

Officer and the Adjutant of the station, and that as a corollary to the reliance which was placed on superior orders in trials of German war criminals the Prosecution was claiming that no German N.C.O.s would dare to take prisoners' lives unless they were satisfied that they had been told that such action would be approved by the Commanding Officer.

The Judge Advocate felt that the Court would be prepared to say without question that it was probably a sound view to take, in regard to the German Army, that the persons who did the killings did not commit these crimes without having some orders from their superiors, but the question was who did give these orders, who were the superiors involved? Apart from Rauer and Scharschmidt, Bottcher and Bopf were also officers. The finding of the Court was that all four officers were guilty of being concerned in the killing of the prisoners on the aerodrome and of the wounded prisoner. The decision of the Court to find Rauer and Scharschmidt not guilty of the first charge, concerning the shootings on the way to the station, may have been influenced by the consideration, which was pointed out in the trial, that it was less reasonable for these officers to believe after the second incident that the prisoners involved were shot while trying to escape than it was after the first, and that measures should have been taken after the first shootings to prevent a repetition.

In the Trial of Kurt Student by a British Military Court at Luneberg, Germany, 6th - 10th May, 1946, the accused was faced with eight charges alleging war crimes committed by him in the kingdom of Greece (according to the last three charges, on the Island of Crete itself) as Commander-in-Chief of the German forces in Crete, at various times during May and June, 1941. The charges alleged respectively that he was "responsible for", first, the use on or about 22nd May of British prisoners of war as a screen for the advance of German troops, when, near Maleme on the Island of Crete, troops under his command drove a party of British prisoners of war before them, resulting in at least six of these British prisoners

of war being killed by the fire of other British troops; secondly, the employment in May of British prisoners of war on prohibited work, when, at Maleme aerodrome on the Island of Crete, troops under his command compelled British prisoners of war to unload arms, ammunition and warlike stores from German aircraft; thirdly, the killing on or about 23rd May of British prisoners of war, when, at Maleme aerodrome on the Island of Crete, troops under his command shot and killed several British prisoners of war for refusing to do prohibited work; fourthly, the bombing on or about 24th May of No. 7 General Hospital when, near Galatos on the Island of Crete, aircraft under his command bombed a hospital which was marked with a Red Cross; fifthly, the use on or about 24th May of British prisoners of war as a screen for the advance of German troops, when, near Galatos on the Island of Crete, troops under his command drove a party of British prisoners of war before them (these British prisoners of war being the Staff and patients of No. 7 General Hospital), resulting in a named Staff Serjeant of the Royal Army Medical Corps and other British prisoners of war being killed by the fire of British troops; sixthly, the killing on or about 27th May, of British prisoners of war, when, near Galatos, troops under his command killed three soldiers of the Welch Regiment who had surrendered to them; seventhly, the killing on or about 27th May, of a British prisoner of war, when, near Galatos, troops under his command wilfully exposed British prisoners of war to the fire of British troops, resulting in the death of a named Private of the Welch Regiment; and finally, the killing in June of British prisoners of war, when, at a prison camp near Maleme, troops under his command shot and killed several British prisoners of war. He pleaded not guilty to all the charges.

The offences alleged all took place in connection with an attack by German parachutists on the Island of Crete under the direction of the accused. The latter, then General Student, was shown to have been at his base in Greece until the morning of 25th May, 1941, and to have been in Crete from that time until the end of June, 1941. Air support was in the control of General von Richthoven, Commander of the 8th Air Corps, though a certain degree of co-operation between the two generals was shown to have existed.

The accused was found not guilty of the first, fourth, fifth, seventh and eighth charges but guilty of the second, third and sixth.

Subject to confirmation by superior military authority, he was sentenced to imprisonment for five years. This sentence was not, however, confirmed.

The eight charges brought against the accused alleged not offences committed by him, but offences for which he was responsible. The Prosecutor pointed out in his closing address: "This case falls really into two parts and there are two separate matters which it will be your duty to decide. First whether these events which you have heard sworn to in the witness box or any of them in fact took place and if you decide that they did take place the second point will arise as to whether this man was responsible for them."

