

and in Law No. 10 of the Allied Control Council for Germany (Art. II, (4), (b)). That is to say, within the limits of the principle that the plea can succeed only in mitigation of punishment and not in freeing the accused from penal responsibility.

The Jurisdiction of Courts and the Status of Accused and Victims.

16. The French trials include a number of cases in which the accused were Allied nationals or nationals of non-belligerent countries, and other cases in which the victims were not French nationals.

17. In one case (1) the accused was a citizen of Luxembourg, an allied country during the late war. The accused, a Lucien Fromes, joined the ranks of the Gestapo as a Hauptsturmführer and was tried for murder, pillage and wanton destruction of property committed on French territory. Found guilty on all counts, he was condemned to death.

In another case (2) the accused was a national of a non-belligerent country, Spain. He was tried on two different counts: for "violations against the external security of the State", and for "murder and ill-treatment". In both cases the place of the alleged crimes was in Germany, where the defendant was interned in concentration camps from 1940-1945 after having been found in France as a Spanish Republican refugee. On the first count he was charged with having "maintained relations during the war with subjects and agents of an enemy country", acting against the security of the French State, and on the second count with having physically ill-treated French, Belgian and Spanish inmates in the camps and with having killed a Spaniard.

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(1) Trial of L. FROMES. Judgment pronounced by the Military Tribunal at Lyon on 23rd November, 1945. FR. 17.

(2) Trial of G. LENDINES MONTE. Judgment pronounced by the Military Tribunal in Paris, on 25th April, 1947. FR. 112.

The defendant was acquitted on the first count and on the second the Court ordered additional investigations,

18. In a number of cases the victims included nationals of allied countries such as Poles, Russians, Yugoslavs, and sometimes even nationals of enemy countries, such as Italians.<sup>(1)</sup>

The crimes involved were mostly ill-treatment, torture and murder. The victims were either prisoners of war or internees or deportees.

Apart from the cases in which the victims of allied and/or enemy nationality were included in French trials on account of the fact that there were at the same time victims of French nationality, there are cases in which no French nationals were involved at all.

19. In all the above trials the jurisdiction of the French Courts was based upon the fact that the criminal offences were perpetrated on French territory or on territory otherwise falling within the jurisdiction of French authorities, or else upon the fact that victims of the war criminals tried included French nationals. All the cases fell within the express terms of Article 1 of the Ordinance of 28th August, 1944, relative to the repression of war crimes.

There is in this nothing remarkable or new in international law. However, the trials under review confirm the practice of implementing in war crimes trials general principles of penal law and of subjecting the rules governing the jurisdiction of war crimes tribunals to the said principles.

There are one or two points, though, which should be noted in connection with the laws of war and the protection of human rights secured by their rules. One of these points concerns

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(1)

Trials registered under Nos. FR. 39, 58, 104, 109, 120 and 122.



the recognition of the rights of enemy alien nationals as being covered by the laws and customs of war.

In one of the cases referred to above, para. 18 (1) the defendant, a German, was charged with having severely ill-treated Russian and Italian deportees and prisoners who were placed under his authority as slave labourers in the province of the Saar. The offences were committed in 1944. The trial, which concerned no other nationalities than those mentioned, resulted in a conviction of hard labour for 10 years. With respect to the victims of Italian nationality the judgment is undoubtedly based on a development of international law. In the texts made available to the United Nations War Crimes Commission it is not clear whether the Italians concerned were members of the Italian armed forces who one way or another attracted the displeasure of their German allies after the capitulation of Italy, or were civilians who in connection with Italy's surrender were deported to Germany as slave labourers. The French law under which the trial was held (Ordinance of 28th August, 1944) prescribes the jurisdiction of French courts in the following cases (Art. 1):

- When the offence is committed in France or in territory under French authority;
- When the offence is committed against either of the following categories: a French national; an individual under French protection; a person serving or who had served under the French flag; a stateless person residing in French territory before 17th June, 1940; or finally, against a refugee in French territory.

If the Italian victims were civilians it is difficult to see how they could be absorbed under any of the above-cited categories, unless they were recognised as "refugees" or persons

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(1) Trial of R. RAITH. Judgment pronounced by the Military Tribunal at Nancy on 18th May, 1946. FR. 58.

"under French protection", neither of which, in the circumstances, seem to be a proper legal construction. Therefore, it is more likely that in this case, the French court did in fact nothing else than apply the notion of "crimes against humanity" as defined in the Allied Control Council Law No. 10 and in the Nuremberg Charter, that is to say, as a crime directed against "any civilian population", including nationals of enemy countries. If, on the other hand, the Italian victims were members of the Italian forces who were treated by the Germans as prisoners of war and taken as such to France for forced labour, the solution on the basis of either the French Ordinance or the concept of "crimes against humanity" is still more difficult. Members of armed forces do not fall within the definition of "crimes against humanity" and are neither suited for subjection to any of the categories covered by the French Ordinance. In this case, the development of the law would appear so much the more striking that it goes beyond the limits of the French Ordinance insofar as it embodies the laws and customs of war, and beyond the concept of "crimes against humanity", which, however new and wide, does not cover military personnel among the victims.

20. Finally, it might be worth making some remarks on the case of the Spanish national tried for war crimes and for acts directed against the external security of France (see para. 17). In his case, war crimes for which he was tried were committed on German territory outside the French Zone of Occupation, namely, in the concentration camp of Mauthausen, which lies in the Russian Zone of Occupation. However, in this case, the part of the trial concerning war crimes was held by a French Tribunal on account of the fact that there were French nationals among the victims and that the accused was in the hands of the French authorities. The offences allegedly committed were clearly



war crimes in the technical sense: the defendant, being an inmate in a German concentration camp, was charged with having sided with the Germans and brutally ill-treated other inmates, exactly in the same manner as was done by the Germans themselves.

However, the point in the case is that the defendant did not belong to a country at war with any of the Powers engaged in the conflagration of 1939-1945; neither did he serve in the armed forces of any such Power. On the contrary, he was a Spanish refugee in France at the outbreak of the war, and was interned by the Germans as a political suspect. Therefore, the sole fact of having put him on trial provides a very convenient illustration of the hitherto already well admitted principle that the personal status of a war criminal, particularly the question of whether he is a national of a belligerent or neutral power, is irrelevant. At the same time, it shows that, to the extent to which human rights are covered by war crimes trials, the contemporary system of international law is wide enough to extend penal retribution for violations of human rights in a great variety of cases.

## PART II.

### Quislings and Traitors.

#### The Trial of Laval.

21. As pointed out at the beginning of this paper, no official documents regarding trials of quislings and traitors by French courts have been submitted to the United Nations War Crimes Commission.

Yet, the importance of considering such trials and assessing to what extent they might be relevant for this Report was obvious. In this respect it was particularly appropriate to take into account the trials of Maréchal Pétain and Pierre Laval.

They were the two leading personalities in the Vichy régime who were both found guilty of and were convicted for treason and collaboration with the enemy. Consequently, if information of major importance could be found in regard to violations of human rights and penal retribution thereof under French law, it was to be found in the first place in these two trials.

22. It has been possible to obtain an unofficial account of the Laval trial, which reproduces a verbatim record of the proceedings of the Court. Although unofficial, this account can safely be regarded as accurate, having been published in the well-known collection of important trials edited by Maurice Gargon, the reputed French barrister. (1)

Unfortunately, nothing of the kind could be obtained regarding the trial of Pétain, so that the present analysis is perforce restricted to one only of the two principal French trials of quislings and traitors.

23. As previously mentioned (2) the trial of Pierre Laval is of limited value to this Report. As could be expected the main, or rather, the sole object of the trial was to establish whether the defendant had committed high treason or not, as a leading member of the Vichy régime. Therefore, insofar as violations of human rights came into the picture, they did so only inasmuch as they were incidental to the alleged treasonable activities of the accused. This is apparent in all the various stages of the trial, namely in the indictment of the prosecutor, in the course of the proceedings of the Court and in its judgment. In all these stages the place allotted to such violations is comparatively insignificant, and there is no express reference to "human rights" by name, but only in substance.

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(1) See work cited above, p. 2, para. 2, n. 1.

(2) Cf. above, para. 2.



However, to the extent to which such violations were the object of the prosecution, of the proceedings and of the judgment, the information which concerns them can be regarded as valuable. Its chief value lies not so much in the magnitude of the trial within the field of French national and international affairs. It lies more in that trials of traitors which include violations of human rights as punishable under penal law are a novel phenomenon, and that in view of the aims declared in the United Nations Charter and of the purposes of its organs entrusted with promoting a more effective protection of human rights, they are a welcome source of information of how this protection is operating on a national level.

#### The Court.

24. Pierre Laval was tried by a High Court of Justice instituted by an Ordinance of 18 November, 1944. (1)

The Court was formed for the specific purpose of dealing with charges against persons having taken part in the activities of the so-called Vichy government. The competence of the Court over accused persons included the head of the State, heads of the Government, ministers and other high officials holding responsible positions, such as Secretaries of State, Governors General, High Commissioners and the like. (2)

The Court was composed of three judges (magistrates) and 24 members of the jury. The judges were the first president of the Court of Cassation; the president of the Criminal Chamber of the Court of Cassation; and the first president of the Court of Appeal in Paris. The members of the jury were

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(1)

Cf. Journal Officiel de la République Française, No. 128, 19 novembre, 1944, p. 1382-1383.

(2)

Cf. Art. 2.

chosen by drawing lots from two lists drawn up by the Provisional Consultative Assembly. Half of those nominated and chosen were Senators or Deputies on 1st September, 1939. (1)

The criminal investigation was carried out by a special commission upon charges submitted to it by the Prosecutor General. (2) The indictment was drawn up by the Prosecutor and approved by the commission acting as a Chamber of Prosecution. (3)

The procedure before the Court was that of a regular penal court competent in similar cases (Cour d'Assize), with the difference that all decisions and sentences were taken and pronounced after joint deliberation of the judges and the jury. The Court was empowered to impose any punishment from a fine to the death penalty, and to pronounce the national indignity and confiscation of property of the defendant. The judgment was final giving only the right to submit a plea for pardon. (4)

The trial began on 4th October 1945 and was terminated a few days later, on 9th October. Laval was found guilty of the charges and was condemned to death and executed on 15th October. He had lodged a plea for pardon, which was rejected by the Head of the French State. (5)

#### The Charges.

25. Laval was indicted under two counts:

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- (1) Cf. Art. 3.  
(2) Cf. Arts. 6 and 7.  
(3) Cf. Art. 9.  
(4) Cf. Art. 19.  
(5) This position was held at the time by Général de Gaulle, as an interim post until the setting up of a definite constitutional régime in post-war France.



(a) for "conspiracy against the internal security of the State",

and

(b) for "intelligence with the enemy with a view to favouring the latter's enterprises in connection with his own".

All the charges submitted under these two counts covered the period of time Laval was member of the Vichy Government. He entered the cabinet of Pétain on 23rd June 1940 as Minister of State, and on 11th July 1940 became Vice-Premier and successor-designate of Pétain as head of State. He was dismissed by Pétain on 13th December 1940, and was returned to power in April 1942, when he became Premier, a post which he kept until the liberation of France in August 1944.

It is mainly under the second count that violations of the individual rights of French citizens were involved, although it is possible to trace some violations of a broader significance under the first count.

All the evidence regarding violations of human rights was submitted only with a view to proving high treason, but as such the said evidence and violations formed a distinct part of the trial.

The charge of conspiracy against the internal security of the State.

26. This charge consisted in that the accused was alleged to have caused and personally brought about the end of the constitutional basis of the III Republic, by the abolishment of its democratic foundations, and by installing an authoritarian State with Maréchal Pétain, at its head. The indictment specified that the defendant brought about on 10th July 1940 "the suppression of the Presidency of the Republic, the cumulation of all powers in Pétain's hands and the adjournment of the Parliament sine die". His motives in doing so were alleged to include the wish to see Germany win the war, and one of the reasons for wishing for a

German victory was alleged to be his hatred of Great Britain.<sup>(1)</sup>

Under this count, and as part of acts which undermined the "internal security of the State", the prosecution included a specific charge which concerns the violation of civic or political rights of French citizens. The charge consisted in that the Vichy Government disbanded the so-called Conseils généraux, which had a function approaching that of a local parliament, and abolished the election of mayors in towns with a population of more than 2,000 inhabitants.<sup>(2)</sup> However, this was not developed beyond the point of a fact briefly mentioned as concurring to establish the violation of the "internal security of the State".

The charge of intelligence with the enemy.

27. Most of the information regarding human rights is to be found under this count.

The main charge consisted in that the defendant in collaborating with the enemy undertook legislative and executive measures in order to "adapt the French constitution to German institutions", and acted with a view to shaping the French state on the model of Nazi Germany.

It is in these measures that violations of human rights of French citizens were involved and were the object of the trial.

28. Referring to the period when Laval became Prime Minister in 1942, the prosecutor submitted facts regarding persecutions of French citizens on racial, religious or political grounds:

"The so-called French policy (of Laval) became then an entirely German policy: persecutions (were started) of Jews, Freemasons, communists and members of the Resistance from all parties; the police (was) put at the disposal of the Gestapo; 22,000 arrests (were

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(1) Cf. op. cit., p. 27-28, 267-269, 273-274.

(2) Cf. op. cit., p. 177-181, with the defence of Laval on this point, and p. 276.



"made) in Paris during the night of 15/16th July". (1)

The prosecutor made a specific case of the persecution of the Jews upon the Nazi model:

"On the 30th October 1940 appeared a law signed by Pierre Laval, then Vice-Premier, excluding a whole category of Frenchmen from the French community, (namely) banning the Jews from all public functions and from most professions... A law of 11th December 1942... forced the Jews to report... for the purpose of inscribing the word "Jew" in their identity cards, as well as in their ration cards, in order to make it easier for the Gestapo to detect them." (2)

29. Another charge was submitted for introducing, by legislative and executive measures, compulsory labour with the purpose of forcibly transporting French workers to Germany:

"...Voluntary enlistment having become a rare occurrence, Laval resorted to compulsory measures. First, a law (was enacted) for the "use and orientation" of man-power, subjecting men and women to any work the Government would find useful. After this a ban (was imposed) on employing workers without permission... Then compulsory labour (was introduced), real organised conscription, (establishing) markets of slaves to be delivered to Germany; ration cards were denied to those not complying... and all this was accompanied by the strictest instructions issued to the Regional Prefects." (3)

Instructions issued by Laval on 12th July 1943 were quoted as an illustration, showing that the defendant had warned medical officers not to exempt workers on the ground of "physical ineptitude without good reason". In this connection the medical officers were threatened that they would be forbidden to exercise their profession, and the administrative personnel in charge of conscription was threatened with internment. A passage quoted was to the effect that "the Government had undertaken to send 220,000 workers. This obligation must be abided by". (4).

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(1) Cf. op. cit., p. 29.

(2) Cf. op. cit., p. 276.

(3) Cf. op. cit., p. 29-30.

(4) Cf. op. cit., p. 30. See also p. 287-288.

On the other hand, evidence was submitted to show that the defendant had not only violated the rights of those conscripted for slave labour, but also of members of their families. On 11th June, 1943, following a broadcast made by Laval where he warned those evading labour conscription in that sense, a law was enacted prescribing internment, imprisonment and fines for members of the families of those not reporting for labour duties. (1)

Finally, the Secretary General of the National Federation of Deported Workers and their Families was heard as a witness and testified about the forcible transfer of 785.000 workers to Germany. He read to the Court a number of telegrams signed by Laval or by his subordinates and containing instructions to make the scheme effective. The witness also testified that about 220.000 workers were "conscripted" by in fact being arrested at random in the streets, and that about 50.000 workers disappeared or lost their lives in Germany. (2)

The Defence.

30. The accused pleaded "Not Guilty" to all counts. Regarding the charges involving violations of human rights he adopted a general line of defence. He contended that whatever he did was undertaken under the duress of the occupation and in order to avert much worse measures which the enemy would have introduced without a French Government during the occupation. On specific points, such as with regard to the instructions and laws signed by him, he either evaded a direct answer or let it be understood that he was not personally responsible for the tenor of the texts themselves. (3)

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(1) Cf. op. cit., p. 288-289.

(2) Cf. op. cit., p. 233-237.

(3) Cf. for instance, op. cit., p. 131 and 252.



The Judgment.

31. The accused was found guilty on both counts submitted by the prosecution and condemned to death.

Of all the charges involving violations of human rights the court retained the following in its judgment:

- (a) The dissolution of political or administrative bodies constituted by elections, which involves the violation of civic or political rights:
- (b) the persecution of Jews:
- (c) the mass deportation of workers "put at the disposal of Germany with a view to assisting her in her war effort." (1)

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(1) Cf. op. cit., p. 305-309.

III/116

14th November, 1947

UNITED NATIONS WAR CRIMES COMMISSION

HUMAN RIGHTS: PREPARATORY PAPERS

INFORMATION ON HUMAN RIGHTS IN TRIALS

OTHER THAN THOSE HELD BEFORE THE  
INTERNATIONAL MILITARY TRIBUNALS

THE LEGAL BASIS AND JURISDICTION OF THE COURTS

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

Shortage of time has prevented a complete analysis of these aspects of war crime trials from being made. It is hoped, nevertheless, that the following notes will be of interest and of use to the United Nations in their work.

A. LEGAL BASIS UNDER INTERNATIONAL LAW

1. In so far as a Court tries enemy nationals for war crimes committed against nationals of the country whose authorities have established the Court, the jurisdiction of the Court is based on the undoubted right under international law of a belligerent to punish, on capture of the offenders, violations of the laws and usages of war committed by enemy nationals against the nationals of that belligerent.

2. In so far as such a Court tries enemy nationals for war crimes committed against Allied nationals (or persons treated as such) other than nationals of the country whose authorities have established of the Court, jurisdiction may be based on either

- (a) the general doctrine called Universality of Jurisdiction over War Crimes, under which every independent State has in 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; or
- (b) the doctrine that a State has a direct interest in punishing the perpetrators of crimes if the victim was a national of an ally engaged in a common struggle against a common enemy.



The doctrine called Universality of Jurisdiction which has received the support of the United Nations War Crimes Commission and is generally accepted as sound, received exhaustive treatment by Willard B. Cowles in an article entitled Universality of Jurisdiction over War Crimes (California Law Review, Vol. 33 (1945), p. 177), in which the learned author states: "..... when it is a matter of doing justice in places where ordinary law enforcement is difficult or suspended, the military tribunals of the United States ..... have acted on the principle that crime should be punished because it is crime. They have had no concern with ideas of territorial jurisdiction.... No evidence has been found that any of the decisions just discussed were the subject of protest by the governments of the accused persons. Certain it is that in none of these United States cases is there any evidence of a consciousness on the part of the courts of any duty not to assume jurisdiction." The author then argued that "while the state whose nationals were directly affected has a primary interest, all civilized states have a very real interest in the punishment of war crimes", and that "an offence against the laws of war, as a violation of the law of nations, is a matter of general interest and concern". He concluded that "every independent state has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offence was committed".

3. In so far as a Court tries enemy nationals for offences which do not constitute war crimes stricto sensu (i.e. offences committed against other enemy nationals or neutrals other than those treated as Allied nationals) jurisdiction may be based on the undoubted right under international law of a belligerent, on the total breakdown of the enemy owing to debellatio, to take over the entire powers of the latter, including the power to make laws and to conduct trials. Thus, by the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on the 5th June, 1945, the four Allied Powers occupying Germany assumed supreme authority.<sup>(1)</sup> The question whether or not the laws enacted and enforced by the Allied Powers as a result of this act technically respect the principle of nullo crimen sine lege, nulla poena sine lege does not effect the complete legality under international law of their actions.<sup>(2)</sup>

4. Some few of the enactments which are set out later in the present paper<sup>(3)</sup> provide for the trial of traitors as well as the trial of war criminals. In so far as the Courts set up under such legislation try persons accused of treasonable offences they are, of course, exercising the jurisdiction which any state has over its own subjects.

