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III/25.
19th December 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Request from French National Office raising two questions
of Law.
Referred to Committee III.

The French National Office has submitted to the United Nations War Crimes Commission the text of a letter sent on 9th November 1945 by the Director of the (French) Enemy War Crimes Research Office in Paris, to the French Representative on the United Nations War Crimes Commission, a copy of which, together with the English translation, is appended to this paper.

The Document was circulated to Committee I as Doc. I/46 on 19th December 1945 and Committee I decided in its meeting of the same date to refer the matter to Committee III and ask it for its opinion on both legal questions raised in the document.

2 Enclosures.

I/46.
19th December, 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

Translation of a Letter from:

The Director of Enemy War Crimes Research Office.

Dated: Paris, 9th November, 1945.

To Professor Gros at The French Embassy,
4, Carlton Gardens,
London, S.W.1.

I have the honour to acknowledge receipt of your letter of 16th October 1945 by which you returned to me file No. 1094/GM/CI concerning a war crime committed in Czechoslovakia. The victim being a citizen of Alsace-Lorraine, i.e. a Frenchman, it is evident that we, and not, as our draftsman assumed, the Czechoslovak Government, are competent to deal with the case.

It seems however, that the matter should be examined by the United Nations Commission and a statement of principle sought. Our files contain one precedent and further cases presenting the same problem will certainly recur.

The problem concerned is that of Alsatians enlisted for the German Army by force who then deserted, were sentenced as deserters and shot under a sentence.

The responsibility for the enlisting into the German Army, in disregard of International law, Alsatians who are French nationals, belongs to the leaders of the ex-Reich, to the members of the General Staff and to the Gauleiter of Alsace-Lorraine, Wagner, but to what extent are the members of a German Military Court responsible who acted as regular judges and awarded sentences as provided by the German Military Court in case of a soldier deserting from the German Army, even if the deserter were an Alsatian?

In judging the responsibility of the officers and men of whom those Courts were composed, the fact must be borne in mind that they could not be ignorant of the Alsatian origin of the accused. The enlistment of these men in disregard of International law, a fact which must certainly have been pointed out by the defence, should have secured to the accused a high measure of extenuating circumstances. It seems, however, that the German Military Courts judged the cases of Alsatian deserters with particular severity.

You would greatly oblige me by submitting this question of principle to the United Nations Commission and to let me know whether the members of these German Military Courts may be arrested as war criminals, in cases where the awarded sentences appear to have been excessive.

Paris le 9 Novembre 1945.

Le Directeur du Service de Recherche
des Crimes de guerre ennemis.

A

Monsieur le Professeur GROS
Ambassade de France,
4, Carlton Gardens, S.W.1.

J'ai l'honneur de vous accuser réception de votre lettre du 16 Octobre 1945, m'adressant en retour un dossier No 1094/GM/CI, relatif à un crime de guerre commis en Tchécoslovaquie.

La victime étant un Alsacien-Lorrain, donc un Français, il est évident que nous sommes compétents pour instruire le dossier et non pas le Gouvernement tchécoslovaque, comme l'avait jugé notre rédacteur.

Il semble cependant que cette affaire devrait faire l'objet d'un examen et d'une déclaration de principe devant la Commission des Nations Unies. Nous avons déjà dans nos dossiers un précédent, et de nouvelles affaires posant le même problème se présenteront certainement.

Il s'agit en l'espèce d'Alsaciens-Lorrains incorporés de force dans l'armée allemande, déserteurs, jugés comme tels et fusillés après jugement.

La responsabilité de l'incorporation dans l'armée allemande, au mépris de toute loi internationale, des Alsaciens-Lorrains citoyens français, incombe aux dirigeants de l'ex-Reich, aux membres du Grand Etat-Major et au Gauleiter d'Alsace-Lorraine WAGNER. Mais quelle peut être la responsabilité encourue par les membres d'un Tribunal Militaire allemand jugeant régulièrement et condamnant aux peines prévues par le Code de Justice Militaire allemand, un soldat déserteur de l'armée allemande, même si celui-ci est un Alsacien-Lorrain.

A la charge cependant des officiers et soldats composant ces tribunaux militaires, il faut retenir ce fait d'évidence qu'ils ne pouvaient ignorer la qualité d'Alsacien-Lorrains des inculpés. Cette incorporation faite au mépris du Droit International, dont la défense faisait certainement état, aurait dû permettre aux inculpés de bénéficier de larges circonstances atténuantes.

Il semble, au contraire, que les Tribunaux militaires allemands se soient montrés particulièrement sévères pour les Alsaciens-Lorrains déserteurs.

Je vous serais obligé de soumettre cette question de principe à la Commission des Nations Unies et de me faire connaître si les membres de ces Tribunaux militaires allemands peuvent être retenus comme criminels de guerre lorsque la peine prononcée peut paraître excessive.

III/26
12 January 1946

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

The Czechoslovak Case No. 1962 (Reinhold Boecker)
Draft Letter to the Czechoslovak National Office

Sir,

The charge submitted by you against Reinhold Boecker concerning crimes committed in Podbrezova (Slovakia) has been referred to Committee III for consideration.

Committee III would be grateful if you could implement the charge by additional information on the following points.

- 1) Was the factory at Podbrezova engaged in the manufacture of war material.
- 2) What was the number of employees of the factory when the accused became Superintendent.
- 3) What was the number of Czechoslovak workers dismissed from the factory while Boecker was Superintendent.
- 4) What was the total period during which Boecker was Superintendent of the factory.
- 5) What positions did the Dismissed employees occupy in the factory.
- 6) ~~What positions~~ Were activities similar to those with which Boecker is charged restricted to the one factory at Podbrezova or have similar activities been recorded also with regard to other factories and if so, which.

You would greatly oblige me by giving attention to this letter at your earliest convenience.

Yours sincerely

TERJE WOLD
Acting Chairman of Committee III

III/27.
1st February, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

The Czechoslovak Case No.1962 (Reinhold Boecker.)

Draft Report.

- I. In its meeting held on 6th December 1945, Committee I decided to put the accused Reinhold Boecker on list 'A' on the second and third counts mentioned in Doc.III/23, paragraph I. With regard to the first count, namely attempts to denationalise the inhabitants of occupied territory, Committee I adjourned the case and referred it to Committee III asking for its opinion:
- (a) whether count 1 of the charge No.1962 is covered by Document C.149, and
 - (b) whether the facts under count 1 of the charge constitute a war crime.
- II. Committee III considered the question whether and in what circumstances denationalisation is a war crime in its report on the Yugoslav Charge No.1434, Commission Document C.149 of the 4th October 1945, and arrived in that report at an affirmative answer to the question whether denationalisation can constitute a war crime. The reply of Committee III to the question (a), if this is to be understood in the general sense, namely whether attempts to denationalise the inhabitants of occupied territory are capable of constituting a war crime is, therefore, in the affirmative.
- III. With regard to the narrower question whether the war crime of attempts to denationalise the inhabitants of occupied territory can be committed by systematically removing employees and workers of the nationality of the occupied State and by replacing them with employees and workers of the nationality of the occupying State, Committee III refers to Paragraph VI of its report Doc.C.149, where it has been stated that under denationalisation in the criminal sense, Committee III understands the use of the de facto power wielded by an occupant in execution of a policy aiming at depriving the inhabitants of an occupied territory of their national characteristics and/or transforming the ethnological character of the region.

From this it follows that in order that there be the war crime of denationalisation, two conditions must be given: (a) there must be a general policy of the occupying Power aiming at depriving the inhabitants of their national characteristics, etc., and (b) the power wielded by the occupant must have been made subservient to this general policy.

If these two sets of circumstances are established then it can be said that a prima facie case for a charge for this crime has been established irrespective of the particular way in which the criminal policy of denationalisation has been pursued, and in which way the de facto power of the occupant has been abused to such criminal purposes.

In the case before the Committee only one of these two elements constituting the war crime of denationalisation has so far been prima facie established, namely the fact that the actual power of the occupant was used. It is stated in the charge that the accused as a functionary appointed by the German Wehrmacht used the power thus vested in him for the systematic removal of Czechoslovak employees and workers.

But the facts stated in the Czechoslovak case do not, as yet, establish also the second element of this war crime, namely the existence of a policy aiming at denationalisation and the fact that the accused was an instrument of this policy.

Committee III, therefore considers it appropriate to advise Committee I to ask the Czechoslovak National Office for additional information.

- IV. This additional information should prove, if possible, that the actual number of dismissals for which the accused is responsible was such that his activities had a chance to reach the alleged objective, namely the denationalisation of inhabitants of Slovakia.

In this connection it would be certainly relevant to learn:

- (a) the numbers of employees of the factory when the accused became its superintendent,
- (b) the number of workers of Czechoslovak nationality who were dismissed during his term of office.

It would also be useful to know exactly the length of the total period during which Boecker was superintendent of the factory.

In order to establish that a policy of denationalisation was being applied, it would be further useful if information could be furnished showing that activities similar to those with which Boecker is charged were not restricted to the one factory at Prodbrezová, but that similar activities had been recorded also with regard to other factories, either in the region or in the province or in the whole of Czechoslovakia.

To enable Committee I to decide whether there was a prima facie case for the charge of denationalisation, it would also be of interest to know what positions the dismissed employees actually occupied in the factory, whether they were leading employees, (managers, foremen and so on), or whether the dismissals were not restricted to persons of responsibility and influence.

To round up the picture, it would be of considerable use to learn how the dismissals were effected, whether due notice was given to the workers and employees or whether they were simply dismissed without notice.

- V. Two further facts should be cleared up before Committee I comes to a conclusion about this case, namely:

- (a) whether the factory was a State factory or was privately owned,
- (b) whether it was engaged in the manufacture of war material.

Question (a) is of interest in view of Art.55 of the Hague Regulations, according to which the occupying State shall be regarded as an administrator and usufructuary of public buildings, landed property, forests and agricultural undertakings belonging to the hostile State and situated in the occupied country. From this it may be deduced that the rights of the occupying Power with regard to a State factory are more extensive than in the case of a privately owned plant and that certain measures which would be illegal in the case of a privately owned factory can be considered covered by Art.55 in the case of a State factory.

The question sub (b) is of interest for two reasons: the one is related to that dealt with in the immediately preceding paragraph and is based on Art.53 of the Hague Regulations which give power to an army of occupation to take possession, inter alia, of depots of arms, stores and supplies which may be used for military operations. The second aspect of this question is based on Art.52 of the Hague Regulations which forbid requests of services of such a nature which would involve the inhabitants in the obligation of taking part in a military operation against their own country. It has been often said that by virtue of Art.52 of the Hague Regulations, in connection with Art.31 of the Geneva Convention of 1929, civilians must not be compelled to work in munition factories, the output of which is used against their own country. This is of course, not to say that the dismissal of employees from a munition factory must under all circumstances be considered legal.

- VI. During the considerations of Committee III a further aspect of the problem was mentioned and Committee III should deal with it in replying to question (b).

In para.VI of C.149, it was said that denationalisation in the wider sense would also comprise such activities as, inter alia, the colonisation of the occupied territory by nationals of the occupant, exploitation and pillage of economic resources, confiscation of property, permeation of the economic life by the occupying State or individuals of the nationality of the occupant. Many of the activities mentioned here will also fall under other headings of the war crimes list, e.g. pillage and confiscation. The protection which International criminal law affords to the economic rights of the inhabitants should not be restricted to rights of property in the narrower sense like, real property and chattels, but should cover also the protection of the economic interest of the working classes, i.e. of those of the inhabitants of the occupied territory whose means of subsistence are based on their work and employment. Wholesale and indiscriminate interference with such economic rights of the inhabitants of occupied territory should also be protected by International criminal law, even if the respective activities are not ancillary to the policy of denationalisation.

III/28
1st February, 1946

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

Request from French National Office raising two questions of law
(III/25 and I/46)

Note by the Secretary to Committee III

I. At the meeting of Committee III held on 29th January 1946, which this writer was unfortunately unable to attend, it was decided that the reply to the question of jurisdiction should be:

(a) that without going into the question whether the French or Czechoslovak Courts should have the jurisdiction to try war crimes committed against French nationals on Czechoslovak territory, the Committee was of the opinion that in case both countries claim the jurisdiction, such action would not be contrary to International Law.

(b) As it is still possible that the Commission will have to act as arbitrator in cases where a person is wanted as a war criminal by more than one country and as long as the recommendation contained in Doc. C.123 have not been accepted by France, it is not possible for the Commission to give any general ruling in such cases.

The Committee suggests that the Commission should state a time limit with regard to answers by Governments which have not yet replied to the recommendation proposed in Doc. C.123.

II. With regard to the question of substance, namely whether or not the German military judges had committed a war crime, the Committee decided that the reply should be that:

(a) the mere fact that a judge sat in the Court trying an Alsatian for desertion because according to the German law he was considered as a German citizen, it is not necessarily considered a war crime.

(b) That the judge in question is responsible as a war criminal only if he neglected the ordinary principles of legal procedure to such an extent that according to the laws of all civilised countries his acts or omissions would have constituted a punishable crime.

III. This secretary was charged with the task of preparing a draft report which, in accordance with the discussion and the above decisions, should be given to the French National Office.

IV. Owing to the disruption of the Commission's technical services due to the removal from Church House to Lansdowne House 2nd Floor, and from Lansdowne House 2nd Floor to Lansdowne House 3rd Floor, it will unfortunately not be possible to circulate the draft report in time for the meeting to be held on 4th February. The secretary will, therefore, take the opportunity of asking Committee III for further guidance as to the report to be prepared, particularly in regard to the following points.

(1) It is submitted that the reply to the French request given supra 1(a) settled fully the question put to Committee III in giving a reply to the difference of opinion which had occurred within the French authorities. The French draftsman (notre rédacteur) assumed that the Czechoslovak Government was competent, the French director of the Enemy War Crimes Research Office expressed the opinion that

French jurisdiction was established to the exclusion of Czechoslovak jurisdiction.

What the Committee is called upon to give is their advice as to this question only and this advice is to the effect that, under International Law, the jurisdiction of both countries is possible (Lotus case).

The question of extradition or transfer of war criminals has not arisen, the Commission does not know in whose custody the criminals are, whether in French, or in Czechoslovak, or in other allied custody; no difference of opinion between the French and Czechoslovak authorities exists and it is most improbable that it will arise.

(2) It is submitted for consideration whether the proposed setting of a time limit to Governments for accepting the recommendation C.123 is in the present circumstances, in accordance with international practice.

(3) The reply II(a) to the question of substantive law is in full agreement with the memorandum of Colonel Archibald King, Chief of the International Law Division of the American Judge Advocate General's Department, Commission Document C.153, which could be referred to in the report to be delivered by Committee III.

(4) With regard to the reply to the substantive question under II(b), I venture to draw attention to the following possible objections, which may or may not be well founded, but which should be considered before the question is decided.

(a) The Four-Power Agreement of 8th August 1945 is based on the general principle that the domestic law of a European Axis country is irrelevant to the question whether or not a certain set of circumstances does or does not constitute a war crime, in the wider sense. This is expressly stated with regard to crimes against humanity in Art. 6(c) of the Charter, where it is said that the activities described there are criminal "whether or not in violation of the domestic law of the country where perpetrated". Moreover, Art. 8 of the Charter provides that the fact that the defendant acted pursuant to order of his Government shall not free him from responsibility, but may be considered in mitigation of punishment if the tribunal determines that justice so requires.

The German law incorporating Alsace-Lorraine into Germany which, incidentally, is not before the Committee, is obviously a "domestic law" in the meaning of Art. 6(c) and an order of the German Government in the meaning of Art. 8 of the Charter.

(b) The plea that a German citizen cannot be punished for complying with German law, particularly the laws about the incorporation of Czechoslovakia and Poland into the German Reich, was raised by the defence in the Belsen trial, e.g. by Prof. H.A. Smith acting as Counsel for the Defence, who pleaded that crimes against Czechoslovak and Polish citizens could not be considered war crimes because Poles and Czechoslovaks were German subjects under German law. This plea was not upheld by the Lüneburg Court.

(c) If compliance with domestic law does not free from criminal responsibility administrative officials and members of military and para-military forces, it may be doubted whether it is possible to recognise such defence in the case of judges whose position vis-a-vis their own Governments and their statutory orders is certainly stronger and more independent than that of an administrative official or of a member of the forces.

(d) It is submitted with great respect that the proposed reply II(b) accords to Axis judges the unrestricted defence of superior order which in all other connections is now discarded by judicial practice and official allied opinion. If the judge does not "neglect the ordinary principles of legal procedure to such an extent that according to the laws of civilised countries his acts or omissions would have constituted a punishable crime", he is, under the draft reply, entirely immune from criminal responsibility.

(e) The Draft Reply II(b) answers the question whether a certain behaviour constitutes a war crime, by stating that it does so, if it, under the laws of all civilised countries, would have constituted a crime.

(f) It has been pointed out in the discussion that the death penalty for desertion in war time does not appear "excessive". This would mean that in general, no criminal responsibility would rest on the judges in similar cases.

The consideration that the judge ought to have acknowledged extenuating circumstances does probably not help because, if he is excused by his law, he may also plead that his law did not allow him to take the French origin into consideration as an extenuating circumstance or he may even plead that his law in the case of certain capital offences does not acknowledge extenuating circumstances at all.

If we acknowledge the Axis law as a defence it is difficult to speak of an abuse of power and of a behaviour which is contrary to the principles of jurisdiction generally accepted.

(g) This writer is, therefore, personally inclined to the opinion that it would be more in line with allied judicial and official practice not to acknowledge the alleged German annexation law as freeing the judges from responsibility but to hold them responsible and to consider in mitigation of punishment of the judges the fact that they were acting under superior orders, namely orders from their governments and their own domestic law, and, as the case may be, under duress or misapprehension.

III/29.
9th February, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Request from French National Office raising two questions of law.
III/25 and I/46.

DRAFT REPORT.

NOTE: The Documents III/25 and I/46 have so far been discussed in the meetings of Committee III held on 8th and 29th January and 4th February 1946. (Minutes Nos. 1, 3 and 4 of 1946.) From the Minutes Nos. 1/46 and 4/46 it appears that no unanimous opinion has so far been reached. Because the Secretary to Committee III has been charged with preparing a Draft Report, he herewith submits two alternative drafts: Draft A being based on the result of the meeting of 29th January 1946, Draft B giving expression to the views expressed by some members in the meetings held on 8th January and 4th February 1946, which were also tentatively submitted in Doc. III/28.

DRAFT A.

The text of paragraphs II and III is taken from the Minutes No. 4/1946.

- I. In a letter from the Director of the French Enemy War Crimes Research Office, to the French representative on the United Nations War Crimes Commission, the wish has been expressed that the matter dealt with in that letter should be examined by the United Nations War Crimes Commission and a statement of principle sought. The letter is concerned with war crimes committed in Czechoslovakia. The opinion has been expressed by a French authority that the Czechoslovak Government is competent to deal with the case. In the letter from the Director of the Enemy War Crimes Research Office, this view is dissented from and it is stated that the French Office is competent, the victims being French nationals from Alsace-Lorraine.

The problem of substantive law involved is that of French citizens from Alsace-Lorraine enlisted in the German Army by force who then deserted, were sentenced as deserters and shot under a sentence. It is stated in the letter that the responsibility for the enlisting into the German army in disregard of International Law of French nationals from Alsace-Lorraine belongs to the leaders of the Ex-Reich, to the members of the General Staff and to the Gauleiter of Alsace-Lorraine, Wagner. The question is put to what extent the members of the German Military Courts are responsible who acted as regular judges and awarded sentences as provided by the German Military Code in cases of a soldier deserting from the German Army, even if the deserter were an Alsatian.

The French document further states that, in judging the responsibility of the officers and men of whom these courts were composed, the fact must be borne in mind that they could not be ignorant of the Alsatian origin of the accused. The enlistment of these men in disregard of International Law, a fact which must certainly have been

pointed out by the defence, should have secured to the accused a high measure of extenuating circumstances. It seems, however, that the German military courts judged the cases of Alsatian deserters with particular severity.

- II. Regarding the question which Government is competent to deal with cases like those mentioned in the French document, the Commission is of opinion that there is no doubt that Czechoslovak Courts have jurisdiction over crimes committed on Czechoslovak territory. On the other hand, if French Courts claim jurisdiction in view of the fact that the victim was a French national, such claim would not be contrary to the rules of International law. (Lotus case.)

As to the possible question to whom the criminals should be surrendered, the Commission feels that it is not possible to give any general ruling as long as the recommendation contained in Doc.C.123 has not been either accepted or rejected by the interested parties. It is not appropriate to give a general opinion as long as it is possible that the Commission will be called upon to act as arbitrator in concrete cases.

- III. Further, the question has been raised in what circumstances German judges can be considered to be guilty of a war crime if they tried an Alsatian for desertion in consequence of the fact that Alsace-Lorraine was, contrary to International Law, annexed during the war and that the inhabitants of this territory were, according to German law, considered to be German citizens.

The Commission is of opinion that the mere fact of sitting on a Court trying an Alsatian deserter does not in itself constitute a war crime, and further, that the mere fact that a judge considered the annexation of Alsace-Lorraine as established does not eo ipso constitute a war crime. The judge is further, in the opinion of the Commission, not guilty of a war crime if he acted upon the consequences necessarily connected with this annexation, that is, in our case, the fact that the citizens of Alsace-Lorraine became, pursuant to this annexation, German citizens.

The Commission is further of opinion that the judge is guilty of a war crime if the rules of procedure applied were contrary to the principles recognised by all civilized nations, or if the law administered was contrary to the principles recognised by all civilized nations to such an extent that his acts or omissions would have constituted a punishable crime.

DRAFT B.

- I. Text as in Draft A.
- II. With regard to the question of jurisdiction involved in the case, Committee III relies on the judgment of the Permanent Court of International Justice in the case of S.S. "LOTUS" (France v. Turkey), decided in 1927. In this judgment, the Court stated that in exercising jurisdiction, International law leaves States a "wide measure of discretion"; that where there is no prohibitive rule of International law "every State remains free to adopt the principles which it regards as best and most suitable"; that "all that can be required of a State is that it should not overstep the limits which International law places upon its jurisdiction"; that "within these limits, its right to exercise jurisdiction rests in its sovereignty"; that the so-called territoriality of criminal law is not an absolute principle of International

law"; that any exception of the right of States to exercise jurisdiction must be "conclusively proved" and that as municipal jurisprudence is divided, it is hardly possible to see in it an indication of the existence in International law of a rule restricting the criminal jurisdiction of a State to crimes committed on its territory.

In addition to the jurisdiction of the Czechoslovak courts, which would be based on the fact that the crimes have been committed on Czechoslovak territory, there is no obstacle, in International law, to the French courts also claiming jurisdiction if French municipal law vests it in them in cases where French nationals have been the victims of crimes committed outside France.

In cases such as outlined in the French document, concurrent jurisdiction is, therefore, possible under International law.

- III. As to the question of substance, namely the criminal responsibility of the judges, Committee III considers it necessary to draw attention to the fact that the document appears to contain an unwarranted assumption by describing the French nationality of the victim as "a fact which must necessarily have been pointed out by the defence" and by stating that the judges could **not** be ignorant of the victims' Alsatian origin.

The Committee decided to base its discussions on the assumption that the judges, whose criminal responsibility is in question, knew that the victims had been both French citizens from Alsace-Lorraine, and that they had been compulsorily called up for service with the German Army. If the judges - without fault of their own - did not know that the accused were French nationals who had been enlisted into the German Army against their will, no problem of criminal repression against these judges would arise, because a German judge does not commit a war crime in sentencing in war time a German soldier for desertion from the German Army.

- IV. In framing its opinion on the question of substantive criminal law, Committee III was guided by the memoranda by Major General Myron C. Cramer, the United States Judge Advocate General, and Colonel Archibald King, Chief of the International Law Division of the United States Judge Advocate General's Department (Commission Document C.153.) Committee III shares the opinion expressed in these memoranda which is to the effect that while premature annexation of occupied territory is unquestionably a violation of International law, it is unsound and may be unsafe to conclude therefrom that every action taken by a Court alleged to be illegally instituted (or alleged illegally to extend its jurisdiction) entails ipso facto the criminal liability of all persons associated with the operation of such a court. Mere technical violations of International law should not be held, eo ipso, to produce the individual criminal responsibility. The decisive consideration would seem to be whether the trial of an accused by a particular court deprived him of the protection to which he was entitled under the Law of Nations, i.e.

- (a) whether a given judicial action flouted a specific prohibition of the Hague Regulations, or was
- (b) in disregard of those fundamental principles of human justice accepted by civilised peoples.

The action of a court which results in the illegal condemnation, seizure or destruction of property, should not protect a judge merely because homage has been done to legal forms. In all cases, the substance of the action taken may be scrutinised to determine its propriety under the law of nations. (Para.2. of General Cramer's summary, para.34 (2) of Colonel King's memorandum, Doc.C.153.)

The action of the court itself rather than any alleged illegality in its inception, should furnish the test of judicial criminality. The decisive consideration would seem to be whether trial of an accused by an enemy court deprives him of the protection to which he is entitled under International law, viz, whether judicial action produced either a violation of some specific prohibition under the regulations, or was in disregard to those fundamental principles of human justice recognised by civilised peoples. The action of judicial authorities in this respect is on no different plane from that of military or executive authorities. Nor should any greater weight be given to the pleas of "act of State" and "superior orders" than is given in other situations (para.30 of Doc.C.153)

- V. If the trials of the Alsatian deserters were conducted in disregard of those fundamental principles of human justice which have been accepted by civilised peoples, if, e.g. the accused were denied the right to introduce evidence, or to present witnesses, particularly in proving their Alsatian origin and French nationality, or if principles repugnant to the modern practices of civilised nations were applied, outrageous penalties inflicted, and the like, then the criminal responsibility of the judges could not certainly be in doubt.

But Committee III is of opinion that the judges should not escape personal responsibility even in such cases, where "homage has been done to legal forms". Even where the trial was conducted properly, it must be examined whether the judicial action, although formally correct, produced a violation of some specific rule of International law.

