

- 1) Witnesses to prove the general state of the camp at Belsen.
- 2) Showing of the film of what was found at Belsen,
- 3) Witnesses to prove the gas chambers at Auschwitz,
- 4) Evidence regarding each individual accused.

#### VII. RULES OF EVIDENCE.

In this connection it was mentioned that although this trial was by British Military law, under the regulations there have been certain alterations made in the laws of evidence for the obvious reason that if that were not so, many people would be bound to escape justice because of movements of witnesses and therefore affidavits may be put before the court. Therefore the prosecution would call all the witnesses available and then put the affidavits before the court and ask for that evidence to be accepted. (Regulation 8 (1) of the Royal Warrant A.O. 81/1945 provides that at any hearing before a Military Court convened under the Regulations the Court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the Court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a Field General Court-Martial. This general provision appears to cover Affidavits though affidavits are not mentioned among the particular instruments and documents enumerated, without prejudice to the generality of this general provision, under (a) to (f) *ibid.*)

#### VIII. HEARSAY EVIDENCE IN THE TRIAL.

On the second day, (18th September), Brigadier Hugh Llewellyn Glyn Hughes was examined by the prosecutor and questioned, inter alia, about Red Cross parcels sent by Jewish societies for interned Jews. The witness said that he was merely told how the boxes had got there. He could not give the name of the person who had told him.

The prosecutor said he had deliberately led up to this point. This was the first occasion in this trial where the question of the admission of hearsay evidence arose and before asking the witness to repeat what was told to him, the prosecutor had deliberately paused in order that if there was to be an objection from the defence, it should be made. The next question would be, of course, "What was the Brigadier told?" The Judge Advocate asked whether anybody was going to object and this not being the case, the prosecutor was asked to proceed with the examination.

#### IX. OBJECTION TO PART OF AN AFFIDAVIT.

On 19th September 1945, the affidavit of Colonel Johnson was put in by the prosecutor. One of the defending officers objected to three paragraphs of the affidavit on the ground that they contained merely comment on points which it was the court's duty to decide. The difficulty consisted in the fact that the court must know what is in the paragraph to decide whether they will admit it or not. The prosecutor pointed out that this was inevitably so in a system of courts martial, by which the court is both judge of law and fact. The court must, in effect, read themselves, or have read to them the paragraphs in order that they may consider the legal point, then they must do the impossible and say "we refuse to allow this to be put before us and in our capacity

of judges of fact, we will ignore them, although in our capacity of judges of law we must consider them first."

One of the paragraphs objected to was left out on the advice of the Judge Advocate who remarked that the man swearing this affidavit was going rather outside his province. As to the two remaining paragraphs, the court decided that the following sentences should not be put in: "In short such orders and the carrying out of such orders was mass murder" and "and his accomplices in mass murder."

X. THE BELSEN FILM AS EVIDENCE.

On 20th September, the film of the scenes which were found at Belsen was shown to the court. Technically the film was an exhibit to an affidavit (made by members of the Army Film and Photographic Unit,) stating that they photographed scenes at the camp, that they had seen the cinematographic film from the negatives of the photographs taken by them, and that the film negatives were copies of the film taken by them. No difficulties from the procedural point of view arose with regard to linking up the film as actually shown, with the affidavit.

XI. THE QUESTION OF TRANSLATIONS.

At the beginning of the interrogation of one of the witnesses for the prosecution, Dr. Ada Binko, the Polish defending officer said that if the witness gave evidence in German, he would not require it to be translated into Polish.

The Judge Advocate felt bound to advise the court that in his view, in this particular kind of court, the accused must hear the evidence in the language which they could understand. Counsel cannot possibly know how to cross-examine except on instruction and his instructions must necessarily be according to evidence. The Judge Advocate advised the court that he did not think that anybody should waive the rights of a person who does not understand the language when serious accusations of fact are being made against an accused. He added that the defending officers were no doubt endeavouring to shorten the proceedings but he thought it would be wrong in law.

The court conferred and decided that the evidence must be translated into Polish so that the Polish accused would understand, excepting in any such case where a particular witness is called to make a specific accusation against one or two of the German accused, where there is no question of that witness raising any point at all against the Polish accused, but in cases where the Polish accused may be implicated by the witness, then the evidence must be translated into Polish.

XII. CROSS EXAMINATION OF THE WITNESS  
Dr. ADA BINKO.

The procedure in cross examining witnesses having been much discussed, the following are some examples of the cross examination of the prosecution witness, Dr. Binko:

a) "MAJOR CRAWFIELD: Do you mean to swear that during the fifteen months you were at Auschwitz apart from the gypsies no person other than a Jew was sent to the gas chamber? A. Yes.

Q. I suggest to you that that statement is quite untrue. What do you say to that? A. I have sworn at the very beginning that I shall say nothing but the truth and I am very astonished if I am approached now to be lying."



b)"Q. Will you answer the next question either with "yes" or "no". Is it true that it was almost exactly when Dr. Klein took over as senior doctor that the medical stores were discovered and made available?

A. I cannot answer this question with "yes" or "no" because you must understand the conditions and the reasons why the stores were opened and made available, particularly at that time, as they were.

Q. Will you state whether or not it was at that time that the stores were made available? A. I must repeat once more that I cannot answer this question with "yes" or "no" because anybody in Dr. Klein's place would have made the stores available because the British troops were just arriving, and the whole world should know that at that time these were the reasons why the stores were made available. That is the reason why I cannot answer this question with only "yes" or "no".