#### B. LEGAL BASIS UNDER MUNICIPAL LAW

The legal basis under Municipal Law of the various Courts, Commissions, and Tribunals set up to try alleged war criminals necessarily varies somewhat from country to country, but it is not possible at the present stage to indulge in any extensive comparative study of the sources under Municipal Law of war crimes jurisdiction. It may, nevertheless be of value to indicate the relevant enactments and the type of courts to which, in each country, war crime trials have been referred.

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(1) See, in this connection, Professor Hans Kelsen, The Legal Status of Germany in American Journal of International Law, Vol. 39, p. 518.

(2) Before the breakdown of the enemy, the belligerent commander has the right, subject to Hague Convention No. IV of 1907, to legislate for the territories under his occupation and so to provide for the punishment, inter alia, of offences by one enemy national against another.

(3) See pp. 20 - 27.

It is generally agreed that an alleged war criminal is entitled to trial by military court, but this does not prevent his captors from trying him by a civil court should they choose to do so. For this point of view, the municipal enactments concerning the trial of war criminals fall into three categories, according to whether they (i) create new courts; or (ii) refer cases of alleged war crimes to a military court for which legal provision has already been made; or (iii) refer such cases to already existing civil courts.

The relevant United Kingdom and United States municipal provisions fall into the first class. The French Ordinance of August 28th, 1944, is an example of the second, while the Norwegian enactments illustrate the third.

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. The Royal Warrant states 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 violations 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, is "nothing else than the residue of arbitrary authority which at any given time is legally left in the hands of the Crown" (Dicey's definition).<sup>(1)</sup>

The United States Military Commissions are an old institution which existed prior to the Constitution of the United States of America. They have been described as the American Common Law War Courts. They were not created by statute, but are recognised by statute law. Whereas the British Royal Warrant of 14th June, 1945, 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, on the other hand, have made different provisions for different territories, namely for the Mediterranean, European, Pacific and China Theatres of Operations (see p. 18 of this document and pp. 12-15 of document III/114).<sup>(2)</sup>

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), and in the Dominion of Canada by an Order in Council, made under the authority of the War Measures Act of Canada, and entitled The War Crimes Regulations (Canada) (P.C. 5831 of 30th August, 1945; Vol. III, No. 10, Canadian War Orders and Regulations). The latter were re-enacted

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(1) See also pp. 17-18 of the present document, and pp. 105-10 of War Crime Trial Law Reports published for the United Nations War Crimes Commission by His Majesty's Stationery Office, London, Volume I. 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 *in re Yamashita* (1946) and *in re Hotta* (1946). Regulation 6 of the Royal Warrant states explicitly that 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.

(2) For further details regarding the Legal Basis of the United States Military Commission see War Crime Trial Law Reports, Vol. I, pp. 73, 75, 76 - 79 and 111 - 113.



in an Act of 31st August, 1946. The Canadian and Australian war crime Courts are, like the British, Military Courts.<sup>(1)</sup>

The competence of French Military Tribunals to try war criminals, apart from those sitting in the French Zone of Germany, is based on the Ordinance of August 28th, 1944,<sup>(2)</sup> concerning the suppression of war crimes, which, by virtue of Article 6 thereof, is applicable not only to Metropolitan France but also to Algeria and the Colonies.

The first paragraph of Article 1 of the Ordinance provides that persons guilty of offences under the Ordinance shall be tried by French military tribunals in accordance with the French laws in force. Trials held by virtue of the Ordinance have taken place before Permanent Military Tribunals and Military Appeal Tribunals, for which legal provision already existed before its enactment for the trial of offences by French military personnel. 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...."<sup>(3)</sup>

The necessary starting point for a study of Norwegian law relating to the trial of war criminals is the Law of December 13th, 1946 (No. 14) on the Punishment of Foreign War Criminals, the text of which differs only in one minor respect relating to punishment from that of a Provisional Decree of the same subject dated May 4th, 1945. In promulgating the Provisional Decree, the Norwegian Government in London acted in accordance with the resolution adopted by the Storting at Elverum on April 9th, 1940,<sup>(4)</sup> and with § 17 of the Norwegian Constitution, which provides that: "The King may make or repeal regulations concerning commerce, customs, trade and industry, and police; they must not, however, be at variance with the Constitution or the laws passed by the Storting ..... They shall operate provisionally until the next Storting." The Law was passed by the Storting on December 12th, 1946, and was sanctioned by the King on December 13th, 1946. Paragraph 1 of the Law reads as follows:

"Acts which, by reason of their character, come within the scope of Norwegian criminal legislation are punished according to Norwegian law, if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norway or were directed against Norwegian citizens or Norwegian interests."

One result of the words "are punished according to Norwegian law" is that in Norway, no special Courts, military or otherwise, have been set up to try cases of alleged war crimes. Such proceedings are brought before the ordinary Courts of the land.<sup>(5)</sup>

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- (1) See also pp. 17 - 18. (2) For which see p. 10.
- (3) It is intended to include in War Crime Trial Law Reports, Vol. III, an Annex dealing with French Law Concerning Trials of War Criminals by Military Tribunals and by Military Courts in the French Zone of Germany.
- (4) This resolution gave the Norwegian Government full power to take any steps and to make any decisions which they might find necessary under war-time conditions.
- (5) See p. 11.

The conducting of War Crime trials before the Danish Civil Courts<sup>(1)</sup> is provided for in the Danish Act of Parliament of July 12th, 1946, on the Punishment of War Criminals, while the Belgian Law of 20th June, 1947, relates to the competence of Belgian Military Tribunals in the matter of war crimes.<sup>(2)</sup> Other relevant Belgian enactments are the Decree of 5th August, 1943 and the Act of Parliament of 30th April, 1947.

A law Governing the Trial of War Criminals was enacted by the Chinese Authorities on October 24th, 1946; Article XIV of this Law provides that:

"Art. XIV. War crime cases shall be within the jurisdiction of the Military Tribunals for the Trial of War Criminals, attached to various Military Organisations by order of the Ministry of Defence."<sup>(3)</sup>

For a study of the jurisdiction of the Netherlands Courts trying alleged war criminals, the relevant enactments are the Extraordinary Penal Law Decree of December 22nd, 1943 (Statute Book D. 61) and the Decrees of 22nd December, 1943 (Statute Book D. 62) and of 12th June, 1945, (Statute Book F. 91) by which 5 special courts and a special Cour de Cassation were set up having jurisdiction over the crimes to which the Extraordinary Penal Law Decree is applicable. These courts are composed of military and civilian judges.<sup>(4)</sup>

The Law of August 2nd, 1947, of the Grand Duchy of Luxembourg provides for the trial of alleged war criminals in Luxembourg by a specially established War Crimes Court, which, according to Article 20 of the Law, is to have a mixed civil and military composition.<sup>(5)</sup>

The jurisdiction of Polish Courts trying war criminals and traitors is based on various decrees, of which the consolidated texts were promulgated by the Polish Minister of Justice on October 31st and December 11th, 1946 (See Official Gazette of the Republic of Poland 17th November, 1946, No. 59, item 327 and 15th December, 1946, No. 69, item 377). Polish trials of war criminals and traitors are held before civil courts, including a specially established Supreme National Tribunal.<sup>(6)</sup>

A Yugoslav Law of 25th August, 1945 governs the trial of war criminals and traitors by Yugoslav Courts. Such offences are tried by either civil or military courts, according to the provisions of paragraphs 1 and 2 of Article 14 of the law:

- "(1) Criminal acts under this Law are tried in the first instance by the People's County Courts, or in the case of military persons, by military courts.
- (2) In particularly important cases, criminal cases under Article 2 of this Law are to be tried by the Supreme Courts of the federative units, or if the act is of general state significance by the Military Bench of the Supreme Federal Court, or otherwise, by the Supreme Federal Court."<sup>(7)</sup>

Provisions for the trial of war criminals and traitors in Czechoslovakia were made by Decree No. 16 of June 19th, 1945, of the President of the Czechoslovak Republic, Law No. 22 of 24th January, 1946, of the Provisional National Assembly of the Republic, Law No. 245 of 18th December, 1946, of the Constituent National Assembly of the Republic, and Decrees Nos. 33/1945 and 57/1946 of the Slovak National Council. Such trials were to be held before specially appointed People's Courts.<sup>(8)</sup>

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(1) See p. 12.

(2) See p. 20.

(3) See p. 19.

(4) See p. 16.

(5) See p. 12.

(6) See p. 24.

(7) See p. 25.

(8) See p. 22.



Trials of alleged war criminals in Greece are held in accordance with the Constitutional Act 73/1945 (Government Gazette p. 250), before either the Special Court Martial in Athens of mixed military and civilian composition or Courts Martial of entirely military composition.

Apart from the British and United States Military Courts and Commissions which have been established for the trial of alleged war criminals in Germany (for instance at Wuppertal and Hamburg in the British Zone and at Dachau in the United States Zone), several systems of Military Government Courts have also been set up, in the various zones, with power to try war crimes and other offences.

Proclamation No. 1 of General Eisenhower, acting as Supreme Commander of the Allied Expeditionary Force, provided in Section II:

"Supreme legislative, judicial and executive authority and powers within the occupied territory are vested in me as Supreme Commander of the Allied Forces and as Military Governor, and the Military Government is established to exercise these powers under my direction. All persons in the occupied territory will obey immediately and without question all the enactments and orders of the Military Government. Military Government Courts will be established for the punishment of offenders. Resistance to the Allied Forces will be ruthlessly stamped out. Other serious offences will be dealt with severely."<sup>(1)</sup>

In his Ordinance No. 2, General Eisenhower, again acting as Supreme Commander, established Military Government Courts for the parts of Germany occupied by the western Allies. He also issued Rules of Procedure of Military Government Courts, and, further, Ordinance No. 1 (Crimes and Offences).<sup>(2)</sup>

In the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on June 5th, 1945,<sup>(3)</sup> however, the four Allied Powers occupying Germany assumed supreme authority over Germany. By the establishment of the Allied Control Council the same Allies set up a body which was to have supreme authority over "matters affecting Germany as a whole".

The Declaration states, inter alia, that:

"The Representatives of the Supreme Commands of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the French Republic, hereinafter called the "Allied Representatives", acting by authority of their respective Governments and in the interests of the United Nations, accordingly make the following Declaration:

"The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption for the purposes stated above, of the said authority and powers does not effect the annexation of Germany".

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(1) Italics inserted.

(2) The date of Promulgation of Ordinances Nos. 1 and 2 was 18th September, 1944. See also p. 27.

(3) British Command Paper (1945) Cmd. 6648.

Articles I and II of Proclamation No. 1 establishing the Allied Control Council run as follows:

"I. As announced on 5th June, 1945, supreme authority with respect to Germany has been assumed by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic.

II. In virtue of the supreme authority and powers thus assumed by the four Governments, the Control Council has been established and supreme authority in matters affecting Germany as a whole has been conferred upon the Control Council."

Section III of Proclamation No. 1 of the Control Council provides as follows:

"Any military laws, proclamations, orders, ordinances, notices, regulations and directives issued by or under the authority of the respective Commanders-in-Chief for their respective Zones of Occupation are continued in force in their respective Zones of Occupation."

Shortly after the Declaration of Berlin, the British, United States, French and Russian Zones were brought into being and the jurisdiction of General Eisenhower as Supreme Commander over the western occupied territories came to an end.

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, remained 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.

Similarly, Ordinance No. 4 (Confirmation of Legislation) of the British Zone, runs as follows:

"Whereas on 14th July, 1945, the Commander-in-Chief of the British Zone of Control assumed all authority and power theretofore possessed and exercised by the Supreme Commander Allied Expeditionary Force within the British Zone, NOW IT IS HEREBY ORDERED as follows:

#### Article I.

1. All Military Government Proclamations, Ordinances, Laws, Notices, Regulations and other enactments and orders and all amendments and modifications thereof issued by or under the authority of the Supreme Commander Allied Expeditionary Force and effective within the British Zone of Control on 14th July, 1945, are hereby confirmed and (subject to the provisions of Article II hereof) will continue in force throughout the British Zone until repealed or amended by or under the authority of the Commander-in-Chief of the British Zone of Control.

#### Article II.

2. All the enactments mentioned in Article I hereof shall where the context so requires or admits be read and construed as if throughout the expression "Commander-in-Chief of the British Zone of Control" were substituted for the expression "Supreme Commander Allied Expeditionary Force".



Article III.

3. The British Zone of Control is that portion of Germany which is occupied by the forces serving under the command of the Commander-in-Chief of the British Armed Forces of Occupation in Germany. It does not include the British Sector of Berlin."

Military Government Courts continued, therefore, to operate in the British Zone as under Ordinance No. 2 (with amendments) until 1st January, 1947, when under Ordinance No. 68 they were replaced by a system of Control Commission Courts.<sup>(1)</sup>

A French High Command in Germany was created on 15th June, 1945, and Ordinance No. 1 of 28th July, 1945, of the French Commander-in-Chief, which was thus enacted after the Berlin Declaration and after the emergence of the four Allied Zones, maintained in force the two Ordinances of the Supreme Allied Commander referred to above. This brief account of the legal history of the French Military Government Tribunals is repeated in the Preamble to Ordinance Nos. 20 and 36 of the French Commander-in-Chief, which make provisions regarding the jurisdiction of French Military Government Courts.<sup>(2)</sup>

On December 20th, 1945, Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity) of the Allied Control Council came into force; its purpose, according to its preamble was "to give effect to the terms of the Moscow Declaration of 30 October, 1943, and the London Agreement of 8 August, 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal."

Law No. 10 reaffirms the right of the Commander-in-Chief of each Zone to establish within his Zone tribunals for the punishment, inter alia, of war crimes. Article III thereof provides that: "Each occupying authority, within its Zone of occupation,

(a) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested:.....

(b) shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal:.....

2. The Tribunal by which persons charged with offences hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8th August 1945:....."

The effect of Law No. 10 within the Zones of Germany must now be traced. By Article 1 of Ordinance No. 36 of 25th February, 1946, the French Zone Commander has simply bestowed upon the existing Military Government Courts in the French Zone jurisdiction over the offences set out in Article II of Law No. 10.<sup>(3)</sup>

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(1) See pp. 9 and 28.

(2) See p. 28.

(3) See p. 29.



Ordinance No. 7 of the Military Government of the United States Zone of Germany, which became effective on October 18th, 1946, provided, in the words of its Article I, for "the establishment of Military Tribunals which shall have power to try and punish persons charged with offences recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes." Article II(a) of the Ordinance, as will be seen presently, referred to Law No. 10 as one of the legal sources from which the power to promulgate the Ordinance arose. (1) It is in pursuance of this Ordinance that the Military Tribunals were set up to conduct the trials commonly referred to as the "Nuremberg Subsequent Proceedings". (2) According to the Opening Speech of the Prosecution in one of these trials, that of Josef Altstötter and 15 others, Ordinance No. 7 was enacted "for the purpose of implementing Law No. 10 of the Allied Control Council for Germany, and to carry out the purposes therein stated".

Ordinance No. 68 of the British Zone of January 1st, 1947, set up a new system of Control Commission Courts; Law No. 10 is not directly referred to in this Ordinance, but paragraph 3 of the latter includes within the criminal offences which Control Commission Courts shall have jurisdiction to try: "All offences under any proclamation, law, Ordinance, Notice or Order issued by or under the authority of the Allied Control Council for Germany in force in the British Zone." (3)

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(1) See pp. 29 - 30.

(2) These Trials are the following: Case No. 1, Trial of Karl Brandt and 22 others, Case No. 2, Trial of Erhard Milch, Case No. 3, Trial of Josef Altstötter and 15 others, Case No. 4, Trial of Oswald Pohl and 17 others, Case No. 5, Trial of Friedrich Flick and 5 others, Case No. 6, Trial of Carl Krauch and 22 others, Case No. 7, Trial of Wilhelm List and 11 others, Case No. 8, Trial of Ulrich Greifelt and 13 others, Case No. 9, Trial of Otto Ohlendorf and 23 others, Case No. 10, Trial of Alfried Krupp von Bohlen und Halbach and 11 others, Case No. 11, Trial of Ernst von Weizsäcker and 18 others.

(3) See p. 28.

C. THE JURISDICTION OF  
WAR CRIME COURTS

1. General Remarks

Had time allowed, those provisions of the enactments mentioned above which define the jurisdiction of war crime courts could have been made the subject of considerable comparative analysis and classification. While it has only been possible under the circumstances to make a limited number of remarks of a more general nature, it has nevertheless been thought of use to make the following collection of jurisdictional provisions as a basis for discussion and thought.

2. The French, Norwegian, Danish, Netherlands and  
Luxembourg Provisions: The Continental Legal  
Approach to War Crime Trials <sup>(1)</sup>

It is possible to discern a difference between the Anglo-Saxon and the prevailing Continental legal approach to the punishment of war criminals and the French, Norwegian, Danish, Netherlands and Luxembourg provisions may be used to demonstrate the latter.

The first paragraph of Article 1 of the French Ordinance of August 28th, 1944, for instance reads 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 tried by French Military Tribunals 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".<sup>(2)</sup> When a French Military Tribunal tries an alleged war criminal, the judges decide first whether a provision of the French Criminal Code has been violated and, only secondly, whether this breach was justified by the laws and customs of war.

Again, the Norwegian attitude towards the treatment of war criminals follows the general Continental practice by stressing that, before punishment of any individual offender becomes legal, he must be shown to have offended against some specific provision of Norwegian municipal law as well as against the laws and usages of war. The Norwegian approach is shown in the first sentence of Article 1 of the Law of December 13th, 1946 (No. 14): "Acts which, by reason of their character, come within the scope of Norwegian criminal legislation are punished according to Norwegian law, if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norway or were directed against Norwegian citizens or Norwegian interests...."<sup>(2)</sup>

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(1) See p. 16.

(2) Italics inserted.



A commentary of the Norwegian Ministry of Justice and Police which explains the provisions of the Law claims that this attitude is the same as that adopted in the Moscow Declaration, which provided that war criminals other than major war criminals were to be tried and punished in accordance with the laws of the liberated countries. The Ministry, quoting Art. 96 of the Norwegian Constitution: "No-one may be convicted except according to law, or be punished except according to judicial sentence.....", then goes on to state that: "Norwegian courts can only inflict punishment according to provisions of Norwegian civil or military law. The principle laid down in Art. 96 of the Constitution must be interpreted in this connection so as to make an arbitrary application of an undefined provision of international law inadmissible. In Norway, international law is not incorporated into national law as an integral part, as is the case in various foreign legal systems. Before a rule of substantive international law can be applied by Norwegian courts, it must be incorporated into Norwegian national law by a special act. A clear example of this is Art. 92 of our military criminal code, which fixes the punishment for a typical war crime committed by enemy soldiers. The paragraph is based on the international regulations which are to be found in the Geneva Convention of 1929, regarding the treatment of sick and wounded; cf. Art. 23f of the Hague Regulations."

It is to be noted, however, that a Norwegian Court is not precluded from sentencing a war criminal to death by the fact that the municipal enactment enabling the supreme penalty to be exacted for his offence was not passed until after the commission thereof. Accordingly, judgment went against Karl Hans Hermann Klinge when he appealed to the Supreme Court of Norway against his being condemned to death as a war criminal by the Eidsivating Lagmannsrett (Court of Appeal), on December 8th, 1945. Counsel for Klinge claimed that the Lagmannsrett had unjustly applied the Provisional Decree of 4th May, 1945<sup>(1)</sup> under which the sentence of death was permissible; as the crimes for which the defendant had been convicted had been committed before the passing of that Decree, the punishment should have been restricted to the limits set by Arts. 228, 229 and 62 of the Civil Criminal Code, according to which the death sentence could not have been passed; his argument was based on Art. 97 of the Norwegian Constitution, which provides that: "No law may be given retroactive effect." On 27th February, 1946, however, for various reasons a majority of the Supreme Court judges rejected these arguments.

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(1) This was the predecessor of the Law of December 13th, 1946, and made, on this point, the same provisions.