- VI. In the present case, positive provisions of the Hague Regulations and generally recognised rules of customary International law have been violated by the judicial action in question.

Under Art.23 of the Hague Regulations a belligerent is forbidden to compel the subjects of the hostile party to take part in the operations of war directed against their own country. Under Art.45, it is forbidden to force the inhabitants of occupied territory to swear allegiance to the hostile Power. Art.52 prohibits the requisition of services involving the inhabitants in the obligation to take part in military operations against their own country.

The alleged deserters, who were tried by the German military judges, had been enlisted into the German army in flagrant violation of these provisions and of the general rules of customary International law, making "premature" annexation illegal and "usurpation of sovereignty" a war crime.

The death sentences passed on these alleged deserters were substantially nothing but the enforcement of the continuation of this flagrantly illegal position.

It follows from what has been said that the death sentences, even if not arrived at in the course of an outrageous procedure, flouted the quoted provisions of conventional and customary International law.

- VII. It may be objected to this argument that the German judges in sentencing to death persons who under German law were German nationals and deserters from the German army, did nothing but their duty as military judges and cannot therefore be guilty of war crimes.

Committee III does not consider this defence sound. It shares the view expressed in the American memorandum, paragraph 30, that the action of judicial authorities in this respect is on no different plane from that of military or executive authorities and that no greater weight shall be given to pleas of "act of State" and "superior orders" in the case of judges than is given in other situations. Committee III adds that the

Four-Power Agreement of 8th August 1945 is based on the general principle that the domestic law of a European Axis country is irrelevant to the question whether or not a certain set of circumstances does or does not constitute a war crime, in the wider sense. This is expressly stated with regard to crimes against humanity in Art.6(c) of the Charter, where it is said that the activities described there are criminal "whether or not in violation of the domestic law of the country where perpetrated". Moreover, Art.8. of the Charter provides that the fact that the defendant acted pursuant to order of his Government shall not free him from responsibility, but may be considered in mitigation of punishment if the tribunal determines that justice so requires.

The German law incorporating Alsace-Lorraine into Germany, which, incidentally, is not before the Committee, is obviously a "domestic law" in the meaning of Art.6(c) and an order of the German Government in the meaning of Art.8. of the Charter.

The plea that a German citizen cannot be punished for complying with German law, particularly the laws about the incorporation of Czechoslovakia and Poland into the German Reich, was raised by the defence in the Belsen trial, e.g. by Prof.H.A.Smith acting as Counsel for the Defence, who pleaded that crimes against Czechoslovak and Polish citizens could not be considered war crimes because Poles and Czechoslovaks were German subjects under German law. This plea was not upheld by the Lüneburg Court.

VIII. If compliance with domestic law does not free from criminal responsibility administrative officials and members of military and para-military forces, it may be doubted whether it is possible to recognise such defence in the case of judges whose position vis-a-vis their own Governments and their statutory orders is certainly stronger and more independent than that of an administrative official or of a member of the forces.

It would, therefore, in the opinion of Committee III be in line with allied judicial and official practice not to acknowledge the alleged German annexation law as freeing the judges from responsibility for what, in substance, was the illegal causing of the death of allied citizens.

The mere fact that a judge considered the annexation of Alsace-Lorraine established would not, eo ipso, entail his criminal responsibility. But if, in acting upon this illegal fact, he, by his judgment, deprived the victims of the protection of positive provisions of International law, and ordered them to be shot or hanged, he is, in the Committee's opinion, not protected by his national law, at least not to a higher degree than a soldier is who obeys an illegal order given by his superior.

Any other interpretation would lead to the inadequate result that any Axis judge or authority who was careful enough to stick to some minimum forms of legal procedure would be freed from responsibility for illegal acts clothed as judgments or official decision. If he was allowed, with impunity to sentence to death allied nationals as "deserters" from the German army, this would mean that he was also allowed to sentence allied nationals for "high treason" against Germany, for offences against the "new political order" and the like. Neither for desertion in war time, nor for high treason appears the death sentence "excessive", if inflicted on genuine soldiers, legally drafted into the German Army, or on genuine German nationals, who owe allegiance to the German State. Even the consideration that the judge ought to have acknowledged extenuating circumstances does probably not help because, if he is excused by his law, he may also plead that his law did not allow him to take the French origin into consideration as an extenuating circumstance or he may even plead that his law in the case of certain capital offences does not acknowledge extenuating circumstances at all.

IX. It will of course be a matter for the court, considering the guilt of each individual judge, to have regard, if it thinks fit, in mitigation of punishment, to the fact that the German judges were acting under superior orders, namely orders from their Government, and laws enacted by the Hitler régime.

It may even be that one or the other of the judges may successfully plead that he acted under duress (necessity) or under a mistake of fact, but this is, as has been said, for the court to consider and not for the United Nations War Crimes Commission, who is called upon to express its opinion whether or not prima facie a war crime has been committed.

III/30.
8th March, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

The Czechoslovak Case No.2553. (Christoph Manner.)

Referred to Committee III.

On the 26th February, the Czechoslovak Representative on the United Nations War Crimes Commission presented to the Commission a charge against Christoph MANNER, Gauhauptstellenleiter and member of the SS, for the alleged crime of deportation of civilians committed on 22nd September, 1938, in Bohemia.

The short statement of facts and the particulars of alleged crimes contained in this charge are as follows:

On the 22nd September 1938, the accused, with the assistance of others, kidnapped a man working with the Czechoslovak police, transported him from Czechoslovakia over the frontier to Germany and delivered him there to the Gestapo.

The accused, up to the incorporation of the so-called "Sudeten-gebiet", held a high position in the Henlein Party and in 1940 became a member of the SS. Since 1933 he worked as an agent of the German Intelligence Service (Gestapo) in the border regions of Bohemia.

Armand Goldreich fled from Germany to Czechoslovakia where he found asylum as a political refugee. He assisted the Czechoslovak police especially in unmasking persons posing as refugees who, however, were actually sent by the Nazis to Czechoslovakia for spying purposes.

On September 22nd, 1938, near the border of Bohemia, the accused arranged, by order of the Gestapo, an attack on Armand Goldreich and, with the assistance of some other unknown perpetrators, kidnapped and transported him across the Czechoslovak border to Germany, where he delivered him to the Gestapo.

At that time, just a week before Munich and during the days of Czechoslovakia's mobilisation, Germany intensified her War of Nerves policy by provoking an increased number of incidents in the border regions of Bohemia in order to maintain a permanent state of unrest and to create pretexts for the intended invasion. Moreover, the crime under consideration aimed at lowering the prestige of the Czechoslovak authorities as well as at terrorising German refugees.

As evidence the respective file of the Ministry of Interior in Prague is referred to.

In its meeting held on 7th March 1946, Committee I decided to refer the case to Committee III for examination as to whether this particular crime should be considered as a crime against humanity and for what reason.

III/31.
20th March, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Supplement to the Survey of European

Armistice Conventions and Surrender

Documents. (Doc. III/22)

Provisions Concerning War Criminals.

NOTE: Document III/22 contains a survey of the provisions of the European Armistice Conventions and Surrender Documents dealing with war criminals.

In addition to the documents mentioned there, it should be noted that the Control Council Law No.10 (circulated as Research Document No.15(bis)), is relevant to the question.

Only now the text of the Control Council Proclamation No.2, dated 20th September 1945, has become available to this Commission. This Proclamation contains "certain additional requirements imposed on Germany". Its preamble and the text of its Section X is reproduced below.

PROCLAMATION No.2.

Certain Additional Requirements Imposed on Germany.

To the people of Germany:

We, the Allied Representatives, Commanders-in-Chief of the forces of occupation of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the French Republic, pursuant to the Declaration regarding the defeat of Germany, signed at Berlin on the 5th June, 1945, hereby announce certain additional requirements arising from the complete defeat and unconditional surrender of Germany with which Germany must comply (in so far as these have not already been fulfilled), as follows:-

Section X.

36. The German authorities will furnish any information and documents and will secure the attendance of any witnesses, required by the Allied Representatives for the trial of:-

- (a) the principal Nazi leaders as specified by the Allied Representatives and all persons from time to time named or designated by rank, office or employment by the Allied Representatives as being suspected of having committed, ordered or abetted war crimes or analogous offences;

- (b) any national of any of the United Nations who is alleged to have committed an offence against his national law and who may at any time be named or designated by rank, office or employment by the Allied Representatives;

and will give all other aid and assistance for these purposes.

37. The German authorities will comply with any directions given by the Allied Representatives in regard to the property of any person referred to in sub-paragraphs 36(a) and (b) above, such as its seizure, custody or surrender.

III/32.
20th March, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

The Yugoslav Cases Nos. 1323 and 1462.

1) The Yugoslav Representative on the United Nations War Crimes Commission presented to the Commission charges against certain Italians, including Italian judges, alleging both war crimes in the narrower sense and crimes against humanity.

While the charges, as far as they allege war crimes in the narrower sense, were disposed of by Committee I some time ago, and the charged persons placed on the respective lists of the United Nations War Crimes Commission, those parts of the charges that alleged crimes against humanity only were adjourned.

2) In the meeting of Committee I held on 14th March 1946, Minutes No. 54, Committee I decided to refer to Committee III the question as to whether or not the crimes involved in these particular cases should be considered as crimes against humanity, and for what reasons.

This decision of Committee I concerns paragraphs III, IV, VII, VIII and IX of case No. 1323 and case No. 1462.

3) The Yugoslav representative has kindly made an extract from the charge No. 1323 and the addendum thereto as far as they are relevant at this stage. A copy of this paper by Dr. Zivković is appended to this document.

4) The short statement of facts and the particulars of alleged crime contained in the case No. 1462, are as follows:

" The individuals listed above are guilty of crimes including murder, shooting of hostages and Yugoslav prisoners of war, destruction of villages, illegal arrests and mass deportations.

" This charge deals with a number of crimes committed by the Italians during this war against the Yugoslav population in the provinces known as VENEZIA GIULIA, TRIESTE and ISTRIA.

" It is a known fact that the Italian authorities secretly persecuted the Slav population of the above-named provinces long before this war and, after the occupation of regions within the frontier of Yugoslavia proper, they did not even try to hide their policy of terrorism and denationalisation of the Yugoslav minority in Italy. Encouraged by the initial successes of the Axis, the Italian authorities, both civil and military, deprived the Yugoslavs of Italy of all the protection and rights which the latter should have enjoyed in accordance with the treaties. Moreover, the Italian authorities, after the Yugoslavs of Italy rose to arms in consequence of this Italian policy and became part of the Yugoslav National Army of Liberation, applied to the Yugoslav citizens of Italy the same criminal methods which they had employed in the case of the inhabitants of the conquered parts of Yugoslavia proper.

Investigation of these crimes is far from complete and only a fragmentary picture can be provided so far. However, in this charge there are some cases from which some particulars of Italian criminal methods can be collected.

" BERGONZI, ZICCAVO and FABRONI of the Difesa Territoriale at Videm (Udine) were especially responsible for introducing, during 1941-42, the same drastic measures against the Yugoslav population of Venetia Giulia as those in force against the inhabitants of Yugoslavia proper. They ordered the shooting of hostages and of members of the Yugoslav Army of Liberation the burning down of villages and mass deportations. Units under their command committed the following crimes:-

" In July 1942, Herman FURLAN of Gozza near VIPAVA (Vipaco) a soldier of the Yugoslav Army, was captured and shot.

On the 21st July 1942, seven Yugoslav soldiers were captured during the mopping up operations in the sector Vipava-Nanos and shot on the spot. Their houses were burnt down on the same day.

On the 24th August 1942, the so-called Partisan SASA, a Yugoslav soldier, was captured and shot.

Between the 10th and 15th September 1942, the squadristi burnt down several houses in the village GRAHOVO near GORIZIA in revenge because seven young Slovenes had joined the Partisans in the woods.

On the 28th and 29th September, 67 relatives in all of those who had joined the Yugoslav Army were arrested and sent to concentration camps.

On the 1st October 1942 a number of families, whose members were with the Yugoslav Army, were deported from the municipality of TRNOVO (Montespino). 17 families were also deported from the municipality of St. PETER near Gorizia (Gorica).

On the 7th November 1942, Franc MASLO and Hedvik MASLO, Yugoslav soldiers, of Monforte del Timavo, and a woman Partisan were captured and shot.

On the 26th November 1942, about 50 relatives of Partisans were arrested and deported from PODERDO near Gorizia.

In December 1942 a number of punitive expeditions, so-called "rastrellamenti" were carried out against villages in the area of GORIZIA, TOLMIN and IDRIA. Houses were burnt down and a number of persons were shot or deported.

On the 5th December 1942, 16 more relatives of Partisans were arrested and deported from the "rastrellamento" areas. "

5) Arrangements have been made for the Minutes No. 54 of the meeting of Committee I, held on 14th March 1946, to be sent to members of Committee III for information, as soon as they are available.

III/33.
22nd March, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Material for the preparation of a definition of
"crimes against humanity."

Compiled by Egon Schwelb, Legal Officer.

I. Preliminary.

Committee III, to whom the case of Christoph Manner (No. 2553) who is charged with a "crime against humanity" had been referred by Committee I, decided in its meeting held on 12th March 1946, to attempt a definition of "crimes against humanity", and charged this writer with the collection of the material and the preparation of a paper on the subject.

The present report contains:

- 1) A survey of the use of the term "crime against humanity" and similar expressions prior to the 1939-1945 War.
- 2) The preparatory discussions during the 1939-1945 War.
- 3) An analysis of the basic documents of the present post-war period.
- 4) Illustrations to be derived from the Nuremberg proceedings at present still in progress.
- 5) An attempt at a definition.

II. The Development prior to the 1939-1945 War.

- 1) The Fourth Hague Convention of 1907 recalls that the Contracting Parties have been animated by the desire to serve, even in the case of war, "the interests of humanity and the ever-progressive needs of civilization" (Preamble, paragraph 2). In the much quoted eighth paragraph of the Preamble the Contracting Parties declared, inter alia, that "the inhabitants and belligerents remain under the protection and governance of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience".

The term "humanity" here appears in a document which deals, as it were, per definitionem, with war crimes in the narrowest and technical sense, namely with violation of the laws and customs of war which are laid down in the document itself.

- 2) The Peace Treaty of Versailles provided in Art. 227 that the Allied and Associated Powers "publicly arraign Wilhelm II of Hohenzollern, formerly the German Emperor, for a supreme offence against international morality and the sanctity of treaties." In its decision the special tribunal sitting over Wilhelm II was to be guided "by the highest motives of international policy with a view to vindicating the solemn obligations of international undertakings and the validity of international morality".

This arraignment of the Kaiser did not take effect on a charge of a violation of existing law but the ex-Kaiser was charged, according to what the authors considered to be the then state of international law, with

offences against moral, not legal provisions. This precedent of Art.227, therefore, does not concern the present problem of "crimes against humanity", because the latter, as framed in the Charter of the International Military Tribunal, are crimes offending against legal and not only moral duties. Art.227 of the Treaty of Versailles was, of course, the predecessor not of the provisions of Art.6 (c) of the Charter, (Crimes against humanity), but of Art.6(a) of the Charter (crimes against peace), with this important distinction, that the crimes against peace under Art.6(a) are not merely contraventions of a moral code, but violations of legal provisions. This difference illustrates the development of international law - at least in theory - between 1919 and 1945.

3) The Commission of Fifteen, set up in January 1919 by the Preliminary Peace Conference, reported that "in spite of the explicit regulations, of established customs and of the clear dictates of humanity, Germany and her Allies have piled outrage upon outrage". The majority of the members of the Commission held that all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of States who have been guilty of offences against the laws and customs of war or the laws of humanity are liable to criminal prosecution". Here we find for the first time the juxtaposition of offences against the laws and customs of war corresponding to Art.6(b) of the 1945 Charter, and offences against the laws of humanity corresponding to its Art.6(c).

4) I do not know whether the 1919 Commission, in using the terms "offences against the laws of humanity" had in mind offences which were not covered by the other expression "violation of the laws and customs of war", particularly whether the Commission thought of crimes against "any civilian population" committed by the Central Powers in World War I. It is common knowledge that to some extent also in the first world war persecutions of their own nationals had been conducted by the Central Powers on a considerable scale, though not on a scale comparable with what happened in Nazi dominated Europe between 1933 and 1945. Reference is made, e.g. to persecutions by the Austrian and Hungarian authorities of political opposition groups and of Slavonic and Rumanian races in Austria and Hungary, and crimes committed by Bulgars and Turks against racial minorities. Whatever the answer to these questions may be, in the actual text of the Peace Treaties, the phrase "laws of humanity" does not appear and Arts.228-230 of the Treaty of Versailles dealt only with acts in violation of the laws and customs of war.

III. The preparatory discussions during the Second World War. Action by the United Nations War Crimes Commission.

1) The necessity of including into the retributive actions of the United Nations also crimes committed against neutrals, against Stateless persons and last, but not least, against persons of enemy nationality, was felt early in the second World War, when the outrages committed by the German Nazis and the Italian Fascists against opposition groups and racial minorities became generally known. It was particularly the unprecedented crimes against the Jews, irrespective of their citizenship, that contributed to the general opinion that not only crimes committed against allied combatants and allied civilian populations, should be punished.

The London International Assembly, e.g., recommended in "The Punishment of War Criminals", Report of Commission I, p.7., that in defining the scope of the retributive action of the United Nations, "a comprehensive view should be taken, including not only the customary violations of the laws of war, but any other serious crime against the local law committed in time of war, the perpetrator of which has not been visited by appropriate punishment". In respect of the extermination of Jews, it was recommended "that punishment should be imposed not only when the victims were Allied Jews, but even when the crimes had been committed against stateless Jews or any other Jews, in Germany or elsewhere." Finally, the London International Assembly recommended "a speedy punishment of crimes such as those that were perpetrated

after the last war against peace-minded Germans who were assisting the Allies in re-establishing law and order".

2) The United Nations War Crimes Commission itself has from a very early date devoted its attention to the punishment of crimes such as those committed against German and stateless Jews in Germany. As a result of consideration by the Commission of the draft resolution submitted by Committee III under the title "Scope of the Retributive Action of the United Nations", (Doc.C.20), a letter was written by Sir Cecil Hurst to the Rt.Hon.Anthony Eden on the 31st May 1944. The following was stated in this letter, the text of which was approved by the Commission on 30th May 1944 (Minutes No.20):

" Technically, a distinction can well be drawn between atrocities committed by the enemy which are violations of the laws and customs of war and those which are not, but it will probably be the general view that the need to exact retribution is as great in the one case as in the other.

" A category of enemy atrocities which has deeply affected the public mind, but which does not fall strictly within the definition of war crimes, is undoubtedly the atrocities which have been committed on racial, political or religious grounds in enemy territory.

" The publicity which was given to the appointment of the Commission for the Investigation of War Crimes led many people to assume that it would be part of the duties of the Commission to investigate atrocities of this character committed by the enemy in enemy territory as well as in occupied territory. I have been approached on occasions by bodies and individuals desirous of knowing whether they could help the Commission in this part of its work. If some other machinery for dealing with the above category of cases is to be set up, the Commission feels that a public announcement to this effect would be helpful, in order that the public at large may understand that effective steps will be taken to ensure that the authors of these atrocities are brought to justice.

" The Governments of the United Nations may already have in view some plan for bringing the authors of these crimes to justice, but if that is not the case, it is right that you should know that the Commission is prepared to take up this work if by so doing it can assist the Governments of the United Nations. "

The then Lord Chancellor (Lord Simon) replied to Sir Cecil Hurst in a letter dated 23rd August 1944, inter alia,:

" Thirdly, in your letter of the 31st May you refer to a category of enemy atrocities which does not fall within the definition of war crimes, namely, atrocities committed on racial, political or religious grounds in enemy territory. This would open a very wide field. No doubt you have in mind particularly the atrocities committed against the Jews. I assume there is no doubt that the massacres which have occurred in occupied territory would come within the category of war crimes and there would be no question as to their being within the Commission's terms of reference. No doubt they are part of a policy which the Nazi Government have adopted from the outset, and I can fully understand the Commission wishing to receive and consider and report on evidence which threw light on what one might describe as the extermination policy. -I think I can probably express the view of His Majesty's Government by saying that it would not desire the Commission to place any unnecessary restriction on the evidence which may be tendered to it on this general subject. I feel I should warn you, however, that the question of acts of this kind committed in enemy territory raises serious difficulties and it would probably be better that the Commission should not concern itself with these until the matter has been fully considered in the light of your recent recommendations.

His Majesty's Government do attach very great importance to the investigation which they feel sure is proceeding of the massacres committed in the occupied territories and the identification of those responsible. "

The matter was further discussed in the meeting of the Commission held on 26th September 1944. The record in the Minutes of the meeting is as follows, (Doc.M.33, p.3.):

" Persecution of Jews.

" Lord Wright was of opinion that the persecution of the Jews in Germany was, logically, a war crime, and that the Commission might have to consider extending its definition of war crimes. "

The Chairman, Sir Cecil Hurst remarked that Lord Simon's letter had indicated a desire that the Commission should not interpret its mandate in any narrow spirit, but pointed out the difficulties in the way of including in the Commission's duties the handling of German crimes against Germans in Germany. He, (the Chairman) should like to remind the Commission that the vast majority of the crimes committed against the Jews fell within the Commission's terms of reference because they had been carried out in occupied territory such as Poland, or because the victims were non-Germans.

A further letter by Mr. Eden, dated 8th November 1944, was received from the Foreign Office, confirming the attitude taken in the Lord Chancellor's letter dated 23rd August 1944. It stated:

" The views of the War Cabinet on your letter of the 31st May were communicated to your Commission in the letter from the Lord Chancellor to yourself as Chairman on the 23rd August 1944. The fourth paragraph of that letter dealt with the suggestion put forward by the Commission as to atrocities committed on racial, political or religious grounds in enemy territory. In that letter, after stating the view then held, the Lord Chancellor went on to say that His Majesty's Government would give further consideration to this question. I am therefore writing to let you know that His Majesty's Government adhere to the views as stated in that letter. The majority of these atrocities will have been committed against enemy nationals; if committed against Allied nationals they are within your Commission's terms of reference already. I think it is clear from the letter that there was no intention to exclude atrocities on these grounds in enemy territory if they in fact came within the category of war crimes, but you were clearly raising the wider issue. His Majesty's Government do not - as was stated in the letter, - wish to preclude the Commission from collecting any evidence which they feel would be of value in relation to the general extermination policy which has undoubtedly been carried out in occupied territory in circumstances which constitute war crimes.

" Apart from other considerations His Majesty's Government feel that the progress of the war has made the war criminal question one of some urgency, and it would be a mistake for the Commission to undertake this additional and heavy burden. It is unnecessary to say that His Majesty's Government sincerely hope that those who have been responsible for these atrocities may one day have the punishment which their actions deserve. "

3) On the 12th June 1944, President Roosevelt made a statement containing, inter alia, the following paragraphs:

"This nation is appalled by the systematic persecution of helpless minority groups by the Nazis. To us the unprovoked murder of innocent people simply because of race, religious or political creed is the blackest of all possible crimes. Since the Nazis began this campaign many of our

citizens in all walks of life and of all political and religious persuasions have expressed our feeling of repulsion and our anger. It is a matter with respect to which there is and can be no division of opinion amongst us. "

"To the Hitlerites, their subordinates and functionaries and satellites, to the German people and to all other peoples under the Nazi yoke, we have made clear our determination to punish all participants in these acts of savagery. In the name of humanity we have called upon them to spare the lives of these innocent people. "

The then United States Under-Secretary of State, Mr. Grew, said on 1st February 1945 that the State Department plan calls "for the punishmentfor the whole broad criminal enterprise, including offences wherever committed againstminority elements, Jewish, and other groups and individuals",

4) In the House of Commons on 4th October 1944, in reply to a question asking that the names of those responsible for crimes against German democrats and anti-Nazis, such as the murder of 7,000 internees in Buchenwald concentration camp, should be added to the list of war criminals, Mr. Eden said:

" Crimes committed by Germans against German, however reprehensible, are in a different category from war crimes and cannot be dealt with under the same procedure. His Majesty's Government have this matter under consideration, but I am not in a position to make any further statement at present. "

In reply to a further question as to whether the murder of anti-Nazi Germans in Germany was not just as criminal as the murder of other anti-Nazi elsewhere, Mr. Eden said:

" I was not trying to measure the degree of the reprehensible in any of these deeds; all I was saying was that it was not a war crime in the sense of other crimes that are being committed, and other means would have to be found for dealing with it. "

Finally, in reply to a question by Mr. Silverman as to whether the terms of reference of the War Crimes Commission should be widened so that all these matters could be dealt with by exactly the same procedure, Mr. Eden said:

" No, Sir. We really have given some thought to this. I cannot agree with my Hon. Friend about widening the work of the War Crimes Commission; they have a very definite and circumscribed task. I agree, however, about the offensiveness of these crimes; all I say is, that they must be handled in some other way. "

In the House of Commons on 31st January 1945, the then Minister of State, Mr. Richard Law stated, in reply to a question:

" Crimes committed by Germans against Germans are in a different category from war crimes and cannot be dealt with under the same procedure. But in spite of this, I can assure my hon. Friend that His Majesty's Government will do their utmost to ensure that these crimes do not go unpunished. It is the desire of His Majesty's Government that the authorities in post-war Germany shall mete out to the perpetrators of these crimes the punishments which they deserve. "

" The authorities to which I refer are the authorities who will be in control in Germany when the war comes to an end. I think I can leave it to my hon. and learned Friend to imagine who those authorities will be. "

5) In view of the quotations from Commission documents, recommendations from semi-official bodies like the London International Assembly and from the quoted official statements of spokesmen of the British and American Governments, it is not difficult to conclude that Art. 6(c) of the Charter of the International Military Tribunal and its corollaries, particularly Law. No.10, are the outcome of the deliberations of this Commission, and similar discussions in other quarters.