Student was not shown to have ordered any of the offences alleged, and it follows that in finding him guilty on three charges the Court applied the doctrine of the indirect responsibility of a commander for offences committed by his troops. As has been seen, the Confirming Authority differed from the Court in his estimate of Student's responsibility.

The Prosecutor claimed that: "General Student was very keen on the capture of Crete. He had pitted his opinion against the opinion of Hitler and it was up to him to get Crete at all costs and in my submission all these things were done by subordinates with the full knowledge that they would have been supported by their Commander-in-Chief." Defence Counsel, on the other hand, pointed out that: "When a General decides to make a big scale operation on a corps basis he makes his appreciation of the situation and his staff work out the orders regarding details. Any general policy is obviously that General's responsibility but I maintain that the details are not. The orders which have been worked out by his staff are passed on to all commanders at all levels until the small details are arrived at. It is the small tasks such as the attack on a given hill which are planned and carried out by the junior commanders and their troops. Therefore surely is it not the junior commanders who are responsible for any small and isolated incidents happening within their platoons or sections and are not the senior commanders responsible for what happens throughout their command as a whole." The basic principles relating to the extent of the responsibility of a commander for offences committed by his troops, however, were not fully examined in the present case.

Certain facts may nevertheless be set out which were considered of some importance in the case, and which may have been taken into account by the Court and by the Confirming Authority in making their respective decisions.

In the first place, it was recognized as more probable that repeated or wide-spread offences were performed under the General's orders than isolated offences. Counsel for the Defence observed that all the charges related to acts done in the Maleme/Cania area, whereas actually troops were dropped at four main points, Maleme, Cania, Returnnom and Herakliom. In other words, he claimed, only about half

of the troops concerned in the invasion were in the Maleme/Cania area. It could not, therefore, be said that it was the general policy of the Parachute troops to commit atrocities and to capture Crete at any price. Why, he asked, if the shooting of prisoners of war was General Student's general policy, did not incidents occur at the prison camps at Cania and Skenis similar to those alleged to have happened at the camp near Maleme?

The Prosecutor claimed that three instances had been proved in which captured troops had been forced by German soldiers to advance ahead of them, either to act as a screen to the latter in their attack or to cause the Imperial troops to reveal their positions by firing on the prisoners in mistake for their enemies. The fact that no less than three instances of such behaviour had been proved gave rise to an inference, in the Prosecution's submission, that an instruction had been given that in certain circumstances such action was correct. He pointed out that General Student had said that he was responsible for the whole of the training of the parachute division.

In his summing up the Judge Advocate set out very clearly what had been the Prosecution's position in the case; the Prosecution, he said, "are going to say that, when you look at this list of atrocities deposed to by the ordinary decent type of soldier or airman, you will have to draw the inference that it was calculated; that it was part of the policy and that it would only arise in the well disciplined German forces if those troops and the officers knew that they had been either ordered to do it by their commander or, alternatively, that they had been led to believe that nothing would have been heard about it and it would be condoned and appreciated."

A second important question in connection with the responsibility of the accused was that of his official relationship with General von Richthoven, Commander of the 8th Air Corps. Clearly if the latter was

able to act entirely independently of Student, the accused could not be held responsible for the bombing of the aerodrome. Defence Counsel claimed that during a conference between the accused and General von Richthoven, only general outlines for air support were discussed. The Prosecutor, on the other hand, claimed that the hospital could not have been selected as a target without the knowledge of the accused and his staff. The Judge Advocate's opinion was that the Court would "be satisfied that, in any major operation on that island, there would be no bomb dropped without Student knowing why and ensuring that the parachute troops should not be bombed"; he thought that the Court would accept "that there was, in this German expedition, the closest liaison between the staff of the air force and the staff on the ground."

Nevertheless the accused was found not guilty of the fourth charge.

The physical presence of the accused in Crete at the time of the alleged offences, on the other hand, was not regarded by Counsel as important. The Prosecutor submitted that it was "quite immaterial" whether he was in Athens or in Crete "at the time"; he was supreme commander during the whole operation. The Defence made no particular use of the fact that the accused did not arrive in Crete until May 25th, 1941. The Judge Advocate restricted himself to the observation that: "It is common ground that General Student was not in this area at all before the morning of the 25th May, and therefore any thing that he may be responsible for up to that date would have been done from his base in Greece."