(2) The examination of Klinge's appeal involved the judges in an interpretation of one of the most fundamental provisions of the Norwegian constitution. It was perhaps in the circumstances inevitable therefore that interesting arguments based on principles of justice and public policy should have been raised. Thus, Judge Skau pointed out that circumstances like those facing the Court could not have been foreseen when the constitution was drafted, and expressed the opinion that it seemed unreasonable that provisions made for the protection of the community could be relied upon by an enemy of the same community. To allow such a plea to be put forward by foreign war criminals would be a violation of the high principles which were the foundation of Art. 97 and the claim for justice which it supported. Judge Holmboe, on the other hand, clearly regarded Art. 97 of the Constitution as a safeguard against despotism, whose full effect was worth preserving even if complete justice would, in consequence, not be done in the present case in so far as Klinge would be punished too leniently. Judge Larssen said that the acceptance of the view of the minority among the judges would offend the natural sense of justice.

Judge Schjelderup and Judge Larssen seem to have considered it correct to interpret the word "law" in Art. 97 as including the laws and customs of war as well as Norwegian law, in cases like the one before the Court. For a full account of the trial, see Volume III of War Crime Trial Law Reports, published for the United Nations War Crimes Commission by H.M. Stationery Office, London, pp. 1 et seq.



Similarly, Article 1 of the Danish Law of July 12th, 1946, on the Punishment of War Criminals provides that: "If a non-Danish subject, being in the service of Germany or serving under one of Germany's allies, has infringed the rules and customs of international law governing Occupation and War and has performed, in Denmark or to the detriment of Danish interests, any deed punishable per se in Danish law, an action can be brought against such person in respect of the crime committed and a punishment imposed in a Danish Court in pursuance of this Act," (1)

Article 1 of the Law of 2nd August, 1947, on the suppression of war crimes, of the Grand Duchy of Luxembourg provides that:

"Agents of other than Luxembourg nationality, who are guilty of crimes or delicts falling within the competence of the Luxembourg tribunals and which were committed after the outbreak of hostilities, if these offences were committed at the time or under the pretext of the state of war and were not justified by the laws and customs of war, whether such agents were captured within the Grand Duchy or on enemy territory or whether the Government secured them by extradition, shall be prosecuted before a War Crime Court and tried in accordance with the Luxembourg laws in force and with the provisions of the present law." (1)

The Anglo-Saxon legal approach to war crime trials has been a little different in this respect. (2) Instruments such as the British Royal Warrant or the United States Theatre Regulations and Directives, which have validity in the respective municipal legal systems, have provided in general terms that the Courts operating under them shall have jurisdiction over war crimes, but the practice of these Courts, in so far as they try war crimes stricto sensu, is to require only that a breach of the laws and usages of war must be shown. An enactment governing such a court may sometimes attempt to define the scope of the term "war crime", and further, the provisions of municipal law are often quoted, as analogies, by Counsel, and in British trials by the Judge Advocate or Legal Member, but the violation of any set of legal rules other than the laws and usages of war (possibly as interpreted in the enactment) need not be shown.

### 3. Comments on the "Continental Approach"

(1) It will be seen that for an offence to be punishable under, for instance, the French war crimes law it must be shown to have violated not only the laws and usages of war but also the relevant municipal laws. While the jurisdiction of courts set up under such laws as the French Ordinance cannot (in theory at least) be wider than that of courts, like the British Military Courts, which are simply empowered to try violations of the laws and usages of war, it can certainly be narrower than that jurisdiction.

That this possibility is not a merely theoretical one was shown by the successful appeal to the Cour de Cassation of Hugo Gruner, ex-Kreisleiter of Thann, against the sentence of death passed on him (as on Robert Wagner, ex-Gauleiter of Alsace, and others) by the Permanent Military Tribunal at Strasbourg, which sat from 23rd April to 3rd May, 1946.

Gruner was charged and found guilty on 3rd May of the premeditated murder of four British prisoners of war on German soil, despite the plea put forward on 23rd April by his Counsel that the Tribunal lacked jurisdiction since the acts alleged had not been committed either in France or in

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(1) Italics inserted.

(2) See pp. 17 and 18.

territory under the authority of France or against or to the prejudice of any of the persons mentioned in the first paragraph of the Ordinance of 28th August, 1944. The Tribunal had rejected this argument, stating that, under Article 177 of the Code de Justice Militaire, the decision on the question whether an offence comes within the jurisdiction of a Military Tribunal and the authority to commit the trial to such Tribunal rests with the juge d'instruction; the Orders for Trial issued by the juge d'instruction (ordonnance de renvoi) have the same effect as Orders for Trial issued by the Indictments Division of the Court of Appeal (arrêts de renvoi). It is an established principle that the "arrêt de renvoi" issued by the Court of Appeal is constitutive of the jurisdiction of the Court to which it commits the case for trial. The same principle applied to the Order for Trial issued by the juge d'instruction where such Order replaces the decision of the Court of Appeal. No appeal lying against the Order of the juge d'instruction of 6th April, 1946, it had become final.

In its judgment of July 24th, 1946, the Cour de Cassation, after quoting the provisions of the first paragraph of Article 1 of the Ordinance, pointed out that the Tribunal's decision of the 3rd May, 1946, stated that Gruner was, by the answers made to the questions Nos. 146 to 153, declared guilty of four acts of voluntary homicide, each specified by questions Nos. 31 - 38 in the following terms: "Is it proved that on the 7th October, 1944, at Reinweiler (Baden), a homicide was voluntarily committed against the person of an English prisoner of war of unknown address?" "Did this murder immediately precede accompany or follow the murder set out in the 4th question?"

The crimes set out in the charge against Gruner were shown by the answers made to the above-mentioned questions to have been committed in Germany against the persons of soldiers of an Allied army and were not among those which, according to the terms of the Ordinance of 28th August, 1944, could be prosecuted before French Military Tribunals and tried according to French laws.

It followed that, in applying to Gruner provisions of the said Ordinance, the decision which was challenged violated these provisions and had no legal basis.

The Court quashed the ruling of 23rd April, 1946, which rejected the arguments of Gruner based on lack of competence, together with the judgment of 3rd May, 1946, as far as it related to Gruner.

Since the acts contained in the charge against Gruner did not fall within the jurisdiction of the existing French Courts, the Court stated that a reference back for re-trial was not possible and that Gruner was to be freed if he was not detained for another reason or required by an Allied authority.

It would seem, on the other hand, that Gruner's offence would have fallen within the jurisdiction, for instance, of the Norwegian Courts. After the sentence already quoted, (1) Article 1 of the Norwegian Law of December 12th, 1946 (No. 14) continues:

In accordance with the terms of the Civil Criminal Code Art. 12, paragraph 4, with which should be read Art. 13, paragraphs 1 and 3, the above provision applies also to acts committed abroad to the prejudice of Allied legal interests or of interests which, as laid down by Royal

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(1) See pp. 10 - 11.



proclamation, are deemed to be equivalent thereto."<sup>(1)</sup>

The Norwegian Ministry of Justice and Police in its explanatory memorandum<sup>(2)</sup> stated that the reference to Allied legal interests had been included in the proposed law in order to make it clear that it would be within the competence of Norwegian Courts, where desirable, to try alleged war criminals for offences against the laws and customs of war committed in Allied Countries.

There seems no reason why the same would not apply to offences against the laws and customs of war committed against Allied nationals in Germany.

(ii) The requirement laid down by the French and Norwegian war crimes enactments, among others, to the effect that an alleged war crime must be shown to have offended not only the laws and usages of war but also municipal law, is not without its accompanying difficulties. It has already been seen<sup>(3)</sup> that Klinge was enabled thereby to claim that the retroactive application of the Ordinance under which he was sentenced to death was contrary to a more fundamental document having validity in the municipal law of Norway, namely the Norwegian Constitution. A minority of judges of the Supreme Court indeed voted in favour of his appeal.

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(1) The provisions of the Civil Criminal Code quoted in the text above run as follows:

"Art. 12. Norwegian Criminal Law, except when otherwise specified or laid down by agreement with a foreign country, is applicable to acts which have been committed.....

(4) abroad by a foreigner when the act either

- (a) is included among those dealt with in the following Articles of this law: (Here follow a series of paragraph numbers.) or,
- (b) is a crime which is also punishable according to the municipal law of the country in which it was committed provided that the defendant's temporary or permanent domicile is Norway.

Where the punishability of the act is dependant on or influenced by an actual or premeditated result, the act is considered to have been committed both where the act was actually committed and where the result took place or was intended to take place.

Art. 13. The prosecution of crimes mentioned in Art. 12 (4) can only be carried out according to Royal decision.

Whenever a person is prosecuted in Norway for an act for which he has already been prosecuted in another country, the punishment already suffered must, as far as possible, be deducted from the new term of punishment."

(2) See p. 11.

(3) See p. 11.

A more general difficulty, however, arises out of the need on the part of the legislator to see to it that the municipal law is supplemented, where necessary, in order to ensure that the provisions of that law are wide enough to provide against those war crimes, as the term is understood in current legal thought, which it was the intention of the authorities concerned to prosecute.

Thus, Article 1 of the French Ordinance of 28th August, 1944 states that "in particular" certain specified provisions of the Code Pénal and Code de Justice Militaire shall be the subject of prosecution in accordance with the provisions set out on p.10 of this document if they have been committed in the circumstances described therein. Further, Article 2 of the Ordinance lays down that certain war crimes shall be treated as the violation of certain specified provisions of the Codes:

"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 Art. 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 Art. 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 conscripted 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."

Article 2 of the Luxembourg Law of August 2nd, 1947, contains a similar collection of paragraphs interpreting provisions of the Code Pénal of Luxembourg so as to cover various types of war crimes.



There are very few provisions in Norwegian criminal law directly and specifically concerned with foreign war criminals. The great majority of the offences which could be punished as war crimes are, in their nature, covered by clauses of the Norwegian civil and military criminal codes having general application. There can be no doubt, claimed the Ministry, that an execution carried out as means of reprisal constitutes murder (Art. 233 of the Civil Criminal Code). It is equally clear that the employment of prisoners of war or civilians as living buffers against enemy forces can be classified as murder, manslaughter, inflicting bodily injury, etc. Collective fines (contrary to the Hague Regulations), requisitioning, confiscation and the like must be regarded as robbery. Any employment of prisoners of war or civilians contrary to the regulations of international law, illegal conscription for forced labour, internment, deportation, etc., are to be regarded as illegal deprivation of freedom".

The Ministry maintained, however, that: "The German economic exploitation of Norway stands in this respect in a class by itself. Its scale and the forms in which it has been carried out lie in some respects so far beyond the usual conception of criminal law that it is difficult or even impossible to regard the different acts as being within the scope of existing provisions of the Civil or Military Criminal Codes. In order to amend this deficiency the Ministry consider it necessary to lay down a special provision which covers every kind of German exploitation in Norway performed by force or threat thereof..... Acts like the excessive issue of currency notes, unreasonable fixing of prices, irresponsible exploitation of clearing agreements, etc. can hardly be assimilated with any particular crime already defined and covered by the law. If criminal prosecution against those individually responsible in this connection should arise, it is deemed necessary that the law should give certain instructions to those administering the law. Those regulations, however, should be given a very comprehensive though general form, considering the very varied economic transactions which may arise in this connection".

Accordingly the following provision is made by Art. 2 of the Law on the Punishment of Foreign War Criminals:

"Confiscation of property, requisitioning, imposition of contributions, illegal imposition of fines, and any other form of economic gain illegally acquired by force or threat of force, are deemed to be crimes against the Civil Criminal Code, Art. 267 and Art. 268, paragraph 3."

The Netherlands Law of July 1947 (Statute Book H. 233) has succeeded in following in a sense the Continental approach while at the same time ensuring that no war crime or crime against humanity as defined in Article 6 (b) and (c) of the Charter of the International Military Tribunal will go unpunished because of lack of jurisdiction on the part of the Netherlands Courts. That law adds a new article 27 a to the Extraordinary Penal Law Decree, of which paragraphs 1 and 2 reads as follows:

- "1. He who during the time of the present war and while in the forces or service of the enemy State is guilty of a war crime or any crime against humanity as defined in Art. 6 under (b) or (c) of the Charter belonging to the London Agreement of 8th August 1945 promulgated in Our Decree of 4th January 1946 (Statute Book No. G.5) shall, if such crime contains at the same time the elements of a punishable act according to Netherlands Law, receive the punishment laid down for such act.
2. If such crime does not at the same time contain the elements of a punishable act according to the Netherlands law, the perpetrator shall receive the punishment laid down by Netherlands law for the act with which it shows the greatest similarity."(2)

(1) See p. 11.

(2) Italics inserted.

4. United Kingdom and British Commonwealth Enactments

The jurisdiction of British Military Courts appointed for the trial of war criminals derives from the Royal Warrant of 14th June, 1945, Army Order 81/45, of which Regulation provides that the term "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.

Similarly, the War Crimes Regulations of Canada of 30th August, 1945 (later re-enacted as a Statute of 31st August, 1946) define a war crime simply as "a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September 1939".

The jurisdiction of British and Canadian War Crime Courts is limited, then, to the trial of violations of the laws and usages of war, and is therefore 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)).

A Court trying only laws and usages of war is not, however, limited to the trial of offences against nationals of the country whose authorities set up the Court.<sup>(1)</sup> Thus, for instance in the trial of Otto Sandrock and Three Others before a British Military Court at Almelo, Holland, from 24th - 26th November, 1945, (the Almelo Trial), a British Military Court tried and sentenced German nationals for offences against, not only a British prisoner of war, but also a Dutch civilian. In the trial by a British Military Court at Singapore of W/O Tomono Shimio of the Japanese Army, the accused was charged, found guilty and sentenced to death by hanging for having unlawfully killed American prisoners of war at Saigon, French Indo-China. The locus delicti commissi was French territory; the victims were United States nationals.

The jurisdiction of Australian Military Courts for the trial of alleged war criminals is rather wider than that of the British and Canadian Military Courts.

Article 3 of the Commonwealth of Australia War Crimes Act of 11th October, 1945 (No. 48 of 1945) states that:

"In this Act, unless the contrary intention appears .... "war crime" means:

- (a) a violation of the laws and usages of war; or
- (b) any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on the third day of September, one thousand nine hundred and forty-five, under the National Security (Inquiries) Regulations (being Statutory Rules 1941, No. 35, as amended by Statutory Rules 1941, Nos. 74 and 114 and Statutory Rules 1942, No. 273,) committed in any place whatsoever, whether within or beyond Australia, during any war.<sup>(2)</sup>

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(1) See above pp. 1 - 2.

(2) The Preamble to the Act contains the words: "Whereas it is expedient to make provision for the trial and punishment of violations of the laws and usages of war committed during any war in which His Majesty has been engaged since the second day of September, One thousand nine hundred and thirty-nine, against any persons who were at any time resident in Australia or against certain other persons."



The Instrument of Appointment referred to states that the expression "war crime" includes, inter alia:

- "(1) Planning, preparation, initiation or waging of a war aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

This definition of "crime against peace" is the same as that used in Art. 6 (a) of the Charter attached to the Four-Power Agreement of 8th August, 1945. The effect of this is that "crimes against peace" form part of the term "war crime" as defined by the Australian statute.

The Australian Act does not, on the other hand, comprise in its definition of "war crime" crimes against humanity within the meaning of Art. 6 (c) of the Charter of the International Military Tribunal, excepting of course "crimes against humanity" which also fall under the term "violations of the laws and customs of war."

Of particular interest <sup>are</sup> those Australian provisions which determine the territorial application of the Act and the extent of the jurisdiction of the Australian Military Courts. The Preamble states the expediency of making provision for the trial and punishment of violations of the laws and usages of war committed against "any persons who were at any time resident in Australia or against certain other persons". The main basis for the power of Military Courts is section 7 of the Act, which provides that:

"A military court shall have power to try persons charged with war crimes committed, at any place whatsoever, whether within or beyond Australia, against any person who was at any time resident in Australia, and for that purpose, subject to any direction by the Governor-General, to sit at any place whatsoever, whether within or beyond Australia."

Article 12, however, adds the following:

"The provisions of this Act shall apply in relation to war crimes committed, in any place whatsoever, whether within or beyond Australia, against British subjects or citizens of any Power allied or associated with His Majesty in any war, in like manner as they apply in relation to war crimes committed against persons who were at any time resident in Australia."

Under the Act the Australian Military Courts have, therefore, jurisdiction in all cases where the victim had been either resident in Australia or a British or an allied subject.

The jurisdiction of the Australian Military Courts does not extend to crimes committed "against any civilian population", e.g., against neutrals or enemy subjects, because crimes against other than British and allied nationals are outside the scope of the term "war crime" as defined in the Australian Statute.

## 5. United States Provisions

As will be seen, (1) the United States authorities have made different provisions for different territories, and the jurisdictions conferred have not been the same. The narrowest jurisdiction is that vested in the Military Commissions appointed in the

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(1) See Document III/114, pp. 12 - 15, where the relevant provisions are set out.

Mediterranean Theatre of Operations. In the Mediterranean Regulations (Regulation 1) the expression "war crime" means a violation of the laws or customs of war. United States Commissions other than those appointed in the Mediterranean Theatre of Operations have, however, been empowered to try other offences in addition to war crimes.

6. The Jurisdiction of Chinese War Crime Tribunals

Article II of the Chinese Law of October 24th, 1946, Governing the Trial of War Criminals provides that:

"Article II. A person who commits an offence which falls under any one of the following categories shall be considered a war criminal.

1. Alien combatants or non-combatants who, prior to or during the war, violated an International Treaty, International Convention or International Guarantee by planning, conspiring, preparing to start or supporting, an aggression against the Republic of China, or doing the same in an unlawful war.
2. Alien combatants, or non-combatants who during the war or a period of hostilities against the Republic of China, violate the Law and Usages of War by directly or indirectly having recourse to acts of cruelty.
3. Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as (a) killing, starving, massacring, enslaving, or mass deportation of its nationals, (b) stupefying the mind and controlling the thought of its nationals, (c) distributing, spreading, or forcing people to consume, narcotic drugs or forcing people to consume or be inoculated with poison, or destroying their power of procreation, or oppressing and tyrannising them under racial or religious pretext, or treating them inhumanly,
4. Alien combatants or non-combatants who during the war with, or a period of hostilities against the Republic of China, commit acts other than those mentioned in the three previous sections but punishable according to Chinese Criminal Law."

Article III of the law enumerates 38 types of offences which are to be deemed violations of the laws and usages of war within the meaning of Article II, Section 2, but are said to be included among the offences mentioned in Section 2; the list is not therefore to be regarded as exhaustive.

Article IV makes the following provisions:

"Article IV. All provisions under Article II apply to acts committed between 18th September, 1931 and 2nd September, 1945, only, with the exception of cases set out in section 1 and 3 which are also subject to prosecution."

The protection of the Chinese Courts is not, however, afforded only to Chinese Nationals, since Article VII provides that:

"Article VII. Alien combatants and non-combatants who committed any of the offences provided under Article II against the Allied Nations or their nationals, or against aliens under the protection of the Chinese Government are subject to the application of the present Law."



It will be noted that the Chinese War Crimes Law resembles the Australian<sup>(1)</sup> in that both provide Courts acting under their provisions with jurisdiction to try, in addition to alleged war crimes proper (i.e. violations of the laws and usages of war), what may be termed "crimes against peace" (cf. Article II Section 1 of the Chinese Law) but not such crimes against humanity as do not at the same time represent war crimes. Thus, while offences against certain types of victims other than Chinese and Australian Nationals may be tried before Chinese and Australian Courts respectively (cf. Article VII of the Chinese provision and Article 12 of the Australian), offences by enemy nationals against enemy nationals definitely cannot be so tried.

7. Jurisdiction of the Greek Courts over War Criminals

Under the provisions of the Greek Constitutional Act 73/1945 (Government Gazette p. 250), enemy nationals may be tried before Greek War Crime Courts for any offence which would be a violation of Article 6 of the Charter of the International Military Tribunal. The Greek Courts therefore have jurisdiction over crimes against humanity and crimes against peace as well as over war crimes.<sup>(2)</sup> Acts which constitute offences against the Greek Penal Code may also be brought before such Courts when they have been committed by enemy nationals and were not justified by the laws and usages of war.

8. Jurisdiction over Treasonable Acts

It should be noted that the Belgian, Czechoslovak, Polish and Yugoslav enactments mentioned above<sup>(3)</sup> provide for the trial, not only of war crimes but also of acts of a treasonable nature.

