribunal : The question of territory has no bearance upon this question, for (1) military courts do not acquire jurisdiction upon a civilian offender even if he did commit his crime on the territory of the nation, and (2) jurisdiction is acquired even outside this territory if the offender was a soldier. Furthermore : The circumstance that the person injured by the offence is of the same nationality as the court does not necessarily confer upon that court jurisdiction to pass sentence upon a foreigner. (Supposing a Belgian was injured in Russia by a Roumanian soldier, the Belgian court has no jurisdiction to pass sentence upon the Roumanian. Finally, I do not understand what may be meant by the "nationality of property injured by an offence" for I conceive nationality as an appurtenance of persons and not of property.

4. That the law and procedure to be applied and followed in determining and punishing violations of the laws and customs of war are the laws and the procedure for determining and punishing such violations established by the military law of the country against which the offence is committed.

The normal law and procedure to be applied for the punishment of war crimes are in most European countries, neither those established by military law, nor are they those of the country of the victim but they are as a rule the ordinary criminal law of the place where

the crime was committed.

5. That in case of acts violating the laws and customs of war involving more than one country, the military tribunal of the countries affected may be united, thus forming an international tribunal for the trial and punishment of persons charged with the commission of such offences.

It was inevitable that, being based on four inaccurate premises, the fifth point was not only inaccurate, but unpracticable : In this paragraph it was proposed that in case of crimes concerning several countries military tribunals of those various countries should join and form one international tribunal, and this proposal forms art. 229 of the Versailles Treaty.

When one tries to find out how the American delegation conceived this tribunal one discovers that "it would be formed by the mere assemblage of the members of the military courts or commissions of the various nationalities, each one "bringing with him the law to be applied, namely the laws and customs of war".

This suggestion seems to have been based on the assumption that in all countries the military courts were on the American model (x), that the application of the "laws of war" was within the province of all military courts, and that any crime committed in the occupied countries during the four years of the war, either by civilians or by soldiers came under the jurisdiction and could be conveniently dealt with by these military courts.

It is needless to point out that this assumed unity of scope, law, and jurisdiction of all military courts was erroneous, and it is permitted to believe that the proceedings of the suggested court, composed of officers of different nations and language each of whom endeavoured to apply the military law and procedure of his own country would not only have been slow, but that they might have led to chaos; moreover the decisions of such a court could hardly have carried much weight with the judicial world or with public opinion.

It seems that the American delegation mixed up, with the so-called "right" of trying violations of the law of war, the customary "de facto" power that belongs to any army commander to submit to the jurisdiction of his military courts or commissions, in time of war or occupation, inhabitants accused of having committed crimes against the persons or property of his forces.

It should be remembered however that such "de facto" power is not a "right", but merely an expression of the arbitrary will of the military commander, also known by the name of "martial law".

(x) This is not the case : in U.S.A. there are two kinds of military tribunals : courts martial of statutory jurisdiction, which have jurisdiction mainly over soldiers, and military commissions (first created by General Scott during the Mexican War in September 1846 and confirmed in the Order no. 1 of the Advance G.H.Q. - A.E.F. issued at Trèves (Germany) in December 23rd, 1918), which were instituted "for the trial of inhabitants offending against the laws of war or of the military Government". I would like to point out that the present tense "offending" was used in the order; this seems to exclude, from the jurisdiction of military commissions, the inhabitants who, in the past, before the institution of the military government, might have committed violations of the laws of war. In most of the other Allied countries there is no such distinction, and courts martial assume jurisdiction in respect of civilians who are accused of jeopardizing the safety of their Forces.

The criterium for jurisdiction of a military court in respect of inhabitants is whether it is imperative, for the safeguard of the army, that the inhabitants should be court-martialled : In the case where the actual safety of the Forces (or of a member thereof) would be jeopardized by the lack of immediate trial and punishment, the military court is justified in assuming jurisdiction in self-defence but where there is no emergency, where such safety does not require the immediate trial, the case must be brought before the ordinary court. Thus an Allied court in Rhineland was justified in assuming jurisdiction to try any inhabitant who had attacked, harmed, injured or robbed an Allied soldier there, but had no jurisdiction, in respect of those same inhabitants, for crime or violations of the law of war which they might previously have committed against the population of occupied Belgium at the time when they were in that country. This was expressly stated in art. 6 of the Armistice Terms of November 11th, 1918. Therefore, if an inhabitant had been accused of such a crime, he should have been sent to the Leipzig Court, by virtue of the agreements of May-July 1920, to be tried there.