Q. I have not asked under what circumstances they were made available. All I have asked is regarding the matter of time. Will you say whether or not it was about that time that the stores were made available?

A. I understood the question at the very first moment, but I cannot answer this question otherwise than I do now.

THE PRESIDENT: I think it is clear to the court that what you are asking the witness is: was it about the time that Dr. Klein took over that the stores were issued or not? - and that the witness is apparently not willing to answer that question and is going off into questions as to the reason why the stores were issued and that sort of thing. I think, as far as I am concerned - and I am sure the rest of the court - it is perfectly clear the point you are making.

THE JUDGE ADVOCATE: As a matter of fact, she has answered the question: "Three or four days before the British came two more rooms were opened and stores of medicine and instruments were produced in such quantities as we did not see or even think of." She put that at about three or four days before the British came. I think that is what you want.

CAPTAIN BROWN: Yes. (To the witness) To your knowledge were any Red Cross parcels distributed to the internees? A. Yes. On the day before the British troops entered the camp the stores were opened and hundreds and hundreds of Red Cross parcels were found, having come from Geneva.

Q. Will you answer my question. It seems to be a perfectly easy question to answer with "yes" or "no". Is it within your knowledge that Red Cross parcels were distributed to the internees? A. It is a perfectly simple question for the defending counsel to answer with "yes" or "no" but not for me, because the Red Cross parcels were in the camp for a long period, but only a few hours, or let us say half a day before the British troops arrived were they in fact distributed.

Q. I put it to you that your statement yesterday regarding Kramer kicking four Russians, or your statement today regarding Kramer kicking and hitting several internees is a complete fabrication. A. I would like to point out that it was me who was present and not the defending counsel during those incidents I described yesterday and today. "

XIII. QUESTIONING WITNESSES AS TO THE  
REASONS FOR THEIR ARREST.

One of the defending officers objected to the question put by the prosecutor to the witness, Dora Szafran, why she was arrested by the Germans. In the defending officer's submission, it was irrelevant why

the witnesses were arrested. It does not form part of either charge against the accused and it may tend to prejudice the accused.

The Judge Advocate said that the Court may hear evidence that some of these internees were criminal and the court should know if it has to test the credibility or assess the weight to be attached to a witness's evidence, the reason why she was put into a concentration camp. The Judge Advocate, therefore, advised the court that that question was not introduced for the purpose of prejudice, but was properly placed before the Court in order to assist it when taking into account what weight it attaches to the witness's testimony. The president ruled that the prosecutor was perfectly entitled to put that question for the reasons the Judge Advocate had pointed out.

(To Be Continued.)



III/20.  
20th October 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

The Czechoslovak Case No. 26 (Sepp Dietz) referred to Committee III.

Result of the discussion in Committee III held on 9th October 1945.  
Summarized by the Secretary to Committee III.

- I. The Charter of the International Military Tribunal is not only an indictment, but an International agreement "constitutif de droit".
- II. All crimes mentioned in Article 6 of the Charter (including paragraphs (a) and (c) are war crimes in the wider sense.
- III. Crimes against humanity committed against allied nationals or on allied territory are not essentially different from violations of the laws and customs of war. (Proposition by Dr. Mayr-Harting.)

Alternative:

Crimes against humanity are not essentially different from violations of the laws and customs of war. (Proposition by Dr. Zivković)

- IV. Persons charged with such crimes are, therefore, to be listed as war criminals and to be surrendered to the allied State on the territory of which or against the nationals of which they have committed their crimes. (Proposition by Dr. Mayr-Harting.)

Alternative: (In case Dr. Zivković's proposition is adopted)

Persons charged with such crimes are, therefore, to be listed by the United Nations War Crimes Commission. It is for Committee I to make proposals as to the procedure to be applied in such cases.

- V. All war crimes in the wider sense, comprising all three groups mentioned in Article 6, (a), (b) and (c) of the Charter, fall within the terms of reference of the United Nations War Crimes Commission.

Alternative:

The United Nations War Crimes Commission should ask for an extension of their terms of reference to include crimes against humanity. (Alternative suggestion by M. Stavropoulos.)

- VI. The "crimes against humanity" are covered by the Commission's working list of War Crimes. (Doc. C.1.)
- VII. The existing arrangements of the allied military authorities do not provide for the handing over of criminals other than war criminals. Nor are, in cases like that of Sepp Dietz, extradition treaties applicable even if considered as continuing in force towards the Control Council, because the extradition treaties concluded by Czechoslovakia did not provide for the extradition by the contracting parties, of their own citizens. (Proposition by Dr. Mayr-Harting.)

VIII. The crime has been committed by the accused in circumstances corresponding to war (a fight between armed formations of different nations.) (Proposition by Dr. Schram-Nielsen.)

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Note by the Secretary to Committee III.

1) The statement that Article 6 of the Charter is "constitutif de droit" implies the assertion that it is a piece of retrospective criminal legislation. It is submitted that it is controversial whether this really is the case. Mr. A.M. Wilding-White in an article "Punishing War Criminals: What is the Applicable Law?" published in the Law Journal of 13th October 1945, comes to the conclusion that Article 6 of the Charter does not make new law. Cf. also the discussion around Sir Arnold McNair's paper C.43 concerning the crime of aggressive war. It could be said that the Agreement of 8th August is either "constitutif de droit" or declaratory of existing law.