Another interesting British Trial is that held before a British Military Court sitting at Wuppertal, Germany, June 4th - 5th, 1946, of Fritz Hartjenstein and Five Others, who were accused of being concerned in the killing of a British prisoner of war at Struthof/Natzweiler prison camp on or about 30th July, 1944.

Of Hartjenstein's responsibility in the alleged crime, the Judge Advocate in his summing up, said: "The position of Hartjenstein was that he was Kommandant of this camp Obviously you would have no doubt about his implication if you were satisfied that he gave orders for the execution. There is another aspect you will have to consider; to what extent he is liable if he did not give orders for this execution... There is no direct evidence that he authorized this execution. Some implied it because he was the Kommandant of the camp; there is some little vague evidence." He reminded the Court that, according to the Prosecution's case, Hartjenstein "either authorised the execution or was running a camp where authorization was not required". Hartjenstein was sentenced to death and this sentence was confirmed.

The remarks of the Judge Advocate in one other case tend to show that a Commander can in certain circumstances, be held liable for offences which were committed, not on his orders, but as a result of his negligence. A Military Court sitting at Wuppertal on 10th and 11th July, 1946, sentenced General Victor Seeger to imprisonment for three years on a charge of being concerned in the killing of a number of Allied prisoners of war; the Judge Advocate said of this accused: "The point you will have to carefully consider - he is not part of any organisation at all - is: was he concerned in the killing, in the sense that he had a duty and had the power to prevent these people being dealt with in a way which he must inevitably have known would result in their death it is for you with your members, using your military knowledge going into the whole of this evidence to say whether it is right to hold that General Seeger, in this period between, let us say the middle of August or towards the end of August, was holding a military position which required him to do things which he failed to do and which amounted to a war crime in the sense that they were in breach of the Laws and Usages of War."

Of the United States trials which are relevant in this connection easily the most important is the trial by a United States Military Commission at Manila, Philippine Islands, of General Yamashita, Commanding General of the 14th Army Group of the Imperial Japanese Army, which took place between October 1st and December 7th, 1945. The indictment against him alleged that he violated the laws of war in that, between 9th October, 1944, and 2nd September, 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines.

(A brief account of the human rights alleged to have been violated will be inserted here).

The opening statement of the Prosecution contains the following words:

"The charge states that the accused, during a certain period of time while he was Commander of Armed Forces of Japan then at war with the United States of America and its Allies, unlawfully disregarded and failed to discharge his duty as such Commander - unlawfully disregarded and failed to discharge his duty as Commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and its Allies and dependencies, particularly the Philippines; and thereby violated the laws of war. That is the charge, that is the case: Disregarded his duty to control the members of his command, and permitted them to commit violations of the laws of war."

It was not alleged that Yamashita had ordered any of the crimes set forth in the Bills of Particulars presented to the Commission.

(The Bills of Particulars in their opening words showed this and will be quoted).

Counsel for the Defence was mainly concerned to show, not that the atrocities had not been committed, but that the accused neither knew of, condoned, excused or ordered them. One of his sentences is reminiscent of the claim of Rauer's Counsel that Rauer was too overworked and harassed by the approaching Allied forces to be able to exercise proper supervision over the prisoners of war in his hands; Counsel for Yamashita said:

"Can it be seriously contended that a commander, beset and harassed by the enemy, staggering under a successful enemy invasion to the south and expecting at any moment another invasion in the north, that such a commander could in the period of a handful of weeks gather in all the strings of administration?" Other factors on which he relied were the newness of the accused's command and the distance separating him and his troops: "How can the man possibly be held accountable for the action of troops which had passed into his command only one month before, at a time when he was 150 miles away - troops which he had never seen, trained or inspected, whose commanding officers he could not change or designate, and over whose actions he has only the most nominal control?"