The problem with which the American delegation at the Peace Conference was faced concerned this last category of cases : the crimes which were to be punished had been committed, not against the army of occupation, but against civilian of the occupied countries or against prisoners of war in Germany, weeks, months or years before the time when the army of the Allies had marched into Germany.

The jurisdiction of military courts in this respect was not justified by the necessity to protect the rights and safety of the troops, and therefore it was not justified at all. Thus the American members, on the grounds that there was no precedent, precept, practice, or procedure for the international court which had been suggested by the majority of experienced lawyers which formed the Commission, proposed, relying on erroneous assumptions, the institution of an international military tribunal, which could not have functioned without serious difficulties, and which had all the faults which they were trying to remedy for it was also without precedent, precept, practice or procedure.

If the courts provided for in the Treaty of Versailles had been instituted, they would have been real martial courts, functioning after the war had ceased, with the sole object of obtaining easy convictions from courts which were assumed to be courts of somewhat summary jurisdiction entitled to dispense with cumbrous formalities, to disregard ordinary law, and where charges could be framed without technicalities and without proper consideration of the rights of the defence. Such martial courts are repellent to all lawyers and can be called into being only when the state of emergency is such that it is impossible to have recourse to the ordinary courts, but as soon as the necessity or safety no more commands it, the normal situation with recourse to the ordinary courts of justice should be restored.

Many people believe that military courts or commissions are a convenient way of administering a speedy justice, devoid of formalities and that they are more expeditious than civil courts. I have in the course of my career, as a professional civil and criminal judge since 1920, many times been called upon to preside courts-martial, and I have always found that military courts are much slower than civil courts; it is natural that when professional judges, whose daily occupation it is to try cases, sit on the bench, the work is done with less delay than when done by officers of the Forces, who only sit occasionally on a court and are not accustomed to that sort of work. In most Continental courts it is not the proceedings in themselves which take up much time, these can be conducted speedily, what takes time is the defence, and the procedural obstacles which it sometimes endeavours to put in the way. If the accused is to be given a fair chance to present his defence, to obtain the assistance of counsel, to call evidence, the trial will take some time. This does not mean that special rules cannot be adopted to speed up the proceedings : the temporary suppression of the right of appeal would be, in this respect, a most effective measure.

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A valuable lead as to post-war policy is to be found in the composed words which President Roosevelt used on August 21st, 1942 : "Those who are now committing barbaric crimes against the civil "population of the countries they occupy should be subjected to the due "process of law." This, as is known by those who are familiar with the interpretation of the 14th. Amendment of the American Constitution, includes the right to a proper defence; as the President supplemented this by adding that the accused "will have to stand in the Courts of Law "of the very countries which they are now oppressing and to answer for "their acts", this seems to indicate that whether the accused are judged by civil or by military courts, they will not be judged by "martial law" which is no law at all, but that they will be brought to the place where their outrages were committed, to be judged there by the proper courts of the countries concerned.

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From this note it will be understood that "martial law" and the "law of war" are of no use when it is a question of punishing what we call "war crimes". In respect of these war crimes there is no excuse of emergency, and therefore the accused should be tried by the ordinary courts of the country concerned. This does not mean that jurisdiction cannot be conferred upon military courts, but that, as legislation stands now, such courts do not have jurisdiction, and that, if it is contemplated to confer such jurisdiction upon them, appropriate legislation should be passed to that effect. The question whether, by legislation, the jurisdiction of military courts could be extended to the full length which international law would recognise and permit is a complicated matter which might involve departure from some of the fundamental principles of criminal law (questions of jury, territoriality of criminal law, etc...) and which would have to be carefully considered, for it might affect the whole economy of the criminal system of the country concerned. Moreover in some cases it would involve modifications which might be conflicting with the national Constitution which it is, in ordinary circumstances, very difficult to modify, and, in the present circumstances, impossible.

CONCLUSIONS :

1. Deciding the technical details of any legal scheme concerning the punishment of the war criminals should be done by lawyers of the countries where the scheme is to operate.

2. It is a fallacy to believe that all military courts will, at the end of the war automatically have jurisdiction to try the war crimes which have been committed in the course of the war.