2) Committee III should also express its opinion regarding the point raised by Commander MOUTON, that Article 6 is only a provision dealing with the jurisdiction of the International Military Tribunal.



III/21.  
29th October 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

Draft Report of Committee III on the Czechoslovak Case No.26:  
Concerning a Crime Committed on Czechoslovak Territory at the  
Beginning of March, 1939.

By the Secretary to Committee III.

- I. Committee I referred to Committee III the legal questions which had arisen in connection with the Czechoslovak charge No.26 against a German named Sepp Dietz.

The facts of the case were, roughly, that the accused man, (Sepp Dietz) had at the beginning of March, 1939, with a group of S.S. men, invaded Czechoslovak territory, provoked clashes with the police and the population and committed crimes, particularly murder.

At the time when the crimes were committed by the accused, most of the United Nations were not yet involved in the second World War. In 1941 the President of the Czechoslovak Republic made a Declaration according to which Czechoslovakia considered herself in a state of war with Germany from the moment Germany had committed acts of violence against the security, independence and territorial integrity of the Republic. This declaration has not, so far, been endorsed by all the Governments represented on the Commission.

- II. Accordingly it would have been the task of Committee III to which the case had been referred to give its opinion on the following two questions: (a) whether at the beginning of March 1939 a state of war was in existence between Czechoslovakia and Germany and (b) what the position was if the answer to this question was in the negative. The acting Czechoslovak representative declared in the meeting of Committee III held on 9th October 1945 (Minutes No.9/45) that Committee III should not deal with the aspect of the case based on the consideration whether or not Czechoslovakia was at war at the beginning of March 1939, but that Committee III should restrict itself to the question whether crimes against humanity committed against allied subjects or on allied territory should be dealt with in the same way as violations of the laws or customs of war.

Committee III agreed to this proposal and therefore confined its deliberations to the question mentioned sub (b), it being generally understood that this discussion and the conclusion the Committee reached on the question (b) was without prejudice to the attitude of the respective governments and their representatives concerning the question (a).

- III. The question supra (b) is primarily a question of the jurisdiction of the United Nations War Crimes Commission. The Commission was constituted at the meeting of Allied and Dominions representatives held in London on the 20th October 1943. Among the primary purposes of the Commission there was mentioned the task that: (1) "It should investigate and record the evidence of war crimes identifying where possible the individuals responsible". (2) "It should report to the Governments concerned cases in which it appears that adequate evidence might be expected to be forthcoming".

The scope of the Commission's terms of reference was eventually extended by vesting in the Commission also the competence of the originally envisaged Technical Committee of Lawyers, a fact which is not relevant to the present question.

These terms of reference, and particularly the expression "war crimes" used therein must, in the view of Committee III, be interpreted in the light of the present state of International Law, particularly as laid down in the Four Power Agreement dated 8th August 1945.

IV. The United Nations War Crimes Commission has already, in its Doc.C.144, expressed the view that the Agreement and the Charter "are documents which give effect to far-reaching principles which have been long and fully discussed in the Commission and have been embodied in recommendations made by it or have obtained the assent of a number of its member Governments." The Commission has emphasized that the Charter embodies important principles of law. The members of Committee III do not, therefore, share the view that the Agreement was an indictment; they are of the opinion that the Charter is an International document declaratory of existing law and/or creating new law ("constitutif de droit").

V. The Agreement dated 8th August 1945 is called an "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis". Under Article 1 of the Agreement there shall be established an International Military Tribunal for the trial of war criminals, etc.

Throughout, (Articles 3, 4, 6 and Preamble) the document speaks of "war criminals". The same expression, "war criminals", is used in the Charter of the International Military Tribunal (Article 1, Article 6, paragraph 1 and Article 14).

Article 6 of the Charter, dealing with the jurisdiction of the tribunal, enumerates the acts which are crimes, coming within the jurisdiction of the tribunal, and distinguishes (a) crimes against peace, (b) war crimes and (c) crimes against humanity. From this it follows that the Agreement and the Charter use the expression "war crime" in a narrower and in a wider sense.

In the Preamble, in Articles 3, 4, and 6 of the Agreement and in Articles 1, 6 (paragraph 1) and 14 of the Charter the expression "war crime" is used in the wider sense and comprises not only violations of the laws or customs of war, but also "crimes against peace" and "crimes against humanity".

In Article 6, paragraph 2, lit (c) the word is used in the narrower sense and is there confined to violations of the laws or customs of war.

VI. This double meaning of the term "war crime" is not restricted to the Four Power Agreement of 8th August, 1945. Article 29 of the "Terms of Surrender" accepted by the Italian government speaks of Benito Mussolini, his chief fascist associates and all persons suspected of having committed war crimes or analogous offences.

Article 11 (a) of the Declaration regarding the defeat of Germany dated 5th June 1945, uses the expressions "the principal Nazi leaders and all persons suspected of having committed, ordered or abetted war crimes or analogous offences."

In these two documents the term "war crime" is used in the narrower sense, "crimes against peace" are covered by the references to Mussolini's "chief fascist associates" and to the "principal Nazi leaders", "crimes against humanity" by the term "analogous offences". The Potsdam Declaration too, distinguishes between "war crimes" in the narrower sense and "atrocities".

The armistices with Rumania (Art.14) Finland (Art.13), Bulgaria (Art.6) and Hungary (Art.14) on the other hand, speak only of the comprehension and trial of persons accused of war crimes.