9. The Jurisdiction of Belgian Military Tribunals over War Crimes and Certain Treasonable Acts

Article 2 of the Belgian Law of June 20th, 1947, relating to the competence of Belgian Military Tribunals in the matter of war crimes provides that:

"Article 2. Crimes falling within the jurisdiction of the Belgian Criminal Code committed in violation of the laws and customs of war between 9th May, 1940 and 1st June, 1945, by persons who, at the time of the commission of the offence, were in the enemy forces or the forces allied to those of the enemy of whatever standing, but especially in the capacity of a functionary in the judicial and administrative services, in the military or auxiliary services as an agent or inspector of an organisation, or a member of a formation of any sort whatever, who is charged by such persons with a mission of any nature at all, shall be tried by military tribunals in accordance with the provisions of this present law and those which are not contrary to the Code of Military Penal Procedure."

Apart from this general enactment there exist certain other provisions relating to the competence of Military Courts over war crimes and treasonable offences committed outside of Belgium. Article 1

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(1) See pp. 17 - 18.

(2) See a similar Danish provision referred to on p. 15 of Doc. III/114. For the provisions of Article 6 of the Charter, see Dr. Litawski's papers.

(3) See p. 5.

of the above-mentioned law states that:

"Article 1. Article 2 of the Decree of 5th August, 1943, is replaced by the following text:

Article 10 of the Preliminary Chapter of the Code of Criminal Procedure, which enumerates the cases in which a foreigner can be tried in Belgium for crimes committed outside the territory of the Kingdom, is completed by the addition of the following paragraph:

"4. In time of war, against a Belgian citizen or a foreigner resident in Belgium at the time of the outbreak of hostilities, a crime of homicide, wilful bodily injury, rape, indecent assault or denunciation of the enemy".

The original Article 2 made the same provision except for the omission of the words "or a foreigner resident in Belgium at the time of the outbreak of hostilities".

Articles 1 and 3 of the Decree of 5th August, 1943, have been amended by an Act of Parliament of 30th April, 1947, which provides as follows:

"Article 1.

Article 1 of the decree of 5th August, 1943, conferring exceptional jurisdiction on the Belgian courts in the matter of certain crimes and misdemeanours committed outside national territory in time of war is replaced by the following article:

"The following addition shall be made to Article 8 of the preliminary chapter of the Code of Criminal Procedure:

'A Belgian who, in time of war, committed outside national territory, a crime or misdemeanour against a national of a country allied to Belgium as defined in paragraph 2 of Article 117 of the Criminal Code, can be tried in Belgium, either on the request of the injured foreigner or of his family, or on receipt of an official notice served to the Belgian authorities by the authorities of the country where the crime was committed or of the country of which the injured party is or has been a national. This applies even if the crime is not one of those mentioned in the law of extradition'".

"Article 2.

Article 3 of the decree of 5th August, 1943, is replaced by the following:

"Article 12 of the preliminary chapter of the Code of Criminal Procedure is replaced by the following article:

'Except in cases covered by Nos. 1 and 2 of Articles 6 and 10, the trial of crimes dealt with in the present decree can only be held if the accused is arrested in Belgium.

However, when the crime has been committed in time of war, the trial can be held in all cases, provided the accused is a Belgian, even if he is not arrested in Belgium, but if the accused is a foreigner, the trial can be held in Belgium if the accused is found in enemy territory or if his extradition can be obtained; the trial can also be held in Belgium in the cases mentioned in the preceding paragraph'".



10. Jurisdiction of the People's Courts in  
Czechoslovakia over War Criminals and  
Traitors

The Czechoslovak Decree No. 16 of 1945, as amended by Law No. 22 of January 24th, 1946, makes detailed provisions regarding the types of offences punishable thereunder and the penalties attaching to each category of offences. The following provisions are of particular interest

(i) Section 1 of the Decree provides that:

"Any person who during the period of imminent danger to the Republic (see para. 18) committed, either on the territory of the Republic or outside it, any of the following offences under the Law on the Defence of the Republic of 19th March, 1923, No. 50 in the Collection of Laws, is to be punished according to the provisions set out below:

conspiracy against the Republic (para. 1), is to be sentenced to death;

any person guilty of planning conspiracies (para. 2), or of threat to the security of the Republic (para. 3), treason (para. 4, Art. 1), betrayal of State secrets (para. 5, Art. 1), military treachery (para. 6, Arts. 1, 2 and 3) or of violence against constitutional agents (para. 10, Art. 1), is to be sentenced to penal servitude for a period varying from twenty years to a life sentence and in the case of especially aggravating circumstances is to be sentenced to death."

(ii) Section 2 of the Decree makes it a punishable offence to have been at the time of imminent danger to the Republic a member of any of the following organisations: Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (S.S), Freiwillige Schutzstaffeln (F.S.), Rodobrana (a Slovak fascist organisation) or the Szabadsapatok (a Hungarian fascist organisation active during the war in the Hungarian occupied part of Czechoslovakia), or of other, not enumerated, organisations of a similar kind."

(iii) According to paragraph 1 of Section 3:

"(1) Any person who during the period of imminent danger to the Republic (see para. 18) carried out propaganda for or supported the Nazi or Fascist movement, or who approved or defended the enemy government on the territory of the Republic or any of the illegal acts of the occupation High Command and the authorities and organs under its orders during this period in the press, on the wireless, in films or plays or at public gatherings shall, if not guilty of an offence punishable by a severer penalty, be sentenced for his crime to penal servitude for from five to twenty years, but if he committed the said crime with the intention of destroying the moral, national or state consciousness of the Czechoslovak people, and especially of Czechoslovak youth, he shall be sentenced to penal servitude for from ten to twenty years and in the presence of especially aggravating circumstances to penal servitude for a period varying from twenty years to a life sentence or to death."

- (iv) Under Section 3, paragraph 2, a person who, at the time of imminent danger to the Republic, was a functionary or commander in one of certain organisations, is punishable by hard labour from 5 - 20 years. The organisations are: The Nazi Party, the Sudetendeutsche Partei (the party led by Henlein), Vlasta, (a Czechoslovak quisling organisation), Hlinkova Garda (a Slovak Militant Quisling organisation). Here it is not membership as such, that establishes the criminal liability, since only functionaries or commanders in these organisations are to be punished.
- (v) Section 6 of the Decree makes the ordering of forced labour and the taking part in giving effect to such orders, during the same period of danger, a criminal offence. The punishment is to be more severe if forced labour was connected with deportation abroad.
- (vi) Section 7 of the Decree makes it a criminal offence, punishable by death or lesser penalties, to have caused, during the same period, loss of liberty or bodily harm in the interests of Germany or her allies. Under the express provision of paragraph 3 of Section 7 this applies also to the causing such an effect by means of a court decree or an administrative decision. A related provision is that of Section 11, which provides sanctions for denunciations effected in the interests of the enemy. If loss of life was the effect of such denunciation, the death penalty may be imposed; otherwise such denunciations are punishable by hard labour from 10 - 20 years, and under aggravating circumstances by life imprisonment.
- (vii) Offences against property during the same period and cloaked in the form of judicial or official acts, are also punishable (Sections 8 and 9).
- (viii) Section 10 makes it a punishable offence to have exploited, at the time of the imminent danger to the Republic, the distress caused by national, political or racial persecution, in order to enrich oneself, to the detriment of the State, a legal corporation or any person.
- (ix) Section 12 provides that:
- "Under this law any foreigner who committed the crime mentioned in Sec. 1, or any of the crimes mentioned in Secs. 4-9 while on foreign territory, shall be punished if he committed them against a Czechoslovak citizen or against Czechoslovak public or private property."
- (x) The "time of the imminent danger to the Republic" is defined in Section 18 of the Decree as the time between 21st May, 1938, the time of the first Czechoslovak mobilisation against the threat of German invasion, and a day to be appointed by Government decree.

The Slovak Decree No. 33/1945 as amended by Decree Nos. 83/1945 and 57/1946 sets out detailed provisions defining various types of quislings and collaborators, and the punishment to be meted out to each. In addition, Section 1 of the Decree states that:

"Any foreign national<sup>(1)</sup> who

(a) has supported the dismemberment of the Czechoslovak Republic or destruction of its democratic government, or who

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(1) Italics inserted.



(b) has taken part in political, economic or any other kind of oppression of the Slovak nation, especially any person who has terrorised or plundered the Slovak people, fought with the German Army on the territory of the Czechoslovak Republic against the Red Army, the other Allied armies, the Slovak uprising or the partisans in Slovakia, or who has in the course of such action committed murder, robbery, arson, extortion, or has been an informer or committed other outrages or acts of violence, or been in the service of Nazi Germany or Horthy's Hungary, or has ordered or aided the deportation of Slovak nationals abroad, or been guilty of any other act against the Slovak national interest, shall be sentenced to death for his crime."

11. Jurisdiction of Polish Courts over  
War Crimes and Treasonable Activities

The types of offences which fall within the jurisdiction of the Polish Courts for the trial of alleged war criminals and traitors are succinctly set out in Articles 1, 2, 3, 4 and 9 of the Decree of 11th December, 1946, which provide as follows:

"Article 1.

Any person who, assisting the authorities of the German State, or of any State allied with it,

- (1) took part in committing acts of murder against the civilian population, members of the armed forces or prisoners of war; or
- (2) by giving information or detaining, acted to the detriment of persons wanted or persecuted by the authorities on political, national, religious or racial grounds,

is liable to the death penalty."

"Article 2.

Any person, who, assisting the authorities of the German State, or of a State allied with it, acted in any other manner or in any other circumstances than those indicated in Article 1 to the detriment of the Polish State, or of a Polish corporate body, or of civilians, members of the armed forces or prisoners of war,

is liable to imprisonment for a period of not less than three years, or for life, or to the death penalty."

"Article 3.

Any person who, taking advantage of the conditions created by the war, compelled persons to act under threat of persecution by the authorities of the German State, or by a State allied with it, or acted in any other manner to the detriment of persons wanted or persecuted by the said authorities,

is liable to imprisonment for a period of not less than three years, or for life."

"Article 4, Para. 1.

Any person who was a member of a criminal organisation established or recognised by the authorities of the German State or of a State allied with it, or by a political association which acted in the interest of the German State, or a State allied with it,

is liable to imprisonment for a period of not less than three years, or for life, or to the death penalty.

Para. 2.

A criminal organisation in the meaning of Para. 1 is a group or organisation:

- (a) which has as its aims the commission of crimes against peace, war crimes or crimes against humanity; or
- (b) which while having a different aim, tries to attain it through the commission of crimes mentioned under (a).

Para. 3.

Membership of the following organisations especially is considered criminal:

- (a) the German National Socialist Workers' Party (National Sozialistische Deutsche Arbeiter Partei - NSDAP) as regards all leading positions,
- (b) the Security Detachments (Schutzstaffeln - S.S.),
- (c) the State Secret Police (Geheime Staats-Polizei - Gestapo),
- (d) the Security Service (Sicherheits Dienst - S.D.)."

"Article 9.

The provisions of the present Decree are applicable to criminal acts committed between September 1st, 1939 and May 9th, 1945."

Article 6 provides that:

"Article 6.

To inform against or to hand over to the authorities of the German State, or of a State allied with it, persons wanted for a common crime is not punishable, provided the person responsible for giving information or handing over acted in the greater public or private interest."

12. Jurisdiction of Yugoslav Courts over War Crimes and Treasonable Activities

Articles 2 and 3 of the Yugoslav Law of August 25th, 1945, set out the types of offence which fall within the jurisdiction of Courts acting under that Law:

"Article 2.

1. As a criminal act against the people and the state is considered an act aimed at the forcible overthrow of or threat to the existing state system of Democratic Federal Yugoslavia, or any menace to its foreign



security, or to the basic democratic, political, national and economic achievements of the liberation war, e.g. the Federal structure of the State, the equality and fraternity of the Yugoslav peoples, and the system of the people's authorities.

2. As a criminal act under this Law any act outlined in the preceding paragraph directed against the security of other states with which Democratic Federal Yugoslavia has a treaty of alliance, friendship or co-operation, is punishable with due regard to the principle of reciprocity."

"Article 3.

As guilty of criminal acts under Article 2, the following shall be liable to punishment:

1. Any person who undertakes an act aimed at the forcible over-throw of the people's representative body of Democratic Federal Yugoslavia or of the Federative Units, or at overthrowing the Federal or Federative Units organs of supreme state administration, or the local organs of state administration, or at preventing these by menace from fulfilling their legal rights and duties, or at compelling them to fulfil those to the end desired by the person thus exercising force.

2. Any subject of Yugoslavia who commits an act to the detriment of the military strength, the defensive capacity or the economic power of Democratic Federal Yugoslavia, or which threatens the independence or integrity of its territory.

3. Any person who commits a war crime, i.e. who during the war or the enemy occupation acted as instigator or organiser, or who ordered, assisted or otherwise was the direct executor of murders, of condemnations to the punishment of death and the execution of such, or of arrests, torture, forced deportation or removal to concentration camps, of interning, or of forced labour of the population of Yugoslavia; any person who caused the intentional starvation of the population, compulsory loss of nationality, compulsory mobilisation, abduction for prostitution, or raping, or forced conversion to any other faith; any person who under these circumstances was responsible for any denunciation resulting in any of the measures of terror or terrorisation outlined in this paragraph, or any person who in these circumstances ordered or committed arson, destruction or loot of private or public property; any person who entered the service of the terroristic or police organisations of the occupying forces, or the service of any prison or concentration or labour camp, or who treated Yugoslav subjects and prisoners-of-war in an inhumane manner.

4. Any person who during the war organised or recruited others to enter, or himself entered any armed military or police organisation composed of Yugoslav subjects, for the purpose of assisting the enemy and fighting with the enemy against his own Fatherland, accepting from the enemy arms and submitting to the orders of the enemy.

5. Any person who during the war against Yugoslavia or against the allies of Yugoslavia, accepted service in the enemy army, or took part in the war as a fighter against his Fatherland or its allies.

6. Any person who during the war and enemy occupation entered the police service or accepted service in any organ of enemy authority, or assisted these in the execution of requisition orders for the taking

of food and other goods, or in the pursuance of any other measures of force against the population of Yugoslavia.

7. Any person who organised armed revolt or took part in this, or organised armed bands or their illegal entry to the territory of the state for the purpose of effecting acts outlined in Article 2 of this Law, or any person who abandoned his place of residence and joined any armed and organised group for the commission of such acts.

8. Any person who in the country or outside organised any association having fascist aims, for the execution of any act outlined in Article 2 of this Law.

9. Any citizen of Yugoslavia who incites a foreign state to war against his Fatherland, or to armed intervention, to economic warfare, to seizure of any property of Democratic Federal Yugoslavia, or of its subjects, to the rupture of diplomatic relations, the cancellation of international treaties, or to any interference in the internal affairs of his Fatherland, or who in any way whatsoever assists any foreign state at war with Yugoslavia.

10. Any person who carries out espionage, i.e. who either hands over or steals or collects data and documents which by their content constitute any particularly guarded state or military secret for the purpose of handing such information to any foreign state, or any fascist or enemy organisation, or any unknown person.

11. Any person who kills any military person or representative or person in the service of the people's authorities either when these are carrying out their official duties or because of these, or commits such act against any person of an allied or friendly state.

12. Any person who for the purposes outlined in Article 2 destroys or damages by arson or any other means any transport, building or other material, any water supply system, public warehouse or any public property."

### 13. Jurisdiction of the Military Government Courts Set Up in Germany

The jurisdiction of the Military Government Courts set up by General Eisenhower as Supreme Commander was defined in Article II of Ordinance No. 2<sup>(1)</sup> as follows:

"1. Military Government Courts shall have jurisdiction over all persons in the occupied territory except persons other than civilians who are subject to military, naval or air force law and are serving under the command of the Supreme Commander, Allied Expeditionary Force, or any other Commander of any forces of the United Nations.

2. Military Government Courts shall have jurisdiction over:

- (a) All offences against the laws and usages of war.
- (b) 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.
- (c) All offences under the laws of the occupied territory or of any part thereof."

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(1) See p.6.



As has been seen, (1) these Courts continued to exist in the British Zone, from the time when the latter came into existence until the setting up of the Control Commission Courts, under Ordinance No. 68 of the British Zone. Paragraph 2 of Ordinance No. 68 makes the same provision as Article II paragraph 1 of the Supreme Commander's No. 2, with the substitution of "Control Commission Courts" for "Military Government Courts", of "British Zone" for "occupied territory", and of "Commander-in-Chief" for "Supreme Commander, Allied Expeditionary Force". For purposes of greater clarity, commas have been placed at the beginning and end of the phrase "other than civilians".

Paragraph 3 of Ordinance No. 68 makes the following provision, which is similar to that of paragraph 2 of Article II of Ordinance No. 2:

"Criminal Jurisdiction"

3. Control Commission Courts shall have jurisdiction to try:-

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

Paragraph 4 of Ordinance No. 68 adds a provision relating to civil jurisdiction:

"4. The Control Commission Courts shall exercise such jurisdiction in civil matters as the Commander-in-Chief may by order published in the Gazette, from time to time direct."

Articles 1 and 2 of Ordinance No. 20 of the French High Command in Germany (2) provide that:

"Article 1.

Military Government Tribunals are competent to try all war crimes defined by international agreements in force between the occupying Powers whenever the authors of such war crimes, committed after the 1st September, 1939, are of enemy nationality or are agents, other than Frenchmen, in the service of the enemy, and whenever such crimes have been committed outside of France or territories which were under the authority of France at the time when the crimes were committed."

"Article 2.

These crimes are punishable by all the penalties which such Tribunals are empowered to pronounce, including the death penalty."

Article 1 of Ordinance No. 36 lays down that:

"Military Government Tribunals in the French Zone of Occupation in Germany are competent, in virtue of Law No. 10 of the Allied Control Council concerning the punishment of persons responsible for war crimes, crimes against peace and crimes against humanity, to try the crimes set out in that law."

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(1) See p. 8.

(2) See p. 8.

The provisions of Law No. 10 which are important in this connection are those contained in Article II, of which paragraphs 1 and 2 run as follows:

"1. Each of the following acts is recognized as a crime:

(a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War Crimes. Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against Humanity. 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.

(d) Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal.

"2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organisation or group connected with the commission of any such crime or (f) with reference to paragraph 1(a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellities or held high position in financial, industrial or economic life of any such country."

In the United States Zone of Germany, Military Government Courts continued to operate under Ordinance No. 2 of the Supreme Commander after establishment of the four Allied Zones, <sup>(1)</sup> but were later supplemented by the setting up of Military Tribunals under Ordinance No. 7 of the Military Government of the United States Zone, which enactment became effective on October 18th, 1946. <sup>(2)</sup>

Articles I and II(a) in full of Ordinance No. 7 provide that:

"Article I. The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offences recognized as crimes in Article II of Control Council Law No. 10; including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offences.

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(1) See p. 7.

(2) See p. 9.



Article II. (a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8th August, 1945, certain tribunals to be known as "Military Tribunals" shall be established hereunder. "

Article II of Control Council Law No. 10, which is referred to in Article I of Ordinance No. 7 has already been quoted.<sup>(1)</sup>

Articles 10 and 11 of the Charter of the International Military Tribunal, to which specific reference is made in Article II of Ordinance No. 7, and implicit reference in Article II, 1(d) of Law No. 10, makes the following provisions:

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

Article 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organisation and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organisation."

In its judgment of 30th September and 1st October, 1946, the International Military Tribunal came to certain decisions regarding the criminality of the Gestapo and S.D., the S.S. and the Leadership Corps of the Nazi Party<sup>(2)</sup> in doing so it acted in accordance with Article 9 of its Charter which states that:

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

Certain organisations and parts of organisations having thus been declared criminal by the Nuremberg International Military Tribunal, allegations of membership in such organisations are included in the charges against many, if not most, of the defendants at present being tried at Nuremberg before Military Tribunals set up under Ordinance No. 7, and the power of these Tribunals to find an accused guilty of such membership arises from Article II(a) of that Ordinance which has been quoted above.<sup>(3)</sup>

In trials before the Military Tribunals acting under Ordinance No. 7 the criminal nature of groups or organisations declared criminal by the International Military Tribunal cannot be questioned, and in a very similar way the ordinary Military Government Courts in the United States Zone are bound by a directive of 26th June, 1946, issued by Headquarters,

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(1) See p. 29.