3. It should be borne in mind that "martial law" will not help to solve the problem of war crimes.

4. The mistake of Versailles by which military courts alone were charged with judging war crimes should on no account be repeated. The existing jurisdiction of national courts (civil or military) in respect of war crimes should not be curtailed or interfered with by any international agreement. If, by appropriate legislation, it can be extended by some nations to cover crimes committed abroad against its own nationals, so much the better, but it is doubtful whether this will be possible, and even if it is possible whether it will be effective.

5. Questions of jurisdiction which will need to be solved by international agreement are :

(a) crimes committed on Axis soil against Allied nationals of which no Allied court has jurisdiction,
(b) crimes committed on Axis soil against Axis or stateless nationals (cfr. Mr. Eden's declaration of March 3rd.
(c) crimes in respect of which several Allied courts have

jurisdiction.

6. If either allied or inter-allied courts, military or civil, charged with such jurisdiction are expected to function in Germany, the agreement which will end hostilities (be it called armistice, or unconditional surrender, or diktat or otherwise) should include a statement authorizing the setting up on German soil of such courts derogatory to international law.

LONDON INTERNATIONAL ASSEMBLY.

COMMISSION I ON THE TRIAL OF WAR CRIMINALS.

and

The Juridical Commission of the Committee for Reconstruction Problems.

Report

on the Constitution of and the Jurisdiction

to be conferred on an

INTERNATIONAL CRIMINAL COURT. (I)

by

Dr.J.M. de MOOR.

(I) In this report certain special considerations have been devoted to the possible powers of the proposed "United Nations Commission for the Investigation of War Crimes".

Par.1. I N T R O D U C T I O N.

Before dealing with the more technical juridical side of the institution and the method of procedure of an International Criminal Court(initially for the punishment of War Criminals, and later on as an indispensable organ of a new International order), we have first of all to look at the practical side of the problem, and weigh up the chances of achieving our object.

Therefore it is useful briefly to go over what recently has been said by leading statesmen in this connection about the punishment of War Criminals. -

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It will be remembered that, following upon the well known Declaration of Allied Continental Powers made at St.James'Palace on the 13th January 1942, in which the punishment of War Criminals by means of an organised administration of justice was declared to be one of the chief war aims, the subject was exhaustively discussed on the 7th October 1942 in the House of Lords(1).

At the same time President Roosevelt made a similar declaration.

An Anglo-American proposal, vigorously acclaimed by all the Allies, was also made known, having as object the establishment with a little delay as possible of a "United Nations Commission for the Investigation of War Crimes", whose task would be to collect evidence of war crimes during the war, and to take steps to produce the criminals for trial.

The individuals suspected of war crimes would as far as possible have to be surrendered at the signing of, or during the period of the Armistice. The Lord Chancellor was of the opinion, and in this he was supported by Lord Addison, that when this Commission had collected the evidence and the suspect had been arrested, the further administration of justice could best be left to the National Courts.

With regard to the establishment of one or more International Criminal Courts, the Lord Chancellor declared himself willing to discuss this with the Allies, but he thought that it would be very difficult to find a solution to this problem, more particularly in view of the great difference in procedure between the Anglo-American and the European-Continental legal system.

In the Speech to Members of St.Stephens Club which he gave at the beginning of this year(1943)the Lord Chancellor further developed this theme, and according to the news-

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To the Yugoslavian Member H.E.Vladimir Milanovitch,

with the compliments of Dr.J.M.de Moor,
Netherlands Delegate on the United Nations Commission
for the Investigation of War Crimes.

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newspapers reports, he once more emphasized that it was the Allies firm intention"to note out just and sure punishment to ringleaders responsible for the organised murder of thousands of innocent people, and for atrocities, which had violated every tenet of the Christian faith." The guilty should include not only the highly placed individuals who inspired and directed those monstrous crimes, but also those who in cold-blooded ferocity had organised and taken a definite and responsible part in carrying them out.

"The modus operandi of the United Nations Commission for the Investigation of War Crimes still formed the subject of a special study."

Par.2.The United Nations Commission for the Investigation of War Crimes.

If it is intended to fix the task of this Commission in conformity with the scheme indicated at the time by the then Commission I of the London International Assembly, it would not only have to decide which cases should be brought before the Courts, and to take steps to produce the criminals for trial, but it would have a far more extensive task.