There, obviously, the term "war crime" is used in the wider sense, comprising also crimes against peace and crimes against humanity. It is not conceivable that it could have been the intention of the Allied Powers to leave unpunished Rumanians, Bulgarians and Hungarians who were guilty of crimes against humanity or of crimes against peace. Such an interpretation would be entirely refuted by the actual policy practiced in these countries after their conquest.

- VII. If the United Nations War Crimes Commission had been formed at a time when the state of International law would have been what it is today no doubt could possibly have arisen about the necessity to interpret the term "war crime" in the wider sense as including crimes against peace and crimes against humanity and the Commission's actual practice has, from the beginning, been based on the assumption that what in the Charter is called "crimes against peace" falls within its jurisdiction. The Commission has consistently listed "major war criminals" on its lists.

In the present situation, it is, in the view of Committee III appropriate for the Commission, not to construe its terms of reference narrowly and to accept the wider interpretation of the expression "war crime".

- VIII. What has been said in the preceding paragraph is particularly true of crimes against humanity committed against allied nationals or on allied territory. These are, both in substance and in procedure, not essentially different from violations of the laws and customs of war. No new machinery or procedure is needed in order to deal with them, if they are treated in the same way as violations of the laws or customs of war. Neither a new procedure of the Commission nor new arrangements regarding surrender and trial are necessary. All war crimes in the wider sense are covered by the Commission's working list of war crimes. (Doc.C.I.)

- IX. As to crimes committed on enemy or neutral territory or against enemy or neutral nationals - a problem which is not involved in the present case - additional arrangements would appear to be necessary and it was advocated in Committee III that arrangements should be made by the United Nations War Crimes Commission to list those criminals against humanity which are not covered by the conclusions stated below, which have been raised by the Czechoslovak case No.26.

- X. If the procedure of the United Nations War Crimes Commission were not made available for the listing of persons accused of crimes against humanity committed against allied nationals or on allied territory, no machinery for detaining them would be in existence. The arrangements made by the allied military authorities do not provide for the handing over of criminals other than war criminals. Nor are, in cases like that of Sepp Dietz, extradition treaties applicable even if considered as continuing in force towards the Control Council, because the extradition treaties concluded by Czechoslovakia did not provide for the extradition by the contracting parties, of their own citizens.

- XI. Committee III has, therefore, arrived at the following

CONCLUSIONS:

- 1) Crimes against peace and crimes against humanity as defined in paragraphs (a) and (c) of Article 6 of the Charter of the International Military Tribunal should be considered as war crimes in the same way as violations of the laws and customs of war, as defined in paragraph (b) of that article.

- 2) Persons charged with crimes against humanity committed against allied nationals or on allied territory should be listed by the United Nations War Crimes Commission and surrendered to the Allied Government concerned.
- 3) Committee III recommends that Sepp Dietz be listed as a war criminal, provided the facts are considered sufficient to establish a prima facie case, which is a question for Committee I to decide.



III/21 (1)  
9th November 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

Draft Report of Committee III on the Czechoslovak  
Case No.26 concerning a Crime Committed on Czecho-  
slovak Territory at the Beginning of March, 1939.

Redrafted according to the decisions of Committee  
III of 30th October and 6th November, 1945.

Committee I referred to Committee III the legal questions which had arisen in connection with the Czechoslovak charge No.26 against a German named Sepp Dietz.

After discussion, Committee III decided to recommend that, provided Committee I are satisfied as to the facts stated in the charge, Sepp Dietz be listed as a war criminal because he has committed a crime against humanity as defined in Article 6, paragraph 2(c) of the Charter of the International Military Tribunal.

The following are the reasons for this recommendation by Committee I:

- I. The facts of the case were, roughly, that the accused man, (Sepp Dietz) had, at the beginning of March 1939, with a group of S.S. men invaded Czechoslovak territory, provoked clashes with the police and the population and committed crimes, particularly murder.

In 1941 the President of the Czechoslovak Republic made a declaration according to which Czechoslovakia considered herself in a state of war with Germany from the moment Germany had committed acts of violence against the security, independence and territorial integrity of the Republic.

- II. Accordingly it would have been the task of Committee III to which the case had been referred to give its opinion on the following two questions: (a) whether at the beginning of March 1939 a state of war was in existence between Czechoslovakia and Germany and (b) what the position was if the answer to this question was in the negative. The acting Czechoslovak representative declared in the meeting of Committee III held on 9th October 1945 (Minutes No.9/45) that Committee III should not deal with the aspect of the case based on the consideration whether or not Czechoslovakia was at war at the beginning of March 1939, but that Committee III should restrict itself to the question whether crimes against humanity committed against allied subjects or on allied territory should be dealt with in the same way as violations of the laws or customs of war.

Committee III agreed to this proposal and therefore confined its deliberations to the question mentioned sub (b), it being generally understood that this discussion and the conclusion the Committee reached on the question (b) was without prejudice to the attitude of the respective governments and their representatives concerning the question (a)

- III. The question supra (b) is primarily a question of the jurisdiction of the United Nations War Crimes Commission. The Commission was constituted at the meeting of Allied and Dominions representatives held in London on the 20th October 1943. Among the primary purposes of the Commission there was mentioned the task that: (1) "It should investigate and record the evidence of war crimes identifying where possible the individuals responsible." (2) "It should report to the Governments concerned cases in

which it appears that adequate evidence might be expected to be forthcoming."

The scope of the Commission's terms of reference was eventually extended by vesting in the Commission also the competence of the originally envisaged Technical Committee of Lawyers, a fact which is not relevant to the present question.