(2) See British Command Paper, Cmd. 6964, pp. 66 - 83.

(3) For details of the jurisdiction of the Spruchkammern in the British and United States Zones over cases involving membership of criminal organisations see Dr. Mayr-Hartings part of the Report.

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UNITED NATIONS WAR CRIMES COMMISSION.

HUMAN RIGHTS REPORT: PRELIMINARY PAPERS.

JURISDICTION OVER VIOLATIONS OF HUMAN RIGHTS

OF GERMAN CITIZENS AND STATELESS PERSONS

COMMITTED WITHIN THE TERRITORY OF

THE GERMAN REICH.

Rapporteur: H. Mayr-Harting.

PART I.

C O N T E N T S.

- A. The International Military Tribunal for the Trial of German Major War Criminals.
1. The International Character of the Tribunal.
  2. The Jurisdiction of the Tribunal.
  3. The Law Applied by the Tribunal.
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A. The International Military Tribunal for the  
Trial of German Major War Criminals.

Violations of human rights of German citizens and Stateless persons, for which the National Socialist Régime is considered responsible formed the subject matter of the trial before the International Military Tribunal at Nuremberg; they also form the subject of a number of trials which are being held before the municipal courts (military as well as civil) established in Germany ( and Austria) by the four occupying Powers; and they are being dealt with by the ordinary German courts.

The International Military Tribunal, created by the Agreement of 8th August 1945, differs in its character, in its jurisdiction and in the law which it applied from the other courts which have been concerned with those violations of human rights that are of interest in this connection. For this reason, and in view of its outstanding importance, it is proposed, first of all, to devote a separate chapter to the Nuremberg trial (as far as it was concerned with violations of human rights of German citizens and Stateless persons.)

1. The International Character of the Tribunal.

The Nuremberg Tribunal is an International Tribunal. It came into existence by virtue of an Agreement between the Governments of the United Kingdom, the United States of America, the U.S.S.R., and (the provisional Government) of the French Republic. It originated, in fact, like any other international court or tribunal, in an international treaty.

The great majority of writers who deal with the Nuremberg Trial have never questioned the international character of the Tribunal.<sup>(1)</sup> It has, however, been suggested<sup>(2)</sup> that the Nuremberg Tribunal can only

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(1) Cf. Lord Wright - War Crimes under International Law: The Law Quarterly Review, Vol.82 (January 1946), p.40 et seq.; G.A.Finch: The Nuremberg Trial and International Law - The American Journal of International Law Vol.41 (January 1947), p.20 et seq.; Quincy Wright: The Law of the Nuremberg Trial - The American Journal of International Law, Vol.41, (January 1947), p.38 et seq.; H.Kolsen: "Will the Nuremberg Trial constitute a Precedent?" - International Law Quarterly, Vol.I, No.2, (1947), p.153 et seq.

(2) G.Schwarzenberger: "The Judgment of Nuremberg" - Tulane Law Review, Vol. XXI (March 1947), p.329 et seq.

in a formal sense be considered as an international tribunal and that, in substance, it is a municipal tribunal of extraordinary jurisdiction, which the four Powers, parties to the Agreement of 8th August 1945, share in common. It has been argued that by debellatio the Allies became the joint sovereigns of Germany and that "little importance need be attached to the circumstance that the joint sovereigns exercised their jurisdiction as the fountain of law and justice in Germany by an international treaty; for this mode of co-ordinating their sovereign wills is not so much determined by the object of their joint deliberations as by the character of the joint sovereigns as four distinct subjects of international law."<sup>(1)</sup>

The municipal character of the Tribunal, the argument continues, could hardly be questioned, had it been established by one State after this State alone had conquered Germany instead of four victorious Powers which combined their efforts towards the same end.<sup>(2)</sup>

The view that it was the intention of the parties in substance to establish joint military tribunals under municipal law rather than a truly international tribunal has been inferred chiefly from a statement of Mr. Justice Jackson,<sup>(3)</sup> who declared in the course of the Nuremberg trial:

"One of the reasons this (Tribunal) was constituted as a military tribunal instead of an ordinary court of law was to avoid the precedent-creating effect of what is done here on our own law and the precedent control which would exist if this were an ordinary judicial body."<sup>(4)</sup>

It has been pointed out that "if the Tribunal had been conceived by the Powers as an international tribunal there was no need to guard either against precedent control or against the precedent-creating effect of the judgment on the municipal law of the four Powers. If, however, the Tribunal was a joint tribunal under municipal law and had not been given the status of an extraordinary tribunal by being

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(1) G. Schwarzenberger: op.cit., p.334.

(2) G. Schwarzenberger: op.cit, p.334.

(3) G. Schwarzenberger, op.cit, p.334.

(4) Quoted by G. Schwarzenberger, p.333.



labelled a military tribunal, it could at least have been argued that the Judgment of the Tribunal had such effects."<sup>(1)</sup>

The present report seeks to show no more than that, in the opinion of the great majority of the leading writers on the subject, the Nuremberg Tribunal is to be considered as an international tribunal, but that this opinion has been contested. Without assuming to decide a question which, to some extent, is controversial, it is pointed out that it was not the Control Council for Germany but the Governments of the United States of America, Great Britain, France and the Soviet Union which established the Tribunal<sup>(2)</sup> and appointed its members.<sup>(3)</sup>

That it was not the intention of the parties to the Agreement of 8th August 1945 to create "joint military tribunals under municipal law" seems to be shown by the Preamble of the Agreement wherein the four signatories declared that they were acting (not as the sovereigns over the former German territory but) "in the interest of all the United Nations."<sup>(4)</sup>

In addition, it has been stressed that the Agreement makes no difference between Germany whose national government had been abolished and replaced by a condominium government of the four Occupant Powers, and the other European Axis States over which the signatories had not assumed sovereign legislative power. The Agreement was concluded - not for the prosecution of German war criminals only, but "for the prosecution of European Axis war criminals."<sup>(5)</sup> - It was an international treaty which expressly denoted the tribunal created by it as an "international" tribunal and which was concluded not only by the four Occupying Powers, but also by the many other United Nations

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(1) G. Schwarzenberger, *op.cit.*, p.334.

(2) Art.I of the Agreement of 8th August 1945 ("...after consultation with the Control Council for Germany...")

(3) Article 2 of the Charter.

(4) H. Kelsen, *op.cit.*, p.168.

(5) H. Kelsen, *op.cit.* p.168.

which adhered to it, after being invited in Article 5 of the Agreement to do so.<sup>(1)</sup>

## 2. The Jurisdiction of the Tribunal.

The judgment of the International Military Tribunal derives the Tribunal's jurisdiction from two different sources. It states: "the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world ..."

"The signatory Powers created this Tribunal, defined the law it was to administer and made the regulations for the proper conduct of the trial. In doing so they have done together what anyone of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law."<sup>(2)</sup>

Thus the jurisdiction of the Tribunal is based, in the first instance, on the joint sovereignty of the four Allied Powers over Germany. By the Berlin Declaration of 5th June, 1945, the four Allied Powers, then in complete control of Germany, assumed "supreme authority with respect to Germany including all the powers possessed by the German Government, the High Command, and any State, municipal or local government, or authority". The purpose of this measure was "to make provision for the cessation of any further hostilities on the part of the German armed forces for the maintenance of order in Germany and for the administration of the country...."<sup>(3)</sup>

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(1) H. Kelsen, *op.cit.*, p.168.

(2) Judgment, p.38.

(3) Preamble of the Declaration of 5th June, 1945, quoted by Quincy Wright, *op.cit.*, p.50.



It is held that a State may acquire sovereignty over a territory by declaration of annexation after subjugation of the territory, if that declaration is generally recognised by the other States of the world; and it is a fact that the Berlin Declaration has been recognised not only by the United Nations but also by neutral States.<sup>(1)</sup>

"This Declaration, however, differed from the usual declaration of annexation in that it was by several States, its purposes were stated, and it was declared not to effect the annexation of Germany."<sup>(2)</sup>

It has been argued that the greater right comprises the lesser one, and that therefore a State or States which are in a position to annex a territory appear to be entitled to declare the lesser policy of exercising sovereignty temporarily and for specific purposes. The Berlin Declaration has been constructed in this way. The exercise of powers of legislation, adjudication and administration in Germany by the four Allied Powers is thus permissible under international law and limited only by the rules of international law applicable to sovereign States in territory they have subjugated. From this it follows that the parties to the Agreement of 8th August 1945, had the power to enact the Charter annexed to the Agreement as a legislative act for Germany, provided they did not transgress fundamental principles of justice which even a conqueror ought to observe towards the inhabitants of annexed territory.<sup>(3)</sup>

In the passage of the Judgment quoted above,<sup>(4)</sup> reference is further made to the international basis of the Tribunal's jurisdiction. It has been pointed out that the words of the Judgment which are relevant in this connection: "...for it is not to be doubted that any nation has the right thus to set up special courts to administer law,"<sup>(5)</sup>

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(1) Quincy Wright op cit. p.50; cf. A. Finch, op.cit, p.22; G. Schwarzenberger, op.cit, p.339, etc.

(2) Quincy Wright, op.cit, p.50.

(3) Quincy Wright, op.cit, pp.50-51.

(4) Judgment, p.38. (cf. p.5 note 2, above)

(5) Idem.

is subject to certain qualifications. For international law limits the criminal jurisdiction of a State; there is no doubt, however, that every State has the authority to set up special courts to try any person within its custody who commits war crimes - at least if such offences threaten its security.<sup>(1)</sup> It is believed that this jurisdiction is broad enough to cover the jurisdiction over violations of human rights of German citizens and Stateless persons which the Tribunal assumed.<sup>(2)</sup>

A third source of the jurisdiction of the International Military Tribunal is suggested by the Preamble of the Agreement of the 8th August 1945. It says that the "signatories" when concluding the Agreement, were "acting in the interests of all the United Nations", and Art. 5 of the Agreement declares that "any Government of the United Nations may adhere to this Agreement".<sup>(3)</sup> It is held by Quincy Wright that also Art. 5 of the Moscow Declaration and Art. 2(6) of the Charter of the United Nations support to some extent the idea that the four Powers, acting in the interest of the United Nations, had the right to legislate for the entire community of nations. He points out that the Charter of the United Nations assumed that the Organisation could declare principles binding on non-members. It is, in his view, therefore possible that the United Nations which created the Agreement of 8th August 1945, intended to act for the community of nations as a whole, thus making universal international law.

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(1) Quincy Wright, *op.cit.*, p.49.

(2) As this part of the Report deals exclusively with the jurisdiction over violations of human rights of German citizens and Stateless persons no attempt has been made here to examine the wider question of the jurisdiction conferred by the Charter in its full extent. (Cf. however, Part of this Report, p. ) As to the Universality of Jurisdiction over War Crimes, cf. H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, *The British Year Book of International Law*, 1944, (Vol. 21), p. 63 et seq. Quincy Wright, *op.cit.*, p. 45 and the authorities quoted there.

(3) *Op.cit.*, p. 51.



The Judgment of the International Military Tribunal does not make any reference to this conceivable source of its jurisdiction. Quinicy Wright, too, is of the opinion that it is not necessary to employ the source, since the right of the parties to the Agreement to give the Tribunal the jurisdiction which it asserted is amply supported by the position of these powers as the Government of Germany or by the sovereign right of each of them to exercise universal jurisdiction over the offences stated.

3. The Law applied by the Tribunal.

Article 6 of the Charter annexed to the Agreement of 8th August 1945, enumerates the offences falling within the Tribunal's jurisdiction. The provisions of Article 6 are in the words of the Judgment, "binding upon the Tribunal as the law to be applied to the case."<sup>(1)</sup>

As early as January, 1946, Lord Wright expressed the view<sup>(2)</sup> that it was not the Agreement which gave the acts defined in Article 6 of the Charter the character of offences, but that these acts were placed by the four Powers under the jurisdiction of the Tribunal because they were considered as offences already under existing law. He continued: "On any other assumption the court would not be a court of law but a manifestation of power." The Judgment expresses the same view: "The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is an expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."<sup>(3)</sup>

It is not necessary to deal here with those parts of the Judgment which set out that the provisions of the Charter concerning crimes

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(1) Judgment, p.3.

(2) "War Crimes under International Law, The Law Quarterly Review, Vol. 62 (January, 1946), p.41.

(3) Judgment, p.38.

against peace are merely declaratory of international law as it existed before the execution of the Agreement of 8th August 1945; for although the violations of human rights which are alone of interest in this part of the Report, - i.e., violations of human rights of German citizens and Stateless persons - were referred to in Count One of the Indictment, the restrictive interpretation given by the Judgment of the provisions of the Charter relating to the "common plan or conspiracy"<sup>(1)</sup> increases the importance of those provisions which concern crimes against humanity as a legal basis for the punishment of violations of human rights of German citizens and Stateless persons.

Article 6(c) of the Charter<sup>(2)</sup> provides that crimes against humanity "committed against any civilian population before or during the war" - "whether or not in violation of the domestic law of the country where perpetrated" fall within the jurisdiction of the International Military Tribunal if they are connected "with any crime within the jurisdiction of the Tribunal" (that is crimes against peace, or war crimes).

It is obvious that these provisions were chiefly meant to extend the jurisdiction of the Tribunal to acts of inhumanity which were committed by the Nazi régime against Germans and Stateless persons.

The authorities differ as to whether acts mentioned in Article 6(c) of the Charter constitute crimes under international law when undertaken in a State's own territory against its own nationals. Quincy Wright points out<sup>(3)</sup> that acts of this kind have repeatedly led to a "humanitarian intervention" by other States. He further refers to the numerous Conventions which place States under an obligation to respect certain fundamental rights of minorities, backward peoples, workers and other persons within their jurisdiction. He mentions

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(1) Cf. below, pp.10 et seq.

(2) As amended by the Protocol of 6th October 1945, cf.

(3) Op.cit., p.60.



finally that the acts which constitute crimes against humanity have repeatedly been the subject of extradition treaties and that the States have thus recognised the duty of co-operating in bringing to justice persons guilty of such crimes.

In opposition to these and other weighty arguments, it has been contended that there is no rule of international law, customary or conventional, establishing criminal responsibility for every misuse of national sovereignty. In particular, those of the acts mentioned in Article 6(c) of the Charter which were committed in peace time are, according to this view, covered by the conception of exclusively domestic jurisdiction.<sup>(1)</sup>

The International Military Tribunal examined with great care whether the crimes against humanity charged against the defendants were committed in connection with or in furtherance of a policy of planning and waging aggressive war or the perpetration of war crimes as defined in Article 6(b) of the Charter, and the Tribunal declined "to make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter."<sup>(2)</sup>

As has been said above,<sup>(3)</sup> every State is entitled under international law, to set up special courts to try any person within its custody who commits war crimes - at least if such offences threaten its security; crimes against humanity committed in connection with crimes against peace, or war crimes in the technical sense of the word, appear to fall within this category of offences.<sup>(4)</sup>

It can be said, therefore, that at the time of the creation of the Charter, an international basis existed for the jurisdiction over crimes against humanity connected with crimes against peace or war crimes,<sup>(5)</sup> and that the Tribunal confined itself to the jurisdiction over

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(1) G.A. Finch, *op.cit.*, p.23. G. Schwarzenberger, *op.cit.*, pp.353 and 354.

(2) Judgment, p.65.

(3) p.6, above.

(4) Cf. however, "Note on the Nuremberg Trials", signed P.D., *The Law Quarterly Review*, Vol.62, July, 1946, pp.230 and 231, where it is said that the provisions of Art.6(c) of the Charter which consider crimes against humanity committed in connection with crimes against peace or war crimes as crimes under international law are "the only element of novelty in the law" (that is in the Charter). Cf. also, G.Schwarzenberger, *op.cit.*, p.351 et.seq.

(5) cf. p.7, note 2, above.

this type of crimes against humanity.

4. Violations of Human Rights of German Citizens  
and Stateless Persons referred to in Count One  
of the Indictment, (The Common Plan or Conspiracy.)

Violations of human rights of German citizens and Stateless persons are mentioned in Count I of the Indictment<sup>(1)</sup> in connection with the measures taken by the Nazis in order first to seize totalitarian control of Germany and then to consolidate their position of power.

Under the heading "The acquiring of totalitarian control of Germany: "Political", the following is stated:

" In order to accomplish their aims and purposes, the Nazi conspirators prepared to seize control over Germany to assure that no effective resistance against them could arise within Germany itself."

In this connection, it is said that a few weeks after Hitler's appointment as Reich Chancellor the clauses of the Weimar Constitution guaranteeing personal liberty, freedom of speech, of the Press, of association and assembly were suspended, that the Nazis shortly afterwards secured the passage by the Reichstag of a "Law for the Protection of the People and the Reich" giving Hitler and the members of his cabinet plenary powers of legislation and that again a short time later all political parties except the Nazi Party were prohibited.

The Indictment goes on to describe how the Nazis set about the "consolidation of their position of power within Germany, the extermination of potential internal resistance and the placing of the German nation on a military footing". This policy included the reduction of the Reichstag to a body of Nazi nominees; the curtailment of the freedom of popular elections, the transformation of the states, provinces and municipalities, which had formerly exercised semi-autonomous powers, into hardly more than administrative organs of the central government; the purge of civil servants; and the restriction of the independence of the judiciary, which was rendered subservient

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(1) Indictment, Count I, Section IV (D) and (E), Proceedings, p.



to Nazi ends". - "In order to make their rule secure from attack and to instil fear in the hearts of the German people", the Nazis established "a system of terror against opponents and supposed or suspected opponents of the régime". They imprisoned such persons without judicial process, holding them in "protective custody" and concentration camps, and subjected them to persecution, degradation, despoilment, enslavement, torture and murder. - In addition to the suppression of distinctively political opposition, certain other movements and groups, which the Nazis regarded as obstacles to their retention of total control in Germany and to the aggressive aims of the conspiracy abroad" were suppressed. These were, according to the Indictment, in particular the free trade unions, the Christian churches, and certain pacifist groups. The free trade unions were destroyed by confiscating their funds and properties, persecuting their leaders, prohibiting their activities, and supplanting them by an affiliated Party organisation. With these and other measures, "any potential resistance of the workers was frustrated and the productive labour capacity of the German nation was brought under the effective control" of the Nazis. To eliminate the Christian churches in Germany a programme of persecution of priests, clergy and members of monastic orders, who were thought opposed to the purposes of the Nazis, was pursued, and church property was confiscated. "Particularly relentless and cruel" was the persecution of pacifist groups, including religious movements dedicated to pacifism. - Among the measures which were to serve the Nazis for the consolidation of their position in Germany, the persecution of the Jews is also mentioned. The Nazis embarked on a policy of relentless persecution of the Jews designed to exterminate them. The annihilation of the Jews became indeed an official State policy, carried out both by official action and by incitement to mob and individual violence. The programme of action against the Jews included disfranchisement, stigmatisation, denial of civil rights, violence, deportation, enslavement, enforced labour, starvation, murder and mass extermination. - It was further

alleged in the Indictment that "in order to make the German people amenable to their will and to prepare them psychologically for war", the Nazis reshaped the educational system and particularly the education and training of the German youth, that they imposed a supervision of all cultural activities and controlled the dissemination of information and the expression of opinion within Germany as well as the movement of intelligence of all kinds from and into Germany.

Under the heading "The Acquiring of Totalitarian Control in Germany: Economic", the Indictment next describes how the Nazis, after they had gained political power "organised Germany's economy to give effect to their political aims"; and it proceeds to show how the Nazis used the political and economic control of Germany, which they had gained by innumerable violations of individual and civic rights guaranteed by the Weimar Constitution, for the realisation of their aggressive plans.

In the submission of the Indictment, the measures adopted by the Nazis in furtherance of their intentions to acquire totalitarian control of Germany and then to consolidate their power within that country, are to be considered as "steps deliberately taken to carry out the common plan".<sup>(1)</sup> It follows that all violations of civil and individual rights which enabled the Nazis to gain and to retain power in Germany, are covered by Article 6(a) of the Charter.