For instance it would be obvious, that - so long as an International Criminal Court is not in existence - the Commission should have to decide to what extent an eventual call upon the "Plea of Superior Order" would permit the case to be sent forward to be judged or not. This would have the advantage that with respect to such a matter of principle a certain unity would be achieved - in spite of all divergence of procedure - without any alteration in the respective National Legislations.

Besides this, the Commission would be most competent to decide which"United Natio's Courts - in case of equal competency - would be appointed, and have the honour of administering justice.

In the third place, this Commission - as long as the International Criminal Court does not exist - could fulfil the work which in the Report of Dr.Benes to Commission I regarding "Extradition" was attributed to that Court, namely, to decide whether or not a crime has to be considered as a political one, with respect to an Allied request for extradition by Neutral Countries of persons suspected of War Crimes. - (This"extradition" to be requested of the Neutral Countries, is to be clearly differentiated from the "Surrender" to be made by the Axis States, and the "exchanges" which may take place between the Allies themselves.)

With regard to cases which have been sufficiently investigated before the Armistice, the Commission will have to produce a List of names of suspects to the Allied Governments, in order to ensure their surrender immediately at the cessation of actual

actual hostilities.

In respect of complaints coming in later, and which still ought to be investigated, the Commission should have the power independently to trace suspects in the occupied and ex-enemy territories, there to collect the necessary evidence, hear witnesses, prepare the cases for submission to the Courts, if necessary also to demand the "surrender or Extradition" of suspects, and finally to hand over such suspects to the afore-mentioned Courts of Justice, - or, as Lord Simon said:"to take steps to produce the criminals for trial"(1).

In art.230 of the Treaty of Versailles, itwas already laid down that "the Germans had to furnish all documents and information of every kind, necessary to ensure the full knowledge of the incriminating acts, etc." This did not appear to be sufficient, and ended in a fiasco at Leipzig(2). We shall therefore have to take matters into our own hands this time.

If the competence of the United Nations Commission for the Investigation of War Crimes would be fixed on the large above mentioned basis, - the Commission working on one side partially as a general tribunal, on the other as a great International Public Prosecuting Office, and the great majority of the cases finally being judged by the National Courts, the question of the punishment of war criminals would, to a considerable extent, be solved.

I feel myself obliged in this connection once more to emphasize this point, because the establishment of the United Nations Commission for the Investigation of War Crimes may now be considered as very near, and a development of the functions and of the task of this Commission in the direction indicated is by no means excluded. To my knowledge, this opinion is shared by many prominent English Jurists.

On the other hand, although only a short while ago Lord Lytton and the English Trade Unions Council declared themselves in favour of such a Court, and in addition Mr.Hambro, in his book:"How to win the Peace", recommended it warmly, the chances of founding an International Criminal Court for the punishment of war criminals are alas somewhat smaller, at least in the immediate future.

(1)Of course in cases where the concerned United Nations Governments have the suspects already in hands, and the Government of no other United Nation claims them, the intermediary of the United Nations Commission is not necessary. All these cases can be judged by the competent national Courts.
(2)See inter alia Claude Mullins:"The Leipzig Trials", London, 1921, and"German War Trials", Report of Proceedings before the Supreme Court in Leipzig, Published by H.M. Stationery Office, London, 1921.

As we all know, on one side, it takes a certain time to establish an International Organisation of this kind, and especially to get the ratification of all the concerned Nations, - on the other the available time in so urgent a matter as the judging of war criminals, is now very short.

For this reason it would seem to me to be a token of wise discretion to strive in the first place for the development and consolidation of the tasks and powers of the United Nations Commission for the Investigation of War Crimes in the direction already indicated. The liberation of Mussolini after the signing of the Armistice with Italy, with all its consequences, in spite of the constant and re-iterated urgings of the experts that this time the surrender of the chief war criminals must take place before, and as a condition of, the signing of an Armistice, only proves once more how important it is in such a matter to stick to one's guns, and above all to act in a practical fashion.

Par.3.Grounds for the institution of an International Criminal Court.

In the meantime, the foregoing does not mean that the speedy formation of an International Criminal Court alongside the United Nations Commission for the Investigation of War Crimes, either in independent form or as part of the "Permanent Court of International Justice at the Hague", is not extremely desirable, and we should continue to strive for it with all our strength.