These terms of reference, and particularly the expression "war crimes" used therein should, in the view of Committee III be interpreted in the light of the present state of International Law, particularly as expounded in the Four Power Agreement dated 8th August 1945.

- IV. The United Nations War Crimes Commission has already, in its Doc. C.144, expressed the view that the Agreement and the Charter "are documents which give effect to far reaching principles which have been long and fully discussed in the Commission and have been embodied in recommendations made by it or have obtained the assent of a number of its member Governments". The Commission has emphasised that the Charter embodies important principles of law.

The members of Committee III are therefore of the opinion that the Charter is an important document in the formulation of International Law, whether declaratory of existing law or creating new law.

- V. The important international documents agreed upon during and on the conclusion of the second world war, used the term "war crime" sometimes in a narrower sense which is restricted to violations of the laws or customs of war, sometimes in a wider sense comprising also "crimes against peace" and "crimes against humanity". The narrower meaning is attributed to the term "war crime" in Article 29 of the Italian Terms of Surrender, in Article 11(a) of the Declaration regarding the Defeat of Germany dated 5th June 1945, in the Potsdam Declaration and in Article 6, paragraph 2, lit (c) of the Charter of the International Military Tribunal. In the wider sense, comprising also crimes against peace and crimes against humanity, the term is used in the Armistices with Rumania (Art.14), Finland (Art.13), Bulgaria (Art.6) and Hungary (Art.14), in the Preamble and in Articles 3, 4 and 6 of the Agreement for the Prosecution and punishment of the Major War Criminals of the European Axis, dated 8th August 1945, and in Articles 1, 6 (para.1) and 14 of the Charter of the International Military Tribunal.

The actual practice of the United Nations War Crimes Commission, has, from the beginning, been based on the assumption that what in the Charter of the International Military Tribunal is called "crimes against peace" falls within its jurisdiction. The Commission has consistently listed "major war criminals" on its lists.

For the purpose of listing criminals, it is necessary to understand the term "war crime" in the wider sense indicated by the foregoing examples.

- VI. The acts of which Sepp Dietz is accused, fall, in the opinion of Committee III, under "crimes against humanity", namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war. He acted, according to the charge, in the interests of the European Axis countries. His crimes were committed on allied territory and against allied nationals.



VII. What has been said in paragraphs IV and V. is particularly true of crimes against humanity committed, like the crimes dealt with in the present case, against allied nationals or on allied territory. These are, both in substance and in procedure, not essentially different from violations of the laws and customs of war. No new machinery or procedure is needed in order to deal with them, if they are treated in the same way as violations of the laws or customs of war. Neither a new procedure of the Commission nor new arrangements regarding surrender and trial are necessary. All war crimes in the wider sense are covered by the Commission's working list of war crimes. (Doc.C.1.)

VIII. If the procedure of the United Nations War Crimes Commission were not made available for the listing of persons accused of crimes against humanity committed against allied nationals or on allied territory, no machinery for detaining them would be in existence. The arrangements made by the allied military authorities do not provide for the handing over of criminals other than war criminals. Nor are, in cases like that of Sepp Dietz, extradition treaties applicable even if considered as continuing in force towards the Control Council for Germany, because the extradition treaties concluded, e.g. by Czechoslovakia did not provide for the extradition by the contracting parties, of their own citizens.

IX. Crimes against humanity, as defined in paragraph (c) of the Article 6 of the Charter of the International Military Tribunal, should be considered as war crimes in the same way as violations of the laws and customs of war, as defined in paragraph (b) of that article.

Persons charged with crimes against humanity committed against allied nationals or on allied territory should be listed by the United Nations War Crimes Commission and surrendered to the Allied Government concerned.

III/22.  
26th November 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Survey of European Armistice Conventions and Surrender Documents.

Provisions concerning War Criminals.

Compiled by the Secretary to Committee III.

1. GERMANY.

- a) Unconditional Surrender of German and Italian Forces at Caserta, 2nd May 1945. Communiqué of Allied Force Headquarters, Mediterranean. American Journal of International Law, Vol.39, Supplement page 168.
- b) Unconditional Surrender of German Forces at Rheims, 8th May 1945. *ibid*, page 169.
- c) Unconditional Surrender of German Force at Berlin, 9th May 1945, *ibid*, page 170.
- d) Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany. 5th June 1945. (Germany No.1 (1945) Cmd.6648, (H.M.Stationery Office). Department of State Bulletin, Vol.XII, No.311. Reprinted in American Journal of International Law, *ibid*, page 171. )

Article 11:

(a) The Principal Nazi leaders as specified by the Allied Representatives, and all persons from time to time named or designated by rank, office or employment by the Allied Representatives as being suspected of having committed, ordered or abetted war crimes or analogous offences, will be apprehended and surrendered to the Allied Representatives.

(b) The same will apply in the case of any national of any of the United Nations who is alleged to have committed an offence against his national law, and who may at any time be named or designated by rank, office or employment by the Allied Representatives.

(c) The German authorities and people will comply with any instructions given by the Allied Representatives for the apprehension and surrender of such persons.

2. ITALY.

- a) Conditions of Armistice signed on 3rd September 1943. (Italy No.1 (1945) Cmd. 6693. H.M.Stationery Office.)
- b) Additional Conditions signed on 29th September 1943, at Malta. Instrument of Surrender of Italy, *ibid*, No.2.