The judgment of the Commission included the following passages:

"The crimes alleged to have been permitted by the Accused in violation of the laws of war may be grouped into three categories: (1) Starvation, execution or massacre without trial and mal-administration generally of civilian internees and prisoners of war; (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives; (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offences extended throughout the period

the Accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended throughout the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon. It is "noteworthy that the Accused made no attempt to deny that the crimes were committed, although some deaths were attributed by Defence Counsel to legal execution of armed guerrillas, hazards of battle and action of guerrilla troops favorable to Japan,.....

"The Prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused. Captured orders issued by subordinate officers of the accused were presented as proof that they, at least, ordered certain acts leading directly to exterminations of civilians under the guise of eliminating the activities of guerrillas hostile to Japan. With respect to civilian internees and prisoners of war, the proof offered to the Commission alleged criminal neglect, especially with respect to food and medical supplies, as well as complete failure by the higher echelons of command to detect and prevent cruel and inhuman treatment accorded by local commanders and guards. The Commission considered evidence that the provisions of the Geneva Convention received scant compliance or attention, and that the International Red Cross was unable to render any sustained help. The cruelties and arrogance of the Japanese Military Police, prison camp guards and officials, with like action by local subordinate commanders were presented at length by the prosecution.

"The Defence established the difficulties faced by the accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply with especial reference to food and gasoline, training, communication discipline and morale of his troops. It was alleged that the sudden assignment of Naval and Air Forces to his tactical command presented almost insurmountable difficulties. This situation was followed, the Defence contended, by failure to obey his orders to withdraw troops from Manila, and the subsequent massacre of unarmed civilians, particularly by

Naval forces. Prior to the Luzon Campaign, Naval forces had reported to a separate ministry in the Japanese Government and Naval Commanders may not have been receptive or experienced in this instance with respect to a joint land operation under a single commander who was designated from the Army Service. As to the crimes themselves, complete ignorance that they had occurred was stoutly maintained by the accused, his principal staff officers and subordinate commanders; further, that all such acts, if committed, were directly contrary to the announced policies, wishes and orders of the accused. The Japanese Commanders testified that they did not make personal inspections or independent checks during the Philippine campaign to determine for themselves the established procedures by which their subordinates accomplish their missions. Taken at full face value, the testimony indicates that Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted.....

"This accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army in peace as well as war in Asia, Malaya, Europe, and the Japanese Home Islands. Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nonetheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood. The Rules of Land Warfare, Field Manual 27-10, United States Army, are clear on these points. It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering military justice. The tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character, and training

of his troops are other important factors in such cases. These matters have been the principle considerations of the Commission during its deliberations.....

"General Yamashita: The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances.

Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging."

The case eventually came before the Supreme Court of the United States on an application for leave to file a petition for writs of habeas corpus and prohibition in that Court, and on a petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines, denying the petitioner's application to the court for writs of habeas corpus and prohibition. Judgment was delivered on February 4th, 1946.

In the majority judgment of the Supreme Court, delivered by Chief Justice Stone, the following passage appears:

"The charge, so far as now relevant, is that petitioner, between October 9th, 1944 and September 2nd, 1945, in the Philippine Islands, "while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he ... thereby violated the laws of war".... It is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charges is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command

for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

"It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that ist violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

"This is recognized by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates". Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out". And Article 26 of the Geneva Red Cross Convention 1929 for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles (of the convention) as well as for unforeseen cases". And, finally, Article 43 of the Annex of the Fourth Hague Convention requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and

safety, while respecting, unless absolutely prevented, the laws in force in the country".

"These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognised, and its breach penalized by our own military tribunals".

It will have been noted that Chief Justice Stone delivered the judgment of a majority of the Supreme Court. Mr. Justice Murphy and Mr. Justice Rutledge dissented for this opinion. The two dissenting judges held the opinion, inter alia, that the atrocities proved to have taken place were committed while Yamashita's troops were disorganised largely due to the onslaught of the United States forces, and that since Yamashita had not ordered these offences to be committed and had not even known of their happening he could not be held responsible for their perpetration.