It is now proposed to examine the attitude of the Tribunal towards the above mentioned submissions presented by the Prosecution.

The Judgment begins by reviewing the growth of the Nazi Party "to a position of supreme power from which it controlled the destiny of the whole German people and paved the way for the alleged commission of all the crimes charged against the defendants."<sup>(2)</sup>

It examines the origin and aims of the Nazi Party and shows that the Party programme, which was proclaimed in February 1920, and remained unchanged until the dissolution of the NSDAP in 1945, fore-shadowed the

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(1) Judgment, p.43.

(2) Judgment, p.3.



atrocities against the Jews, the measures for large-scale rearmament, the seizure of Austria and Czechoslovakia, and the war.<sup>(1)</sup>

Continuing, the Judgment speaks of the political activities of the Party and of the leaders of the NSDAP who, as early as their first election campaigns, hardly troubled to conceal their intention of destroying the democratic structure of the Weimar Republic and replacing it by a totalitarinn régime "which would enable them to carry out their avowed policies without opposition."<sup>(2)</sup>

The first steps towards the realisation of this aim were taken within a few weeks of Hitler's appointment as Reich Chancellor. In the same section<sup>(3)</sup> the Judgment draws attention to the Reichstag fire, which was used by Hitler and his Cabinet as a pretext for passing a decree suspending the constitutional guarantees of freedom; and points out that, soon afterwards on the basis of this decree, a substantial number of members of the parliamentary opposition was taken into "protective custody", with the final result that the Reichstag, intimidated by these and similar measures, passed the so-called "Enabling Act" which gave the Hitler Cabinet full legislative powers including the power to deviate from the Constitution.

In the paragraphs which follow the Judgment describes the measures which served the NSDAP for the consolidation of their position of power within Germany.<sup>(4)</sup> In this connection it recalls the violations of civic and individual rights which were set forth in the Indictment.<sup>(5)</sup> The judgment evidently considers these violations also as part of a policy which aimed at the elimination of all opposition, the complete control of Germany's political and economic life, the uniting of the people in support of the Nazi Government's policies in particular the policy of

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(1) Judgment, p.4.

(2) Judgment, p.5.

(3) Judgment, p.6.

(4) Judgment, pp.7 et seq.

(5) Section IV (D), (E), cf.p.11 et seq., above.

large-scale rearmaments, - the organisation of the nation's resources so as best to serve the purposes of war and which, in this way, prepared for war. Yet, in this part of the Judgment it already becomes clear that the Tribunal does not share the opinion of the Prosecution, which regarded any participation in these policies and the resulting violations of civic and individual rights as constituting evidence of a participation in a conspiracy declared criminal under Article 6(a) of the Charter.

The history of the Nazi Party and the steps which it took, first to seize and then to retain power in Germany, are reviewed by the Judgment merely in order to show "the background of the aggressive war and war crimes charged in the Indictment".<sup>(1)</sup> When this has been done, and only then, the Judgment turns to "the question of the existence of a common plan and the question of aggressive war."<sup>(2)</sup> It is only after it has examined the activities of the Nazi Party in Germany that the Tribunal turns to Counts One and Two of the Indictment and to the facts which appear relevant in connection with them: "The Tribunal now turns to the consideration of the crimes against peace. Count One of the Indictment charges the defendants with conspiring or having a common plan to commit crimes against peace. Count Two of the Indictment charges the defendants with committing specific crimes against peace .... It will be convenient to consider the question of the existence of a common plan and the question of aggressive war together ..."<sup>(3)</sup>

The Judgment goes on to observe that in "Mein Kampf", Hitler had already stated the aims of his foreign policy, which were later to lead to war. It next deals with the all-important meetings of 5th November 1937, 23rd May 1939, 22nd August 1939 and 23rd November 1939, where Hitler disclosed his concrete plan of aggression to his confidants.<sup>(4)</sup>

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(1) Judgment, p.3.

(2) Judgment, p.13.

(3) Judgment, pp.12 and 13.

(4) Judgment, pp.14 - 17.



The Judgment then discusses the several aggressive acts and aggressive wars undertaken by the Nazis, the invasion of Austria being the first and the war against the U.S.A. the last.<sup>(1)</sup>

In general terms the Judgment pronounces its opinion on the concept of the Prosecution referred to above.<sup>(2)</sup> in the section dealing with "The Law as to the Common Plan or Conspiracy."<sup>(3)</sup> Summarising the argument of the Prosecution, it declares: "The Prosecution says in effect, that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal;"<sup>(4)</sup> and it continues: "Conspiracy is not defined in the Charter but in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning to criminal must not rest merely on the declarations of a Party programme such as are found in the 25 points of the Nazi Party announced in 1920, or the political affirmations expressed in "Mein Kampf" in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan."<sup>(5)</sup>

The Judgment then observes once more that the seizure of power by the Nazi Party and the subsequent extension of its power over all spheres of Germany's economic and social life must be remembered when the later plans for waging wars are examined,<sup>(6)</sup> and it declares: "That plans were made to wage wars as early as 5th November, 1937<sup>(7)</sup> and probably before that, is apparent..."<sup>(8)</sup> In the opinion of the Tribunal,

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(1) Judgment, pp.17-36.

(2) Page 13, above.

(3) Judgment, p.42 et seq.

(4) Judgment, p.43.

(5) Judgment, p.43.

(6) Cf. Judgment, p.3 and p. 15 above,

(7) The first of the meetings mentioned on p.15 above in which Hitler disclosed his concrete plan of aggression.

(8) Judgment, p.43.

however, it is not necessary to decide "whether a single master conspiracy to the extent and over the time set out in the Indictment has been proved..." "But the evidence establishes with certainty the existence of many separate plans rather than a single conspiracy embracing them all".<sup>(1)</sup>

The tie which binds the defendants together is, in the submission of the Indictment, the common plan or conspiracy to commit crimes against peace.<sup>(2)</sup> All the defendants were charged in the Indictment with this offence, and it was moreover the only offence alleged against all the defendants.

An examination of the parts of the Judgment which deal with the individual defendants shows that, first of all, Goering, Keitel, Raeder and Neurath were found to be participants in a concrete plan to wage war. Goering, Raeder and Neurath took part in the so-called Holzsaeh Conference of 5th November 1937<sup>(3)</sup> where Hitler spoke of the problem of living space and of the annexation of Austria and Czechoslovakia, which would remove "any threat from the flanks in case of a possible advance westwards", and moreover strengthen the German war potential. The detailed statement of Hitler's objects and the definite time-table given at this Conference make it clear that this statement was not just a repetition of the rather indefinite aims announced so often before; the latest dates for the annexation of Austria and Czechoslovakia were now laid down by Hitler <sup>as falling between 1943 and 1945 at the latest.</sup><sup>(4)</sup> Keitel was present at the Conference of 23rd May 1939<sup>(5)</sup> when Hitler announced his decision "to take Poland at the first suitable opportunity".<sup>(6)</sup> Participation in the above-mentioned conference<sup>(7)</sup> constitutes only one of the grounds on which

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(1) Judgment, p.43.

(2) It is not necessary to discuss here the opinion of the Prosecution concerning the conspiracy to commit war crimes and crimes against humanity which has been rejected by the Tribunal; cf. however, Judgment, p.44, and Part of the Report, p.

(3) Cf. pp. 15 and 16 above and Judgment, pp.84, 111 and 125.

(4) Judgment, p.16.

(5) Cf. pp.15 and 16, above.

(6) Judgment, p.91.

(7) pp.15 and 16 above.



the four above named defendants were found guilty on Count 1. However, in several cases where defendants were declared not guilty under Count 1, the Tribunal mentions expressly that they had not taken part in any of these conferences,<sup>(1)</sup> and shows in this way the importance which it attached to this point. Yet it must be noted that Hess, Ribbentrop, Rosenberg and Jodl were found guilty on Count 1 for different reasons, none of them having been present at any of these conferences.<sup>(2)</sup> The remaining defendants were found not guilty on Count 1.

It is shown with the greatest possible clarity in the part of the Judgment which deals with Frick, that in the opinion of the Tribunal the responsibility for violations of human rights of German citizens committed during the period of seizure of power by the NSDAP and the consolidation of its position in Germany cannot be considered as participation in a conspiracy within the meaning of Article 6(a) of the Charter.

Frick took over the office of Minister of the Interior in the Cabinet formed by Hitler in 1933, and it cannot be doubted that he was largely responsible for the previously mentioned violations of civic and individual rights of German citizens. In regard to these the Judgment says: "...The new Minister of the Interior immediately began to incorporate local governments under the sovereignty of the Reich. The numerous laws he drafted, signed and administered abolished all opposition parties and prepared the way for the Gestapo and their concentration camps to extinguish all individual opposition. He was largely responsible for the legislation which suppressed the trade unions, the Church, the Jews. He performed his task with ruthless efficiency".<sup>(3)</sup> It is nevertheless in accordance with the

(1) Cf. Judgment, p.99 (Frick); p.100 (Streichler); p.107 (Doenitz); p.128 (Bormann).

(2) As regards Hess, the Judgment says, inter alia, "...Hess was Hitler's closest personal confidant; their relationship was such that Hess must have been informed of Hitler's aggressive plans when they came into existence (Judgment, p.87). Ribbentrop's participation in concrete plans is proved by his rôle in the diplomatic activity preceding the aggression against Poland (Judgment p.69). In the case of Rosenberg it has been proved that he was one of the originators of the plan for attacking Norway (Judgment, p.95) and in Jodl's case his participation in the plan concerning the aggression against Norway, Greece, Yugoslavia and Russia (Judgment, p.117).

(3) Judgment, pp.98 and 99.

notion of conspiracy, as defined by the Judgment, that he was not found guilty on Count 1. Thus the Judgment continues: "Before the date of the Austrian aggression Frick was concerned only with domestic administration within the Reich... Consequently, the Tribunal takes the view that Frick was not a member of the common plan or conspiracy to wage aggressive war as defined in this Judgment."<sup>(1)</sup>

The Judgment arrives at a similar conclusion when dealing with the "Leadership Corps" of the Nazi Party, the Gestapo and S.D., and the S.S. It was, in the words of the Judgment, "the primary purposes of the Leadership Corps from its beginning... to assist the Nazis in obtaining and, after January 30th, 1933, retaining control of the German State."<sup>(2)</sup> In its examination of the detailed activities of this organisation, the Judgment states, inter alia, that it was one of the tasks of the Leadership Corps to ensure the highest possible proportion of "Yes" votes in the plebiscites, and that high ranking political leaders were engaged in collaboration with the Gestapo and S.D., in tracking down political opponents, many of whom were arrested and deported to concentration camps.<sup>(3)</sup> Continuing, the Judgment declares: "These steps which relate merely to the consolidation of control of the Nazi Party are not criminal under the view of the conspiracy to wage aggressive war which has previously been set forth."<sup>(4)</sup> This is one of the reasons why persons who had ceased to hold the positions enumerated in the Judgment prior to the 1st September, 1939, did not fall within the group of members of the Leadership Corps, which has been declared criminal.<sup>(5)</sup>

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(1) Judgment, p.99. In view of his activities concerning the annexation of Austria, the Sudetenland, Memel, Danzig, the Eastern Territories, etc., Frick was found guilty on Count 2 (Crimes against Peace.)

(2) Judgment, p.68.

(3) Judgment, p.68.

(4) Judgment, p.68.

(5) Judgment, p.71.



The view adopted in regard to the Leadership Corps applies, mutatis mutandis, in the cases of the Gestapo and S.D. and the S.S. The participation of these organisations in the so-called consolidation of the Nazi Party's position in Germany is, in the opinion of the Tribunal, not less important than that of the Leadership Corps. In this case, again, persons who resigned their relevant functions before the 1st September 1939, did not fall within the groups declared criminal, for the same reasons as were set out in the case of the Leadership Corps. (1)

A view deviating from the opinion of the Judgment, discussed in the preceding paragraphs, appears to be represented in the "Dissenting Opinion" of the Soviet member of the International Military Tribunal Major-General Jurisprudence I.T.Nikitchenko. Dealing with "The Unfounded Acquittal of Defendant von PAFEN" (2) the learned judge begins with summarising the facts which, in his opinion, show von Papen's responsibility. He points out, inter alia, that Papen revoked Bruening's order dissolving the S.S. and S.A., "thus allowing the Nazis to realise their programme of mass terror;" that "by the application of brute force (he) did away with the Social-Democratic Government of Braun and Severing"; he "participated in the purge of the State machinery of all personnel he considered unreliable from the Nazi point of view; on the 21st March 1933, he signed a decree creating special political tribunals"; he also signed "an order granting amnesty to criminals whose crimes were committed in the course of the "national revolution".

From these and other facts the learned judge concludes that "von Papen actively aided the Nazis in their seizure of power"; and "used both his efforts and his connections to solidify and strengthen the Hitlerian terroristic régime in Germany...."

As von Papen was only charged under Counts 1 and 2, it is obvious that he was considered as having participated in the conspiracy to commit crimes against peace.

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(1) Judgment, pp.75 and 79.

(2) Judgment, pp.137-8.

The opinion of the Soviet member of the International Military Tribunal that the responsibility for violations of civic and individual rights of German citizens, which occurred in the period of consolidation of the Party's position in Germany, is to be treated as participation in a conspiracy within the meaning of Article 6(a) of the Charter, can also be deduced from Section V, "Incorrect Judgment With Regard to the Reich Cabinet" <sup>(1)</sup> of the "Dissenting Opinion". After it has been stated that the Reich Cabinet was "the directing organ of the State with a direct and active rôle in the working out of the criminal enterprises", the legislative activities of the Cabinet which violated civic and individual rights guaranteed by the Weimar Constitution are reviewed. The following enactments and measures are mentioned, inter alia the decrees ordering the confiscation of the property of all communistic and social-democratic organisations, respectively; the law of the "Reconstruction of the Reich", whereby democratic elections were abolished for both central and local representative bodies; the previously mentioned Law of 7th April 1933, and others whereby politically unreliable persons were removed from Government service; the destruction of the free trade unions; the creation of the Gestapo and concentration camps; the Nuremberg laws against the Jews, etc.

It is in view of these activities, that, in the opinion of the Soviet member of the International Military Tribunal the Reich Cabinet ought to be declared a criminal organisation.

However, the "Dissenting Opinion" deals - apart from the case of HESS where the death penalty is considered more appropriate than the sentence passed - exclusively with accused persons who were acquitted. No dissenting opinion is expressed, for instance, on the verdict whereby FRICK was found not guilty on Count 1, nor on the findings which excluded members of some organisations who had resigned their functions prior to the 1st September 1939, from the groups declared criminal. The verdict concerning FRICK and the findings with regard

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(1) Judgment, p.142 et seq.



to members of certain organisations follow, as has been shown above,<sup>(1)</sup> from the opinion of the Tribunal that the participation in the previously mentioned measures during the "seizure of power" and "consolidation" cannot be qualified as participation in a conspiracy as defined by the Tribunal.

5. Violations of Human Rights of German Citizens and Stateless Persons referred to in Count 4 of the Indictment, (Crimes against Humanity).

Count 4 of the Indictment,<sup>(2)</sup> comprises crimes against humanity committed within and outside of Germany, committed before and during the war, and crimes directed against co-nationals and aliens.

As this part of the report is concerned exclusively with crimes against humanity committed against German citizens (and Stateless persons), it is first of all proposed to extract those offences from the material contained in the Indictment.

The Indictment distinguishes between "murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations before and during the war",<sup>(3)</sup> on the one hand, and "persecutions on political, racial, or religious grounds in execution of and in connection with the common plan"<sup>(4)</sup> mentioned in Count 1,<sup>(5)</sup> on the other hand. The Indictment does not, however, contend that only the second type of crimes against humanity (persecutions, etc), is connected with a common plan, for it makes the same contention with regard to the first type (Murder, extermination, etc).<sup>(6)</sup> Neither does the Indictment contend that only crimes against humanity of the first type were committed before and during the war, for it

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(1) p. 18 et seq.

(2) Indictment, Section X.

(3) Indictment, Section X(A).

(4) The common plan to which reference is made comprises not only crimes against peace, but also war crimes and crimes against humanity. Cf. Judgment, p. 44 and Part of the Report, p.

(5) Indictment, Section X(D).

(6) "This plan involved ... murder and persecution of all who were, or who were suspected of being, opposed to the common plan alleged in Count 1". (Indictment, Section X - Introduction.)

alleges that those of the second type were also committed in both periods.

The following crimes against humanity cited under the heading "murder, extermination, etc.", are of interest in this part of the report: the "policy of persecution, repression and extermination of all civilians in Germany who were, or who were believed to, or who were believed likely to become hostile to the Nazi Government and the common plan or conspiracy described in Count 1"; the imprisonment of such persons without judicial process; their detention in "protective custody" and concentration camps where they were subjected "to persecution, degradation, despoilment, enslavement, torture and murder."

The Indictment speaks also of special courts the task of which it was to carry out the will of the Nazis; of "favoured branches or agencies of the State and Party"; which were permitted "to operate outside the range even of Nazified law and to crush all tendencies and elements which were considered undesirable"; and of various concentration camps, in particular of Buchenwald and Dachau, which were established as early as 1933 and 1934 respectively, and of their inmates who were put to slave labour and murdered and ill-treated, - acts and policies which were continued (and extended to the occupied countries) after 15th September 1939, and until the 8th May, 1945.

Under the heading "Persecution on Political, Racial and Religious Grounds ..." <sup>(1)</sup> the Indictment mentions persecutions directed against Jews and persons whose political belief or spiritual aspirations were deemed to be in conflict with the aims of the Nazis. It is stated that Jews were systematically persecuted since 1933; that they were deprived of their liberty, thrown into concentration camps where they were murdered and ill-treated; and that their property was confiscated. The Indictment adds "hundreds of thousands of Jews were so treated before the 1st of September 1939". Going into details, the Indictment speaks of the anti-Jewish demonstrations which, by order

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(1) Indictment, Section X(B).



of the Gestapo, took place all over Germany in November, 1938. During these demonstrations Jewish property was destroyed and 30,000 Jews were arrested and sent to concentration camps, and their property was confiscated.

The Indictment also deals with the persecutions of the Jews after 1st September 1939, which were directed against both German Jews and the Jewish part of the inhabitants of occupied territories. - As examples of the persecution of political opponents (of German nationality) of the régime, the murder of the social-democrat, Breitscheid, and the Communist, Thaelmann, and the internment of "numerous political and religious personages" are quoted.

It would appear from the survey of the acts of inhumanity and persecution committed on political, racial or religious grounds, and enumerated in the Indictment, that only part of the violations of human rights dealt with in Count One of the Indictment have been classified by the prosecution as crimes against humanity.

It is not the intention of this report to examine in detail which specific human rights have been violated by this or that crime against humanity. It is, however, possible to indicate some violations of human rights which manifestly do not constitute crimes against humanity.

It has been pointed out<sup>(1)</sup> that, in the opinion of the Prosecution, the notion of conspiracy to commit crimes against peace covers acts such as the destruction of the parliamentary system in Germany; the prohibition of all political parties, with the exception of the NSDAP; the curtailment of the freedom of popular elections; and the transfer of plenary powers of legislation to Hitler and his Cabinet. The Indictment also considers participation in the legislative and administrative measures which reduced the powers of regional and local governments throughout Germany, transforming them into subordinate divisions of the Central Government, as evidence of participation in a conspiracy which is criminal under Article 6(a) of the Charter. The

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(1) cf. page 10 et seq. above.

same applies to the restriction of the Independence of the judiciary, the removal of Jews from the Bench for political or racial reasons, and the discharge of civil servants of "non-Aryan descent", and of those whose political views did not comply with the requirements of the régime. Similarly, in the opinion of the Prosecution, participation in the destruction of the free trade unions in Germany, the attempt of the National-Socialist régime to subvert the influence of the Churches over the people and, in particular, over the youth of Germany, the educational measures of the régime and its control over the dissemination of information and the expression of opinion within Germany, constitutes participation in a common plan to commit war crimes, as set out in Count One.