In the first place, surely the judging of a certain, be it limited, number of the most prominent criminals, such as HITLER, HIMMLER, GOEBBELS, GOERING, MUSSOLINI, CIANO, etc.,etc., could take place much better by an International Criminal Court than by any National Court of Law, however high its standing and however undoubted its integrety might be. It can even be said that the trial of these individuals, if it is to give general satisfaction, can and may only take place through the medium of an International Organ.

In the second place, an International Criminal Court is still more qualified for the three functions which in the absence of such a Court have to come to the United Nations Commission for the Investigation of War Crimes, namely: -

(a): the settlement of competence between the Allied Courts in cases where several consider themselves equally competent;

(b): the decision regarding eventual Pleas of Superior Order; and

(c): deciding the question whether a crime is a political or a social one in the case of requests for extradition to so-called Neutrals - which question would surely be more in its place at an International Criminal Court.

In the third, and certainly not the least important, place, the establishment of an International Criminal Court is of the greatest importance for the future, as it cannot be done without in the post-war World-Organisation. Any organisation for the maintenance of International Order and Peace is in my opinion not complete if it does not possess an International Criminal Court before which those persons who disturb or threaten to disturb international order or peace can be summoned, and by which they can, if need be, be punished or eliminated.

Indeed, the real significance of the punishment of war criminals is only made clear when it is viewed in conjunction with the construction of a new International Order. For the object of this punishment - as Lord Cecil expressed so lucidly in his Speech in the House of Lords on the 7th October 1942 - is chiefly threefold, viz :

a: to give satisfaction to the shocked sense of right and wrong of the whole civilized world, and particularly of the peoples in the Axis-occupied territories;

b: to frighten future wrong-doers; and

c: to re-establish respect for Law and Order in the whole world.

These basic principles can undoubtedly best be established by the activities and judgments of a really International Criminal Court.

Par.4. History and Development of the idea of the formation of an International Criminal Court.(1)

In the past there have been several attempts to establish an International Criminal

(1)In order to enter not too much in details we will not mention here other forms of International Penal Jurisdiction, which are not concentrated in one Central International Court, such as the jurisdiction of the "Tribunaux Mixtes" in Egypt and the "Allied Maritime Courts"(Allied Powers Maritime Courts Act 1941),etc.,although they possess some interesting aspects for our problem, and have worked very successfully.

Court, and we have a number of projects and examples at our disposal.

More particularly in the course of the Great War of 1914 - 1918 the idea of an International Criminal Court was frequently brought up.

The Committee of Fifteen, formed after the War of 1914 - 1918 by the Temporary Peace Conference, recommended on the 25th January 1919 the constitution of a "High Tribunal" to be formed by three Members appointed by each of the Five Great Powers, and one by each of the smaller Powers. It would apply the principles of the Law of Nations as they result from the usages established among civilized peoples, from the Laws of Humanity, and from the dictates of public conscience. The Court would itself decide upon its procedure. Especially four classes of charges should be brought before the Court:

a. those against civilians and soldiers of several Allied Nations, such as outrages committed in prison camps, where prisoners of war of several nations were congregated;

b. those against persons of authority, whose orders were executed not only in one area or on one battlefront, but affected the conduct of operations against several of the Allied Armies;

c. those against civil or military authorities, without distinction of rank, including the Heads of States, who ordered, or, obstained from preventing or taking measures to prevent, putting an end to, or repressing, violations of the laws or customs of war;

d. those against such other persons belonging to enemy countries as, having regard to the character of the offence or the law of any belligerent country, it may be considered advisable not to proceed before a court, other then the "High Tribunal".-

A special ruling was made for the prosecuting organ at the Tribunal. These proposals were not accepted, chiefly owing to objections from America and Japan.

In art.227 of the Versailles Treaty, a special International Criminal Court was thereupon proposed to try Wilhelm the Second of Hohenzollern. This article reads as follows: -

"The allied and associated powers publicy arraign Wilhelm II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

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

United States of America, Great Britain, France, Italy and Japan.

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 undertatakings, and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed."

Solely because, under the existing regulations, the Netherlands could not, and should not, surrender William II for an "offence against international morality and the sanctity of treaties", the International Criminal Court in question never became a reality.