Article 29:

Benito Mussolini, his chief Fascist associates and all persons suspected of having committed war crimes or analogous offences whose names appear on lists to be communicated by the United Nations will forthwith be apprehended and surrendered into the hands of the United Nations. Any instructions given by the United Nations for this purpose will be complied with.

- c) Protocol signed at Brindisi on 9th November 1943, amending the Additional Conditions.  
(ibid No.4.)

The title of the document signed at Malta on the 29th September 1943 (supra b.) changed to "additional conditions of Armistice with Italy."

Article 29 amended to read as follows:

Benito Mussolini, his chief Fascist associates, and all persons suspected of having committed war crimes or analogous offences whose names appear on lists to be communicated by the United Nations and who now or in the future are on territory controlled by the Allied Military Command or by the Italian Government, will forthwith be apprehended and surrendered into the hands of the United Nations. Any instructions given by the United Nations to this purpose will be complied with.

3. ROMANIA.

Conditions of an Armistice with Roumania, signed at Moscow, 12th September, 1944.

(Miscellaneous No.1. (1945) Cmd.6585. H.M.Stationery Office.  
Department of State Bulletin, Vol. XI, No.273, (17 September 1944,  
Reprinted in American Journal of International Law, Vol.39,  
Supplement p.88.)

Article 14:

The Roumanian Government and High Command undertake to collaborate with the Allied (Soviet) High Command in the apprehension and trial of persons accused of war crimes.

4. FINLAND.

Conditions of an Armistice with Finland, signed at Moscow, 19th September 1944).

(Miscellaneous No.2. (1945) Cmd.6586. H.M.Stationery Office.  
Reprinted in American Journal, ibid page 85.)

Article 13:

Finland undertakes to collaborate with the Allied Powers in the apprehension of persons accused of war crimes and in their trial.

5. BULGARIA.

Conditions of an Armistice with Bulgaria, signed at Moscow, 28th October 1944.

(Miscellaneous No.3. (1945) Cmd. 6587, H.M.Stationery Office.

Department of State Bulletin, Vol.XI. No.279 (29 October 1944)  
Reprinted in American Journal, ibid p.93.)

Article 6:

The Government of Bulgaria will co-operate in the apprehension and trial of persons accused of war crimes.

6. HUNGARY.

Armistice with Hungary, signed at Moscow, 20 January 1945.  
(Department of State Bulletin, Vol.XII, No.291 (21 January 1945)  
p. 83.  
Reprinted in American Journal, ibid, p. 97.)

Article XIV.

Hungary will co-operate in the apprehension and trial, as well as the surrender to the Governments concerned, of persons accused of war crimes.



III/23  
6th December, 1945

UNITED NATIONS WAR CRIMES COMMISSION

Report on the Czechoslovak Case No. 1962  
(Reinhold Boecker) referred to Committee III

By the Secretary to Committee III

- I. On November 28th, 1945, the Czechoslovak National Office presented to the Commission a charge against Reinhold Boecker, Captain of the Waffen S.S., concerning crimes committed in 1944 - 1945 in Podbrezová (Slovakia). The accused is charged on three counts:-

1. Attempts to denationalise the inhabitants of occupied territory.
2. Torture of civilians.
3. Wanton destruction of private property.

The short statement of facts contained in the charge reads as follows:-

"The accused participated in the criminal Nazi system of Germanisation. He tortured civilians. He wantonly burned down the administrative building of a factory."

The particulars of the alleged crime state that:-

"The accused was appointed by the German Wehrmacht's Security Agent in the Prodbrezová Iron Works, at Prodbrezová (Slovakia). He participated in the criminal Nazi policy of Germanisation, he especially forced on the management of the Prodbrezová Iron Works German employees and workers by systematically removing employees and workers of Slovak or Czech nationality.

He denounced and handed over to the Gestapo and the S.D. (Security Service) Czechoslovak employees and workers.

He participated in the investigation and "interrogation" of imprisoned members of the Underground Movement and of partisans and personally took part in the ill-treatment and torture of the prisoners.

In complicity with four Germans he burned down the management's administrative building of the Prodbrezová Iron Works, containing important documentary material, and caused thus a damage of more than two million pre-war crowns to the Iron Works."

- II. In its meeting held on December 6th, 1945, Committee I decided to put the accused Reinhold Boecker on List A on the second and third counts mentioned above.

With regard to the first count, Committee I adjourned the case and referred it to Committee III, asking for its opinion,

- a) whether count 1 of the charge No. 1962 is covered by Document C. 149, and
- b) whether the facts under count 1 of the charge constitute a war crime.

14/45.  
11th December 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Notes of the Meeting of Committee III held on 11th December 1945 at

3.0 p.m.

There were present:

|                      |   |                 |
|----------------------|---|-----------------|
| Major Dr. Fanderlik, | } | Czechoslovakia, |
| Dr. Mayr-Harting,    |   | Denmark,        |
| Dr. Schram-Nielsen,  |   | Netherlands.    |
| Commander Mouton,    |   |                 |

The Committee having eight members and only three being present, it was decided to adjourn the meeting till Tuesday 18th December 1945 at 3.0 p.m.

The members present at the meeting were unanimous in the view that to have a quorum it would be necessary for at least a majority of the members of Committee III to be present, that is at least five members. The following is a list of the countries at present represented on Committee III:

China,  
Czechoslovakia,  
Denmark,  
Greece,  
Netherlands,  
Norway,  
Poland,  
Yugoslavia.