Another relevant United States Trial, is that of Yuicki Sakamoto, held at Yokohama, Japan, on February 13th, 1946. The accused was sentenced to life imprisonment after being found guilty on a charge alleging that he "between 1st January, 1943 and 1st September, 1945, at a prisoner of war camp Fukuoka #1, Fukuoka, Kyushu, Japan did commit cruel and brutal atrocities and failed to discharge his duty as Commanding Officer in that he permitted members of his command to commit cruel and brutal atrocities."

A charge entitled Neglect of Duty in Violation of the Laws and Customs of War was brought against Lt. General Yoshio Tachibana and Major Sueo Matoba of the Imperial Japanese Army and against Vice Admiral Kunizo Mori, Captain Shizuo Yoshii and Lt. Jisuro Suyeyoshi of the Imperial Japanese Navy, in their trial by a United States Military Commission at Guam, Marianas Islands, in August, 1946. The Specifications

appearing under this charge alleged that various of the above accused unlawfully disregarded, neglected and failed to discharge their duty, as Commanding General and other respective ranks, to control members of their commands and others under their control, or properly to protect prisoners of war, in that they permitted the unlawful killing of prisoners of war, or permitted persons under their control unlawfully to prevent the honourable burial of prisoners of war by mutilating their bodies or causing them to be mutilated or by earring flesh from their bodies.

All of the accused mentioned above were found guilty of the charge alleging neglect of duty, and although a sentence of life imprisonment was the highest penalty imposed by the Commission on an accused sentenced on this charge alone, yet the trial does serve as further proof that neglect on the part of a higher officer of a duty to restrain troops and other persons under his control can render the officer himself guilty of a war crime when his omission has lead to the commission of such a crime.

The Prosecution in the Trial of Field Marshall Milch before a United States Military Tribunal in Nuremberg, claimed that a close analogy could be drawn between that case and the Yamashita proceedings. The facts were similar and the opinion of the Supreme Court was "particularly in point in the matter of responsibility for senior officers". The Prosecutor said:

"In the cases of the medical experiments, we have a much less complex situation. There is no question of a senior officer in an occupied country, rather we are faced with a simple direct chain of command problem. Milch - Foberster - Hippke. Had Milch given the order, the experiments would have been terminated, but no order of termination was given - people were murdered and Rascher remained in the Luftwaffe until he was transferred to the S.S. in March of 1943. The defendant had an affirmative duty to know what was going on, and an affirmative duty to act so as to stop the experiments. That he was ignorant of the true state of affairs is

unbelievable in view of the letters and the testimony of those who were below him. Field Marshals are not made as are non-commissioned officers... By holding the office which he held, he had the duty to control the activities of those who were his subordinates, to insure that they conducted themselves as soldiers and not as murderers. He has failed woefully in the task."

The judgment of the Court on Count two, which alleged that the defendant was a principal in, accessory to, ordered, abetted, took a consenting part in and was connected with, plans and enterprises involving medical experiments without the subjects' consent, in the course of which experiments, the defendant, with others, perpetrated murders, burtalities, cruelties, tortures and other inhuman acts, includes the following passage:

"In approaching a judicial solution of the questions involved in this phase of the case, it may be well to set down seriatim the controlling legal questions to be answered by an analysis of the proof:

- (1) Were low-pressure and freezing experiments carried on at Dachau?
- (2) Were they of a character to inflict torture and death on the subjects?

(The answer to these two questions may be said to involve the establishment of the corpus delicti).

- (3) Did the defendant personally participate in them?
- (4) Were they conducted under his direction or command?
- (5) Were they conducted with prior knowledge on his part that they might be excessive or inhuman?
- (6) Did he have the power or opportunity to prevent or stop them?
- (7) If so, did he fail to act, thereby becoming particeps criminis and accessory to them?"

The Court later expressed the following conclusions:

"(3). The prosecution does not claim (and there is no evidence) that the defendant personally participated in the conduct of these experiments.

"(4). There is no evidence that the defendant instituted the experiments or that they were conducted or continued under his specific direction or command.....

was also Field Marshal in the Luftwaffe, 1940 to 1945; Air Quarter Master General, 1941 to 1944; member of the Central Planning Board, 1942 to 1945; and Chief of the Jaegerstab, 1944 to 1945, and also was Generalluftzeugmeister".