IV. Crimes against Humanity in recent basic documents.

The following documents contain provisions regarding crimes against humanity:

- 1) the Charter of the (European) International Military Tribunal,
- 2) Control Council Law No.10,
- 3) the Charter of the International Military Tribunal for the Far East.

It may be noted, in this connection that the Austrian "Constitutional Act concerning War Crimes and other National Socialist Misdeeds", which was enacted on 26th June, 1945, i.e. before the conclusion of the Four-Power Agreement dated 8th August 1945, contains, in section 1 (2) a penal sanction for "acts repugnant to the natural principles of humanity against other persons" (i.e. other than enemy combatants and civilian populations of occupied territories.)

1) The Definition of Crimes against humanity in the Charter of the (European) International Military Tribunal.

(A) Art.6. of the Charter annexed to the Four-Power Agreement of 8th August 1945 provides that the International Military Tribunal shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes:

- (a) crimes against peace
- (b) war crimes
- (c) crimes against humanity, namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

(B) From the text the following can be gathered:

- (a) in order to fall under Art.6 (c) a crime must have been committed by persons acting in the interests of the European Axis countries;
- (b) it is irrelevant whether the crime was committed by an individual as such or by a person as a member of an organisation;
- (c) there are two types of crimes against humanity:

crimes of the "murder-type", namely, murder, extermination, enslavement, deportation and other inhumane acts, and

"persecutions".

- (d) In the case of the former, i.e. the more serious type, the Charter provides that they must have been committed against any civilian population. This means that (1) crimes committed against military forces are outside the scope of the provision; (2) single and isolated acts committed against individuals are also outside the scope. The wording "civilian population" clearly indicates that a larger body of victims is visualised. (3) The nationality of the civilian population affected is irrelevant. (arg. "any" civilian population). The term, therefore, includes crimes both against allied and against enemy nationals. As far as allied civilian populations are the victims, the crime falls both under Art.6 (b) and Art.6 (c).
- (e) It is irrelevant whether a crime of the "murder type" has been committed before or during the war.
- (f) With regard to "persecutions", the Charter provides that, in order to fall under the provision, two conditions must be complied with: (1) the persecution must have been committed on political, racial or religious grounds, and (2) in execution of, or in connection with any crime within the jurisdiction of the tribunal.
- (g) The word "persecutions" covers activities which are less grave than murder, extermination, enslavement, deportation and other inhumane acts. Persecutions are distinguished from these more serious types of crimes against humanity in that they fall under the provision only if they were committed on certain grounds (political, racial or religious) and in execution of or in connection with either a crime against peace, or a war crime in the narrower sense, or a crime against humanity of the murder type.
- (h) The last paragraph of Art.6, provides that leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes (which include "crimes against humanity") are responsible for all acts performed by any persons in execution of such plan. From this provision stipulating the vicarious liability of leaders, organisers, etc., it can be gathered that the leaders and organisers are responsible for acts performed by third persons. Nothing is said about the responsibility of the actual performers, but it seems to be implied that the perpetrators are also criminally liable though the Charter itself in general and this provision in particular, deals only with persons responsible on the high level.
This is borne out by the Control Council Law No.10, (Military Government Gazette, No.5, p.46) which was passed to give effect, inter alia, to the London Agreement of 8th August 1945.
- (i) It is expressly stated that for the question whether there is a punishable crime against humanity, it is irrelevant whether or not it has been committed in violation of the domestic law of the country where perpetrated. This means that the defendant cannot successfully plead that he was allowed to commit a crime by the law of the territory where it was committed. Compliance with municipal law

is no defence to a charge for a crime against humanity. It is submitted that this is only one application of the general rule permeating the modern law of war crimes that superior order is no defence, if the order is illegal. Art.6 (c) of the Charter provides in effect that superior order is no defence even in cases where the illegal order or, for that matter, the illegal permission is given in the form of a municipal enactment. Here the Charter expressly lays down the supremacy of International law over municipal law.

2) The definition of Crimes against Humanity in the Control Council Law No.10.

The assumption made above (1(h)) about the criminal liability not only of the planners and instigators, but also of the actual perpetrators, is borne out by Art.II(1)(c) of the Control Council Law No.10.

In Law No.10, the definition of crimes against humanity which is, roughly, taken from the Charter of the International Military Tribunal, is preceded by the words "atrocities and offences including but not limited to ...". Here, expressly, the perpetration of the individual atrocities and offences is declared a punishable offence. The actual text is as follows:

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

(a)

(b)

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

It will be noted that as far as "persecutions" are concerned, the second of the two conditions contained in the Charter (supra 1(f)) is dropped for the province of the local law as intended for the territory of Germany. This means that to be a crime against humanity, within the meaning Law No.10, it is not necessary that the persecution was committed in execution of or in connection with a crime against peace, a war crime or a crime against humanity of the murder type.

The above quoted provision to the effect that domestic law is irrelevant for the question whether or not a crime against humanity has been committed applies also under Law No.10.

3) Crimes against humanity according to the Charter of the International Military Tribunal for the Far East.

Art.6. of the Charter of the International Military Tribunal for the Far East (established by Special Proclamation of General MacArthur, Supreme Commander for the Allied Powers - see Doc.C.182) is framed on the pattern of Art.6. of the Charter of the (European) International Military Tribunal. The differences are as follows: The provision that the accused person must have been "acting in the interests of the European Axis Countries", does, of course, not appear in the Far Eastern Charter. The latter speaks of "Far Eastern war criminals".

The definition of crimes against peace differs insofar as the Far Eastern Charter speaks of the "waging of declared or undeclared war of aggression" and adds International law, obviously International customary law, to International treaties, agreements or assurances.

War crimes in the narrower sense are in the Far Eastern Charter called "conventional war crimes", namely violations of the laws and customs of war. The illustrations contained in Art.6 (b) of the European Charter are omitted.

The definition of crimes against humanity in the Far Eastern Charter differs only in that religious grounds of persecutions are omitted. Persecutions on political and racial grounds are crimes against humanity both in Europe and in the Far East. Persecutions on religious grounds are punishable only under the European Charter.

4) Delimitation of crimes against humanity from other types of crimes.

We have now to attempt to distinguish crimes against humanity within the meaning of the instruments analysed above, from other types of crimes. This task, again, is three-fold because crimes against humanity must be distinguished from 1) crimes against peace, 2) war crimes in the narrower sense and 3) simple or common crimes punishable under municipal criminal law.

In order to attempt this delimitation it is necessary to keep in mind that in a certain general sense, every crime, or nearly every crime, is inhumane and therefore a crime against humanity. What greater crime against humanity can be conceived than the planning, preparation, initiation and waging of a war of aggression? If the documents analysed distinguish crimes against humanity from crimes against peace, they obviously use the former term not in its general connotation, but in a limited technical sense.

Moreover, what can be considered more inhumane and a greater crime against humanity than the violation of the laws and customs of war and particularly the type of violations enumerated in Art.6(b) of the (European) Charter.

Reference has already been made (supra II(1)) to the Preamble of the Fourth Hague Convention where it has been stated that the laws of humanity are the basis and the source of the laws and customs of land warfare. This, in connection with Art.6(c) ("any civilian population") leaves no room for doubt that crimes committed against the civilian population of occupied territory are both violations of the laws and customs of war (Art.6(b)) and crimes against humanity (Art.6(c)). Where enemy combatants are the victims of a crime - irrespective of whether or no the crime is an "inhumane act" - we are faced with a war crime in the narrower sense, not falling under the notion of a "crime against humanity".

5) Strictly speaking also most of the common crimes of the municipal law of civilised nations offend somehow or other against "humanity". There can be no doubt that homicide (murder, manslaughter) is also an offence against humanity in this non-technical sense. The same applies to causing grievous bodily harm, assault, sexual offences and the like. Also among the common crimes against property, there are such as may be considered inhumane, e.g. robbery, arson.

Drawing the distinction between crimes against humanity and ordinary common law crimes is particularly difficult, because the definition of crimes against humanity contained in the Charter enumerates roughly speaking, only acts which are visited by punishment under the criminal law of all civilised nations, but also speaks of "other inhumane acts" a phrase which in this connection is tautological. (An inhumane act is a crime against humanity.) The solution probably is that "inhumane"

common crimes become crimes against humanity, if by their purpose or magnitude they become the concern of foreign Powers and, consequently, the concern of International law.

A further difficulty lies in the fact that the Charter expressly stipulates that it is irrelevant whether an act violates the *lex loci*.

It has been shown in previous papers (e.g. in Doc.C.156, Report on the case of Sepp Dietz) that the term "war crime" in the wider sense comprises crimes against peace, war crimes, violations of the laws and customs of war and crimes against humanity, but it follows on the other hand from what has been said above that the term "crime against humanity" comprises also violations of the laws and customs of war committed against the civilian population and that the phrase "crime against humanity" used in a non-technical sense, covers also crimes against peace, war crimes also if committed against combatants, and ordinary common crimes punishable in municipal criminal law.

V. The Nuremberg Indictment and Proceedings.

- 1) It remains to examine whether the Nuremberg proceedings up to the present stage, throw any additional light on our problem.

In assessing the indictment and the speech of Mr. Justice Jackson in opening the case for the prosecution regarding crimes against humanity, we must be careful to keep in mind that these pronouncements were not made by the Committee of Prosecutors or by Mr. Justice Jackson in any legislative or judicial capacity. The Four-Power Agreement itself was signed on behalf of the four Contracting Powers as an instrument laying down provisions of law. The charge, on the other hand, was presented on behalf of the same governments, but not in their law giving capacity, but in their capacity of a party to judicial proceedings.

That the American representative both in concluding the law making agreement and in presenting the case of the prosecuting party happened to be the same person, (Mr. Justice Jackson), does not alter this position. In the case of Great Britain, France and the U.S.S.R., even the persons were different.

The indictment and Mr. Justice Jackson's speech, to which reference will be made below, is therefore nothing but the statement of the view of one party in judicial proceedings.

- 2) With this proviso reference may be had to Count 4 of the Indictment Cmd. 6696. In paragraph X, (statement of the offence), it is stated that the plan to commit crimes against humanity as defined in Art. 6(c) in Germany, and in the occupied territories, involved, among other things, the murder and persecution of all who were or who were suspected of being hostile to the Nazi party.

These methods and crimes constituted, inter alia, violations of internal penal laws, ^{and} of the general principles of criminal law as derived from the criminal law of all civilized nations. It is also said that the prosecution will rely upon the facts pleaded under Count 3, as also constituting crimes against humanity, which means that the prosecution considers war crimes in the narrower sense falling also under the notion of crimes against humanity. The following examples of crimes against humanity are given in the indictment:

imprisonment of persons without judicial process,
holding them in protective custody and in Concentration Camps,
subjecting them to persecution, degradation, despoilment,
enslavement, torture and murder,

establishing special courts to carry out the will of the conspirators, permitting favoured branches or organs of the State and Party to operate outside the range even of nazified law, persecution of the Jews, confiscation of their property, ordering by the Chief of the Gestapo of anti-Jewish demonstrations all over Germany, destruction of Jewish property, gassing of Jews.

Among individual crimes the indictment cites as crimes against humanity the murder of the Austrian politician, Dollfuss, and the imprisonment of the Austrian politician Schuschnigg, the murder of the German politicians Breitscheid and Thaelmann, and the imprisonment of Pastor Niemöller. The mentioning of Dollfuss is interesting because Dollfuss was at the time of his death the dictator (Prime Minister) of an independent State, which was itself organised on Fascist lines and closely allied to Fascist Italy. The mentioning, in the indictment, of the imprisonment of Schuschnigg, shows that an offence committed against the citizen of a country not under alligant occupation is considered as falling under the term of a crime against humanity. Breitscheid, Thaelmann and Niemöller are examples of the persecution of Social-Democrats, Communists and Churchmen of German nationality constituting crimes against humanity.

3) Mr. Justice Jackson, in his introductory speech delivered at Nuremberg on the 21st November 1945, stated: "We charge guilt on planned and intended conduct that involves moral as well as legal wrong. And we do not mean conduct that is a natural and human, even if illegal, cutting of corners, such as many of us might well have committed had we been in the defendants' positions. It is not because they yielded to the normal frailties of human beings that we accuse them. It is their abnormal and inhumane conduct which brings them to this bar."

He also said: "That attack upon the peace of the world is the crime against international society which brings into international cognizance crimes in its aid and preparation which otherwise might be only internal concerns". In dealing with the Nazi party programme of 1920, Mr. Justice Jackson pointed out that it declared that no Jew or any person of non-German blood could be a member of the nation, such persons were to be disfranchised, disqualified from office, subject to the alien laws and entitled to nourishment only after the German population had first been provided for. Under the heading "The consolidation of Nazi Power", Mr. Justice Jackson proposed to consider the steps "which embraced the most hideous of crimes against humanity, to which the conspirators resorted in perfecting control of the German State; and in preparing Germany for the aggressive war indispensable to their ends". In describing the committing of crimes against humanity prosecuting counsel mentioned the decree suspending the guarantees of individual liberty contained in the Weimar Constitution. Mr. Justice Jackson quoted a document emanating from Col. Gen. von Fritsch, who said in 1938, that shortly after the first war he came to the conclusion that the Nazis would have to be victorious in three battles if Germany were to become powerful again.

- 1) The battle against the working class,
- 2) the battle against the Catholic church,
- 3) the battle against the Jews.

" The warfare against these elements was continuous. The battle in Germany was but a practice skirmish for the world wide drive against them. Here in point of geography and of time are two groups of crimes against humanity - one within Germany before and during the war, and one in occupied territory during the war. But these two are not separate in Nazi planning. They are a continuous unfolding of the Nazi

plan to exterminate peoples and institutions which might serve as a focus or instrument for overturning their "new world order" at any time or place. "

Mr. Justice Jackson proposed to unfold to the court the prosecution's proof regarding crimes against humanity according to Gen. von Fritsch's classification.

In connection with "the battle against the working class", the prosecution mentioned the dissolution of the free trade unions, the confiscation of their funds, the establishment of the German labour front, the appointment of "trustees of labour", and the elimination of the association character of the employers and trade associations.

With regard to crimes against humanity, committed by persecuting the churches, Mr. Justice Jackson pointed out that it is not because the Nazis themselves were irreligious or pagan, but because they persecuted others of the Christian faith that they became guilty of crime and it is because the persecution of the churches was a step in the preparation of aggressive warfare that the offence became one of international consequence. A secret decree by Martin Bormann of June 1941 on the relation of Christianity and National Socialism was quoted. An organised demonstration against the Bishop of Rothenburg was given as an example of a crime against humanity in connection with the battle against the churches. Further examples given were the conflicts within the Protestant Church, the sending of Pastor Niemöller to a concentration camp. Further, the violation of the concordat with the Holy See was adduced, consisting of persecutions of the Catholic Church, its priesthood and members and the suppression of church schools and educational institutions.

With regard to crimes against humanity, committed against Jews, the American Chief Prosecutor said: "What we charge against these defendants is not those arrogances and pretensions which frequently accompany intermingling of different races and peoples and which are likely, despite the honest efforts of Government, to produce regrettable crimes and convulsions. It is our purpose to show plans and designs to which all Nazis were fanatically committed, to annihilate all Jewish people."

After having given an outline of the innumerable crimes committed against Jews, the American Chief Prosecutor discussed terrorism as a preparation for the war. He said: "How a Government treats its own inhabitants generally is thought to be no concern of other Governments or of international society. Certainly few oppressions or cruelties would warrant the intervention of foreign Powers. But the German mistreatment of Germans is now known to pass in magnitude and savagery any limits of what is tolerable by modern civilization. Other nations, by silence, would take a consenting part in such crimes. These Nazi persecutions moreover, take character as international crimes because of the purpose for which they were undertaken. The purpose, as we have seen, of getting rid of the influence of free labour, the churches and the Jews was to clear their obstruction to the precipitation of aggressive war. If aggressive warfare in violation of treaty obligations is a matter of international cognizance, the preparations for it must also be of concern to the international community. Terrorism was the chief instrument for securing the cohesion of the German people in war purposes. Moreover, these cruelties in Germany served as atrocity practices to discipline the membership of the criminal organisation to follow the pattern later in occupied countries."

Later, Mr. Justice Jackson said: "Under the clutch of the most intricate web of espionage and intrigue that any modern state has endured, the persecution and torture of a kind that has not been visited upon the world in many centuries, the elements of the German population

which were both decent and courageous were annihilated. Those which were decent and weak were intimidated." Mr. Justice Jackson went on stating that the Nazis not only silenced discordant voices, they created positive controls as effective as their negative ones. Propaganda on a scale never before known stimulated the party and party formations with permanent enthusiasm.

Mr. Justice Jackson also said: "The fourth count of the indictment is based on crimes against humanity. Chief among these are mass killings of countless human beings in cold blood. Does it take these men by surprise that murder is treated as a crime?...."

VI. Summary.

The law as laid down in the basic documents and as explained in the course of the Nuremberg proceedings, which is at present in progress, is capable of being summarized by the following propositions:

- 1) "Crimes against humanity" are offences committed against civilian populations.
- 2) Crimes committed against combatants are outside the scope of the notion.
- 3) Crimes against humanity may consist in violations
either of the laws and customs of war,
or of positive municipal provisions of criminal law,
or of the general principles of criminal law as derived
from the criminal law of all civilised nations.
- 4) Isolated offences do not fall within the notion. A greater number of victims or a greater number of acts of the same pattern is necessary to constitute a crime against humanity which thereby becomes a concern of foreign States and, consequently, of International law.
- 5) There are two different types of crimes against humanity:
 - (a) crimes of the murder type, (murder, extermination, enslavement, deportation and other inhumane acts). The words "other inhumane acts" cover only serious crimes of a character similar to murder, extermination, enslavement and deportation - eiusdem generis rule of interpretation;
 - (b) persecutions, (on political and racial, in Europe also religious, grounds.)
- 6) Crimes of the murder type are crimes against humanity, if committed by persons acting in the interest of the European Axis countries or by "Far Eastern war criminals".
This condition does not apply in the local law of Germany as laid down by Law No. 10 for criminals other than major war criminals.
- 7) "Persecutions" constitute crimes against humanity only if perpetrated on political and racial (in Europe also religious) grounds. In the case of the major war criminals it is a further condition that "persecutions" be in execution of or in connection with any crime within the jurisdiction of an International Military Tribunal. (i.e. crimes against peace, violations of the laws and customs of war, crimes against peace of the murder type.)

- 8) The nationality of the victims is irrelevant.
- 9) It is irrelevant whether a crime of the murder type has been committed before or during the war. Though this is not expressly stated as to "persecutions" it is submitted that it is also irrelevant whether persecutions have been committed before or during the war.
- 10) Not only the ringleaders, but also the perpetrators of crimes against humanity are criminally responsible.
- 11) It is irrelevant whether or not a crime against humanity has been committed in violation of the *lex loci*.
- 12) A crime against humanity can be committed by enacting legislation which orders or permits crimes against humanity, e.g. unjustified killing, deportations, racial discrimination, suppression of civil liberties, etc.

III/34.
29th March, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

General Propositions defining the term

"crimes against humanity."

(Revised text of the summary of Doc.III/33 embodying the results of the discussion in the Committee III meeting of 26th March, 1946.)

By Egon Schwelb, Legal Officer.

1) Under the basic documents (Charter of the International Military Tribunal annexed to the Four-Power Agreement of 8th August 1945; the Control Council Law No.10; the Charter of the International Military Tribunal for the Far East) there are two different types of crimes against humanity:

- (a) crimes of the murder type, (murder, extermination, enslavement, deportation and other inhumane acts). The words "other inhumane acts" cover only serious crimes of a character similar to murder, extermination, enslavement and deportation - eiusdem generis rule of interpretation;
- (b) persecutions (on political and racial, in Europe also religious, grounds.)

2) According to the text of the basic documents crimes against humanity may consist in the violation

either of the laws and customs of war,
or of positive municipal provisions of criminal law,
or of the general principles of criminal law as
derived from the criminal law of all civilized
nations.

Note: In a purely scientific system violations of the laws and customs of war should not be included in the term "crimes against humanity", which should be restricted to such offences as do not fall under the term of violations of the laws and customs of war.

3) Crimes of the murder type are crimes against humanity, if committed by persons acting in the interest of the European Axis countries or by "Far Eastern War Criminals".

This condition does not apply in the local law of Germany as laid down by Law No.10, for criminals other than major war criminals.

4) Under the terms of the Charters of the International Military Tribunals "crimes against humanity" of the murder type are offences committed against civilian populations.

Crimes against combatants are outside the scope of this type of crime. It is doubtful whether this restriction also applies to persecutions.

Note: Regarding cases falling under the Control Council Law No.10, it has been argued that this restriction is not applicable, the enumeration contained there being not exhaustive, but only exemplary. On the other hand, it could be said also for Law No.10, that the words "including but not limited to" refer only to the enumeration of types of atrocities and offences all of which must be committed "against any civilian population".

5) "Persecutions" constitute crimes against humanity only if perpetrated on political and racial (in Europe also religious) grounds. In the case of the major war criminals it is a further condition that "persecutions" be in execution of or in connection with any crime within the jurisdiction of an International Military Tribunal. (i.e. crimes against peace, violations of the laws and customs of war, crimes against humanity of the murder type.)

6) Isolated offences do not fall within the notion. Only crimes which by either their magnitude and savagery, or by their great number, or by the fact that a similar pattern is applied at different times and places endanger the international community or shock the conscience of mankind warrant the intervention of states other than that on whose territory the crime has been committed. Only crimes on such a scale are a concern of International law.

7) The procedure in cases of crimes against humanity committed on allied territory and/or against allied citizens must necessarily be different from cases of crimes against humanity committed on enemy territory against non-allied subjects.

8) It is irrelevant whether a crime of the murder type has been committed before or during the war.

Though this is not expressly stated as to "persecutions" it is submitted that it is also irrelevant whether persecutions have been committed before or during the war.

9) The nationality of the victims is irrelevant.

Note: See note to proposition 2.

10) Not only the ringleaders, but also the perpetrators of crimes against humanity are criminally responsible.

11) It is irrelevant whether or not a crime against humanity has been committed in violation of the *lex loci*.

12) A crime against humanity can be committed by enacting legislation which orders or permits crimes against humanity, e.g. unjustified killing, deportations, racial discrimination, suppression of civil liberties, etc.

III/35
29th March, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

Committee III.

The Czechoslovak Case No. 2677

(Bressler and others)

I. On March 19th, 1946, the Czechoslovak National Office submitted to the United Nations War Crimes Commission a charge against Hauptmann Bressler, Dr. Wohlmann, F. Mayer and Rudolf Brumm alleging terrorism and plunder of private property, committed in September, 1939, and later, in London and in Bohemia.

II. The "Particulars of Alleged Crime" are as follows:

"The Czechoslovak citizen, Bedřich Tanzer owned the tannery "Hynka Tanzera Syn" at Zlonice in Bohemia and in Prague. He emigrated to this country from Czechoslovakia on 14th March 1939 and also tried to get his family from Czechoslovakia to this country.

"He got in touch with F. Mayer, Holsterhauserstrasse 62, Essen, Ruhr, or Berlin, Steglitz, Peskestrasse 17. Mayer was at that time in London as a German agent and had his office with the Commission Agency, Edge & Co., Ltd., Hanover Square, W.1. Mayer invited Mr. Tanzer to a meeting in the hotel Mount Royal in London in September 1939, there Mayer introduced to Mr. Tanzer the following persons:

Hauptman Bressler, a German officer who pretended to be a representative of the Reich Protector von Neurath and a good friend of Streicher;

Dr. Wohlman, lawyer in Dresden, and

Rudolf Brumm, a tanner from Germany.

"All the accused made proposals to Mr. Tanzer for transferring all his property in Czechoslovakia to Brumm and threatened reprisals against the members of his family and against his general manager and his family in Czechoslovakia if he would not agree.

"Hauptman Bressler behaved most aggressively during the negotiations.

"All the accused stressed they were stern Nazi supporters and that they played an important part in the Nazi Party.

"Finally, the accused enforced on Mr. Tanzer the signing of an agreement draft about transferring all his property to Brumm, in which case the members of his family would be enabled to emigrate from Czechoslovakia with certain belongings. The accused added that the German authorities in Czechoslovakia had to approve the draft and then the negotiations had to be finalised.

"Due to the outbreak of war the negotiations were not concluded. They were, at a later date, renewed in Prague in the absence of Mr. Tanzer. Great pressure was put on the members of the family of Mr. Tanzer in Czechoslovakia and finally the whole property was taken over by Rudolf Brumm and a partner of his, a Sudeten German by name of Honig.

"Brumm allegedly committed suicide in 1943, but this report does not appear to be confirmed."

III. In its meeting held on March 28th, 1946, Committee I adjourned the case.

As far as the alleged offences committed after the outbreak of war in Czechoslovakia are concerned, the case was adjourned for further information to be furnished by the National Office.

As far as the proceedings in London in September, 1939, are concerned the case was referred to Committee III to advise whether or not the facts alleged should be considered as crimes against humanity, and for what reasons.

III/36.
4th April, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Case of the Alleged Alsatian Deserters.

Additional Information (2)

The following is an excerpt from a minute received by Sir Robert Craigie from the Foreign Office in regard to the absence of law for the formal annexation of Alsace-Lorraine by Germany.

" It may be taken as certain that there is no Reich law incorporating Alsace and Lorraine in the German Reich. There is no trace of such a law in the standard collections. It is stated in the 1942 and 1943 editions of the Jahrbuch der Weltpolitik, Deutsches Auslandswissenschaftliches Institut, Berlin, that "formelle Eingliederung" of the newly acquired Western territory would take place after a victorious end of the war.

" There is no trace of a general conferment of German nationality on the inhabitants of Alsace and Lorraine, and, as Dr. Schwelb states, the question was regulated by the Orders of 20 January, 1942 and 23 August, 1942.