III/24.  
12th December 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Bibliography of Legal Literature on the Law of War Crimes and  
Belligerent Occupation in the Second World War.

Compiled by the Secretary to Committee III.

NOTE: The following is circulated as a nucleus for the compilation of a bibliography on the law of War Crimes and Belligerent Occupation, published during the second World War and after its conclusion.

This draft is necessarily incomplete. The literature published outside Great Britain and the United States is, with a few exceptions, so far inaccessible; the same applies to many American legal periodicals.

It would be very much appreciated if Members and National Offices would examine this paper and point out gaps existing in the list.

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III/25.  
19th December 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

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

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

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

2 Enclosures.

I/46.  
19th December, 1945.

UNITED NATIONS WAR CRIMES COMMISSION.

Translation of a Letter from:

The Director of Enemy War Crimes Research Office.

Dated: Paris, 9th November, 1945.

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

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

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

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

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

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

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



Paris le 9 Novembre 1945.

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

A

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

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

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

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

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

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

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

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

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

III/26  
12 January 1946

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

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

Sir,

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

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

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

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

Yours sincerely

TERJE WOLD  
Acting Chairman of Committee III



III/27.  
1st February, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

The Czechoslovak Case No.1962 (Reinhold Boecker.)

Draft Report.

- I. In its meeting held on 6th December 1945, Committee I decided to put the accused Reinhold Boecker on list 'A' on the second and third counts mentioned in Doc.III/23, paragraph I. With regard to the first count, namely attempts to denationalise the inhabitants of occupied territory, Committee I adjourned the case and referred it to Committee III asking for its opinion:
- (a) whether count 1 of the charge No.1962 is covered by Document C.149, and
  - (b) whether the facts under count 1 of the charge constitute a war crime.
- II. Committee III considered the question whether and in what circumstances denationalisation is a war crime in its report on the Yugoslav Charge No.143b, Commission Document C.149 of the 4th October 1945, and arrived in that report at an affirmative answer to the question whether denationalisation can constitute a war crime. The reply of Committee III to the question (a), if this is to be understood in the general sense, namely whether attempts to denationalise the inhabitants of occupied territory are capable of constituting a war crime is, therefore, in the affirmative.
- III. With regard to the narrower question whether the war crime of attempts to denationalise the inhabitants of occupied territory can be committed by systematically removing employees and workers of the nationality of the occupied State and by replacing them with employees and workers of the nationality of the occupying State, Committee III refers to Paragraph VI of its report Doc.C.149, where it has been stated that under denationalisation in the criminal sense, Committee III understands the use of the de facto power wielded by an occupant in execution of a policy aiming at depriving the inhabitants of an occupied territory of their national characteristics and/or transforming the ethnological character of the region.

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

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

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

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

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

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

In this connection it would be certainly relevant to learn:

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

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

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

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

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

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

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

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



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

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

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

III/28  
1st February, 1946

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

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

Note by the Secretary to Committee III

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

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

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

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

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

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

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

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

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

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



French jurisdiction was established to the exclusion of Czechoslovak jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



III/29.  
9th February, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

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

DRAFT REPORT.

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

DRAFT A.

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

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

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

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

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

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

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

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

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

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

DRAFT B.

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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



III/30.  
8th March, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

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

Referred to Committee III.

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

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

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

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

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

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

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

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

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

III/31.  
20th March, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Supplement to the Survey of European

Armistice Conventions and Surrender

Documents. (Doc. III/22)

Provisions Concerning War Criminals.

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

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

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

PROCLAMATION No. 2.

Certain Additional Requirements Imposed on Germany.

To the people of Germany:

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

Section X.

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

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



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

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

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

III/32.  
20th March, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

The Yugoslav Cases Nos. 1323 and 1462.

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

III/33.  
22nd March, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

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

Compiled by Egon Schwelb, Legal Officer.

I. Preliminary.

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

The present report contains:

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

" Persecution of Jews.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

#### IV. Crimes against Humanity in recent basic documents.

The following documents contain provisions regarding crimes against humanity:

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

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

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

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

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

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

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

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

"persecutions".

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



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

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

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

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

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

(a) .....

(b) .....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

#### V. The Nuremberg Indictment and Proceedings.

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

#### VI. Summary.

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

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



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

III/34.  
29th March, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

General Propositions defining the term

"crimes against humanity."

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

By Egon Schwelb, Legal Officer.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

9) The nationality of the victims is irrelevant.

Note: See note to proposition 2.

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

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

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

III/35  
29th March, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

Committee III.

The Czechoslovak Case No. 2677

(Bressler and others)

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

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

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

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

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

Dr. Wohlman, lawyer in Dresden, and

Rudolf Brumm, a tanner from Germany.

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

"Hauptman Bressler behaved most aggressively during the negotiations.

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

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

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

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



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

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

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

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III/36.  
4th April, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Case of the Alleged Alsatian Deserters.

Additional Information (2)

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

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

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

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

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



III/37.  
24th April, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Professor Goodhart on "Crimes Against Humanity".

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

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

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

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

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

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



III/38.  
25th April, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Grotius on the Universality of Jurisdiction.

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

The following quotation may serve as a supplement thereto.

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

III/39  
1st May, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

General Propositions defining the term

"crimes against humanity".

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

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

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

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

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

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

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

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



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

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

It is doubtful whether this restriction also applies to persecutions.

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

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

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

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

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

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

- 9) The nationality of the victims is irrelevant.

Note: See note to proposition 1.