The President of the Hague Jurists-Committee for the drawing up of a scheme for a Permanent Court of International Justice of 1920, the Belgian Descamps, made a proposal regarding a "Haute Cour de Justice Internationale" entitled to deal with crimes against public order and the general law of nations, which would be referred to the Court by the Council or the Assembly of the League of Nations. The Court would have the competence"pour caractériser le délit, fixer la peine, et déterminer les moyens appropiés à l'exécution de la sentence." The Committee passed a "vocu" recommanding an inquiry into this proposal by the Council and the Assembly of the League. The Assembly decided - in agreement with the statement of their appointed Reporter, the Belgian, Fontaine, that the problem was still"très prématuré"(1)

The Conferences of the International Law Association at Buenos Ayres(1922), Stockholm(1924) and Vienna(1926)were more successful, causing the acceptance of a draft-Statute for a Permanent International Court of Justice.

Afterwards the institution of such a Court was constantly discussed, especially at the Congresses of the "Union Interparlamantaire" and of the "Association international du droit pénal".- In 1937 a scheme for an International Court of Justice was presented by the League of Nations at the "Conference regarding the Repression of Terrorist Deeds". A Convention was signed by the representatives of all the participating States, but unhappily it was never ratified by the various Governments.

(1)See Report of the 3rd Committee, Actes, Séances Plénières 1920, pag.764.)

Those two projects of the International Law Association and the League of Nations can now be of great use to us, and I shall revert to them later.

Of no less significance are the experiences of the Permanent Court of International Justice in the Hague, which has gained great authority in the course of time. It is true that this court has so far not been occupied with"Criminal Law", but its rules of procedure and its composition may serve us to some extent as an example.

The question even arises as to whether - especially in view of the very limited time remaining to us to arrive at a result(it has now actually become a matter of months) - the solution could not be found in the formation of a separate "Penal Chamber"of the Permanent Court of International Justice in The Hague, whereby the existing organisation and procedure could be utilized. -

I think however that I must answer this last question in the negative, because the existing organisation and procedure - taking into consideration the altered circumstances and the special task of the new "Penal Chamber" - would in any case not satisfy. For instance, the Court could no longer remain coupled to the Organisation of the League of Nations, as it has been so far. Discussions regarding this are already taking place between the United Nations.

Moreover, the Criminal Court here envisaged is - at any rate for the time being - more an Inter-Allied Court than a strictly International Court, whilst for instance the choosing of the Judges of the Permanent Court of International Justice is also fairly intricate, and the last existing composition of the Judges of the Court would not help us in the least.

Finally a penal law suit is directed by quite other rules, than for instance a civil one.

Par.5.Difficulties.

Undoubtly the questions, which material law and which procedure are applicable, and that of the language to be used, are among the most difficult problems which we have to solve in order to establish an International Criminal Court.

The Lord Chancellor, Lord Simon in this connection said in his Statement in the House of Lords on the 7th October 1942: -

"I will venture to make one observation, purely provisional and tentative, on the third class of tribunal to which attention has naturally been drawn, and which both the noble Viscount, Lord Cecil, and the noble and learned Viscount, Lord Maugham, discussed. I agree, if I may say so, with the noble Viscount, Lord Cecil, that the main difficulty in creating and putting to work effectively this conception of an International Criminal Court is not the difficulty of language; but let nobody run away with the idea that this is an easy conception to make speeches about in general terms. It is an exceedingly difficult matter to deal with if one desires to face and to try to overcome the practical difficulties. The composition of such a Court is not going to be a very easy matter, especially when there are so many belligerents. Strictly speaking, I do not think that it ought to be called an International Court; it ought to be called a United Nations Court, or an Allied Court, for, unlike the Hague Tribunal, or bodies of that sort, it does not really aim at staffing itself by Judges drawn from, amongst others, the enemy countries, or, I should think, the neutral countries.

Then, when you have created this novel Tribunal, you still have to face the question of what is the code of law which it is going to apply. I think myself, as a man who has spent a good deal of his life in the practical business of the law, that one of the greatest difficulties of all, which I dare say to a layman seems comparatively unimportant, would be procedure; for the procedure which is understood and followedin a British Court is completely unlike the methods which are followed elsewhere. There may be a great deal to be said for both views, but before your Court can even start you have to decide what your procedure is going to be. Therefore, without in the least wishing to pour cold water on the idea - and indeed, I see the importance of the point made both by the noble and learned Viscount, Lord Maugham, and by the noble Viscount, Lord Cecil, regarding exceptional cases - I think that we shall probably be wise to put our main trust, as far as a tribunal goes, in tribunals, which do not call themselves international."

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