" Dr. Schwelb in his paper of 19 March 1946* (page 4, last sentence of the first full paragraph) says: "The acquisition of German nationality was to take effect from the day of joining the Wehrmacht or Waffen SS or from the recognition as a reliable German, as the case may be". The German text of the words underlined is "mit dem Tage des Eintritts in die Wehrmacht oder Waffen SS". It may make some difference in individual cases whether "Eintritt" is defined as "the date of receiving call-up papers", or "date of entry into barracks". "

* Special Ad Hoc Committee paper (for the consideration of the case of the alleged Alsatian Deserters, Additional Information.)

III/37.
24th April, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Professor Goodhart on "Crimes Against Humanity".

In connection with the general discussion of the notion of crimes against humanity, (Committee III Minutes No. 7/46 and Documents III/33 and III/34), the following paragraphs from Professor Goodhart's paper on "The Legality of the Nuremberg Trials" (a lecture delivered before the Edinburgh University Law Faculty Society on 5th February 1946, published in "The Juridical Review" of April 1946) are circulated to the members of Committee III for information.

In his paper, a summary of which will be contained in the next issue of the War Crimes News Digest, Professor Goodhart is concerned with the jurisprudential questions whether the International Military Tribunal established by the Four-Power Agreement of 8th August 1945, is a legal court in the true sense and whether the trials it is conducting can properly be described as legal trials.

After examining Counts One to Three of the Nuremberg indictment, which deal respectively with the "common plan or conspiracy", "crimes against peace" and "war crimes", and after having established his proposition that these three counts are in accord with the established principles of International Law, Professor Goodhart goes on to analyse Count Four - crimes against humanity - and writes:

" It is only when we turn to Count Four - Crimes Against Humanity - that we encounter serious legal difficulty. Insofar as these crimes constitute violations of the laws of war there is no juristic problem because they are merely the same crimes as those set forth in Count Three under a different name, but novel considerations arise when the acts charged cannot be brought within this category. This is true in particular of the murders, both before and after 1939, in the concentration camps of the hundreds of thousands of German nationals who were either Jews or political opponents. As International Law is not concerned with the treatment which a State metes out to its own nationals, how can such acts, however brutal, be considered an international crime justiciable by an international court? The answer is that although International Law is not as a general rule concerned with the internal affairs of the various States, nevertheless these may be of such a special nature as to affect the international community, either morally or materially, and thus become matters of international concern. This is not a novel idea, for in the nineteenth century there were a number of instances where States intervened to protect the nationals of other States, and numerous international treaties, unfortunately ineffective, were entered into for the guarantee of human rights. Writing in 1928, Sir Arnold McNair said: "The Law of Nations is a product of Christian civilisation and represents a legal order which binds States, chiefly Christian, into a community. It is therefore no wonder that ethical ideas, some of which are the basis of, and others a development from Christian morals, have a tendency to require the help of International Law for their realisation". Never was this help so urgently required as at the present time. The Charter, in providing that

the deliberate murder of hundreds of thousands of innocent people was punishable as an international crime, was therefore not taking a revolutionary step because no one can doubt that these acts were contrary to the laws of every civilized nation. An international system which had no means of preventing such outrages against common decency would hardly be worthy of respect. In every federal State the federal government is given power to intervene in the affairs of the individual States when the local conditions are such as to endanger the community as a whole. The same principle must be applicable to the international community if it is to survive. We must recognise, however, that in the past this principle was of doubtful validity in International Law, and that therefore Count Four is, in a sense, ex post facto in character. But even if this is granted, this is not a ground on which the count can be criticized, either from the moral or the juristic standpoint, because the acts charged in the indictment are so contrary to all common decency that no possible excuse for their performance could be advanced. The objection to ex post facto legislation is based on the ground that the actor might, at the time when he performed the act, have believed that he was entitled to perform it, but how could such a belief exist in the case of wholesale murder? To argue that the perpetrators of such acts should get off scot-free because at the time when they were committed no adequate legal provision for dealing with them had been devised, is to turn what is a reasonable principle of justice in fully developed legal systems into an inflexible rule which would, in these circumstances, be in direct conflict with the very idea of justice on which it itself is based. No such inflexible course has ever been followed in English law because it has been recognised that on occasions ex post facto legislation, although in principle undesirable, may nevertheless be necessary. If ever there was an instance in which such a necessity existed, then it can be found in the concentration camps of Belsen and Dachau.

" If I have been correct in my interpretation of the law, then the result is that the first three counts are in accord not only with the Charter of the International Military Tribunal but also with the existing International Law, while the fourth count, although based on a novel international principle, is in accord with the principles found in every civilized system of law. "

III/38.
25th April, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Grotius on the Universality of Jurisdiction.

In the course of the discussions concerning Doc.C.174, (the first report by Committee III on the Alsatian Deserters' case), the question was raised, inter alia, whether the doctrine of universality of jurisdiction over war crimes was restricted to Anglo-American jurisprudence. The problem was discussed in paper Misc. No.18.

The following quotation may serve as a supplement thereto.

" The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any person whatsoever". (Grotius, De Jure Belli Ac Pacis Libri Tres (1612) Carnegie Translation 1925, p.504).

III/39
1st May, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

General Propositions defining the term

"crimes against humanity".

(The text contained in this paper replaces the revised text of the summary of Doc.III/33 embodying the results of the discussion in the Committee III meeting of 26th March, 1946, which was contained in Doc.III/34. The re-draft appears necessary in view of the Berlin Protocol of 6th October 1945. (see Doc. C.193.))

1) According to the basic documents (Charter of the International Military Tribunal annexed to the Four-Power Agreement of 8th August 1945, as rectified by the Berlin Protocol of 6th October 1945; the Control Council Law No.10; the Charter of the International Military Tribunal for the Far East,) crimes against humanity may consist in the violation

either of the laws and customs of war,
or of positive municipal provisions of criminal law,
or of the general principles of criminal law as
derived from the criminal law of all
civilized nations.

Note: In a purely scientific system violations of the laws and customs of war should not be included in the term "crimes against humanity", which should be restricted to such offences as do not fall under the term of violations of the laws and customs of war.

2) Under the basic documents there are two different types of crimes against humanity which, with a few exceptions, are subject to the same provisions, namely:

- (a) crimes of the murder type, (murder, extermination, enslavement, deportation and other inhumane acts). The words "other inhumane acts" cover only serious crimes of a character similar to murder, exterminations, enslavement and deportation - eiusdem generis rule of interpretation;
- (b) persecutions (on political and racial, in Europe also religious, grounds.)

3) The crimes described in paragraph 6(c) of the Charter of the European Military Tribunal and in Article 5(c) of the Charter of the International Military Tribunal for the Far East, are crimes against humanity, if committed by persons acting in the interest of the European Axis countries or by "Far Eastern War Criminals" as the case may be.

This condition does not apply in the local law of Germany as laid down by Law No.10, for criminals other than major war criminals.

- 4) Under the terms of the Charters of the International Military Tribunals, "crimes against humanity" of the murder type are offences committed against civilian populations.

Crimes against combatants are outside the scope of this type of crime.

It is doubtful whether this restriction also applies to persecutions.

Note: Regarding cases falling under the Control Council Law No.10, it has been argued that this restriction is not applicable, the enumeration contained there being not exhaustive, but only exemplary. On the other hand, it could be said also for Law No.10, that the words "including but not limited to" refer only to the enumeration of types of atrocities and offences all of which must be committed "against any civilian population".

- 5) "Persecutions" constitute crimes against humanity only if perpetrated on political and racial (in Europe also religious) grounds. In the case of the major war criminals it is a further condition that "persecutions" be in execution of or in connection with any crime within the jurisdiction of an International Military Tribunal, (i.e. crimes against peace, violations of the laws and customs of war, crimes against humanity of the murder type.)

- 6) Isolated offences do not fall within the notion. Only crimes which by either their magnitude and savagery, or by their great number, or by the fact that a similar pattern is applied at different times and places endanger the international community or shock the conscience of mankind warrant the intervention of states other than that on whose territory the crime has been committed. Only crimes on such a scale are a concern of International law.

- 7) The procedure in cases of crimes against humanity committed on allied territory and/or against allied citizens must necessarily be different from cases of crimes against humanity committed on enemy territory against non-allied subjects.

- 8) It is irrelevant whether a crime of the murder type has been committed before or during the war.

Though this is not expressly stated as to "persecutions", it is submitted that it is also irrelevant whether persecutions have been committed before or during the war.

- 9) The nationality of the victims is irrelevant.

Note: See note to proposition 1.

- 10) Not only the ringleaders, but also the perpetrators of crimes against humanity are criminally responsible.

- 11) It is irrelevant whether or not a crime against humanity has been committed in violation of the *lex loci*.

- 12) A crime against humanity can be committed by enacting legislation which orders or permits crimes against humanity, e.g. unjustified killing, deportations, racial discrimination, suppression of civil liberties, etc.

III/40.
4th May, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Paragraphs IV to IX of the Draft Report on the Alsatian Deserters' Case.

Proposals by the Acting Chairman of Committee III, (Dr. Mayr-Harting.)

Note: Below there is reproduced, in Part I, a letter from Dr. Mayr-Harting to the Secretary of Committee III, dated 2nd May 1946, and, in Part II, the text of paragraphs IV to IX of Doc.C.174(C) as it will read when Dr. Mayr-Harting's proposals are adopted by Committee III and eventually by the special Ad Hoc Committee and by the Commission.

I. Letter from Dr. Mayr-Harting to the Secretary to Committee III, dated 2nd May 1946.

"Dear Dr. Schwelb,

" At the meeting of Committee III on the 9th April, 1946, I took it upon myself to redraft Sections IV to VI of Report C.174 as amended by Document C.174(C) (Articles IV to IX,) on the basis of the discussion held by the Committee.

" Given below are the proposed alterations which I should be glad if you would circulate amongst the members of the Committee.

"Article IV, § 1, line 3: substitute the words "French nationals from Alsace" by the words "inhabitants of Alsace".

"Lines 4 and 5: substitute the words "that inhabitants of Alsace-Lorraine" by "those inhabitants of Alsace-Lorraine".

"After Section IV, § 1, insert: "The Commission examined, in the first instance, whether Alsace-Lorraine was, contrary to International Law, annexed by Germany after its occupation in 1940.

" As there existed no Reich Law incorporating Alsace-Lorraine in the German Reich and there was no general conferment of German nationality on the inhabitants of Alsace-Lorraine, the Commission is of the opinion that not even from the German Law could anything be gathered justifying the assumption that Alsace-Lorraine formed part of the German Reich.

" The Commission does not intend to prejudice the International Military Tribunal at Nuremberg which will have to consider this question (compare Indictment Count I & J) nor any findings of French Courts. It believes, however, that it is at present possible to avoid going into the matter if the sentences mentioned in the letter of the French National Office are to be considered war crimes on the part of the judges, even if Alsace-Lorraine was illegally annexed, that is, was part of the German Reich according to German Law. "

"Section IV, § 2, line 1, delete the words: "In this connection."

"Line 2, substitute: the word "document" by "the letter of the French National Office".

"Section V, line 1, substitute the words "holding judicial function" by "exercising jurisdiction over the inhabitants of an occupied territory".

"Section VII, § 2, lines 3, 4 and 5, delete: "under Article 45 hostile power".

"Section VIII, line 1, substitute the words "French nationals" by "inhabitants of Alsace-Lorraine who were considered as French citizens even according to German Law at the time of their call-up". "

II. Text of Paragraphs IV to IX of Doc.C.174(C) incorporating the amendments proposed by Dr. Mayr-Harting in his letter of 2nd May 1946 (Part I of this paper.)

IV.

The question of substantive law has been raised in what circumstances members of a German military court can be considered to be guilty of a war crime if they tried inhabitants of Alsace-Lorraine for desertion in consequence of the fact those inhabitants of Alsace-Lorraine were, contrary to International Law, compulsorily enlisted into the German army.

The Commission examined, in the first instance, whether Alsace-Lorraine was, contrary to International Law, annexed by Germany after its occupation in 1940.

As there existed no Reich Law incorporating Alsace-Lorraine in the German Reich and there was no general conferment of German nationality on the inhabitants of Alsace-Lorraine, the Commission is of the opinion that not even from the German Law could anything be gathered justifying the assumption that Alsace-Lorraine formed part of the German Reich.

The Commission does not intend to prejudice the International Military Tribunal at Nuremberg which will have to consider this question (compare Indictment Count I & J) nor any findings of French Courts. It believes, however, that it is at present possible to avoid going into the matter if the sentences mentioned in the letter of the French National Office are to be considered war crimes on the part of the judges, even if Alsace-Lorraine was illegally annexed, that is, was part of the German Reich according to German Law.

The Commission considers it necessary to draw attention to the fact that the letter of the French National Office appears to proceed on the assumption that the French nationality of the victims was "a fact which must necessarily have been pointed out by the defence" and on the further assumption that the judges could not be ignorant of the victims' Alsatian origin.

The Commission decided to base its discussions on the assumption that the judges, whose criminal responsibility is in question, knew that the victims had been both French citizens from Alsace-Lorraine, and that they had been compulsorily called up for service with the German Army. If the judges - through no fault of their own - did not know that the accused were French nationals who had been enlisted into the German army against their will, no problem of criminal repression against these judges would arise, because a German judge does not commit a war crime in sentencing, in war time, a German soldier for desertion from the German army.

V.

In considering the action of persons exercising jurisdiction over the inhabitants of an occupied territory, the Commission considers it to be decisive whether the trial of an accused by a particular court deprived him of the protection to which he was entitled under the Law of Nations, i.e.,

- (a) whether a given judicial action flouted the specific prohibition of a conventional or customary provision of International law, e.g. the Hague Regulations, or was,
- (b) in disregard of those fundamental principles of human justice accepted by civilized peoples. The action of a court which results in the illegal condemnation, seizure or destruction of property should not protect a judge because homage has been paid to legal forms.

In all cases the substance of the action taken must be scrutinized to determine its propriety under the Law of Nations. The action of judicial authorities in this respect is on no different plane from that of military or executive authorities.

VI.

If the trials of the alleged deserters of French nationality were conducted in disregard of those fundamental principles of human justice which have been accepted by civilized peoples, if, e.g., the accused were denied the right to introduce evidence or to present witnesses or if principles repugnant to the modern practices of civilized nations were applied, outrageous penalties inflicted and the like, then the criminal responsibility of the German military judges could not be in doubt.

The Commission is of the opinion that the military judges should not escape personal responsibility even in such cases where homage has been done to legal forms. Even where the trial was conducted properly it must be examined whether the judicial action, although formally correct, produced a violation of some specific rule of International Law.

VII.

In the present case, positive provisions of the Hague Regulations and generally recognised rules of customary law have been violated by the judicial action in question.

Under Art. 23 of the Hague Regulations a belligerent is forbidden to compel the subjects of the hostile party to take part in the operations of war directed against their own country. Art. 52 prohibits the requisition of services involving the inhabitants in the obligation to take part in military operations against their own country.

The alleged deserters, who were tried by the German military judges, had been enlisted into the German army in flagrant violations of these provisions. The death sentences passed on these alleged deserters were substantially nothing but the enforcement of the continuation of this flagrantly illegal position. They also amounted to causing the death of the alleged deserters without justification.

It follows from what has been said that the death sentences, even if not arrived at in the course of an outrageous procedure, flouted the quoted provisions of conventional and customary International Law.

VIII.

The fact that the illegal call-up of inhabitants of Alsace-Lorraine who were considered as French citizens even according to German Law, at the time of their call-up from Alsace-Lorraine into the German army had been ordered by the leaders of the German Nazi Government does not

free the military judges from responsibility because superior order is no defence if the order is illegal.

IX.

It will, of course, be a matter for the prosecuting authorities to decide in every individual case whether the circumstances are such that they are likely to lead to a verdict of guilty against the judge and it will be a matter for the court considering the guilt of each individual judge, to have regard, if it thinks fit, in mitigation of punishment, to the fact that the German judges were acting under superior orders, namely orders from their Government. There will certainly be cases where the judge may successfully plead that he acted under duress or under a mistake of fact, but this is for the court to consider and not for the United Nations War Crimes Commission who is called upon to express its opinion whether or not prima facie a war crime has been committed.

Such a plea will hardly be open to the judges in cases where, instead of considering the fact that the alleged deserters became German soldiers against their will as an extenuating circumstance, they judged the cases with particular severity.

III/41.
10th May, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

Second Report by Committee III

on the question of the criminality of German Officers
who sentenced French Nationals from Alsace-Lorraine
to death as alleged deserters.

In its meeting held on 7th May 1946, Committee III unanimously adopted the following re-draft of its report C.174.

- I. In a letter from the Director of the French Enemy War Crimes Research Office to the French representative on the United Nations War Crimes Commission, the wish has been expressed that the matter dealt with in that letter should be examined by the United Nations War Crimes Commission and a statement of principle sought. The letter is concerned with war crimes committed in Czechoslovakia. The opinion has been expressed by a French authority that the Czechoslovak Government is competent to deal with the case. In the letter from the Director of the Enemy War Crimes Research Office, this view is dissented from and it is stated that the French Office is competent, the victims being French nationals from Alsace-Lorraine.

The problem of substantive law involved is that of French citizens from Alsace-Lorraine enlisted in the German Army by force who then deserted, were sentenced as deserters and shot under a sentence. It is stated in the letter that the responsibility for the enlisting into the German Army in disregard of International Law of French nationals from Alsace-Lorraine belongs to the leaders of the ex-Reich, to the members of the General Staff and to the Gauleiter of Alsace-Lorraine, Wagner. The question is put to what extent the members of the German Military Courts are responsible who acted as regular judges and awarded sentences as provided by the German Military Code in cases of a soldier deserting from the German Army, even if the deserter were an Alsatian.

The French document further states that, in judging the responsibility of the officers and men of whom these courts were composed, the fact must be borne in mind that they could not be ignorant of the Alsatian origin of the accused. The enlistment of these men in disregard of International Law, a fact which must certainly have been pointed out by the defence, should have secured to the accused a high measure of extenuating circumstances. It seems, however, that the German military courts judged the cases of Alsatian deserters with particular severity.

-2-

II. With regard to the question of jurisdiction involved in the case, the Commission refers to the judgment of the Permanent Court of International Justice in the case of SS "Lotus" (France v. Turkey,) decided in 1927 which lays down the general principles of International law regarding the jurisdiction of independent States in criminal matters. In this judgment, the Court stated that in exercising jurisdiction, International law leaves States a "wide measure of discretion"; that where there is no prohibitive rule of International law, "every State remains free to adopt the principles which it regards as best and most suitable"; that "all that can be required of a State is that it should not overstep the limits which International law places upon its jurisdiction"; that "within these limits, its right to exercise jurisdiction rests in its sovereignty"; that the so-called territoriality of criminal law "is not an absolute principle of International law"; that any exception of the right of States to exercise jurisdiction must be "conclusively proved" and that as municipal jurisprudence is divided, it is hardly possible to see in it an indication of the existence in International law of a rule restricting the criminal jurisdiction of a State to crimes committed on its territory.

The judgment in the LOTUS case deals with criminal jurisdiction in general. In the case of pirates and, in the opinion of the Commission, also of war criminals, every independent State has, under International law, jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed, particularly in cases where, for some reason, the criminal would otherwise go unpunished.

In addition to the jurisdiction of the Czechoslovak courts, which would be based on the fact that the crimes have been committed on Czechoslovak territory, there is, therefore, no obstacle in International law, to the courts of other countries also claiming jurisdiction, e.g. French courts, because French nationals have been the victims of war crimes committed outside France, or the courts of the country in whose custody the criminals are, on the basis of the universality of jurisdiction over war crimes.

In cases such as outlined in the French document, concurrent jurisdiction is, therefore, possible under International law.

III. As to the possible question to whom the criminals should be surrendered, the Commission feels that it is not possible to give any general ruling as long as the recommendation contained in Doc.C.123 has not been either accepted or rejected by the interested parties. It is not appropriate to give a general opinion as long as it is possible that the Commission will be called upon to act as arbitrator in concrete cases.

IV. The question of substantive law has been raised in what circumstances members of a German Military Court can be considered to be guilty of a war crime if they tried French nationals from Alsace-Lorraine ("des Alsaciens-Lorrains citoyens francais"), for desertion in consequence of the fact that they were, contrary to International law, compulsorily enlisted into the German Army.

The Commission examined in the first instance whether Alsace-Lorraine was, contrary to International Law, annexed by Germany after its occupation in 1940. As there existed no Reich law incorporating Alsace-Lorraine into the German Reich, and as there was no general conferment of German nationality on the French nationals inhabiting Alsace-Lorraine, the Commission is of the opinion that even under German law, nothing could justify the assumption that Alsace-Lorraine formed part of the German Reich. This opinion is offered without prejudice to any opinion which may subsequently be expressed by the International Military Tribunal or any national court.

V. The letter of the French National Office, having proceeded on the assumption that the French nationality of the victims was "a fact which must necessarily have been pointed out by the defence" and on the further assumption that the judges could not be ignorant of the victims' Alsatian origin, the Commission decided to base its discussion on the same assumptions.

VI. In considering the action of persons exercising judicial functions in a case such as that now under discussion, it appears to the Commission to be decisive whether the trial of an accused by a particular court deprived him of the protection to which he was entitled under the Law of Nations, i.e:

- (a) whether a given judicial action flouted the specific prohibition of a conventional or customary provision of International Law, e.g., the Hague Regulations, or was,
- (b) in disregard of those fundamental principles of human justice accepted by civilized peoples.

The action of a court which results in the illegal condemnation, seizure or destruction of property should not protect a judge because homage has been paid to legal forms.

In all cases the substance of the action taken must be scrutinized to determine its propriety under the Law of Nations. The action of judicial authorities in this respect is on no different plane from that of military or executive authorities.

VII. If the trials of the alleged deserters of French nationality were conducted in disregard of those fundamental principles of human justice which have been accepted by civilized peoples, if, e.g., the accused were denied the right to introduce evidence or to present witnesses or if methods repugnant to the modern practices of civilized nations were applied, outrageous penalties inflicted and the like, then the criminal responsibility of the German military judges could not be in doubt.

The Commission is of the opinion that the military judges should not escape personal responsibility even in such cases where homage has been paid to legal forms. Even where the trial was conducted properly it must be examined whether the judicial action, although formally correct, produced a violation of some specific rule of International Law.

VIII. In the present case, positive provisions of the Hague Regulations and generally recognised rules of customary law have been violated by the judicial action in question.

Under Art.23 of the Hague Regulations a belligerent is forbidden to compel the subjects of the hostile party to take part in the operations of war directed against their own country. Art.52 prohibits the requisition of services involving the inhabitants in the obligation to take part in military operations against their own country.

The alleged deserters, who were tried by the German military judges, had been enlisted into the German army in flagrant violations of these provisions. The death sentences passed on these alleged deserters were substantially nothing but the enforcement of the continuation of this flagrantly illegal position. They also amounted to causing the death of the alleged deserters without justification.

It follows from what has been said that the death sentences, even if not arrived at in the course of an outrageous procedure, flouted the quoted provisions of conventional and customary International law.

IX. The fact that the illegal call-up of French nationals from Alsace-Lorraine into the German army had been ordered by the leaders of the German Nazi Government does not free the military judges from responsibility because superior order is no defence if the order is illegal.

X. It will, of course, be a matter for the prosecuting authorities to decide in every individual case whether the circumstances are such that they are likely to lead to a verdict of guilty against the judge and it will be a matter for the court considering the guilt of each individual judge to have regard, if it thinks fit, in mitigation of punishment, to the fact that the German judges were acting under superior orders, namely orders from their Government. There will certainly be cases where the judge may successfully plead that he acted under duress or under a mistake of fact, but this is for the court to consider and not for the United Nations War Crimes Commission who is called upon to express its opinion whether or not, *prima facie*, a war crime has been committed.

Such a plea will hardly be open to the judges in cases where, instead of considering the fact that the alleged deserters became German soldiers against their will as an extenuating circumstance, they judged the cases with particular severity.

SECRET.

III/42.
17th May, 1946,

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

General Propositions defining the term "Crimes against Humanity"
under the Charters of the International Military Tribunals and
the Control Council Law No. 10.

Re-drafted according to the decision of the meeting of Committee III
held on 14th May 1946, (Minutes No.10/46.)

Note: The following text, excepting paragraphs 3 and 6,
has been agreed upon by Committee III. With
regard to paragraphs 3 and 6, the Secretary to
Committee III has been charged with re-drafting
them, having regard to the discussion in Committee.

The following texts of paragraphs 3 and 6 are,
therefore, only tentative.

1. According to the basic documents (Charter of the International
Military Tribunal annexed to the Four-Power Agreement of 8th August 1945
as rectified by the Berlin Protocol of 6th October 1945; the Control
Council Law No.10; the Charter of the International Military Tribunal
for the Far East,) crimes against humanity may consist in the violation

either of the laws and customs of war, (*)
or of positive municipal provisions of criminal law,
or of the general principles of criminal law as
derived from the criminal law of all civilized
nations.

2. Under the basic documents there are two different types of crimes
against humanity which, with a few exceptions, are subject to the same
provisions, namely:
 - (a) crimes of the murder type, (murder, extermination, enslavement,
deportation and other inhumane acts). The words "other
inhumane acts" may be held to cover only serious crimes of a
character similar to murder, extermination, enslavement and
deportation - eiusdem generis rule of interpretation;
 - (b) persecutions (on political and racial, under the Charter of
8th August 1945, also religious, grounds.)

(*) It might be argued that in a purely scientific system violations
of the laws and customs of war should not be included in the
term "crimes against humanity", which should be restricted to such
offences as do not fall under the term of violations of the laws
and customs of war.

3. The Charter of the European International Military Tribunal (Art.6.) and the Charter of the International Military Tribunal for the Far East (Art.5.) start from the basic assumption that the major war criminals committed crimes against humanity acting in the interest of the European Axis Countries, or in the interest of the Japanese war effort ("Far Eastern War Criminals"), as the case may be.

This assumption is not expressed in the local law of Germany, as laid down by the Control Council Law No.10 for criminals other than major war criminals.