These and similar violations of civic and individual rights of German citizens remain, however, outside the field covered by Count

4. (1) The crimes against humanity (committed against German citizens) which are contained in the Indictment, are violations of the integrity of life and body, violations of the right to life and of the right to personal liberty, and - to a minor extent - violations of property rights. They were directed against members of political and religious groups, who were deemed to be opponents of the National Socialist régime, and, above all, against the Jews.

The field of violations of human rights of German citizens covered by Count 1 is wider than that of the violations of this kind covered by Count 4. And, moreover, the violations in Count 1, so far as they concern German citizens, include those in Count 4. The violations of human rights of German citizens, which appear in Count 4, are, in other words, part of the violations included in Count One.

The Indictment cites both acts of inhumanity and persecution on political, racial or religious grounds, which were committed prior to the outbreak of war, and those committed during the war.

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(1) As basis for comparing the contents of Count 1 and Count 4, use has been made of the Indictment and Judgment. After examination of the transcripts, some qualifications may become necessary.



The connection with (either) crimes against peace (or war crimes) required by Article 6(c) of the Charter<sup>(1)</sup> is established in the opinion of the Indictment, by the policy in which the crimes against humanity originated. The Indictment emphasises repeatedly that they were persecution, repression and extermination of all civilians who were considered by the Nazi régime as hostile to the common plan or conspiracy described in Count 1.<sup>(2)</sup>

To discover the opinion of the Tribunal, it is proposed first to examine the section of the Judgment dealing with war crimes and crimes against humanity in general.<sup>(3)</sup>

Here, we find that the section "Murder and Ill-treatment of Civilian Population"<sup>(4)</sup> is concerned exclusively with war crimes and crimes against humanity committed during the war. It dwells at some length on the brutal suppression of all opposition to the German occupation authorities, but it refrains from examining the persecution of opponents of the Nazi Government in Germany, as mentioned in the Indictment.

This section of the Judgment alludes moreover to the measures taken against Jews (during the war); and more especially to those directed against the Jews in occupied territories. It does not, however, attempt to distinguish between Jews of Allied nationalities and German Jews.

The fate of the German Jews before and during the war is reviewed in detail in the section "Persecution of the Jews".<sup>(5)</sup> This section recounts the discriminatory laws, enacted after the seizure of power, which limited the offices and professions permitted to Jews; and the restrictions which were placed on their family life and their rights

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(1) Cf. p.10 above, and part of the Report, p.

(2) Cf. p. above, particularly foot-note No.

(3) Judgment, pp.44-46.

(4) Judgment, p. 48, et seq.

(5) Judgment, p.60 et seq.

of citizenship.<sup>(1)</sup>

It is observed that, by the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Among the measures instanced as belonging to this period were: the organised Pogroms, the collective fine of one billion marks imposed on the Jews; the seizure of Jewish estates; the regulations restricting the movement of Jews to certain specific districts within certain hours; the creation of Ghettos, etc. - The Judgment then turns to the extermination of the Jews during the war. The offences described here occurred mostly in the occupied territories. Their victims were millions of Jews, mainly of Polish and Russian origin. It is, however, clear from the text that the Jews of no country were spared.

After dealing in general terms with war crimes and crimes against humanity, the Judgment discusses "The Law Relating to War Crimes and Crimes against Humanity"<sup>(2)</sup> and states with respect to the crimes against humanity of interest here: "... There is no doubt whatever that political opponents were murdered in Germany before the war and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale and, in many cases, was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt."<sup>(3)</sup>

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(1) The violations referred to in this passage interfered partly with fundamental rights and freedoms which are not involved in the crimes against humanity mentioned in the Indictment. (cf. pp. 23 et seq., above). However, in view of the negative attitude of the Tribunal towards the question of crimes against humanity committed before the war, little practical importance attaches to this difference.

(2) Judgment, p. 60 et seq.

(3) Judgment, p. 65.



After having established the facts, the Judgment continues:

"To constitute crimes against humanity the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal."<sup>(1)</sup>

As mentioned above, the necessity of establishing a connection between crimes against humanity committed before the war and crimes against peace, or war crimes, had been appreciated in the Indictment.<sup>(2)</sup>

Without expressing any opinion on the points put forward by the Prosecution, the Judgment proceeds: "The Tribunal is of the opinion that, revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhuman acts charged in the Indictment and committed after the beginning of the war did not constitute war crimes they were all committed in execution of, or in connection with, the aggressive war and therefore constituted crimes against humanity."<sup>(3)</sup>

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(1) Judgment, p.65.

(2) Cf. p. above. Additional arguments for this connection were submitted by the Prosecution during the proceedings. It was pointed out that the collective fine imposed on the Jews in 1938 and the confiscation of their financial holdings were apparently intended to procure the means required for armaments.

Moreover, an article entitled "Jewish question as a factor in German policy in the year 1938", published in 1939 in the German Foreign Office Circular, was submitted with the object of showing that the connection of the anti-Semitic policy with aggressive war was not limited to economic matters. The article said, *inter alia*, "It is certainly no coincidence that the fateful year 1938 has brought nearer the solution of the Jewish question simultaneously with the realisation of the idea of Greater Germany, since the Jewish policy was both the basis and the consequence of the events of the year 1938...The destructive Jewish spirit in politics, economy and culture paralysed the power and the will of the German people to rise again...The healing of this sickness among the people was therefore certainly one of the most important requirements for exerting the force which in the year 1938 resulted in the joining together of Greater Germany in defiance of the world".(cf. Judgment, p.61).

(3) Judgment, p.65.

It remains to be examined in what manner the law established by the Tribunal has been applied in the sections of the Judgment dealing with the accused individually.

The Tribunal declined to make a general declaration "with regard to crimes against humanity committed before the war". It will have to be seen whether, at least in specific cases, inhuman acts committed against German citizens before the war were considered as crimes against humanity within the meaning of Article 6 (c) of the Charter.

Finally, as in the opinion of the Tribunal, all inhumane acts cited in the Indictment and committed during the war constitute war crimes or crimes against humanity within the meaning of the Charter, it will probably be possible to discover among the offences for which the accused have been held responsible crimes against humanity committed against German citizens or Stateless persons during the war.

The two sections of the general part of the Judgment which deal, inter alia, with crimes against humanity committed against German citizens and Stateless persons, have already been reviewed.<sup>(1)</sup>

Offences of this type falling within the pre-war period are, also, the subject of the parts of the Judgment concerning Goering, Frick, Streicher and Funk.

Of Goering it is said:<sup>(2)</sup> "Goering persecuted the Jews, particularly after the November 1938 riots, and not only in Germany where he raised the billion Mark fund as stated elsewhere..."<sup>(3)</sup>

Concerning Frick, the Judgment states: "Always rabidly anti-Semitic, Frick drafted, signed and administered many laws designed to eliminate Jews from German life and economy. His work formed the basis of the Nuremberg decrees, and he was active in enforcing them: Responsible for prohibiting Jews from following various professions and for confiscating their property..."<sup>(4)</sup>

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(1) pp. 26 et seq. above.

(2) These and the following quotations are taken from the sections of the relevant parts of the Judgment entitled "War Crimes and Crimes against Humanity".

(3) Judgment, p. 85.

(4) Judgment, p. 99.



" The police officially fell under the jurisdiction of the Reich Minister of the Interior, but Frick actually exercised little control over Himmler and police matters. However, he signed the law appointing Himmler Chief of the German Police, as well as the decrees establishing and regulating the execution of orders for protective custody. From the many complaints he received and from the testimony of witnesses the Tribunal concludes that he knew of atrocities committed in these camps." (1)

And in regard to Streicher: "For his twenty-five years of speaking, writing and preaching hatred of the Jews, Streicher was widely known as "Jew-baiter No.1". In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution. Each issue of the "Stürmer" which reached a circulation of 600,000 in 1935, was filled with such articles, often lewd and disgusting.

"Streicher had charge of the Jewish boycott of 1st April 1933. He advocated the Nuremberg decrees of 1935. He was responsible for the demolition, on 10th August 1938, of the Synagogue in Nuremberg; and on 10th November 1938 he spoke publicly in support of the Jewish Pogrom which was taking place at that time.

"But it was not only in Germany that this defendant advocated his doctrines. As early as 1938 he began to call for the annihilation of the Jewish race... Typical of his teaching was a leading article in September 1938, which termed the Jew a germ and a pest, not a human being, but "a parasite, enemy ... who must be destroyed ..."

"Other articles urged that only when world Jewry had been annihilated would the Jewish problem have been solved, and predicted that fifty years hence the Jewish graves "will proclaim that this people of murderers and criminals has, after all, met its deserved fate..." A leading article of "Der Stürmer" in May, 1939, shows

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(1) Judgment, pp.99-100.

clearly his aim: "A punitive expedition must come against the Jews in Russia... The Jews in Russia must be killed ..."

"As the war in the early stages proved successful in acquiring more and more territory for the Reich, Streicher even intensified his efforts to incite the Germans against the Jews. In the record are 26 articles from "Der Stürmer", published between August 1941 and September 1944, 12 by Streicher's own hand, which demanded annihilation and extermination in unequivocal terms...

"With knowledge of the extermination of the Jews in the occupied Eastern territories, this defendant continued to write and publish his propaganda of death...

"Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined by the Charter, and constitutes a ~~crime~~ crime against humanity."<sup>(1)</sup>

Of Funk it is said: "In his capacity as Under-Secretary in the Ministry of Propaganda and Vice-Chairman of the Reich Chamber of Culture, Funk had participated in the early Nazi programme of economic discrimination against the Jews. On 12th November 1938, after the Pogrom of November, ... he attended a meeting held under the Chairmanship of Goering to discuss the solution of the Jewish problem, and proposed a decree providing for the banning of Jews from all business activities which Goering issued the same day under the authority of the Four-Year Plan. Funk has testified that he was shocked at the outbreak of 10th November, but on 15th November he made a speech describing these outbreaks as a "violent explosion of the disgust of the German people"; and saying that the elimination of the Jews from economic life followed logically their elimination from political life."<sup>(2)</sup>

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(1) Judgment, pp.101-102.

(2) Judgment, p.103.



Goering, Frick, Streicher and Funk were found guilty on Count 4; crimes against humanity committed against German citizens (and Stateless persons) before the war constitute, however, only part of their offences, which include crimes against humanity committed against Allied nationals during the war. Consequently, it cannot be demonstrated with certainty in these cases that their crimes against humanity, committed against German citizens before the war, were relevant for the verdict on Count 4. The last paragraph of the section quoted above, <sup>(1)</sup> where the Judgment deals with Streicher, points rather in the opposite direction.

More enlightenment can be derived from the parts of the Judgment which concern the accused organisations. In the part referring to the Leadership Corps, under the heading "Aims and Activities," the pre-war activities of the organisation are reviewed, <sup>(2)</sup> and it is mentioned that members of the Leadership Corps collaborated with the Gestapo and S.D. in searching for political opponents and contributed to their arrest and detention in concentration camps. Under the heading "Criminal Activity" the Judgment says: "These steps which relate merely to the consolidation of control of the Nazi Party are not criminal under the view of the conspiracy to wage aggressive war, <sup>(3)</sup> which has previously been set forth". Persons who have resigned their membership prior to 1st September, 1939, fall therefore outside the group declared criminal. <sup>(4)</sup>

In the case of the Gestapo and S.D., under the heading "Criminal Activity" it is said: "Originally one of the primary functions of the Gestapo was the prevention of any political opposition to the Nazi régime, which it performed with the assistance of the S.D. The

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(1) Page 31 above.

(2) Cf. p. 19.

(3) No reference is made in the Judgment to crimes against humanity committed by members of this organisation before the war and to the opinion of the Tribunal with regard to such offences. (cf. p. et seq. above.

(4) Judgment, p. 71.

principal weapon used in performing this function was the concentration camp. The Gestapo ... was responsible for the detention of political prisoners in those camps. Gestapo officials were usually responsible for the interrogation of political prisoners at the camps.

"The Gestapo and the S.D. also dealt with charges of treason and with questions relating to the Press, the Churches and the Jews. As the Nazi programme of anti-Semitic persecution increased in intensity the role played by these groups became increasingly important. In the early morning of 10th November 1938, Heydrich sent a telegram to all offices of the Gestapo and S.D. giving instructions for the organisation of the Pogroms of that date, and instructing them to arrest as many Jews as the prison could hold "especially rich ones" ... By November 11th, 1938, 20,000 Jews had been arrested and many were sent to concentration camps..."<sup>(1)</sup>

In a subsequent passage, the Judgment deals with crimes against humanity committed in the occupied territories during the war. It then arrives at the following "Conclusion": "The Gestapo and S.D. were used for purposes which were criminal under the Charter involving the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories ..." <sup>(2)</sup> A group of members of the Gestapo and S.D. more closely defined in the Judgment was declared criminal: "The basis for this finding is the participation of the organisation in war crimes and crimes against humanity connected with the war." <sup>(3)</sup> Here, too, persons who had ceased to be members prior to 1st September 1939, are excluded from the criminal group.

In the case of the S.S., the picture is similar to that in the case of the Gestapo and S.D. Here, too, under the heading "Criminal Activity", the Judgment speaks of offences against German

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(1) Judgment, p.73.

(2) Judgment, p.75.

(3) Judgment, p.75.



citizens committed before the war. To mention one example only:

"From 1934 onwards the S.S. was responsible for the guarding and administration of concentration camps. The evidence leaves no doubt that the consistently brutal treatment of the inmates was carried out as a result of the general policy of the S.S., which was that the inmates were racial inferiors to be treated only with contempt".<sup>(1)</sup>

Also in the case of the S.S. (as in the case of the Leadership Corps and the Gestapo and S.D.) persons who belonged to the organisation only before the war, i.e. during a period in which nothing but crimes against humanity committed against German citizens and Stateless persons (before the war), can be charged against the organisation<sup>(2)</sup> are excluded from the group declared criminal. They are the persons who left the organisation prior to the 1st September 1939, that is, before the organisation became responsible for war crimes and crimes against humanity other than the type mentioned above.

The same principles were applied in the case of the S.A. Of the S.A. the Judgment says: "The S.A. was also used to disseminate Nazi ideology and propaganda and placed particular emphasis on anti-semitic propaganda ...

"After the Nazi advent to power and particularly after the elections of 5th March, 1933, the S.A. played an important rôle in establishing a Nazi reign of terror over Germany. The S.A. was involved in outbreaks of violence against the Jews and was used to arrest political opponents and to guard concentration camps, where they subjected their prisoners to brutal mistreatment.

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(1) Judgment, p.77.

(2) The part played by these organisations (in particular by the Gestapo and S.D.) in the atrocities committed in Austria and Czechoslovakia before the 1st September 1939, raises legal problems which have not been touched upon in this section of the report (cf. however, part p ). But nothing to be said in this connection affects the argument put forward in the text above.

"On 30th June and 1st and 2nd July, a purge of S.A. leaders occurred... This purge resulted in a great reduction in the influence and power of the S.A. After 1934, it rapidly declined in political significance....

"Some S.A. units were used to blow up synagogues in the Jewish pogrom of 10th and 11th November, 1938".

After having established these facts, the Judgment concludes:

"Up until the purge beginning on 30th June, 1934, the S.A. was a group composed in large part of ruffians and bullies who participated in the Nazi outrages of that period. It has not been shown, however, that these atrocities were part of a specific plan to wage aggressive war, and the Tribunal therefore cannot hold that these activities were criminal under the Charter." (1)

There was, moreover, no evidence to show that the members of the S.A. generally participated in war crimes and crimes against humanity committed after the 1st September, 1939. The Tribunal therefore declined to declare the S.A. to be a criminal organisation. (2)

The Soviet member of the International Military Tribunal, who expressed a dissenting opinion in all cases of acquittal, and, in particular, in all other cases where the Tribunal did not declare an accused organisation to be criminal, omitted to do so in the case of the S.A. He therefore seems to concur in the opinion of the Tribunal, as set forth in the preceding paragraphs in regard to crimes against humanity committed against German citizens (and Stateless persons) before the 1st September 1939.

In view of the above mentioned findings, it is submitted that in the cases of Goering, Frick, Streicher and Funk (3) also the verdict of guilty on Count 4 was not based on the crimes against humanity committed against German citizens (or Stateless persons) with which the defendants were charged.

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(1) Judgment, p.80.

(2) Judgment, p.80.

(3) Cf. p. 29, et seq., above.



The parts of the Judgment dealing with the accused individually frequently mention under headings such as "Crimes Against Peace", "War Crimes and Crimes Against Humanity", "Criminal Activities", etc., (evidently by way of illustration), facts which in themselves do not constitute offences falling, in the opinion of the Tribunal, within its jurisdiction. (1) No reliable conclusion can therefore be drawn from the fact that atrocities are mentioned under headings such as those mentioned above.

Crimes against humanity committed against German citizens and Stateless persons during the war are repeatedly mentioned in the parts of the Judgment dealing with individual defendants. (2)

It will be convenient in this connection, to deal first with the organisations which were declared criminal.

The Judgment says of the Leadership Corps that it was used to prevent German public opinion from reacting against the measures taken against the Jews in the East. In 1942, a confidential information bulletin was sent to all Gauleiters and Kreisleiters, entitled "Preparatory measures for the final solution of the Jewish question in Europe. - Rumours concerning the conditions of the Jews in the East." This bulletin contained no explicit statement that the Jews were being exterminated, but it did indicate that they were going to labour camps, and spoke of their complete segregation and elimination and the necessity of ruthless severity. The Judgment remarks that "Even at its face value it indicated the utilisation of the machinery of the Leadership Corps to keep German public opinion from rebelling at a programme which was stated to involve condemning the Jews of

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(1) Cf., for instance, the section relating to Goering where reference is made to facts which, in the opinion of the Tribunal (in this respect contrary to the opinion of the Prosecution) did not constitute participation in a conspiracy within the meaning of Arts. 6(a) of the Charter. (Judgment, p.84). Cf. further, the section "Criminal Activities of the Gestapo and S.D." (p.32 et seq., above) and others.

(2) As to the general part of the Judgment, cf. p.22 et seq. above.

Europe to a lifetime of slavery." Further, there is evidence that in August 1944, the Leadership Corps had knowledge of the deportation of 430,000 Jews from Hungary.

As to the Gestapo and S.D., the Judgment says: "On the 24th January, 1939, Heydrich, Chief of the Security Police and S.D., was charged with furthering the emigration, evacuation of Jews from Germany, and on 31st July 1941, with bringing about a complete solution of the Jewish problem in German dominated Europe. A special section of the Gestapo office of the RSHA under Standartenführer Eichmann was set up with responsibility for Jewish matters ... Local offices of the Gestapo were used first to supervise the emigration of Jews and later to deport them to the East, both from Germany and from the territories occupied during the war."<sup>(1)</sup> - The Judgment continues with the notorious history of the Einsatzgruppen and the wholesale slaughter of Jews.<sup>(2)</sup>

Describing the criminal activities of the S.S., the Judgment says:

"Through its control of the organisation of the police, particularly the Security Police and S.D., the S.S. was involved in all the crimes which have been outlined in the section of this Judgment dealing with the Gestapo and S.D."<sup>(3)</sup>

Mention has already been made of the responsibility of the S.S. as established by the Tribunal, for the guarding and administration of concentration camps.<sup>(4)</sup>

In regard to the individual defendants accused, the Judgment states, inter alia, that Goering was "the creator of the oppressive programme against the Jews ... at home and abroad;"<sup>(5)</sup> and that Kaltenbrunner, as chief of the RSHA since 1943 was responsible for

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(1) Judgment, pp.73-74.

(2) Judgment, p.74.

(3) Judgment, p.77.

(4) Cf, p.33-34.