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

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

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

III/40.  
4th May, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

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

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

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

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

"Dear Dr. Schwelb,

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

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

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

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

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

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

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

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



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

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

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

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

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

IV.

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

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

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

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

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

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

V.

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

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

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

VI.

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

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

VII.

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

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

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

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

VIII.

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



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

IX.

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

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

III/41.  
10th May, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

Second Report by Committee III

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

SECRET.

III/42.  
17th May, 1946,

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

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

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

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

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

1. According to the basic documents (Charter of the International  
Military Tribunal annexed to the Four-Power Agreement of 8th August 1945  
as rectified by the Berlin Protocol of 6th October 1945; the Control  
Council Law No.10; the Charter of the International Military Tribunal  
for the Far East,) crimes against humanity may consist in the violation  
  
either of the laws and customs of war, (\*)  
or of positive municipal provisions of criminal law,  
or of the general principles of criminal law as  
derived from the criminal law of all civilized  
nations.
2. Under the basic documents there are two different types of crimes  
against humanity which, with a few exceptions, are subject to the same  
provisions, namely:
  - (a) crimes of the murder type, (murder, extermination, enslavement,  
deportation and other inhumane acts). The words "other  
inhumane acts" may be held to cover only serious crimes of a  
character similar to murder, extermination, enslavement and  
deportation - eiusdem generis rule of interpretation;
  - (b) persecutions (on political and racial, under the Charter of  
8th August 1945, also religious, grounds.)

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



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

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

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

III/43.  
26th June, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

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

By the Secretary to Committee III.

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

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

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



III/44  
26th June, 1946.

UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

H.M. Stationery Office.

Conditions of Publication on Agency Terms.

- (1) The cost of production of Agency publications will be recovered by the Stationery Office from the originating departments on the basis of the cost to the Stationery Office plus the usual allowance for Stationery Office departmental expenses. (12½%).
- (2) The price and number of copies to be printed will be approved by the originating department, and any final decision as to format will rest with that department.
- (3) Credit will be given annually to the originating department for copies sold, and for issues for official purposes (other than those under (4) below) at face value less an allowance of 33-1/3% for discounts and publishing expenses.
- (4) Credit will not be given for copies:-
  - (i) supplied in bulk to the order of the originating department at the time of printing,
  - (ii) distributed to the British Museum and other Libraries under the Copyright Act 1911,
  - (iii) distributed for International Exchange at the request of the originating department or under the general arrangements for the International Exchange of Official publications,
  - (iv) distributed for publicity and review purposes,
  - (v) supplied to Members of Parliament with the agreement of the originating Department.
- (5) Copies required by the originating department from time to time (other than copies taken in bulk on publication) will be obtained on demand from the Sale Office, Cornwall House, S.E.1. These will be invoiced at face value less 25% and credited in bulk in The Agency Account (in common with other issues) at face value less 33-1/3%.
- (6) The transfer to the originating department of sums due under agency arrangements will be effected annually and will be accompanied by a statement showing the financial position of each publication and the transactions affecting that publication during the calendar year involved.
- (7) The Stationery Office will as soon as possible after the 31st December of the second complete calendar year following publication submit to the originating department proposals for (a) the purchase by the Stationery Office if necessary of the whole or part of the remaining stocks at a price to be agreed, and (b) the wasting of any copies which are regarded as obsolete the final stocks remaining to be retained as Stationery Office property in respect of which no further financial statements will be rendered.

III/45  
1st July, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

The Yugoslav case No. 3296 referred  
to Committee III

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

The accused are charged with:-

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

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

The short statement of facts is as follows:-

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

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

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

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

to Page 2



fact that they were not fascist:-

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

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

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

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

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

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

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

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

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

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

to Page 3.

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

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



III/46.  
4th July, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

COMMITTEE III

DRAFT LAW REPORTS TO BE DISCUSSED IN  
COMMITTEE III

(Cases 1 to 8 )

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

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

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

CASE NO. 1.

THE "PELEUS" TRIAL.

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

CASE NO. 2.

THE DOSTLER CASE.

(Trial & Law Reports Series No. 14).

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

In Part A:

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

In Part B:

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

Part C. of the paper

will be omitted.

CASE NO. 3.

THE AIMÉLO CASE.

(Trial & Law Reports Series No. 18).

In Part B. (p.7)

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

<sup>suggested</sup>  
Reference will be made to the "glossary" and all general statements will be omitted.

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

CASE NO. 4.

THE HADAMAR TRIAL.

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

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

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



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

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

CASE NO.5.

THE SCUTTLED U BOATS CASE  
(Gerhard Grumpelt)

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

CASE NO.6.

(Masuda)

Will be circulated shortly.

CASE NO.7.

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

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

CASE NO.8.

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

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

CASE NO. 9.

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

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

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



III/47

8th July 1946.

UNITED NATIONS WAR CRIMES COMMISSION

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

By E. Schwelb, Legal Officer.

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

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

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

I. Jurisdiction of the British Military Courts.

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

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

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

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

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

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

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

### III. Convening of a Military Court.

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

### IV. Mixed Inter-Allied Military Courts.

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

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

### V. The Judge Advocate.

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



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

**VI. Rules of Procedure and Rules of Evidence.**

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

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

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

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

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

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

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

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

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

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

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

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

**IX. Punishment of War Crimes.**

The punishment of<sup>a</sup> war crime consists in any one or more of the following:-

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

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

**X. Appeal and Confirmation.**

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

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

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

**XII. The Authority of decisions of Military Courts.**

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