4. The formulation of this paragraph was adjourned. For the previous text, see Doc.III/39.
5. "Persecutions" constitute crimes against humanity only if perpetrated on political and racial (under the European Charter also religious) grounds. In the case of the major war criminals it is a further condition that "persecutions" be in execution of or in connection with any crime within the jurisdiction of an International Military Tribunal, (i.e. crimes against peace, violations of the laws and customs of war, crimes against humanity of the murder type.)
6. Isolated offences do not fall within the notion. As a rule systematic mass action, particularly if it can be shown to be authoritative, will be necessary to transform a common crime, punishable merely under municipal law, into a crime against humanity becoming also the concern of international law. Only crimes which either by their magnitude and savagery or by their great number or by the fact that a similar pattern is applied at different times and places, endanger the international community or shock the conscience of mankind, warrant intervention of states other than that on whose territory the crime has been committed, or whose subjects have become their victims.
7. It is irrelevant whether a crime against humanity has been committed before or during the war.
8. The nationality of the victims is irrelevant.
9. Not only the ringleaders, but also the actual perpetrators of crimes against humanity are criminally responsible.
10. It is irrelevant whether or not a crime against humanity has been committed in violation of the *lex loci*.
11. A crime against humanity can be committed by enacting legislation which orders or permits crimes against humanity, e.g. unjustified killing, deportations, racial discrimination, suppression of civil liberties, etc.

III/43.
26th June, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Information on the Trial Reports which
will be available for inclusion in the
first volume of the annotated summaries.

By the Secretary to Committee III.

The following is a list of summaries of trials which either are ready now or will be ready soon. From this list, the reports to be inserted in the first volume will have to be chosen. In case the summaries of the trials mentioned below should exceed the space available in the first volume, (120-140 pages), some will have to be left over for the second volume. This will probably apply to the Hadamar trial (below, No.4.) the full transcript of which has not yet been received by the Commission.

It is submitted that owing to their length, the summaries of the big concentration camp trials, among the first particularly Belsen and Dachau, will have to be published in the second or third volume.

1. The "Peleus" trial. (Doc.C.199).
2. The American trial against General Dostler. (See Trial and Law Reports Series No.14.) The final text will contain a more elaborate description of the facts and of the course of the proceedings.
3. The "Almelo Case". (Trial and Law Reports Series No.18.) Trial for the killing of one British Pilot Officer and one Dutch civilian by a British Military Court containing a Dutch and a Canadian officer as members.
4. The "Hadamard" trial. (Trial and Law Reports Series Nos. 8 and 17.) In this case the Secretariat of the Commission has not yet received the full transcript. The Trial and Law Reports Series Nos. 8 and 17 are based on information made available by the United States Commissioner.
5. Trial against Lt. Gerhart Grumpelt by a British Military Court for the scuttling of two German submarines after surrender. (See Doc.C.204, II, 10). (In preparation.)
6. The American trial against Rear Admiral Nisuke Masuda and 4 others. (See Doc.C.204, IV, No.27-J, at page 20.) (In preparation.)
7. Trial against Karl Amberger by a British Military Court. (Trial and Law Reports Series No.19.) (Killing of a Prisoner of War when allegedly attempting to escape.)
8. Trial against Erich Heyer and 6 others for the lynching of British prisoners of war at Essen. (Trial and Law Reports Series No.12.)
9. Trial against Bruno Tesch and 2 others by a British Military Court for the supply of poison gas for the S.S. (See Doc. C.204, II, No.34). (In preparation.)

III/44
26th June, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

H.M. Stationery Office.

Conditions of Publication on Agency Terms.

- (1) The cost of production of Agency publications will be recovered by the Stationery Office from the originating departments on the basis of the cost to the Stationery Office plus the usual allowance for Stationery Office departmental expenses. (12½%).
- (2) The price and number of copies to be printed will be approved by the originating department, and any final decision as to format will rest with that department.
- (3) Credit will be given annually to the originating department for copies sold, and for issues for official purposes (other than those under (4) below) at face value less an allowance of 33-1/3% for discounts and publishing expenses.
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 - (i) supplied in bulk to the order of the originating department at the time of printing,
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 - (iv) distributed for publicity and review purposes,
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- (6) The transfer to the originating department of sums due under agency arrangements will be effected annually and will be accompanied by a statement showing the financial position of each publication and the transactions affecting that publication during the calendar year involved.
- (7) The Stationery Office will as soon as possible after the 31st December of the second complete calendar year following publication submit to the originating department proposals for (a) the purchase by the Stationery Office if necessary of the whole or part of the remaining stocks at a price to be agreed, and (b) the wasting of any copies which are regarded as obsolete the final stocks remaining to be retained as Stationery Office property in respect of which no further financial statements will be rendered.

III/45
1st July, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

The Yugoslav case No. 3296 referred
to Committee III

I. On 19th June, 1946, the Yugoslav State Commission submitted to the Commission a charge against Prince Valerio BORGHESE and three others for crimes committed between 1943 and 1946 in the Julian March.

The accused are charged with:-

- "I. Murder and Massacres, Systematic Terrorism
- III. Torture of civilians.
- XIII. Pillage
- XXIX. Ill-treatment of wounded and Prisoners of War.

Violations of Articles 4, 21, 23(b) and (c), 46 and 47 of the Hague Regulations, 1907, and Article 13 of the Yugoslav Military Courts Act, 1944."

The short statement of facts is as follows:-

"From 1943-45, units of the X ("diecina") Flottiglia MASS, under the command of Prince BORGHESE, which collaborated with the Germans after the Italian Capitulation, committed numerous crimes in the JULIAN MARCH against the Slovene population."

The particulars of the alleged crimes are given as follows:-

"After the Italian capitulation in 1943, the X Flottiglia MAS, under the command of Prince Valerio BORGHESE, was the first Italian unit to join the Germans and collaborate with them. With HQ at CONEGLIANO (Treviso), the X Flottiglia MAS recruited volunteers and formed different land forces of battalion strength; they were stationed in the JULIAN MARCH and terrorised the civilian population.

The following crimes were committed against the Slovene people because of their race and the

to Page 2

fact that they were not fascist:-

1. In December, 1944, the Military Chaplain AGAZZI, who was a fanatical fascist, denounced Franc HOCEVAR, a Slovene schoolmaster and a gifted author and intellectual. AGAZZI was well aware that the Italianisation of the JULIAN MARCH was impossible so long as Slovene intelligenzia existed. On AGAZZI's denunciation, HOCEVAR was arrested at GORICA on December 21, 1944, on the orders of Prince BORGHESE and the following day he was sentenced to death. Sentence of death was not carried out at GORICA because of different interventions on HOCEVAR's behalf. He was taken to the HQ of the X MASS at CONEGLIANO where Prince BORGHESE had him shot on January 3, 1945.

2. On December 28, 1944, on Prince BORGHESE's orders, troops of the X MASS, in a terror raid, pillaged the property of three people in the village of SREDNJI LOKOVEC.

3. On December 29, 1944, a unit of the X MASS beat and tortured a man at KANAL, threatened him with death, and looted his belongings.

4. On January 16, 1945, a unit of the X MAS from St PETER, under the command of Umberto BERTOSI, arrested Marjan MAVRIC and deported him to a Concentration Camp in Germany.

On January 24, 1945, they killed Kamilo STEPANCIC while on his way home.

5. In January, 1945, a unit of the X MAS at OSLAVJE looted the property of four men taking away their bicycles, pigs, cows, etc.

6. In February, 1945, X MAS soldiers pillaged the property of a man at ROCINJE.

7. On March 3, 1945, X MAS troops from GORICA looted the Slovene Catholic vicarage at MEDANA.

8. On January 2, 1945, soldiers of the "X MAS" at FULMINE, arrested near SOLKAN, a commander of the Partisan brigade and took him to the house of Countess NORDIS where he was tied to the staircase for two days, beaten and tortured. On the orders of Captain FELICIANO he was taken out at 5 p.m. to the River SOCA (Isonzo) and shot without trial."

It is added that the above particulars were given to the Yugoslav State Commission by reliable witnesses.

to Page 3.

II. The case was considered by Committee I on 27th June, 1946 (Minutes No.64). The decision of Committee I was recorded as follows:-

"As this case alleges crimes against humanity (the crimes were committed by Italians against Italians of Yugoslav origin in Italy), it was decided to refer the case to Committee III for its opinion as to whether or not the alleged crimes should be considered as crimes against humanity and for what reasons."

III/46.
4th July, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

DRAFT LAW REPORTS TO BE DISCUSSED IN
COMMITTEE III

(Cases 1 to 8)

The Secretary to Committee III suggests that the papers dealt with below should now be examined by the Committee as a further stage in the preparation of Volume 1 of the English edition of the proposed publication of Law Reports (in the discussions of the Commission hitherto known as "annotated summaries".)

The attention of the Committee is drawn to the fact that most of the papers were prepared primarily for internal purposes of the Commission, at a time when the shape of the Commission's publications had not been established and before the sample report (Peleus, C.199) had been discussed. The eventual publication would be considerably delayed, if all the papers dealt with below and in Doc. III/43 would now have to be re-typed and duplicated and after discussion by the Committee to be again re-typed and duplicated.

The alterations, proposed in the individual papers are therefore broadly outlined, and it is proposed that a final draft will be circulated when the papers will have been generally discussed by the Committee.

CASE NO. 1.

THE "PELEUS" TRIAL.

An amended text of this report will be circulated as soon as this is technically possible. The Secretary to Committee III proposes that the consideration of the Peleus Case be postponed until then.

CASE NO. 2.

THE DOSTLER CASE.

(Trial & Law Reports Series No. 14).

The following modifications of Trial and Law Reports Series No. 14 will be proposed.

In Part A:

- 1) Generally, the facts and the course of the proceedings will be described more elaborately.
- 2) In para. I (2) the reference to Misc. No. 16 will be deleted and replaced by either a short reproduction of the the relevant provisions or by a reference to a "glossary" or "general introduction" into the law governing American Military Commissions in the Mediterranean Theatre of operations.
- 3) In para. IV (a) the main provisions of the Führerbefehl will be summarized; part C. of the paper will be omitted.

In Part B:

- 1) Paragraph I on page 3 will be preceded either by a general outline of the United States Law as to Military Commissions or by a reference to the proposed "glossary".
- 2) Paragraph (2) on page 6 will be re-worded to omit the expression of subjective opinions and relegating the quotation from Lauterpacht's article to a foot-note.
- 3) Paragraph (3) on pp. 6-7 will be shortened by a reference to the discussion of the same problem in the Peleus report.

Part C. of the paper

will be omitted.

CASE NO. 3.

THE AIMÉLO CASE.

(Trial & Law Reports Series No. 18).

In Part B. (p.7)

- 1) Paragraph 1 (Questions of Jurisdiction and Procedure.)

^{suggested}
Reference will be made to the "glossary" and all general statements will be omitted.

- 2) Paragraph II (Jurisdiction of the Court in International Law). The Secretariat will ask the Committee for guidance as to whether these problems shall be dealt with in the report.
- 3) *ibid.* p.8. References to C.199 will be replaced by references to "Case 1" and to the glossary.

CASE NO. 4.

THE HADAMAR TRIAL.

(Trial & Law Reports Series Nos. 17 and 8)

- 1) As has been stated in Doc. III/43 the Commission has not received a full transcript of the proceedings.

A decision will therefore be sought on the question whether a report on the lines of Trial and Law Reports Series No. 17

(incorporating the basic facts contained in No. 8) should be inserted in the first Volume.

- 2) In case this question should be answered in the affirmative part 11. of the paper (p.5) will be preceded by a reference to the proposed glossary.
- 3) Guidance will be sought on the question whether considerations concerning the jurisdiction in International Law should remain in the report (para. 2 on page 6).

CASE NO.5.

THE SCUTTLED U BOATS CASE
(Gerhard Grumpelt)

The consideration of this case must be postponed until the draft is available.

CASE NO.6.

(Masuda)

Will be circulated shortly.

CASE NO.7.

THE CASE OF KARL AMBERGER
(Trial & Law Reports Series No.19)

- 1) The question whether every report should be preceded by a list of contents will have to be decided uniformly for the whole publication.
- 2) On pages 5 and 7 respectively the order of notes on substantive law and on adjective law will have to be either reversed or there will have to be uniformly, throughout the publication, a re-arrangement to the effect that questions of substantive law should be dealt with before questions of procedure.
- 3) Guidance will be sought on the question whether it is necessary to deal with the question of individual responsibility for violations of International Conventions (pp.5/6).
- 4) A re-wording of the paragraph beginning with "A declaration of this nature could only be reconciled" will be proposed.
- 5) Most of paragraph 2 (Questions of Procedure) (pp. 7 - 10) will be transferred to the proposed "glossary". Paragraphs (c) on page 9 and (c) on page 10 should however be retained for the greater part, as they apply to the particular circumstances of the case.

CASE NO.8.

THE HEYER CASE; LYNCHING OF BRITISH AIRMEN IN ESSEN
(Trial and Law Reports Series No.12)

- 1) A re-arrangement of this paper will be proposed in order to bring it outwardly in line with the scheme of Doc. C.199. (Division into "facts" and "note").
- 2) The note to paragraph VIII (p. 3, top) will be re-written and relegated to a foot-note.

CASE NO. 9.

Since the circulation of Doc. III/43 documents containing information about 47 trials of war criminals conducted by French courts have been received from the French National Office.

It is therefore suggested to postpone the poison gas case against Bruno Tesch and two others (No. 9 of Doc. III/43) and to insert the report of a French case in the first volume instead.

The report on the case of Gauleiter Wagner and others is being prepared by the Secretariat.

III/47

8th July 1946.

UNITED NATIONS WAR CRIMES COMMISSION

Draft Glossary or
General Introduction into the
British Law concerning Trials of War
Criminals by Military Courts.

By E. Schwelb, Legal Officer.

In the meeting of Committee III held on 26 June 1946 (Minutes No. 14/45) it was decided that a "glossary" containing an explanation of the basic legal provisions applied in the cases reported in the "Annotated Summaries" or "Law Reports" should be added to the individual volumes of the proposed publication. The following is an attempt at such an introduction and glossary concerning the law governing British Military Courts for the trial of war criminals.

A similar draft introduction into the law applicable to United States Military Commissions will be circulated soon.

If necessary, arrangements will be suggested for the production of an introduction into the relevant French law.

I. Jurisdiction of the British Military Courts.

The jurisdiction of the British Military Courts for the trial of war criminals is based on the Royal Warrant dated 14th June 1945, Army Order 81/45, as amended by three further Royal Warrants promulgated by Army Orders 127/1945, 8/1946 and 24/1946. The Royal Warrant recites that His Majesty "deems it expedient to make provision for the trial and punishment of violations of the laws and usages of war" committed during any war "in which he has been or may be engaged at any time after the 2nd September 1939". It is His Majesty's "will and pleasure" that "the custody, trial and punishment of persons charged with such violation of the laws and usages of war shall be governed by the Regulations attached to the Warrant".

The Royal Warrant is based on the Royal Prerogative which, in English Law, represents the residue of legal power, left in the hands of the Executive by the legislature.

The constitutionality and legality of the Royal Warrant and of its individual provisions have so far not been challenged in any British Superior Court as have its American counterparts, the orders of the American executive authorities appointing military commissions for the trial of war criminals under the law of the United States. The latter have been reviewed by the Supreme Court of the United States in the so-called Saboteur Case, ex parte Quirin and others (1942) and in the cases re Yamashita (1946) and re Hotta (1946).

Provisions similar to those contained in the Royal Warrant have in the Commonwealth of Australia been made by an Act of Parliament (War Crimes Act, 1945, No. 48/1945).

II. Definition of "War Crime" in the Royal Warrant.

Regulation 1 of the Royal Warrant provides that 'war crime'

means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939. The jurisdiction of the British Military Courts is, as far as the scope of the crimes subject to their jurisdiction is concerned, narrower than the jurisdiction of, e.g., the International Military Tribunal established by the Four-Power Agreement of 8th August, 1945 which, according to Article 6 of its Charter has jurisdiction not only over violations of the laws and customs of war (Art. 6 (b)) but also over what the Charter calls "crimes against peace" and "crimes against humanity" (Art. 6 (a) and (c)).

III. Convening of a Military Court.

Regulation 2 of the Royal Warrant gives to certain Senior Officers power to convene Military Courts for the trial of persons charged with having committed war crimes. The accused is not entitled to object to the President or any member of the Court or the Judge Advocate, or to offer any special plea to the jurisdiction of the Court (Regulation 6).

IV. Mixed Inter-Allied Military Courts.

Under Regulation 5 para 3, the Convening Officer may, in a case where he considers it desirable so to do, appoint as a member of the Court, but not as President, one or more officers of an Allied Force serving under his command or placed at his disposal for the purpose, provided that the number of such officers so appointed shall not comprise more than half the members of the Court, excluding the President. It is left to the discretion of the Convening Officer to appoint or not to appoint allied officers as members of the court.

In the "Peleus" case (Case No. I of this series) and in the Almelo Case (No. 3 of this series), Greek and Dutch officers respectively were appointed to serve on the Military Court; in the first case obviously because a Greek ship and 18 Greek nationals were involved as the victims of the crime; in the second case because the crime had been committed on Dutch territory and one of the victims was a Netherlands national. In other cases, where the number of allied nations involved was obviously too large as: e.g. in the concentration camp cases, no allied officers were appointed. That the appointment of allied members of the Military Courts is not compulsory is strikingly demonstrated by the trial by a British Military Court at Singapore of W/O Tomono Shimio of the Japanese Army (Doc. C.208 II. No. 83 J) In that case the accused was charged, found guilty and sentenced to death by hanging by a Court consisting of British officers only for having unlawfully killed American prisoners of war at Saigon, French Indo-China. The locus delicti was French territory, the victims were United States nationals.

V. The Judge Advocate.

Usually a Judge Advocate takes part in the proceedings of British Military Courts. The Judge Advocate is a lawyer whose main duty it is to advise the Court on questions of both procedure and substantive law. The Judge Advocate has the duty of taking care that the accused does not suffer any disadvantage. In fulfilling his duties he has to maintain an entirely impartial position. If no Judge Advocate is appointed, the Convening Officer shall appoint at least one officer having legal qualifications as President or as a member of the Court unless, in his opinion, no such officer

is necessary. (Rule 103 of the Rules of Procedure S.R. & O 989/1926 and Regulation 5 paragraph 2 of the Royal Warrant, as amended by A.O. 24/1946).

VI. Rules of Procedure and Rules of Evidence.

The Royal Warrant provides in Regulation 3 that, except in so far as therein otherwise provided, the Rules of Procedure applicable in a Field General Court Martial of the British Army, shall be applied to the Military Courts for the trial of war criminals. These rules are contained in the British Army Act and the Rules of Procedure made under the Act by an Order in Council, the latter being a piece of delegated legislation by the Executive, made in 1926 (S.R. & O 989/1926).

According to these enactments the rules of evidence of a British Court Martial, and under the Royal Warrant also of Military Courts, are the rules applicable in English civil courts. By "civil courts" is meant a court of ordinary criminal jurisdiction in England including a court of summary jurisdiction (Sections 163 to 165 of the British Army Act and Rule 73 of the Rules of Procedure, 1926).

The rules of civil Courts in England and, under the cited provisions, also of British Military Courts, differ in certain aspects from the rules of procedure under which Courts of continental countries exercise jurisdiction. One of the main differences is that in English Courts the accused is allowed, if he so chooses, to give evidence on his own behalf as a witness under oath.

VII. Special Rules of Evidence applicable in Military Courts only.

In the interest of the reliability of the fact-finding of the court, English procedure, very similar to most continental codes of procedure, excludes certain types of evidence, e.g. written statements in circumstances where the person can be examined viva voce.

In view of the special character of the war crimes trials and the many technical difficulties involved, the Royal Warrant by Regulation 8 has introduced a certain relaxation of the rules of evidence otherwise applied in English courts.

Under Regulation 8(i), a military court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the Court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible in evidence in proceedings before a Field General Court Martial. It is under this provision that Military Courts are entitled to admit, e.g. affidavits or statutory declarations, i.e. written statements made under oath, which otherwise would not be received as evidence in an English Court.

Regulation 8 enumerates as examples certain types of documents which may be received as evidence.

VIII. Procedure regarding crimes committed by units or groups of men.

Regulation 8(ii) of the Royal Warrant, as amended, provides:

"Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as

prima facie evidence of the responsibility of each member of that unit or group for that crime. In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court".

IX. Punishment of War Crimes.

The punishment of^a war crime consists in any one or more of the following:-

1. Death, (either by hanging or shooting);
2. Imprisonment for life or for any less term;
3. Confiscation;
4. A fine.

The Court may also order the restitution of money or property taken or destroyed by the accused. (Regulation 9).

X. Appeal and Confirmation.

No right of appeal in the ordinary sense of that word exists against the decision of a military court. The accused may, however, within 48 days give notice of his intention to submit a petition to the Confirming Officer against the finding or sentence or both. The petition must be submitted within 14 days. If it is against the finding it shall be referred by the Confirming Officer to the Judge Advocate General or to his deputy. The finding and any sentence which the Court had jurisdiction to pass, if confirmed, are valid, notwithstanding any deviation from the Regulations or the Rules of Procedure or any defect or objection, technical or other. An exception exists only in the case where it appears that a substantial miscarriage of justice has actually occurred.

XI. The British Courts of Law in relation to Military Courts.

Notwithstanding the absence of a right of appeal Military tribunals are in British law to a great extent subject to the control and supervision of the Superior Civil Courts. This supervision of proceedings conducted by military tribunals exercised through the ordinary courts, takes usually the form of applications for the so-called prerogative writs or orders, (writ of Habeas Corpus, order of certiorari, mandamus, and Prohibition.)

XII. The Authority of decisions of Military Courts.

The Military Courts are not superior courts and their decisions are therefore not endowed with that special binding authority which Anglo-American law attaches to judicial decisions as precedents. Their relevance for the development of International Law may rather be compared with the relevance of judicial decisions in countries whose legal systems are not based on the Anglo-American doctrine of stare decisis. Although the findings and sentences of British Military Courts trying war criminals do not lay down rules of law in an authoritative way, they are declaratory of the state of the law and illustrative of actual state practice.

CONFIDENTIAL.

III/48.
16th July, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Draft Glossary or General Introduction into the
British Law concerning Trials of War Criminals
by Military Courts.

The Judge Advocate General's observations on Document III/47.

The following observations have been received from
Colonel R.C.Halse, O.B.E.

- I. As further amendments may be issued to Army Order 81 of 1945, it is suggested that the words "as to 24 of 1946" should be deleted and the words "with amendments" substituted.

Reference should also be made to the Canadian Order in Council.

- IV. 2nd paragraph, 10th line.

Delete "after appointed" and add, "but national observers from all nations interested were invited to attend".

Line 14.

Omit reference in brackets.

- V. Delete and substitute "A Judge Advocate may be deputed to assist a British Military court by the Judge Advocate General of the Forces or in default of such deputation may be appointed by the officer convening the court. The duty of the Judge Advocate is to advise the court on questions of law and procedure and to ensure that the accused does not suffer any disadvantage. In fulfilling his duties he is to maintain an entirely impartial position. The Judge Advocate has no voting powers. The members of the court are judges of law and fact and consequently the Judge Advocate's advice need not be accepted by them".

If no Judge Advocate is appointed the convening officer must appoint at least one officer having legal qualifications as President or as member of the court unless, in his opinion, no such officer is necessary (Rule of Procedure 103 and Regulation 5, paragraph 2 of Army Order 81 of 1945, as amended.)

The Legal member is entitled to vote.

- XI. It is doubtful whether any of the writs referred to in this paragraph would run in respect of military courts. Certainly no applicant for a writ of habeas corpus would be successful if he was an enemy national.

III/49.
19th July, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

re: Law Reporting.

Proposals by the Secretary to Committee III
regarding the procedure during the week ending
27th July, 1946.

- 1) The following cases to be inserted into the first volume of the Law Reports were not considered in the meeting held on 10th July (Minutes No.16/46) and should therefore be examined in the next meeting of Committee III.

Case No.5. Scuttled U-boats case. Gerhart Grumpelt. Trial and Law Reports Series No.21.

Case No.6. The Masuda case. Trial and Law Reports Series No.20.

Case No.9. Trial of Robert Wagner and others. (French case). Trial and Law Reports Series No.22.

- 2) The cases considered by Committee III in its meeting held on 10th July, and in previous meetings, have now been redrafted according to the suggestions made during the discussions and the new text is being circulated to members in a series headed "Manuscripts of War Crime Trial Law Reports", Volume I. It is therefore suggested that final approval should be given to the following reports, as re-drafted:

Case No.1,	Peleus,
" " 2,	Dostler,
" " 3,	Almelo,
" " 4,	Hadamar,
" " 7,	Amberger,
" " 8.	Heyer.

- 3) It is further proposed that the draft glossary of the relevant provisions of British Law (Docs. III/47 and III/48) should be examined.
- 4) Committee III should further continue its consideration of the type of publication proposed by Mr. Hodge.

SECRET

III/50.
23rd July, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

THE QUESTION OF THE JURISDICTION OF THE
UNITED NATIONS WAR CRIMES COMMISSION
OVER CRIMES COMMITTED IN ETHIOPIA DURING THE ITALIAN-ABYSSINIAN WAR.

(Referred to Committee III by the Commission on 19th July, 1946.)

Note by the Secretary to Committee III.

-
- (1) The original terms of reference of the Commission agreed upon at the meeting of the Allied and Dominions representatives, held at the Foreign Office, London, on 20th October, 1943, provided that the Commission should serve two primary purposes:-
- (i) It should investigate and record the evidence of war crimes, identifying where possible the individuals responsible.
 - (ii) It should report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming.

The Lord Chancellor (Lord Simon) proposed that the meeting should take a decision to set up the Commission forthwith but that the question of the possible expansion of the scope of these investigations and functions should be reserved for future consideration. This was unanimously agreed.