(5) Judgment, p.86.



the offences which have been discussed in connection with the Gestapo and S.D. (1)

According to the Judgment, Rosenberg is held responsible for the confiscation of Jewish property. As Minister for Occupied Eastern Territories (from 1941 onwards) "he helped to formulate the policies of ... extermination of Jews ..., and set up the administration which carried them out"... "his directives provided for the segregation of Jews ultimately in Ghettos, his subordinates engaged in mass killing of Jews..." In December 1941, "Rosenberg made the suggestion to Hitler that in a case of shooting 100 hostages Jews only be used." (2)

In the opinion of the Tribunal, Frank, too, in his capacity of Governor General of the Occupied Polish Territory, is to be held responsible for the persecution of the Jews in the General Government. "The area originally contained from 2,500,000 to 3,500,000 Jews. They were forced in Ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation and, finally, systematically and brutally exterminated.... By 25th January, 1944, Frank estimated that there were only 100,000 Jews left." (3)

The crimes against humanity, against German citizens and Stateless persons, both before and during the war, for which Frick, Streicher and Funk were held responsible have been mentioned above.

Schierach, as the Tribunal established, was implicated in the persecution of the Jews. (4)

The examples of crimes against humanity committed against German citizens and Stateless persons during the war, which are instanced in the Judgment, were, speaking generally, directed against Jews regardless of their nationality. The Judgment indicates, in one or two passages, that there were German Jews amongst the victims; (5) as a rule, no attention is paid to the nationality of Jewish victims.

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(1) Judgment, pp.93 and 94. (cf. pp 32 and 33 above.)

(2) Judgment, pp.95 and 96.

(3) Judgment, p.97.

(4) Judgment, p.114.

(5) Cf. for example, Judgment, p.74 and p.37 above.

Crimes against humanity, committed against German citizens other than Jews, during the war, are only sparingly mentioned in the Judgment. All that can be discovered, indeed, apart from the facts stated in the general part of the Judgment and recorded above,<sup>(1)</sup> are one or two remarks in the section concerning Frick. There, it is said, that Frick signed the decrees establishing Gestapo jurisdiction over concentration camps, including the execution of orders for protective custody.<sup>(2)</sup> The Judgment points out in several passages that these decrees also affected German nationals both before and during the war.

No defendant was found guilty on Count 4 (Crimes against Humanity) merely in view of crimes against humanity committed against German citizens and Stateless persons during the war. The general opinion as to these offences held by the Tribunal<sup>(3)</sup> however, leaves no doubt that they were considered as falling within the jurisdiction of the Tribunal and were therefore taken into account.

#### 6. Summary and Conclusions.

The conclusions reached so far may be summarised as follows:

1. The International Military Tribunal is, in substance as well as in name, an international tribunal.

It has been suggested in certain quarters that it was the intention of the parties to the agreement of 8th August 1945, who, by debellatio had become the joint sovereigns of Germany, to establish in substance, joint military tribunals under municipal law, rather than a truly international tribunal. - On the other hand, it must be pointed out that the Tribunal originated, like any other international court or tribunal, in an international treaty and that it was not the Control Council for Germany but the Governments of the

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(1) Cf. p. et seq. above.

(2) Judgment, pp.99-100.

(3) Judgment, p.65 (cf. pp.28-29 above).



States, parties to the agreement, which established the Tribunal and appointed its members. Moreover, it should be noted that the four signatories were acting, to use the words of the Preamble of the Agreement, "in the interest of all the United Nations". The agreement was concluded, not only by the four occupying Powers, but also by the many other United Nations which adhered to it, and it was intended, - not for the prosecution of German war criminals only - but for the prosecution of the "Major War Criminals of the European Axis".

2. The judgment derives the jurisdiction of the Tribunal from two different sources:

(a) from the joint sovereignty over Germany assumed by the four Allied Powers which created the Tribunal. - It is generally accepted that sovereignty over territory is acquired if, after subjugation of this territory, a State declares its annexation and if, moreover, such declaration has been recognized by the other States of the world. The four Powers, then in complete control of Germany, assumed by the Berlin Declaration of 5th June 1945, "supreme authority with respect to Germany". They announced the limited purposes of their declaration and it was said not to effect any annexation. Since the wider right of annexation includes the lesser rights claimed by the Berlin Declaration, and since this declaration has been recognized by the United Nations and neutral States, the exercise of powers of legislation, adjudication and administration in Germany by the four Allied Powers, appears permissible under international law. Consequently, the parties to the Agreement of 8th August 1945, have the power to enact the Charter annexed to the Agreement as a legislative act for Germany.

(b) The Judgment further makes reference to the international basis of the Tribunal's jurisdiction. International law limits the criminal jurisdiction of a State; there is no doubt, however, that every State has the authority to set up special courts to try any person within its custody who commits war crimes - at least if such offences threaten its security. It is believed that this jurisdiction

is broad enough to cover the jurisdiction over violations of human rights of German citizens and Stateless persons, which the Tribunal assumed.<sup>(1)</sup>

(c) A third source of the jurisdiction of the Tribunal is suggested by the Preamble to the Agreement of 8th August 1945; it says that the "signatories" when concluding the Agreement, were "acting in the interests of all the United Nations"; and Article 5 of the Agreement declares that "any Government of the United Nations may adhere to this Agreement". Legal writers have pointed out that also Art. 5 of the Moscow Declaration and Art. 2(6) of the Charter of the United Nations support, to some extent, the idea that the Four Powers, acting in the interest of the United Nations, had the right to legislate for the entire community of nations.

The Tribunal does not make any reference to this probably conceivable source of its jurisdiction.

3. The provisions of the Charter annexed to the Agreement of 8th August 1945 are the law applied by the Tribunal. - The acts defined in the Charter did not acquire the character of offences only by virtue of the Charter; they were offences under international law already at the time of the creation of the Charter.

With regard to crimes against peace, this has been shown in great detail by the Judgment. As the legal basis for the punishment of violations of human rights which are of interest in this part of the report, i.e. the violations of human rights of German citizens and Stateless persons, will chiefly be found in the provisions of the Charter concerning crimes against humanity, it seemed appropriate to examine first, whether these provisions of the Charter are merely declaratory of international law as it existed before the execution of the Agreement of 8th August 1945.

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(1) Cf. p. 7, Note 2.



Crimes against humanity, as defined in Art. 6(c) of the Charter cover acts of inhumanity, and persecution on political, racial and religious grounds, committed within the territory of a State against its own nationals, whether they fall within the period before or during the war.

The question whether the Charter, insofar as it includes this type of crimes against humanity, is "an expression of international law, existing at the time of its creation",<sup>(1)</sup> is controversial.

The Judgment repeatedly stresses that the jurisdiction of the Tribunal is limited to those crimes against humanity which are connected with crimes against peace or war crimes and only atrocities where the Tribunal found sufficient evidence for this connection were taken into account in the verdict.

It has been said before that international law authorises every State to set up special courts to try any person within its custody who commits war crimes, - at least if such offences threaten its security; it appears that this jurisdiction comprises crimes against humanity connected with crimes against peace or war crimes. It is, therefore, submitted that at the time of the creation of the Charter an international basis existed for the jurisdiction over crimes against humanity connected with crimes against peace or war crimes; and that the tribunal confined itself to the jurisdiction over this type of crimes against humanity.

4. The core of the Nuremberg indictment is "the common plan or conspiracy" to commit crimes against peace (Count 1 of the Indictment). All defendants were charged with this offence and it is, at the same time, the only offence charged against all of them.

In the submission of the Indictment, the measures of the Nazis intended to promote their aims first to seize totalitarian control over Germany and later to consolidate their position of power within Germany are to be considered as "steps deliberately taken to carry out the common plan."<sup>(2)</sup> The destruction of the parliamentary system; the trans-

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(1) Judgment, p.38.

(2) Judgment, p.43.

formation of the States, provinces and municipalities, which had formerly exercised semi-autonomous powers, into administrative organs of the central government; the purge of the civil service; the restriction of the independence of the judiciary and their being rendered subservient to Nazi ends; the suppression of movements and groups which the Nazis regarded as obstacles to their retention of total control in Germany, such as the suppression of the free trade unions, the attempt to subvert the influence of the Churches over the people and in particular over the youth of Germany, and the persecution of pacifist groups; interference with the educational system; the strict control of the expression of opinion and the dissemination of information; the system of terror against opponents and suspected opponents of the régime, their imprisonment without judicial process, their detention in concentration camps where they were subjected to degradation, despoilment, enslavement, torture and murder; the policy of relentless persecution of the Jews, etc.etc. - all these violations of civic and individual rights, which served the Nazis to gain power in Germany and to retain it, are covered by Art. 6(a) of the Charter, as conceived by the Prosecution.

This ambitious scheme of the Prosecution which treats all violations of the fundamental rights and freedoms of German citizens, guaranteed by the Weimar Constitution, which can be traced back to the Nazi régime, as phases in the execution of the "common plan" - that is as crimes against peace which fall within the jurisdiction of the International Military Tribunal, - was rejected by the Tribunal.

The Judgment, too, considers the violations of civic and individual rights of German citizens cited in the Indictment as part of a policy, the aim of which it was to eliminate all opposition; to control completely the political and economic life of Germany; to unite the people in support of the policies of the Nazi Government, in particular of their policy of large scale re-armament; to organise the resources of the nation so as to serve best the purposes of war -



and thus to prepare for war itself. Yet, in the opinion of the Tribunal, all this forms part of a policy which in itself, is not criminal; it preceded the conspiracy, which is criminal under Art. 6(a) of the Charter, creating its political and economic pre-requisites; a conspiracy to be criminal, must centre round a concrete plan "clearly outlined in its criminal purpose" and "not too far removed from the time of decision and action".<sup>(1)</sup>

Only those accused whose participation in concrete plans of this sort were proved, were found guilty on Count 1 of the Indictment, (Common Plan or Conspiracy). They were Goering, Keitel, Raeder and Neurath, who were present at one or more of the meetings where Hitler disclosed his plans of aggression against Austria, Czechoslovakia and Poland; Hess, whose intimate relationship with Hitler places it beyond doubt that he knew of this and similar plans of Hitler's though he did not take part in any of those meetings; Ribbentrop, who was involved in the diplomatic activities preceding the aggression against Poland, and Rosenberg and Jodl who participated in the planning of the attack against Norway and Greece, Yugoslavia and Russia respectively.

On the other hand, Frick, for many years the Minister of the Interior of the Hitler Regime, whose responsibility for the violations of civic and individual rights of German citizens was established by the Tribunal beyond doubt, was not found guilty on Count 1, as "before the date of the Austrian Aggression he was concerned only with the domestic administration within the Reich."<sup>(2)</sup>

The opinion of the Tribunal that responsibility for violations of human rights of German citizens during the period of seizure of power by the NSDAP and consolidation of its position in Germany cannot be considered as participation in a conspiracy in the meaning of Art. 6(a) of the Charter, is, further shown in the parts of the Judgment dealing with the accused organisations. Also, the participation

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(1) Judgment, p. 43.

(2) Judgment, p. 99.

of the Leadership Corps, of the Gestapo and S.D., and of the S.S., in violations of human rights of German citizens, committed before the war, has been proved sufficiently. Nevertheless, persons who ceased to be members of these organisations prior to the first of September 1939, were excluded from the groups declared criminal.

5. An examination of the Indictment insofar as it refers to crimes against humanity committed against German citizens and Stateless persons, shows that only a part of the violations of human rights dealt with in Count 1 of the Indictment have been brought under the notion of crimes against humanity. The destruction of the parliamentary system in Germany and of the existing local government institutions, the purge of the civil service and the judiciary rendering them subservient to Nazi ends, the suppression of the free trade unions, the elimination of the influence of the churches, the interference with the educational system, the control of the expression of opinion and the dissemination of information, etc., all of which are covered by Count One, remain outside the field covered by Count 4 (crimes against humanity).

Crimes against humanity (committed against German citizens) which are cited in the Indictment are violations of the integrity of life and body, violations of the right to life and of the right to personal liberty, and, to a minor extent, violations of property rights. They are directed against members of political and religious groups, who were deemed opponents of the National Socialist Régime, and above all, against the Jews.

The category of offences classified in the indictment as crimes against humanity, was somewhat extended during the proceedings, but the fact remains that the field of violations of fundamental rights and freedoms of German citizens covered by Count 1 is considerably wider than that covered by Count 4 and that moreover, the first includes the latter; that, in other words, the violations of human rights of German citizens which are cited in Count 4 form part of those dealt with in Count 1.



The Indictment considers acts of inhumanity and persecution on political, racial or religious grounds, which were committed prior to the outbreak of war, not less crimes against humanity than those which fall within the time of war. The connection with (either) crimes against peace (or war crimes) required by Art. 6(c) of the Charter is, in the submission of the Indictment, shown by the policy from which these atrocities originated. The Indictment stresses repeatedly that they are to be considered as persecution, repression and extermination of all civilians in Germany who were deemed hostile to the common plan or conspiracy described in Count 1. They are the measures taken during the period of the seizure of power and of consolidation of the position of the Nazis in Germany. - It has been said before that in the opinion of the Tribunal, these measures formed part of a policy which, in itself, was not criminal, but created the political and economic basis for a conspiracy criminal under Art. 6(a) of the Charter. The crimes against humanity referred to in the Indictment are, therefore, merely connected with measures which preceded a conspiracy in the meaning of Art. 6(a) of the Charter as conceived by the Tribunal which, in itself, however, did not constitute crimes against peace, (i.e. participation in a common plan or conspiracy to commit crimes against peace.)

The Judgment states that acts of inhumanity and persecution referred to in the indictment which were committed before the outbreak of war, constitute crimes against humanity only if they were in connection with any crime within the jurisdiction of the Tribunal and declared, without expressing any view on the argument of the prosecution with respect to this point, that "it has not been satisfactorily proved that they were done in execution of or in connection with any such crime." (1)

The Tribunal declined to "make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter". (2)

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(1) Judgment, p. 65.

(2) Judgment, p. 65.

The parts of the Judgment dealing with the accused individually, mention frequently under headings such as "crimes against peace", "war crimes and crimes against humanity" and "criminal activities", etc., acts of inhumanity or persecution committed against German citizens before the war.

The verdicts in the cases of the Gestapo and S.D., and the S.S., show, however, clearly, that such atrocities were not considered as offences which fell within the jurisdiction of the Tribunal. Persons who belonged to the organisations only before the war, that is, during the period in which nothing but acts of inhumanity and persecution directed against German citizens and Stateless persons (committed before the war) can be charged against the organisations, are excluded from the groups declared criminal. They are the persons who left the organisations prior to the 1st September 1939, that is, before the organisations became responsible for war crimes, and crimes against humanity, other than the type mentioned before. - The same principles were applied in the case of the S.A., which the Tribunal declined to qualify as a criminal organisation.

With regard to the inhumane acts charged in the Indictment and committed after the beginning of the war, the Judgment states that insofar as they do not constitute war crimes they constitute crimes against humanity, as "they were all committed in execution of or in connection with aggressive war."<sup>(1)</sup>

Crimes against humanity committed against German citizens and Stateless persons during the war are referred to in the Judgment in exceptional cases only, and none of the accused was found guilty on Count 4 solely in view of such offences. The opinion as to these offences held by the Tribunal in general, however, leaves no doubt that they were considered to fall within the jurisdiction of the Tribunal and therefore taken into account.

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(1) Judgment, p.65.



III/118  
14 November 1947

UNITED NATIONS WAR CRIMES COMMISSION

MEETING OF COMMITTEE III

on 17 November, 1947,

at 3.30 p.m.

—

The attached Notes are distributed to members  
for information and for use at this meeting.

III/118  
14 November 1947

UNITED NATIONS WAR CRIMES COMMISSION

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UNITED NATIONS WAR CRIMES COMMISSION

## NOTES

on the meeting of the Legal Staff with  
Sir Robert Craik held on 13 November 1947

The meeting was held in order to determine the final text of the Report on Human Rights which is to be submitted to the United Nations.

The following individual contributions have been examined; Docs. III/96; III/107; III/108; III/108(1); III/109; III/110; III/111; III/112; III/113; III/114; III/115.

A number of verbal amendments have been made and also a number of amendments connected with the merging of the individual contributions which are to compose the Report as a whole. These will be explained orally to members of Committee III at their next meeting on Monday, 17 November, 1947, at 3.30 p.m.

The following definitive scheme has been agreed upon:

### PREFACE

(Being drafted)

### HISTORICAL SURVEY OF THE PROBLEM OF VIOLATIONS OF HUMAN RIGHTS

The text is in Doc. III/107.

### PART I

#### INFORMATION ON HUMAN RIGHTS PROTECTED BY THE LAWS AND CUSTOMS OF WAR

#### INTRODUCTION TO CHAPTERS I & II

(Being drafted)

### CHAPTER I

#### THE NUREMBERG TRIAL

##### A. The Legal Basis of the Trial

Text in Doc. III/113, p. 1-5.

##### B. Jurisdiction of the Tribunal

Text in Doc. III/113, p. 5-32.

##### C. Violations of the Rights of the Victims of War Crimes

(Being drafted as Doc. III/119, to be circulated)



CHAPTER II

THE TOKYO TRIAL

A. The Legal Basis of the Trial

Text in Doc. III/108, p. 1-4

B. Jurisdiction of the Tribunal

Text in Doc. III/108, p. 4-15 and III/108(1)

C. Violations of the Rights of the Victims of War Crimes

Text in Doc. III/109

D. Spheres in which the Rights of the Victims and the Rights of the Accused may be said to have conflicted at the time of the Offence

Text in Doc. III/111

Note: It has been decided to merge the text in Doc. III/110, which deals with the rights of the accused at the time of the trial, with the text in Doc. III/112, p. 57-84 (Coming under Chapter III, E, below).

Conclusions to Chapters I and II

(Being drafted)

CHAPTER III

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

A. Introduction

Text in Doc. III/96, p. 3-10

B. Legal Basis and Jurisdiction of War Crime Courts other than the International Military Tribunals

Text in Doc. III/116 to be circulated

C. Violations of the Rights of the Victims of War Crimes

Text in Doc. III/114, p. 2-36

D. Spheres in which the Rights of the Accused and the Rights of the Victims may be said to have conflicted at the time of the Offence

The text of the Section is sub-divided as follows, and is to be found in the following Documents:

1. Extent of Responsibility of a Commander for Offences committed by his troops

Text in Doc. III/112, p. 1-34.

2. Other Degrees of Liability

Text in Doc. III/114, p. 37-42.

3. Superior Orders

Text in Doc. III/112, p. 35-56.

4. Legality under Municipal Law

Text in Doc. III/114, p. 42-45.

5. Necessity

Text in Doc. III/114, p. 46-48.

6. Reprisals

Text in Doc. III/114, p. 48-50.

7. The Defence of Mistake of Law

Text in Doc. III/114, p. 50-52.

8. The Defence of Mistake of Fact

Text in Doc. III/114, p. 52-53.

9. Self-Defence

Text in Doc. III/114, p. 53-54.

Note: It has been decided to insert Part I of the text in Doc. III/115 in the appropriate parts of this section.

E. Rights of the Accused at the time of Trial

Text in Doc. III/112, p. 57-84.

F. Conclusions to Chapter III

(Being drafted)

PART II

INFORMATION ON HUMAN RIGHTS ARISING OUT OF THE RELATIONSHIP BETWEEN THE STATE AND PERSONS UNDER ITS JURISDICTION

INTRODUCTION

(Being drafted)



The remainder of the text will be considered at the next meeting of the Legal Staff with Sir Robert Craigie, which will take place before the meeting of Committee III on 17 November, 1947. This text is being duplicated for circulation to members.

The division to be considered is proposed as follows:

- A. Jurisdiction over Violations of Human Rights of German Citizens and Stateless Persons committed within the Territory of the German Reich.
  - 1. The International Military Tribunal for the trial of German Major War Criminals.
    - (a) The International Character of the Tribunal
    - (b) The Jurisdiction of the Tribunal
    - (c) The Law applied by the Tribunal
    - (d) Violations of Human Rights of German Citizens and Stateless Persons referred to in Count 1 of the Indictment
    - (e) Violations of Human Rights of German Citizens and Stateless Persons referred to in Count 4 of the Indictment
    - (f) Summary and Conclusions
  - 2. Municipal Courts dealing with Violations of Human Rights of German Citizens and Stateless Persons.

The sub-division in this Section will be similar to that under 1.
  - 3. Conclusions
- B. This Section could deal with the trials of quislings and traitors.

Doc. III/115, Part II, contains an account of the Trial of Pierre Laval.

GENERAL CONCLUSIONS

(Will be drafted if necessary)