During the debate preceeding this decision, the Chinese Ambassador said that, while his government were in full agreement with the proposal to establish the Commission, they wished to make it clear that they reserved the right after the Commission has been set up to raise the question of the period of time which its investigations should cover in so far as war crimes committed in China were concerned. In this connection Dr. Wellington Koo pointed out that China had suffered the consequences of enemy invasion for a longer period than the other Governments represented at the meeting. The meeting took note of this statement.

- (2) From the terms of reference, in connection with the statement by the Chinese Ambassador, which was taken note of, it appears that although the Governments who set up the Commission had, no doubt, in their minds crimes committed during the war, which was then raging, no express limitation to the effect that crimes committed prior to the beginning of the second World War should be excluded from the Commission's jurisdiction was made.

The question appears to be still open for decision by the members of the Commission.

- (3) With regard to Italian crimes committed in Ethiopia in 1935/1936, two questions therefore arise:

- (a) Are the terms of reference of the Commission to be construed to the effect that they only cover war crimes committed during the war which was raging in 1943, the Second World War, or are the terms of reference of the Commission not so restricted?
- (b) In case the terms of reference are restricted to war crimes committed during the Second World War: Is the Italian-Abyssinian War of 1935/36 a war different from the Second World War or does it, like the Japanese-Chinese "incident", form part of the Second World War, having been merged into it?

- (4) The first of the two questions posed in the preceeding paragraph appears to be not a question of law, but of policy. The position as to the period of time which the Commission's investigations should cover, was expressly left over for a later decision by the Commission or its member governments.

- (5) With regard to the second question raised in paragraph 3 of this paper, viz. whether the Italo-Abyssinian war was a war different from the Second World War, this writer has not had an opportunity of examining all the relevant documents for the purpose of this preliminary report. He submits, therefore, as a provisional basis for further discussions by Committee III, the following:

Before 1939, it was generally understood that the Italian-Abyssinian War had been concluded by the debellatio of Ethiopia and by the annexation of Ethiopia by Italy. The question arose at the time whether the Italian Proclamation of Annexation of 9th May 1936 was premature, but, eventually, the Great Powers acquiesced in the conquest of Abyssinia and it was recognised by most governments *de jure* and by all governments *de facto*.

In, say, 1938 or 1939, the question whether the Italian-Abyssinian war had come to an end would unambiguously have had to be answered in the affirmative.

- (6) The question remains whether later events have with retrospective effect, brought about a change in this position.

In the Agreement between the United Kingdom and Ethiopia of 31st January 1942, the government of the United Kingdom recognised that Ethiopia was then a free and independent State. ("Whereas the Government of the United Kingdom recognise that Ethiopia is now a free and independent State and His Majesty the Emperor, Haile Selassie I, is its lawful Ruler, and, the reconquest of Ethiopia being now complete, wish to help His Majesty the Emperor to re-establish His Government and to assist in providing for the immediate needs of the country") (Preamble)

Diplomatic relations between the United Kingdom and Ethiopia were re-established (Art.I), the Emperor of Ethiopia agreed to enact laws against trading with the enemy (Art.VI), he agreed that all prisoners of war shall be handed over to the custody of the British Military Authorities (Art.VII). The Government of the United Kingdom promised to use their best endeavours:

- (a) To secure the return of Ethiopians in Italian hands, and
- (b) To secure the return of artistic works, religious property and the like removed to Italy and belonging to His Majesty the Emperor, the Ethiopian State, or local or religious bodies. (Art.VIII).

Simultaneously, a Military Convention was concluded "to provide for certain matters relating to mutual assistance as Allies in the struggle against the common enemy". In the Military Convention, it was agreed, inter alia, that the appropriate British authority will, on receipt of an application signed by the appropriate official of the Ethiopian Ministry of Justice, surrender any person not being a member of the British Forces who is within any British cantonment or reserved area, and against whom a warrant of arrest has been issued, in respect of any offence triable by an Ethiopian Court. (Art.16 of the Military Convention).

The 1942 Agreement and Military Convention were superseded by an Agreement concluded on 19th December 1944. In this agreement the Ethiopian government agreed to certain provisions "in order as an Ally to contribute to the effective prosecution of the war and without prejudice to their underlying sovereignty". (Art.VII). The contracting parties undertook to collaborate in arrangements for the internment or expulsion of enemy aliens or ex-enemy aliens (Art.X.)

- (7) The quoted provisions of the 1942 and 1944 Agreements between the United Kingdom and Ethiopia did not, in this writer's opinion, amount to a complete and unqualified reversal, with retrospective effect, of the position brought about in 1936. The position at the time prior to 1942 was left where it was and the British Government only recognised that Ethiopia was then, namely in 1942, a free and independent State waging war against "a common enemy".

The 1942 and 1944 Agreements are, therefore, not irreconcilable with the proposition that the 1935/1936 war between Italy and Abyssinia was and has remained a war different from the Second World War.

From the Ethiopian point of view the situation is probably different because the Ethiopian government has not recognised the annexation of Ethiopia by Italy and the Ethiopian Emperor in the Preamble to the 1942 Agreement recites his coronation pledges "not to surrender his sovereignty or the independence of his people".

- (8) It therefore appears that also the second question, (b), contained in paragraph 3 of this paper is not a question of law stricto sensu, but a question governed by a political decision.

It was indicated by a member of the Commission, (Dr.Zivković) in the Commission meeting held on 19th July 1946, that the thesis that the whole war against the "Axis" is one war, has been adopted by the Great Powers in the London Agreement of 8th August 1945, which deals with the prosecution and punishment of the major war criminals of the European Axis. It should be added that the use of the term "Axis" is more a pronouncement of a political view than the laying down of a rule of law. As a legal notion, the "Axis" did not exist in 1935/36. The tripartite pact of Germany, Italy and Japan was formally concluded in 1939. But it must, on the other hand, be admitted, that the use of the term "European Axis" indicates the intention to treat the Axis and the criminal activities of its representatives as one whole, at least as far as the task of retribution is concerned.

- (9) The question dealt with in this paper, namely whether crimes committed by Italians in Abyssinia in 1935/36 fall under the jurisdiction of the Commission may also be approached from a slightly different angle, namely: by analysing the term "war crimes" which is used both in the

terms of reference of the Commission and in a great number of other international documents, e.g. in the Charter of the International Military Tribunal.

In the meeting of the Commission held on 30th January 1946, (M.93), a motion was approved by 9 votes, with 6 abstentions, and accordingly carried, to the effect that crimes against peace and against humanity, as referred to in the Four-Power Agreement of 8th August 1945, are war crimes within the jurisdiction of the Commission. The term "crimes against humanity" (Article 6(c) of the Charter) comprises murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war. From this it follows that crimes against humanity, even if committed before the war, fall within the jurisdiction of the Commission. This does not necessarily mean that crimes against humanity committed during another war are also within the jurisdiction of the Commission, although a conclusion to this effect would not appear to be illogical.

It must be admitted, however, that this line of thought is to a certain extent, artificial. Nor would the consequences be satisfactory. Crimes against humanity committed against the Abyssinian civilian population would be subject to the Commission's jurisdiction, violations of the laws and customs of war, which are not simultaneously crimes against humanity, would remain outside its terms of reference. In other words: war crimes in the narrower sense would be excluded from the Commission's jurisdiction, while war crimes in the wider sense would fall under it.

The practical application would also show unsatisfactory features. The Commission would have to list persons accused of having committed crimes against Abyssinian civilians, but it would have to reject charges regarding similar crimes committed against members of the Abyssinian Armed Forces.

- (10) Finally, attention may be drawn to a provision, issued by the four Great Powers, for the territory of Germany under the jurisdiction of the Allied Control Council. This provision, (Law No.10 published in Military Government Gazette (Germany) No.5.), makes the Moscow Declaration and the Four Power Agreement part of the territorial law of Germany and may certainly be regarded as a document explanatory of the Four Power Agreement. Article II paragraph 5 of this Law provides that in any trial or prosecution for a crime therein referred to (which includes war crimes in the narrower sense, as well as crimes against peace and crimes against humanity) the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30th January 1933 to 1st July 1945. This provision obviously implies that war crimes in the wider sense, including crimes against peace and crimes against humanity, committed even before the 30th January 1933, are within the scope of the retributive action of the Allied Nations.

III/51
23 July 1946

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

re: Law Reporting

The following text of a letter received by the Secretary to Committee III from Mr. James H. Hodge is circulated for the information of members:-

"Dear Dr. Schwelb,

18th July, 1946.

Many thanks for your letter of the 16th inst. I shall be glad to hear from you in due course of the result of the Committee's deliberations and sincerely trust that they will proceed with the publications suggested.

I visited Professor Lauterpacht at Cambridge to ask his guidance as to the best type of person to be entrusted with the editorship of such volumes, and he gave me much useful advice. He is of the opinion that such a series would be useful, instructive, and a valuable record for the future.

It is my view that a general editor should be agreed upon if the project goes forward, as this will materially assist in the correct presentation and evenness of the volumes to be published. In this respect I have asked Professor Lauterpacht, in the event of my firm being entrusted with the publication, whether he would consider acting as such an editor. I feel sure that he would prove eminently suited to such a task should he be able to spare the necessary time; of course, he is extremely occupied at present. If he is too pressed to manage this, he may very likely suggest someone who would prove acceptable to your Commission. I shall let you know what he says.

If your Committee requires any further information I shall be glad to come South to meet them at any time. The last meeting somewhat took me aback as it was on a much larger scale than I had anticipated.

Yours sincerely,

James H. Hodge.

P.S. We treat this series most seriously, and I wish to stress the fact that editors will not be permitted to express views of their own as in the case of 'our normal trials.'

SECRET.

III/52.
24th July, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Publication of Trial Reports by Messrs. Hodge & Co.

Proposals by the Secretary General

to Committee III.

- (1) As a result of the discussions so far conducted both by the Commission and by Committee III, it is suggested that a letter on the lines contained in paragraph 4 of this paper should be sent by the Secretary General to Messrs. Hodge & Co. after a recommendation to this effect has been adopted by Committee III and agreed to by the Commission.
- (2) In addition to approval by the Commission, it is suggested that the concurrence of the appropriate British authorities should be sought before despatching the letter, in view of the fact that they are primarily concerned with this project as mainly British trials will be made available to Hodge for the present.
- (3) It is further suggested that legal advice from a British lawyer conversant with such contracts should be sought before committing the Commission to the undertaking contained in the draft letter.
- (4) The text of the letter might be as follows:

" Dear Sirs,

Reports on Trials of War Criminals.

Referring to our previous correspondence on the above subject, and to our discussions with you at various times, I write to inform you that the United Nations War Crimes Commission has now agreed to a scheme regarding publication of full reports of Trials of War Criminals by your firm and that it is prepared to recommend to its member governments the adoption of the scheme under the following terms:-

- (a) Member Governments who may wish to avail themselves of your services, will place at your disposal the transcripts, records and documents which they want to be made the basis of your publication.
- (b) In cases where additional spare copies of the documents mentioned are not available, the Commission would be prepared to lend you any copy which had been made available to the Commission by its member Governments for official use, provided you undertake the safe return of such copies undamaged.
- (c) The agreement of this Commission with regard to the person or persons to be entrusted with the editing of the individual trials, and the person you may wish to appoint as General Editor for the whole scheme, will be necessary. The Commission's consent to these persons will not be unreasonably withheld.

(d) The drafts of any commentaries and forewords to be included in the publications will be submitted to the Commission for approval and you will undertake to abide by any decisions which the Commission may deem fit to make in this respect.

(e) It will be a matter of a special agreement between the Commission and you where, in which cases and in what manner, reference will be made in the publication itself to the "United Nations War Crimes Commission."

(f) The United Nations War Crimes Commission has the right to transfer its powers under this agreement to any international or national body which should take over its functions, if the Commission should be wound up before the work of publication is concluded.

(g) You will make your own arrangements with the Government or Government department concerned with regard to copyrights, to the payment of fees, if any, for the right to use the documents, and all other questions of financial agreements.

(h) The Commission itself does not undertake any financial responsibility for the publication nor does it desire financial reward for the supervisory function to be exercised by it under the foregoing provisions.

Yours sincerely,

Secretary General. "

III/53.
12th August, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

DRAFT ANNEX ON THE LAW APPLICABLE TO

WAR CRIMES TRIALS CONDUCTED BY

FRENCH MILITARY TRIBUNALS.

By G. Brand.

(The present document is circulated as a basis for drafting Annex III, to be inserted in Volume I of the Law Reports, and, with any suitable modifications, in subsequent Volumes.)

I. The Jurisdiction and Legal Basis of French Permanent Military Tribunals for the Trial of War Criminals

French Military Tribunals for the trial of war criminals are set up by virtue of the Ordinance of August 28th 1944, Concerning the Suppression of War Crimes. It was promulgated in Algiers, and Article 6 states: "The present Ordinance is applicable to Algiers and the colonies. It will be published in the Journal Officiel of the French Republic and shall be put into effect as law". This Article is not, however, to be interpreted in any restrictive sense, since the Ordinance has been used as the basis of numbers of trials held in Metropolitan France.

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

It is not specified which type of Military Tribunals are to deal with cases of War Crimes. The Code de Justice Militaire makes provisions, and in some respects different provisions, for several kinds of Military Tribunals, namely Permanent Military Tribunals, and Military Tribunals attached to the armies, in territorial districts in a state of war, in communes or departments in a state of siege, and in besieged or invested war areas. There are also Military Appeal Tribunals (Tribunaux Militaires de Cassation), to which, by definition, a prisoner could not of course be sent in the first instance. All of the trials recorded in documents so far received by the United Nations War Crimes Commission have been held by Permanent Military Tribunals, and it is, therefore, in relation to them that this Annex speaks.

Article 124 of the Code de Justice Militaire states that: "In time of war, there shall be at least one Permanent Military Tribunal in each military region; the seat of this Military Tribunal shall,

in principle, be the chief town of the military region...."

II. The Composition of a French War Crimes Tribunal

Article 5 of the Ordinance runs as follows: "For adjudicating on war crimes, the military tribunal shall be constituted in the manner laid down in the Code de Justice Militaire. The majority of the military judges shall be selected from among officers, non-commissioned officers and other ranks belonging, or having belonged, to the French Forces of the Interior or a Resistance Group."

III. Persons Subject to the Jurisdiction of French Military Tribunals for the Trial of War Crimes

Article 1 of the Ordinance states that the persons liable to prosecution thereunder are: "Enemy nationals or agents of other than French nationality who are serving enemy administration or interests and who are guilty of crimes or delicts committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before 17th June 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies."

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

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

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

Article 60 includes the following words: "They shall be punished as accomplices for an act treated as a crime or a delict, who, by gifts, promises, threats, abuse of authority or power, scheming or culpable deceit, have provoked that act, or given orders for its commission."

It is worthy of note that a large proportion of the questions put by the President before the Judges in the Wagner trial enquired whether the accused had been accomplices in the commission of the various acts alleged. The wording of Article 60 is particularly interesting in view of the fact that the Judges were asked whether Wagner had been an accomplice, "in abuse of authority or power", in the passing of the illegal sentences alleged in the case, and in the shooting of the prisoners of war. The Judges were also asked whether R8hn, in like manner, had been an accomplice in the latter crime.

IV. Crimes made Punishable by the Ordinance

The terms "War Crime" and "War Criminal" are left undefined in the Ordinance, but it seems to follow from the wording of Article 1 that the offences to be punished are such infractions of French Law as are not made justifiable by the laws and customs of war.

It will be noted that the scope of the term "War Crime" as thus defined, is not quite the same as that laid down in the British Royal Warrant, where it signifies a violation of the laws and usages of war themselves, committed during any war in which His Majesty has been or may be engaged since 2nd September 1939.

Attention should be drawn to the offences specifically mentioned in the second paragraph of Article 1 and in the whole of Article 2. These passages are as follows:-

"In particular, the offences specified and made punishable under Articles 92, 132, 265 et seq., 295, 296, 301, 302, 303, 304, 309 to 317, 332, 334, 341, 342, 343, 344, 379, 400, 434 to 459 of the Code Pénal and Articles 214, 216, 221 et seq. of the Code de Justice Militaire shall be the subject of prosecution in accordance with the above provisions, if they have been committed in the circumstances described in paragraph 1 of the present Article.

Article 2. - The provisions of the Code Pénal and of the Code de Justice Militaire shall be interpreted as follows:

1. The illegal recruitment of armed forces, as specified in Article 92 of the Code Pénal, shall include all recruitment by the enemy or his agents;
2. Criminal association, as specified in Articles 265 et seq. of the Code Pénal, shall include within its scope organisations or agencies engaged in systematic terrorism;
3. Poisoning, as specified in article 301 of the Code Pénal, shall include the exposure of persons in gas chambers, the poisoning of water or foodstuffs, and the depositing, sprinkling or applying of noxious substances intended to cause death;
4. Premeditated murder, as specified in Article 296 of the Code Pénal, shall include killing as a form of reprisal;
5. Illegal restraint, as specified in Articles 341, 342 and 343 of the Code Pénal shall include forced labour of civilians and deportation for any reason whatever of any detained or interned person against whom no sentence which is in accordance with the laws and customs of war has been pronounced.
6. Illegal restraint, as specified in paragraphs 1 and 2 of Article 344 of the Code Pénal, shall include the employment on war work of prisoners of war or requisitioned civilians;
7. Illegal restraint, as specified in the last paragraph of Article 344 of the Code Pénal, shall include the employment of prisoners of war or civilians in order to protect the enemy;
8. Pillage, as specified in Articles 221 et seq. of the Code de Justice Militaire, shall include the imposition of collective fines, excessive or illegal requisitioning, confiscation or spoliation, the removal or export from French territory by whatever means of property of any kind, including movable property and money."

Certain of the Articles mentioned in the second paragraph of Article 1, and not elucidated in Article 2, have been dealt with in the notes to the Wagner Case; it has been seen that Articles 295 and 296 of the Code Pénal define premeditated murder. As this Annex states elsewhere, Article 302 provides the penalty for premeditated murder, patricide and poisoning, and Article 304 provides the penalty for murder. (*)

Of the remainder, Article 132 of the Code Pénal deals with the counterfeiting and altering of French money and the circulation thereof, Articles 205 et seq. with conspiracies to commit crimes

(*) See pp:

against persons or property, 303 with torture and acts of barbarity, 309-317 with voluntary wounding and striking, not regarded as murder, and other voluntary crimes and delicts, 332 and 334 with certain sexual offences, 379 with theft, 400 with extortion, and 434-459 with arson and other forms of destruction. Article 214 of the Code de Justice Militaire deals with abuse of authority and 216 with offences against wounded sick and dead soldiers.

V. Provisions Regarding the Defence of Superior Orders

Article 3 of the Ordinance runs as follows: "Laws, decrees or regulations issued by the enemy authorities, orders or permits issued by these authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Article 327 of the Code Pénal, but can only, in certain circumstances, be admitted as extenuating or exculpating circumstances."

Article 327 of the Code Pénal makes the following provision: "No crime or delict is committed when the homicide, wounding or striking was ordered by the law or by legal authority".

VI. Penalties Attaching to War Crimes

Article I of the Ordinance states simply that the persons specified therein shall be "prosecuted by French military tribunals and shall be judged in accordance with the French laws in force."

Apart from making certain special provisions concerning military degradation and loss of rank and prohibition of residence, and apart from providing the penalties attaching to the commission of a delict, Article 192 of the Code de Justice Militaire, the only article appearing under the Chapter heading: "Penalties Applicable" states: "The penalties which can be applied within the military jurisdictions for crimes are those laid down in Articles 7 and 8 of the Code Pénal."

These Articles, together with the preceding one, read as follows:

" 6. The penalties for crimes are either corporal and ignominious, or simply ignominious.

7. The penalties which are corporal and ignominious are:

- (1) death; (2) penal servitude for life; (3) deportation;
- (4) penal servitude for a term; (5) detention; (6) confinement.

8. The ignominious penalties are:

- (1) banishment; (2) civic degradation. "

These articles provide the possible range of punishment under French Criminal Law; Articles providing against individual offences supply the relevant penalties. For instance, in the Wagner trial, Articles 302 and 304 of the Code Pénal were referred to by the Prosecution, and by the Tribunal in its judgment. The former provides that the penalty for premeditated murder, patricide and poisoning shall be death. The latter lays down that simple murder (i.e. voluntary homicide) shall be punished by penal servitude for life, except in two cases, when the death penalty shall be pronounced. The first arises when the murder has been preceded, accompanied or followed by

another crime. The second arises when the murder has had as its object the preparation, facilitation or execution of a delict, or the facilitating of the flight, or assuring of the impunity, of the authors or accomplices of a delict. (1)

VII. The Procedure followed in French War Crimes Trials

The Ordinance makes no special provisions regarding procedure, but simply makes reference to trial "in accordance with the French laws in force". It is useful however, to make a short survey of the procedure applied in French war crime trials, with particular reference to the Wagner case.

After his preliminary investigation of a case, a military Juge d'Instruction decides whether it should go before a Military Tribunal for trial. (2)

Article 68 of the Code de Justice Militaire, to which reference was made by the Tribunal in rejecting the plea made by Gruner's Counsel to the Jurisdiction of the Tribunal, includes the following passage:

"For all acts liable to be punished by sentences of death, deportation, penal servitude, imprisonment or confinement, the case can be sent before a Military Tribunal only by the Court of Indictment (Chambre des mises en accusation) of the appeal Court for the jurisdictional area within which the Tribunal operates."

In peace time, accordingly, the Juge d'Instruction must refer such cases to the Court of Indictment of the appropriate appeal court, in accordance with Article 66 of the Code, which provides to that effect.

As the Tribunal trying the Wagner Case pointed out, however, Article 68 of the Code de Justice Militaire is not applicable "in time of War". Article 125 bis of that code provides that: "All the rules laid down in the Title I of this Code, concerning Permanent Military Tribunals in time of peace, must be observed also as regards Permanent Military Tribunals in the territorial districts in time of war, the powers of the General commanding the territorial district in time of peace being transferred to the General commanding the military region or the territorial district to the extent of the territory under his authority, provided that:

(2) In time of war, Article 68 shall be inapplicable, and the sending of cases before a Military Tribunal by Order of Committal shall be carried out by a military Juge d'Instruction, as regards both Permanent Military Tribunals and Military Tribunals attached to the armies."

The next step is provided by Article 69 of the Code de Justice Militaire, which lays down that the Public Prosecutor (Commissaire du Gouvernement) shall be charged with taking action against the accused

(1) And see also the penalties provided by the Articles quoted in the notes to the Wagner Trials, pp..... Articles 35 and 37 of the Code Pénal, to which also the Acte d'Accusation (Charge sheet) and the Tribunal referred, make general provisions regarding the cases where civic degradation may, or must, be accompanied by imprisonment, and regarding wartime confiscation for the benefit of the nation of the goods of a condemned person.

(2) Article 42 bis of the Code states that, in cases of delicts, the General commanding the territorial district may, after consulting the Public Prosecutor, decide to follow a different procedure, according to which the preliminary investigation is not conducted by a Juge d'Instruction but by army officers of certain specified ranks.

before the Military Tribunal. He must immediately cause the accused to be notified of the Order of Committal (Ordonnance de Renvoi) whereby the Juge d'Instruction has sent the case before the Military Tribunal. He communicates the same Order to the authority which gave the Order of Enquiry. (3) He sends, to the General commanding the territorial district in which the Military Tribunal sits, a request for its convocation. Finally, he must also draw up an *Note d'Accusation* (Charge Sheet). This document is, in fact, a recital of the facts alleged by the Prosecution.

Article 71 of the Code states that, three days at least before the meeting of the Tribunal, the Public Prosecutor shall communicate to the accused the *Note d'Accusation*, with the text of the law applicable and the names of the witnesses whom he proposes to call. If the accused has not chosen a defending Counsel, a Counsel will be officially provided for him.

Article 72 of the Code provides that trials shall be public, except where the Tribunal decides that this appears dangerous to public order or morals. In any case the judgment must be delivered in public.

Article 119 of the Code, which was mentioned in the Wagner proceedings in connection with the absence of Huber, contains the following passages: "When the accused has been referred to a Military Tribunal for trial and it has not been possible to arrest him, or when he has escaped after being arrested, ... on the receipt of the Decision (4) or Order of Committal, and on the initiative of the Public Prosecutor, the President of the Military Tribunal shall issue an Order, setting out the crime or delict for which proceedings are being taken against the accused, and stating that he will be held bound to present himself within six days, reckoning from the date of execution of the last of the formalities connected with the publication of the said Order.

In wartime, or where the territory in which the offence has been committed is declared to be in a state of siege, the period shall be reduced to five days."

If the accused fails to present himself during the period of grace, Article 120, quoting a Decree-law of 20th May 1940, states that proceedings can be taken against him in his absence or in default (*par contumace ou par défaut*).

The discretionary power of the President regarding the use of evidence, which was referred to in the Wagner trial, arises out of Article 82 of the Code, which includes the following words: "The President shall have a discretionary power in relation to the conduct of the proceedings and the finding of the truth. He shall be able, during the proceedings, to cause to be produced any evidence which seems to him to be of value for the finding of the truth, and to call, even by means of a summons, or to produce, any person to whom it seems necessary that a hearing should be given".

(3) By "Order of Enquiry" is meant the "Order d'Informer" which, in accordance with Article 24 of the Code de Justice Militaire, a General commanding a territorial district must communicate to the appropriate Public Prosecutor if he is satisfied that proceedings should be started before a Military Tribunal against someone amenable to its jurisdiction. The latter then refers the matter to the Juge d'Instruction attached to the Tribunal.

(4) A reference to the decision of a higher court referring a matter to a Military Tribunal for trial. See earlier in these notes on procedure.

After the examination of the witnesses, the accused and the evidence, and after hearing the arguments of Counsel, the accused and his Counsel having the last word, the Tribunal must then, in accordance with Articles 89 - 91 of the Code, retire and vote by secret ballot, answering "yes" or "no" to the questions of fact and law put by the President. By a law of 3rd February 1941, a simple majority is sufficient for decisions on these questions, during war-time. Should the accused be found guilty, the Tribunal must then, by virtue of Article 91 of the Code, decide whether there were extenuating circumstances, and must fix the penalty.

In accordance with Article 93, the President of the Tribunal must then read the judgment in public sitting.

VIII. Provisions Regarding Appeals

Article 125 bis of the Code de Justice Militaire, quoting a Decree of 3rd November 1939, provides that in time of war Permanent Military Appeal Tribunals shall be set up, their number, seat and jurisdiction being fixed by decree. They are to try only persons convicted by Military Tribunals. Article 135 of the Code states that such persons shall have twenty-four hours during which they may appeal to such a court. This period begins to run at the end of the day on which the judgment of the Military Tribunal is read.

Article 134 states that: "Military Appeal Tribunals can annul decisions only in the following cases:

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

According to Article 138 which quotes a Decree of 3rd November 1939, "In all cases where a Military Appeal Tribunal has been established, persons sentenced by Military Tribunals cannot appeal to the Court of Appeal (Cour de Cassation) against the decisions of Military Tribunals and of Military Appeal Tribunals."

III/54.
16th August 1946.

UNITED NATIONS WAR CRIMES COMMISSION

DRAFT GLOSSARY OR GENERAL INTRODUCTION

INTO

UNITED STATES LAW CONCERNING TRIALS OF WAR CRIMINALS
BY MILITARY COMMISSIONS AND MILITARY GOVERNMENT COURTS.

By Egon Schwelb, Legal Officer.

The following is a draft of Annex II to Volume I of the Law Reports to be published. The Draft of Annex I containing a general introduction into the British law concerning trials of war criminals by Military Courts was circulated as Document III/47 and agreed upon by Committee III with certain amendments (See also Document III/48). Its final text is being circulated in the "Manuscript series".

A draft of Annex III, containing an introduction into the relevant French provisions has been circulated as Document III/53 and has also with the kind help of the French representative been submitted to the French authorities for checking.

The present paper deals with the appropriate provisions of United States law.

I. The different types of United States Military and Military Government Tribunals.

In United States Law there are three types of Military Tribunals, namely (a) Courts Martial, (b) Military Commissions and (c) Provost Courts. In addition to these Tribunals, based on internal United States law, both common law and statute, there exist in territory occupied by United States forces (d) Military Government Courts. In the present publication, which deals with the trial of war criminals by Allied Courts, we are not concerned with the type of Military Tribunals mentioned under (a) (Courts Martial) because the jurisdiction of Courts Martial is generally restricted to "persons subject to the Articles of War", i.e., roughly speaking, to members of the United States Army. Provost Courts (supra (c)) are tribunals of a summary nature. As there have been no trials of war criminals before United States Provost Courts, this type can also remain outside the scope of this introduction which therefore will be restricted to: Military Commissions (Part I) and to Military Governments Courts (Part II).

Part I: United States Military Commissions.

II. The Basic Provisions.

The United States Military Commissions are an ancient institution going back to the Mexican war in the first half of the nineteenth century. They have been described as the American common law war court.

They were not created by statute, but recognised by statute law. In very recent decisions, (the so-called Saboteur case ex parte Richard Quirin (1942); in re Yamashita (1946) and in re Homma (1946) the Supreme Court of the United States had occasion to consider at length the sources and nature of the authority to create Military Commissions. The Supreme Court stated that Congress and the President, like the courts, possess no power not derived from the Constitution of the United States. But one of the objects of the Constitution, as declared by its preamble, is to "provide for the common defence". As a means to that end the Constitution gives to Congress the power to "provide for the common Defence", "To raise and support Armies", "To provide and maintain a Navy", and "To make Rules for the Government and Regulations of the land and naval Forces". Congress is given authority "to declare War and make Rules concerning Captures on Land and Water", and "To define and punish Piracies and Felonies committed on the high seas and Offences against the Law of Nations". In the exercise of the power conferred upon it by the constitution to "define and punish offences against the law of nations", of which the law of war is a part, the United States Congress has by a statute, the Articles of War, recognised the "Military Commissions" appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offences against the law of war. The Supreme Court pointed out that Congress, by sanctioning the trial of enemy combatants for violations of the law of war by Military commission had not attempted to codify the law of war or to mark its precise boundaries. Instead it had incorporated, by reference, as within the pre-existing jurisdiction of military commissions created by appropriate military command, all offences which are defined as such by the law of war, and which may constitutionally be included within the jurisdiction.

The Constitution confers on the President the "executive Power" and imposes upon him the duty to "take care that the Laws be faithfully executed". It makes him the Commander in Chief of the Army and Navy. The Constitution thus invests the President as Commander in Chief with the power to wage war and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations including those which pertain to the conduct of war.

Finally the Supreme Court held that Congress by sanctioning trials of enemy aliens by military commission for offences against the law of war had recognised the right of the accused to make a defence. It has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial.

Article 38 of the Articles of War provides that the President of the United States may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof in cases before courts-martial, courts of inquiry, military commissions and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognised in the trial of criminal cases in the district courts of the United States, provided that nothing contrary to or inconsistent with the Articles of War shall be so prescribed. From this it follows that the President of the United States as the Commander in Chief of the Armed Forces, and the Commanders in the field deriving their power from the Chief Executive, have the power to appoint Military Commissions and to prescribe the rules and regulations under which they have to operate.

III. Regulations for the trial of war criminals
by Military Commissions.

The British Royal Warrant of 14th June 1945 (see Annex I of this Volume) has made regulations for the trial of war criminals for all British Military Courts in all theatres of operations and in all territories under the jurisdiction of the United Kingdom Government and armed forces.

The United States authorities have made different provisions for different territories. From the decision of the Supreme Court of the United States in ex parte Richard Quirin it appears that the President, as President and Commander in Chief of the Army and Navy, by Order of July 2nd 1942 (7 Federal Register 5103), appointed a Military Commission and directed it to try Richard Quirin and seven other German nationals for offences against the law of war and the Articles of War and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation, (7 Federal Register 5101), the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States through coastal or boundary defences, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the laws of war, shall be subject to the law of war and to the jurisdiction of military tribunals". The Supreme Court of the United States in its decision ex parte Richard Quirin upheld the legality of this procedure by the President.

Similarly by Command of General McNarney, Regulations for the Trial of War Crimes for the Mediterranean theatre of operations were made on the 23rd September 1945 by circular No. 114; these Regulations (in the following pages called the Mediterranean Regulations), formed the basis of the proceedings against General Dostler (see Case 2 of this Volume).

By command of General Eisenhower, a directive regarding Military Commission in European theatre of operations were made by an Order of 25th August 1945 (to be called European directive hereafter). These rules applied, e.g. to the Hadamar trial (case No. 4. of this Volume). For the United States Armed Forces, Pacific, Regulations governing the trial of war criminals were made by General MacArthur on 24th September 1945. These regulations (to be called in this note Pacific Regulations) formed the basis of the trial, inter alia, of the Japanese General Yamashita the proceedings of which were eventually reviewed by the Supreme Court of the United States.

IV. The Definition of War Crime in the Regulations for the
trial of war criminals in the different United States
theatres of operations.

In the Mediterranean Regulations, "war crime" is defined as meaning a violation of the laws or customs of war. Under the European directive (1a) military commissions are appointed for the trial of persons who are charged with violations of the laws or customs of war, of the law of nations, or of the laws of occupied territory or any part thereof.

In the Pacific Regulations the offence falling under the Jurisdiction of the Military Commissions are described as follows (5):

"murder, torture or ill-treatment of prisoners of war or persons on the seas; killing or ill-treatment of hostages; murder, torture or ill-treatment, or deportation to slave labor or for any other illegal purpose, of civilians of, or in, occupied territory; plunder of public or private property; wanton destruction of cities, towns or villages; devastation, destruction or damage of public or private property not justified by military necessity; planning, preparation, initiation or waging of a war of aggression, or an invasion or war in violation of international law, treaties, agreements or assurances; murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or connection with any offence within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated; and all other offences against the laws or customs of war; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy". The jurisdiction of the Military Commissions operating under the Pacific Regulations, is, therefore, considerably wider than that of the Military Commissions in the Mediterranean theatre, and also wider than those falling under the European directive because, in addition to violations of the laws and customs of war (or war crimes in the narrower sense,) it comprises in a way similar to the International Military Tribunal created by the Four Power Agreement of 8th August 1945, also what is there called crimes against peace and crimes against humanity.

V. Composition of the Military Commissions.

Military Commission shall, under all three Regulations mentioned, be composed of not less than three members. In the European and Mediterranean Theatres of Operations, the members must be officers of the United States Army. The Pacific Regulations, on the other hand, provide also for "international military commissions consisting of representatives of several nations or of each nation concerned, appointed to try cases involving offences against two or more nations or any other offences; and commissions consisting of members of any one branch or of several branches of the army services of one or more nations".(2). The most outstanding instance of an American Military Tribunal consisting of representatives of several nations is the International Military Tribunal for the Far East which was established by Special Proclamation of General Douglas MacArthur of 19th January 1946 (as amended by a subsequent Order of 26th April 1946)"for the just and prompt trial and punishment of major war criminals in the Far East." The Pacific Regulations also provide that persons whose offence have a particular geographical location outside Japan may be returned to the scene of their crimes for trial by competent military or civil tribunals of local jurisdiction, (5b) which is an application of the Moscow Declaration of 30th October 1943 to the Pacific theatre of war.

VI. The Judge Advocate.

In American law the function of the Judge Advocate is entirely different from that of the Judge Advocate in British Military Tribunals. Whereas the British Judge Advocate is an impartial adviser to the Tribunal (see Annex I of this Volume, paragraph) Article 17 of the American Articles of War provides that the trial judge advocate of a general or special court martial shall prosecute in the name of the United States, and shall, under the direction of the Court, prepare the record of its proceedings. The Mediterranean Regulations (3) provide that for each military commission there shall be appointed a judge advocate and a defence counsel with such assistants as may be required, whose duties shall be similar to those of like officers before general courts martial. Similar provisions apply

to the European (1c) and Pacific theatres, in the latter case it being also provided (11) that in prosecutions for offences involving more than one nation, each nation concerned may be represented among the prosecutors.

VII. Rules of Procedure.

The Mediterranean Regulations provide (8) that military commissions shall conduct their proceedings as may be deemed necessary for full and fair trial, having regard for but not being bound by, the rules of procedure prescribed for general courts martial. In the European directive, it is stated (2) that military commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings consistent with the powers of such commissions, and with the rules of procedure set forth in the directive, as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure and evidence prescribed for general courts martial. In the Pacific Regulations it is provided, inter alia, that the commission shall confine each trial strictly to a fair, expeditious hearing on the issues raised by the charges, excluding relevant issues or evidence, and preventing any unnecessary delay or interference (13a). Sessions of the Commission shall be public except when otherwise directed by the Commission (13c). The accused shall be entitled, inter alia, to be represented prior to, and during trial by counsel of his own choice or to conduct his own defence. If the accused fails to designate his counsel, the commission shall appoint competent counsel to represent or advise the accused (14b). The accused shall be entitled to have his counsel present relevant evidence at the trial in support of his defence, and cross-examine each adverse witness who personally appears before the Commission (14c) and to have the charges and specifications, the proceedings and any documentary evidence translated when he is unable otherwise to understand them (14d).

VIII. Rules of Evidence.

The Regulations and the Directive provide that the technical rules of evidence shall not be applied by the military commissions, (paragraph 10 of the European directive, para. 3 of the Mediterranean and para. 16 of the Pacific Regulations). The regulations contain as to evidence, provisions similar to those prescribed in Regulation 8 (1) of the British Royal Warrant (See Annex I of this Volume, p....) For the European theatre it is provided that such evidence shall be admitted before a military commission as, in the opinion of the president of the commission, has probative value to a reasonable man. In the Mediterranean Regulations it is added that without limiting the scope of this rule the following in particular will apply:

- " a. If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the president of the commission, unable to attend without undue delay, the commission may receive secondary evidence of statements made by or attributed to such witness.
- b. Any document purporting to have been signed or issued officially by any member of any allied or enemy force or by any official or agency of any allied, neutral or enemy government, shall be admissible as evidence without proof of the issue or signature thereof.
- c. Any report by any person when it appears to the president of the commission that the person in making the report was acting within the scope of his duty may be admitted in evidence.

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

Similar but not identical provisions are contained in the Pacific Regulations where it is also provided (16b) that the commission shall take judicial notice of facts of common knowledge official government documents of any nation, and the proceedings records and findings of military or other agencies of any of the United Nations, a provision which corresponds to Article 21 of the Charter of the International Military Tribunal annexed to the Four Power Agreement of 8th August 1945.

IX. Crimes committed by units or groups.

The Pacific Regulations contain also the following provisions (16a):

If the accused is charged with an offense, involving concerted criminal action upon the part of a military or naval unit, or any group or organization, evidence which has been given previously at a trial of any other member of that unit, group or organization, relative to that concerted offense, may be received as prima facie evidence that the accused likewise is guilty of that offense. This provision is similar to that of Regulation 8(2) of the British Royal Warrant (See Annex I of this Volume, p)

The Eastern regulations further provide (16e) that:

" The findings and judgment of a commission in any trial of a unit, group or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial by that or any other commission of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in such unit, group or organization convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein."

This provision is to be read in connection with paragraph 4(b) where it is said that "Any military or naval unit or any official or unofficial group or organization, whether or not still in existence, may be charged with criminal acts or complicity therein and tried by a military commission". It will be seen that these

provisions are based on a principle similar to that expressed in Articles 9 and 10 of the Charter of the (European) International Military Tribunal.

X. The Defence of Superior Order.

The Mediterranean and Pacific Regulations contain also a provision of substantive law on the question to what extent the plea of superior order is a defence. The Mediterranean Regulations provide (9):

" The fact that an accused acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the commission determines that justice so requires".

The corresponding provision of the Pacific Regulations reads as follows (16f):

" The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if the commission determines that justice so requires."

As to the development of the law regarding this plea see the notes on the Peleus and Dostler cases, supra, pages

XI. Punishment of War Crimes.

For the commissions operating in the European theatre it is provided that they may be guided by but are not limited to, the penalties authorised by the Manual for Courts Martial, the laws of the United States, and of the territory in which the offence was committed or the trial is held. The Manual for the Courts Martial and the Articles of War prohibit cruel and unusual punishments of every kind and otherwise provides for different crimes different punishments from fines and imprisonment to the death sentence. The Mediterranean Regulations state (13) that appropriate sentences imposed by a military commission are (a) Death (by hanging or shooting), (b) Confinement for life or a lesser term, (c) Fine. In the Pacific Regulations (20) it is added that the Commission may also impose such other punishment as it shall determine to be proper. The Commission may also order confiscation of any property of the convicted accused, deprive the accused of any stolen property, or order its delivery to the Commander-in-Chief for disposition as he shall find to be proper, or may order restitution with appropriate penalty in cases of default. In all Regulations it is provided that concurrence of at least two thirds of the members of the commission present at the time of voting shall be necessary for the conviction and for the sentence.

XIII. Appeal and Confirmation.

No right of appeal in the ordinary sense of that word exists against the decision of a military commission. The Regulations for the Pacific theatre expressly prescribe that, except as therein provided, the judgment and sentence of a commission shall be final and not subject to review.

No sentence of a military commission must however, be carried into execution until it shall have been approved by the appointing authority. Death sentences must, in addition, be also confirmed by the theatre commander.

XIV. The United States Courts of Law in relation to Military Commissions.

Notwithstanding the absence of a right of appeal military commissions are in United States law, to a certain extent, subject to the control and supervision by the superior American courts. This supervision of proceedings conducted by military commissions exercised through the ordinary courts, takes usually the form of applications for one of the ancient so-called prerogative writs of Anglo-American law, the most famous of which is the writ of habeas corpus. The purpose of the writ of Habeas Corpus is to bring the person seeking the benefit of it before the court or judge to determine whether or not he is legally restrained of his liberty. It is a summary remedy of unlawful restraint of liberty. Where it is decided that the restraint is unlawful, the court orders the release of the applicant, but if the restraint is lawful the writ is dismissed. The Supreme Court of the United States has emphasized in ex parte Quirin and in re Yamashita, that on application for habeas corpus the court is not concerned with the guilt or innocence of the petitioners. The court considers only the lawful power of the commission to try the petitioner for the offence charged. Military Tribunals, including the military commissions are not courts whose rulings and judgments are made subject to review by the Supreme Court. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorised to review their decisions.

There are also other ancient remedies similar to the writ of Habeas Corpus, like the writ of Prohibition and the writ of Certiorari, the details of which are outside the scope of this note. They also enable the ordinary courts of the land to examine the question whether a military commission had or had not jurisdiction to proceed and whether it did not exceed its powers. Actually, the Supreme Court of the United States in the decisions mentioned examined the decisions of the military commissions in the cases ex parte Quirin, in re Yamashita and in re Hotta and upheld the decisions of the military Commission in the Quirin case unanimously, in the two other cases by majority judgments.

XV. The Authority of decisions of Military Commissions.

Like the British Military Courts, the United States Military Commission are not superior courts and what has been said on the authority of British Military Courts in Annex I of this Volume, applies mutatis mutandis to decisions of United States Military Commissions.

The decisions of the Supreme Court of the United States in the three cases mentioned and the decisions of the other courts which have been or may be seized of cases of war criminals, in connection with a writ of habeas corpus or other similar remedies have, of course, that binding authority which attaches to their decisions under the general law of the United States.

PART II: Military Government Courts.

XVI. The Establishment of Military Government Courts.

It has been stated in the first part of this Annex that the United States Forces, European Theatre, have used two separate sets of Tribunals for the trial of war criminals, namely Military Commissions, which have been dealt with in Part I of this Annex, and Military Government Courts. These Tribunals are distinct and have a different origin and a different basis for their jurisdiction. The origin and jurisdiction of Military Commissions has been treated in the first part of this paper. Military Government Courts are generally based upon the occupants' customary and conventional duty to govern occupied territory and to maintain law and order.

Military Government Courts were established for the occupied parts of Germany, by Ordinance No.2. made by General Eisenhower, as Supreme Commander of the Allied Expeditionary Force. The Supreme Commander also issued Rules of Military Government Courts.

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

Additional provisions regulating the trial of war crimes and related cases by United States Military Government Courts were made by a directive of General Eisenhower on 16th July 1945.

XVII. Jurisdiction of Military Government Courts.

Under Ordinance No.2. there are three kinds of Military Government Courts: General Military Courts, Intermediate Military Courts and Summary Military Courts (Article I of Ordinance No.2.) The jurisdiction of these Courts is as follows:

Ratione personae: These Courts have jurisdiction over all persons in the occupied territory except allied military personnel.

Ratione materiae: The Military Government Courts shall, under Article II (2), have jurisdiction over:

- (i) all offences against the laws and usages of war;
- (ii) all offences under any proclamation, law, ordinance, notice, or order issued by or under the authority of the Military Government or of the Allied Forces;
- (iii) all offences under the laws of the occupied territory or of any part thereof.

The Jurisdiction of Military Government Courts is therefore wider than the jurisdiction of Military Commissions in the European Theater of Operations, because offences under the local law are made subject to their jurisdiction in addition to violations of the laws and usages of war and violations of provisions made by the Military Government. The directive of 16th July 1945 provides that as a matter of policy, cases involving offences against laws and usages of war, or laws of the occupied territory, or any part thereof, commonly known as war

crimes, together with such other related cases, within the jurisdiction of Military Government Courts, as may from time to time be determined by the Theater Judge Advocate, committed prior to 9th May 1945, shall be tried before the specially appointed courts provided for in this directive.

XVIII. The Composition of Military Government Courts.

General Military Courts and Intermediate Military Courts consist of not less than five members and not less than three members respectively. Military Government Courts are appointed by Army/Military District Commanders; the Orders appointing the Courts designate one or more Prosecutors or Defence Counsel. At least one officer with legal training is detailed as a member of such Courts.

XIX. Rules of Procedure and Evidence.

A Military Government Court shall in general admit oral, written or physical evidence having bearing on the issues before it, and may exclude any evidence which in its opinion is of no value as proof.

Every accused before a Military Government Court shall be entitled inter alia, to be present at his trial, to give evidence and to examine or cross-examine any witness; but the Court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent or if the accused is believed to be a fugitive from justice.

XX. Powers of Sentence.

General Military Courts may impose any lawful sentence, including death.

XXI. Review of Sentences.

A person convicted by a Military Government Court has the right to petition for review of the finding or sentence. The petition must be filed with the Court within 10 days of conviction.

No sentence of a Military Government Court shall be carried into execution until the case record shall have been examined by an Army/Military District Judge Advocate and the sentence approved by the officer appointing the Court or by the Officer Commanding for the time being. No sentence of death shall be carried into execution until confirmed by higher authority. (Theater Judge Advocate).

The Reviewing authority may, upon review, inter alia:

- confirm or set aside any finding,
- substitute the finding of guilty by an amended charge,
- confirm, suspend, reduce, commute or modify any sentence or order, or
- increase any sentence, where a petition for review which is considered frivolous has been filed and the evidence for the accused warrants such increase.

The reviewing authority may at any time remit or suspend any sentence or part thereof.

The proceedings shall not be invalidated nor any findings or sentences disapproved for any error or omission, technical or otherwise, occurring at any such proceedings, unless in the opinion of the reviewing authority it shall appear that the error or omission has resulted in injustice to the accused.

III/55
28th August, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

Re: Law Reporting.

Proposals by the Secretary to Committee III regarding procedure in the meeting of Committee III to be held on Tuesday, 3rd September, 1946, and report on the present position.

- 1) The following Law Reports to be inserted in Volume I, have already been agreed to by Committee III :

Case No: 1, Peleus,
 2, Dostler,
 3, Almelo,
 4, Hadamar,
 7, Dreierwalde(Amberger)
 8, Heyer.

- 2) The following cases have been re-drafted and will be available in manuscript form for consideration and final approval :

5, Grumpelt,
6, Jalluit Atoll (Masuda).

- 3) The case No:9, (French Trial of Gauleiter Wagner) has been prepared by the Secretariat as a first Draft and circulated in the Trial and Law Reports Series Nos; 22 and 23. With the kind assistance of Professor Gros, these papers have been submitted to the French Ministry of Justice for checking and approval. It is hoped that the reply of the French authorities will be available soon.

- 4) Annex I (Introduction into British Provisions) has been re-drafted according to the decisions of Committee III and circulated in manuscript form.

- 5) The Draft Introductions into the United States Law and into French Law, have been prepared by the Secretariat as Doc. III/53 (French) and Doc. III/54 (U.S.A.). As to Annex III (French III/53), the procedure has been the same as in the case of the report on the Wagner trial (supra 3).

- 6) Lord Wright has been asked to contribute the preface to the publication.

- 7) According to the Committee's decisions, an outline of the contents of each case and an index to the whole volume, have been prepared by the Secretariat.

III/56
18th September 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

The Yugoslav Cases

Nos. 4031, 4032, 4033, 4034, 4035, 4036, 4037

referred to Committee III.

1. On 17th September 1946, the Yugoslav State Commission submitted to the Commission seven charges (Nos. 4031 - 4037) concerning crimes committed on territory which, according to the Peace Treaties concluding the First World War, formed part of Italy. Copies of the seven charges are Annexed to this paper.
2. The cases were considered by Committee I on 18th September 1946. Committee I decided to refer the cases to Committee III for its opinion as to whether or not the alleged crimes should be considered as crimes against humanity and for what reasons.

ANNEX.

Case No. 4031.

Yugoslav Charges against Italian War Criminals. Case No. R/It189.

Name of the accused, their rank, units
or official positions:

1. Giovanni CORTE, Generale di Divisione, Comandante della Difesa Territoriale, Trieste. (F.1388)
2. Alberto FERRERO, Generale, Comandante del XXIII Corpo di Armata, Fiume(?) (F.1392)
3. Comandante della Divisione Fanteria "NOVARA" Fiume (?) (F.1390)
4. Comandante del 153 Reg. Fanteria (Fiume?) (F.1390)
5. Segretario Politico Fascista di Mattuglie (Fiume) (F.1391)
6. Comandante del 255 Reg. Fanteria (Fiume) (F.1393)

Date and place of commission of alleged crime:

In March 1942, in the Julian March.

Number and Description of crime in war crimes list:

- I. Murder and Massacres - Systematic Terrorism. XVIII Wanton Devastation and Destruction of Property.

References to relevant provisions of national law:

Violations of Articles 23(b), (c), (g) and 46, of the Hague Regulations, 1907, and Article 13 of the Yugoslav Military Courts Act, 1944.

Short Statement of Facts:

In 1942, Italian troops and their commanders were responsible for war crimes committed in the Julian March, such as the killing of people and the setting of houses on fire.

Particulars of alleged crime:

In July, 1942, Carabinieri at Pola arrested 21 men suspected of belonging to the Partisans. They had already imprisoned 44 for the same reason, bringing the total to 65.

2. On July 4th 1942, Carabinieri at Pola, in a report stated that they had discovered in the Julian March a large Yugoslav organisation attached to the Partisan movement and had arrested 9 men and imprisoned them with 35 others previously arrested for the same reason.

3. On July 7th 1942, Carabinieri surrounded the house of Jakob BRAJAN and as they received no reply to their summons, opened fire on the people inside. Two students from Zagreb were wounded and arrested as well as two other men. The Political Commissar from Mattuglio (Fiume) ordered the house to be burned down as a reprisal. This is stated in an Italian official report dated July 9th, 1942.

4. On July 15 1942, an Italian military lorry was attacked by Partisans, four Italian soldiers being killed and eleven wounded. On July 19th, on the orders of the O.C. XXIII Army Corps, 18 year old JOSIP VRH was shot at the back of the Villa del Nevoso (Smeznik) near Fiume "because he confessed that he belonged to the above-named 'Partisans'." According to the official Italian report VRH was shot without trial.

5. On July 18th 1942, near the hill of Sigkleno (Susak), Italian soldiers, during a mopping up action, attacked Partisans and captured three without loss to themselves. They shot all three prisoners without trial.

6. On July 19th 1942, on the orders of the O.C. "NOVARA" Infantry Division, soldiers of the 153 Infantry Regiment, near Fiume (commune Fontana del Conte) set fire to the house of a woman, Antonia LOGAR, who was arrested on suspicion of favouring the Partisans. The O.C. 153 Infantry Regiment is responsible for this crime committed by his troops.

7. On August 2nd 1942, soldiers of 255 Infantry Regiment, near the village of Senozec (near Trieste) opened fire with their rifles and threw hand grenades at Josip INCANO, a peasant, and Josip PANGARA, mobilized by the 59 Legione CCNN, and killed them as they had not halted at once when challenged. They were out without passes during the curfew. The O.C. 255 Infantry Regiment is responsible for this crime.

On the same day an Italian military patrol at the village of Krusevje (near Trieste) caught Simoni METODI, a painter, without a pass in the curfew zone. On their way to the barracks he "tried to escape" and was shot dead by the Italians.

On the same night they killed Alojz BRALJA in the village of Strane and gravely wounded Josip SEVERIN in the village of Veliko Brdo for the same reason.

8. General Alberto FERRERO in his letter of December 10, 1942, said that during a mopping up action, two armed rebels were captured, and one of them was killed as they alleged he tried to escape.

Particulars of Evidence in Support:

The above particulars were taken from official Italian documents captured by the Yugoslav Army.

Case No. 4032.

Yugoslav Charges against Italian War Criminals. Case No. R/It/204.

Name of accused, his rank and unit,
or official positions:

1. Mignani, from Ferrara, about 40 years old, Major of the
Fascist Militia at Pola. (F.3765).
2. Italian Fascist Garrison at POLA.

Date and place of commission of alleged crime:

On the night 8/9 January, 1944, in the village of BOKARDICA.

Number and description of crime in war crimes list:

1. Murder and Massacres, Systematic Terrorism.
- III. Torture of Civilians.
- VIII. Internment of Civilians under Inhuman Conditions.
- XIII. Pillage. XVIII. Wanton Devastation and
Destruction of Property.

References to relevant provisions of national law:

Violation of Articles 4, 5, 23(b), (c), (g), 46 and 47 of the
Hague Regulations, 1907, and Article 3, para. 3, of the
Law concerning Crimes against the People and the State.

Short Statement of Facts:

On the night of January 8/9, 1944, the Italian garrison at
POLA, under the command of Major MIGNANI, together with
the German garrison, pillaged and set fire to houses in
the village of BOKARDICA, murdered and deported people.

Particulars of Alleged Crime:

On the night of January 8/9, 1944, armed Italian and German
troops from the garrisons at POLA entered the village of BOKARDICA
(in Istria) and, without any provocation from the inhabitants or
from partisan units which were in the neighbourhood, took people
out of their houses and assembled them in groups under strong guard.
Those who did not execute their orders were killed on the spot or
thrown alive into the burning houses. They tortured and killed
many people in the presence of their relatives. Piljan FOSKA had
to witness the torture and death of her two grandsons. The Italians
and Germans looted and set fire to houses, killing 33 people between
the ages of 16 and 70. Others were taken in lorries to POLA
whence they were sent to concentration Camps in Germany. They
threw out of a fast moving lorry and killed a man because he was too
old and unable to work.

MIGNANI led the Italian troops and took part in the above-mentioned
atrocities.

Particulars of Evidence in Support:

Above particulars were given to the Yugoslav State Commission
by reliable witnesses and victims.

Yugoslav Charges against Italian War Criminals. Case No. R/It/206.

Names of accused, their rank or unit,
or official position.

- | | | |
|-----|---|----------|
| 1. | Aldo PEDROTTI, Tenente, Commandante, Milizao Batt.
Cost. IV. Compagnia, at PLAVE ANHOVO. | (F 4322) |
| 2. | PINI, Sottotenente. | (F 4321) |
| 3. | Michele SABA, Sottotenente. | (F 4323) |
| 4. | Karel BARDINI, Maresciallo. | (F 4324) |
| 5. | Vincenzo OBLA, Maresciallo. | (F 4325) |
| 6. | VENTORUZZO, Vice Brigadiere. | (F 4326) |
| 7. | CAROSI, Vice Brigadiere. | (F 4327) |
| 8. | DOMENICI, Caporale-maggiore | (F 4328) |
| 9. | Federico BATTISTI, from PULFERIA, Caporale-
maggiore. | (F 4329) |
| 10. | Giorgio MARIOTTI, milite. | (F 4330) |
| 11. | FLOS, Milite. | (F 4331) |
| 12. | CAMPASSI, Milite. | (F 4332) |
| 13. | SCOLARI, Milite. | (F 4333) |
| 14. | SECCHI, Milite. | (F 4334) |
| 15. | CASAGRANDE, Milite. | (F 4335) |
| 16. | FERRARI, Milite. | (F 4336) |
| 17. | CESARINO CAIER, Milite. | (F 4337) |

Date and place of commission of alleged crime:

On February 13 and 23, 1945, at PLAVE-ANHOVO (in Venezia
Giulia, Zone "B").

Number and description of crime in war crimes list:

II. Putting Hostages to Death.

References to relevant provisions of national law:

Violation of Articles 46 and 50 of the Hague Regulations, 1907,
and Article 3, para. 3, of the Law concerning Crimes against
the People and the State, 1945.

Short Statement of Facts:

1. On the orders of PEDROTTI nine hostages were shot on
February 13, 1945, on the road between ANHOVO and
LOZICE.
2. On February 22, 1945, three women were arrested by the
Fascists and the next day shot by the Italian garrison
on the road between ANHOVO and KANAL, on the excuse
that they attempted to escape.

PEDROTTI gave the order for the executions which were
carried out by PINI, SABA, BARDINI and others of
the above-mentioned accused who all participated
in the execution of the hostages. MARIOTTI was
especially brutal on this occasion.

Particulars of Evidence in Support:

The above-mentioned particulars were given to the Yugoslav State
Commission by reliable witnesses.

Yugoslav Charges against Italian War Criminals Case No. R/It/207.

Name of accused, his rank and unit,
or official position:

1. TURCHET, about 30 years old, Sergente Maggiore, garrisoned at LUPOGLAV in Istria. (F 3763)
2. Italian Fascist garrison and a German garrison at LUPOGLAV. (F 3761)
3. Italian Fascist garrison at the so-called "Red House" near the village of BRGUDAC. (F 3762)

Date and place of commission of alleged crime:

In 1943 and 1944, at the village of BRGUDAC in Istria.

Number and description of crime in war crimes list:

1. Murder and Massacres, Systematic Terrorism.
XIII. Pillage.

References to relevant provisions of national law.

Violation of Articles 23(b), (c), 46 and 47 of the Hague Regulations, 1907, and the Article 3, para. 3, of the Law concerning Crimes against the People and the State.

Short Statement of Facts:

Italian Fascist and German garrisons at LUPOGLAVA murdered people and pillaged the village of BRGUDAC.

Particulars of Alleged Crime:

Soldiers of the Italian Fascist and German garrisons at LUPOGLAVA committed the following crimes in the village of BRGUDAC:

1. On December 17, 1943, they surrounded the village, assembled all the males found there, 45 in number, and imprisoned them. They were then deported to Germany for internment.

2. On March 5, 1944, Germans and Italians carried out a mopping-up action in the same village. They shot four people on the spot, arrested a dozen and took them to LUPOGLAVA. One was hanged and the others released three days later. They also pillaged the village.

3. People from Istria, and especially captured partisans, were tortured by the Italian Fascist garrison at the "Red House" near the village of BRGUDAC. On April 13th, 1944, two partisans were captured in the forest and taken to the "Red House" where they were stripped and tortured to death. Their heads, according to witnesses, were terribly mutilated by torture. The Fascists refused to allow the corpses to be taken to the cemetery by the village priest in order to cover up their crime.

4. During Easter of 1944 they hanged four men in the village of BRGUDAC and on this occasion TURCHET took a leading part in the crime.

5. On June 6, 1944, fighting took place between partisans and the garrison of LUPOGLAVA in which the Italians and Germans were beaten. As a reprisal they entered the village of BRGUDAC the following day, firing in all directions. They pillaged the village, set houses on fire and killed sixteen people, 8 children, 5 women and three old men, one of them 98 years old and another 89. They were killed while having dinner. The Germans and Italians stood in front of the house and called on the people to come out, promising them safety. When the women with their children appeared they turned machine-guns on them and threw bombs.

6. In August, 1944, a German patrol killed three people in the same village.

Particulars of Evidence in Support:

The Yugoslav State Commission holds the statements of reliable witnesses.

Case No. 4035.

Yugoslav Charges against Italian War Criminals Case No. R/It/212.

Names of accused, their rank and unit,
or official position:

1. Emilio ZULIANNI, Colonello, Comandante del VIII Regg.
"Tagliamento" at Udine. (F 4182)
2. Gianfranco REA, from UDINE, tenente, Commandante
of the Italian Garrison at Dorenberg (F 4183)
3. Olinto SPOLERO, from Campiglio Faedis (Udine)
Maresciallo. (F 4181)
4. Alvaris ANTONIOLLI, from PORDENONE, Via Revedole
51, Caporale maggiore. (F 4184)
5. Raffaele ROSETTI, from UDINE, Via Cesare
Battisti 9, Caporale maggiore. (F 4185)
6. Attilio CECCHINI, from Tolmezzo, sergente. (F 4188)
7. Cesare MOLARO, from UDINE, Stradella, Sergente. (F 4190)
8. Gino TULLIO, from POSTUMLA, sergente. (F 4182)
9. Arcilio MERLINI, from Artegna - Udine, Via
Sotto Castello 129, alpino. (F 4189)
10. Evelino DIANA, from Treviso, alpino. (F 4193)

Date and place of commission of alleged crime:

From the end of 1943 to April 1945 at DORENBERG and neighbouring
villages. (Zone B of the Julian March).

Number and description of crime in war crimes list:

- I. Murder and Massacres; Systematic Terrorism.
- III. Torture of Civilians.
- VII. Deportation of Civilians.
- XIII. Pillage.
- XVIII. Wanton Devastation and Destruction of Property.

References to relevant provisions of national law:

Violation of Articles 23 (b), (c), (g), 42, 46 and 47 of the
Hague Regulations, 1907, and Article 3, para. 3, of the
Law concerning Crimes against the People and the State.

Short Statement of Facts:

After the Italian capitulation in 1943, the TAGLIAMENTO VIII
Alpine Regiment, of the Fascist Republican Army, was
stationed at UDINE, under the command of Colonel Emilio
ZULIANNI.

The 2nd battalion, composed of two companies, was garrisoned at
DORENBERG under the command of Tenente REA. This garrison
was the most dreaded of all by the Slovene Population of this
region. Maresciallo SPOLERO had a special unit called by
the people "Banda Spolero" of "death unit." SPOLERO and his
unit went through the country terrorising the population,
arresting, torturing and murdering people.

Particulars of Alleged Crime:

1. On May 29, 1944, Spolero with his band stopped in a car on the
road through PRVACINA and, for no apparent reason, shot a man who was
working in his field.
2. On June 27, 1944, the same soldiers arrested a peasant at
OSEVLJEK and transferred him to GORIZIA. He has not been heard of
since.
3. On July 4, 1944, a patrol led by Spolero shot a man through
the window of his house at GRADISCE.

4. On July 16, 1944, they arrested a man on the road between PRVACINA and GRADISCE and imprisoned him at GORICA. (GORIZIA).
5. On August 16, 1944, they arrested a woman on the road between BORNBERG and GORICA and another at PRVACINA. They were imprisoned at GORICA and then deported to forced labour in Germany. Their fate is unknown as they never returned to their homes.
6. On September 16, 1944, near KOZJAK, the Italians met a peasant on his way home. They robbed him and took him along with them. The next day his body was found near DORNBERG. He had been shot.
7. On September 30, 1944, at PRVACINA, SPOLERO'S band shot a woman of 69 through the window. She succumbed to her wounds on October 22.
8. On December 16, 1944, SPOLERO and his band pillaged PRVACINA firing in all directions and wounding a man in the eye as a result of which he lost his eye.
9. On December 31, 1944, SPOLERO'S patrol shot and killed a woman at PRVACINA.
10. On January 2, 1945, SPOLERO with his patrol arrested a man and sent him to prison at GORICA. He was interned in Germany.
11. On January 7, 1945, on SPOLERO'S orders, a woman was arrested at RAVNE, transferred to GORICA and then deported to Germany. She has not been heard of since.
12. On January 29, 1945, a woman was arrested and sent to a concentration Camp in Germany. She has not been heard of since.
13. On February 10, 1945, SPOLERO with his band arrived in PRVACINA to pillage. People in their homes. SPOLERO entered a house where he shot a girl who was peacefully knitting.
14. On February 11, 1945, SPOLERO arrested a man at PRVACINA and imprisoned him at DORNBERG where he was beaten and tortured. MERLINI was particularly brutal in beating and torturing this man whom he beat on the head with a rifle butt.

MERLINI, DIANA, TULION, MOLARO, CECCHINI, ROSETTI and ANTONIOLLI were members of SPOLERO'S band and participated in the crimes described above.

ZULIANI is responsible for the above crimes as he was commandant of these units, and REA as commander of the 2nd battalion which terrorised the Slovene population of this region, is equally responsible.

Particulars of Evidence in Support:

Above particulars were given to the Yugoslav State Commission by victims and reliable witnesses from DORNBERG and the surrounding villages.

August 30, 1946.

Case No. 4036.

Yugoslav Charges against Italian War Criminals Case No. R/It/213.

Name of accused, his rank and unit,
or official position:

FABIANI, 30 - 35 years old, from KOPAR, Tenente fanteria,
Garrison commandant at VALLE (Bale). (F 12072)

Date and place of commission of alleged crime:

On August 25, 1943 and in November, 1943, at the village of
KRMED, Istria (Zone B).

Number and description of crime in war crimes list:

VII Deportation of Civilians.
Illegal arrest.

References to relevant provisions of national law:

Violation of Article 42 of the Hague Regulations, 1907, and
Article 3, para.3, of the Law concerning Crimes against
the people and the State, 1045.

Short Statement of Facts:

FABIANI used to terrorise peaceful people at VALLE. On
August 25, 1943, he entered the village of KRMED with his soldiers
and Carabinieri where twelve people, for no reason, were arrested
on his orders, mostly old men and women. They were taken to the
barracks "KASTEL" and detained for three days without food or water.
They were then transferred to the prison at ROVINJ in order to be
sent eventually, to the concentration camp. Two weeks later they
were freed by partisans in an armed uprising at Istria.

In November, 1943, unknown carabinieri from VALLE arrested two
peaceful peasants at KRMED. They were taken to prison at ROVINJ
and then passed through POLA to forced labour in Germany. They have
not been heard of since.

Particulars of Evidence in Support:

Above particulars were given by the witness Bernard JURKO from
KRMED to the Yugoslav State Commission.

Case No. 4037.

Yugoslav Charges against Italian War Criminals Case No. R/It/214.

Names of accused, their rank and unit,
or official position:

1. A. BERGONZI, Generale di Corpo d'Armata, Comandante della Difesa Territoriale di UDINE. (F 1184)
2. Ferruccio ZICCAVO, Generale di Divisione, Comandante Interinale della Difesa Territoriale di UDINE. (F 1185)
3. Umberto FABRONI, Colonnello, Capo Ufficio S.N. Difesa Territoriale di UDINE. (F 1186)

Date and place of commission of alleged crime:

In 1942 at UDINE and GORIZIA in the Julian March.

Number and description of crime in war crimes list:

1. Murder and Massacres: Systematic Terrorism.
- II. Putting Hostages to Death.
- VII. Deportation of Civilians.
- XIII. Internment of Civilians under Inhuman Conditions.
- XIII. Pillage.
- XVIII. Wanton Devastation and Destruction of Property.

References to relevant provisions of national law:

Violation of Articles 4, 5, 23 (b), (c), (g), 42, 46 and 50 of Hague Regulations, 1907, and Article 13 of the Yugoslav Military Courts Act, 1944.

Short Statement of Facts:

The above-named war criminals led operations against Croat and Slovene partisans, who were Italian subjects, ordered clearing-up operations ("rastrellamenta") during which men were killed, their houses burned down and their inhabitants sent to concentration camps.

Particulars of Alleged Crime:

1. General A. BERGONZI, as Commandant of Territorial Defence at UDINE, led operations against Partisans, who were Italian subjects of Slovene and Croat nationality, living in the Italian frontier area before April 6, 1941. He gave orders for numerous "rastrellamenta" (clearing-up operations during which houses were burned down, many inhabitants killed and hundreds of people taken to concentration camps. He proposed to put into force in the Julian March the measures used against the National Liberation Movement in Slovenia (Province of Ljubljana), i.e., shooting of hostages and P.O.W's., setting houses and villages on fire, mass deportation of the inhabitants to concentration camps, limitation of human freedom and administrative measures against non-Italian people living in Italy.

He committed the crimes of murder and mass deportation, instigated the shooting of hostages and P.O.W's., and pillaged and set villages on fire.

2. Ferruccio ZICCAVO, as temporary Commander of the Territorial Defence at UDINE in 1942, committed the same crimes as BERGONZI.

3. Colonel Umberto FABRONI was Director-General of the G.H.Q. of the Territorial Defence at UDINE and collaborated with General BERGONZI in the crimes committed by him. He signed the documents Nos. 6 to 11 enumerated below which contain the evidence given in this charge.

I

The following are some of the official documents written by the Comando della Difesa Territoriale and sent to Supreme Army HQ:

1. In his report No. 549 of July 20, 1942, BERGONZI informed the Supreme General Staff of the formation of a Partisan group by the native population and proposed applying to the frontier area the regulations in force in the Ljubljana Province.
2. Report of the Comando della Difesa Territoriale Prot. No. 712 of July 27, 1942, General BERGONZI stated that on July 22 during a clearing-up action, a Partisan named Herman FURLAN from GOZZE DI VIPACCO, was arrested. During his interrogation Herman "attempted to escape. The CC. RR. (Carabinieri Reali) fired several rifle shots at the fugitive and killed him."
3. In report No. 1222 of August 17, 1942, the Comando della Difesa Territoriale informed H.Q. that the Partisan units were composed mostly of native Yugoslav elements, which hid arms, disseminated propaganda and carried out acts of sabotage. He recommended the extension of the curfew, the removal of Yugoslav workers from mines and factories, the closing-down of inns, control of the distribution of food which should be concentrated in the principal centres, and the evacuation of Yugoslavs living in isolated groups of houses.
4. In his report No. 1402 of August 24, 1942, General BERGONZI informed H.Q. that SASA, a Partisan chief, had been killed but gave no particulars. He went on to say that the local people were organised in units by chiefs from the other side of the frontier and that intense anti-Italian and pro-Yugoslav propaganda was being disseminated in the Province of GORICA (GORIZIA) by the Partisans. He therefore thought it necessary to extend the curfew to all the regions of GORICA inhabited by Yugoslavs to close all inns, evacuate isolated houses or groups of houses difficult to control which could be used by Partisans as meeting places and for passing on information and supplies.
5. General BERGONZI stated in his report No. 1561 of August 31, 1942, that Partisan units were composed of local native elements who, after carrying out the orders of their chiefs, returned to their in the guise of peaceful farmers. He proposed to organise anti-Partisan units by the P.N.F. (Partito Nazionale Fascista).
6. Report No. 3832 of November 17, 1942, stated that the Partisans acted in agreement with the local native population, supplying them with clothes, ammunition, medicines, etc., and that the attitude of the population of the Valle of VIPORA was particularly hostile to the Italians. He suggested different measures against the population. He reported that on November 12, 1942, during a clearing-up operation, three partisans (rebels) were killed, one a woman, and a wounded Partisan arrested.
7. In report No. 3985 of November 23, 1942, General BERGONZI informed H.Q. that the native Yugoslav population gave refuge and hospitality to the Partisans and that women's societies were formed with the object of collecting food and clothing for Partisans and that the Italian military and political authorities had reacted very energetically to these acts.
8. Report No. 4246 of December 2, 1942, informed H.Q. that numerous clearing-up operations were carried out, especially in the neighbourhood of GORICA (GORIZIA), TOLUMINO and IDRIA.
9. Report No. 4534 of December 10, 1942, informed H.Q. that Partisans had developed intense propaganda. They organised units, especially among the villagers, who appeared peaceful, but were the more dangerous as they were armed and organised.

10. Report No. 4897 of December 29, 1942, informed H.Q. that the number of young people joining the Partisans had increased.
11. Report No. 5146 of December 29, 1942, signed by Colonel FABRONI, informed H.Q. that the Partisan movement was extending as a increasing number of young Yugoslavs were joining the movement.
12. In a report dated July 21, 1942, H.Q. were informed that during fighting in a sector of VIPAVANANOS, seven Partisans were killed and their homes set on fire.
13. A telegram No. 54/5 of December 31, 1942, stated that a mortar company of the Veneto Division searched the home of a family called ZISMONI at Villa Montevicchio, arrested youths and killed an unknown young man who had shouted for communism and the freedom of Slovenia.
14. A report signed by POLITO to H.Q. stated that between September 10 and 15, seven youths from the village of GRANOVO (in GORIZIA) joined the Partisans and that in revenge the "Squadristi" from PODERDO (PIEDICOLLE) on September 15, 1942, set two houses on fire in the village of CORITENZA in the same locality.
15. Report No. 3853 of September 2, 1942, signed by S. POLITO, stated
 - (i) that early on the morning of September 28, 1942, Italian troops arrested 34 relatives of the 1923 class of men, who had left their homes to join the Partisans in the Commune of SAMBASSO (GORIZIA).

On September 29, 1942, the same troops arrested in the Commune of RANZIANO (G ORIZIA) 33 relatives of young people (1923 Class) who had joined the Partisans.

All these people, 67 in all, were arrested in order to be sent to concentration camps as a reprisal.

 - (ii) About 6 a.m. on October 1, 1942, in the Commune of Montespino (Gorizia), while Italian soldiers were arresting relatives of young men of the 1923 Class who had joined the Partisans, an armed Partisan, ZISMONDO, with two others, fired several revolver shots at an Italian Carabinieri patrol and then escaped into a forest. The Italians, in revenge, arrested ZISMONDO's parents.
16. Report No. 3894 of October 4, 1942, signed by S. POLITO, informed H.Q. that Italian troops from S. PIETRO (GORIZIA) had arrested, with the purpose of interning them in a concentration camp, 17 relatives of some youths of the 1923 Class who had recently joined the Partisan brigades.
17. Report No. 5164 of December 11, 1942, informed H.Q. that on December 5, 1942, 16 relatives of young people who had joined Partisan armed units had been interned in a concentration camp.
18. Report No. 5296 of December 18, 1942, signed by O. BARREL, informed H.Q. that about 50 people were arrested in the zone of PIEDICOLLE suspected of favouring the Partisans.

II.

1. In his report ("telescritto") No. 1030 of August 9, 1942, General ZICCAVO informed H.Q. that two men responsible for the killing of Maresciallo dei CC. RR. MORRONE, Uatia di Aidussina (Gorizia), were identified and killed while attempting to escape.

Report No. 3299 of September 2, 1942, signed by O. BARREL, Vice-Inspettore Generale, gave further details of the above. As a reprisal the Italian military authorities set fire to all habitations in Ustia, consisting of 81 buildings. 300 people, women and children, were left without homes. They were put into houses in the neighbourhood and all the men were imprisoned at GORIZIA while awaiting transportation to the concentration camp at POGGIO TEZZARMATA.

2. In his report No. 1067 of August 10, 1942, General ZICCAVO proposed to Supreme H.Q. that he should apply to the frontier area the measures in force in the province of Ljubljana, i.e., shooting of hostages and P.O.W's, mass trials of people and P.O.W's, mass internment, pillage and arson.

Particulars of Evidence in Support:

Particulars and evidence of these crimes were found in Italian official military documents captured by the Yugoslav Army.

Secret.

III/57.

26th September, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

ITALIAN CRIMES AGAINST HUMANITY

MEMORANDUM

WITH REGARD TO CRIMES PERPETRATED AGAINST YUGOSLAVS
OF ITALIAN CITIZENSHIP IN THE JULIAN
MARCH AND ISTRIA

Presented in the Meeting of Committee III
on 25th September, 1946.
By Dr. R. Zivkovic.

1. The Yugoslav Delegation has submitted to the United Nations War Crimes Commission a number of charges dealing with very serious crimes committed during the last war (1939-1945) by officials of the Italian Government and/or by members of the Italian armed forces against members of the Yugoslav Army of National Liberation and of the Yugoslav Partisan Units, as well as against members of their families.

In all these cases the victims were Yugoslavs by birth and race who lived in the provinces known as the Julian March and Istria, and were Italian subjects.

In dealing with these cases one should take into account that there were two types or groups of victims:

1) Those who belonged to the ranks of the Yugoslav fighting units;

2) The civilian population, the great majority of whom had their relatives in Group 1.

2. The culpability of the Italians concerned in the crimes they perpetrated against both these groups of victims is fully covered by the relevant Articles of the IVth Hague Convention, by Article 6 of the Charter of the International Military Tribunal and by the terms of reference of the United Nations War Crimes Commission, especially in connection with the Resolution adopted by the United Nations War Crimes Commission at its 93rd Meeting held on 30th January 1946 (see M. 93. p.4.).

3. In connexion with some of the Yugoslav charges presented in this respect (No. 1323 and No. 1339) I already had the opportunity of expressing views and demonstrating that the Italian citizenship of the victims was irrelevant from the legal point of view, namely that it could not affect the listing of the culprits by the United Nations War Crimes Commission (see Document I/30, pp. 4 - 11, particularly pp. 8 - 11, para. 4 - 6).

4. From the recognition of this point it follows that crimes perpetrated against the civilian population of Yugoslav race represent crimes against humanity, as defined in Art. 6 (c) of the Charter of the International Military Tribunal.