Nevertheless, he concurred in the finding of not guilty on the second Count; "All of the testimony and the evidence, both for the Prosecution and the Defence, is to the effect that the defendant Milch did not have such knowledge of the high altitude or low-pressure experiments which were carried out and completed by Luftwaffe physicians at Dachau until after the completion of such experiments. The evidence offered as to the knowledge or responsibility of the defendant Milch was not such a nature as to show guilty knowledge on his part of said experiments.

"As to the cooling or freezing experiments performed at Concentration Camp Dachau, for which the defendant is charged with responsibility, I find as a fact that the defendant ordered experiments to be conducted at the camp for the benefit of the Luftwaffe....

"The defendant admits giving orders for the conduct of certain experiments....but contends that he did not know of, or contemplate, that the experiments would be conducted in an illegal manner or would result in the injury or death of any person. The defendant further asserts that he did not know or have any reason to believe that the experiments were conducted in such manner until after they had been completed. He therefore insists that he was and is not responsible for the unlawful manner in which the experiments were actually conducted by the Luftwaffe officers and that he is not guilty of any crime as a result thereof.

"The Tribunal in its majority opinion has fully considered the decision of the United States Supreme Court in the Judgment in re-Yamashita and has found that said decision is not controlling in the case at bar. In weighing the evidence, the Tribunal was mindful of the fact that the defendant gave the order and directed his subordinates to carry on such experiments, and

that thereafter he failed and neglected to take such measures as were reasonably within his power to protect such subjects from inhumane treatment and deaths as a result of such experiments. Notwithstanding these facts, the Tribunal is of the opinion that the evidence fails to disclose beyond a reasonable doubt that the defendant had any knowledge that the experiments would be conducted in an unlawful manner and that permanent injury, inhumane treatment or deaths would result therefrom.

"Therefore the Tribunal found that the defendant did not have such knowledge as would amount to participation or responsibility on his part and therefore found the defendant not guilty on charges contained in Count No. 2."

The extent to which the Chinese Courts have been willing to go in pinning responsibility of this kind onto commanders was shown by the Trial of Takashi Sakai by the Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking, 27th August, 1946. The accused was sentenced to death after having been found guilty, inter alia, of "inciting or permitting his subordinates to murder prisoners of war, wounded soldiers and non-combatants; to rape, plunder, deport civilians; to indulge in cruel punishment and torture; and to cause destruction of property." The Tribunal expressed the opinion that it was an accepted principle that a field Commander must hold himself responsible for the discipline of his subordinates. It was inconceivable that he should not have been aware of the acts of atrocity committed by his subordinates during the two years when he directed military operations in Kwantung and Hong Kong. This fact had been borne out by the English statement made by a Japanese officer to the effect that the order that all prisoners of war should be killed, was strictly enforced. Even the defendant, during the trial, had admitted a knowledge of murder of prisoners of war in the Stevensons Hospital, Hong Kong. All the evidence, said the Tribunal, went to show that the defendant knew of the atrocities committed by his subordinates and deliberately let loose savagery upon civilians and prisoners of war.

It will be noted that the Tribunal pointed out that the accused must have known of the acts of atrocities committed by his subordinates; the question is therefore, left open whether he would have been held guilty of breach of duty in relation to acts of which he had no knowledge.

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It is clear that the knowledge that he might be made liable for offences committed by his subordinates even if he did not order their perpetration would in most cases act as a spur to a commander who might otherwise permit the continuance of such crimes of which he was aware, or be insufficiently careful to prevent such crimes from being committed. Any rule making a commander to some degree responsible for the offences of his subordinates even in the absence of specific orders must go some way towards preventing the violation of human rights and towards vindicating such rights if they have been infringed.

The relevant material whose collection has so far been possible has been set out at some length above, in view of the importance of the subject and the present state of flux in the law and practice concerning it. The following general remarks may, however, be made.

1. The law on this matter is in a formulative stage and it would be wrong to expect to find hard and fast rules in universal application. In the circumstances it is inevitable that considerable discretion is left in the hands of the Courts to decide how far it is reasonable to hold a commander responsible for such offences of his troops as he did not order.

2. It is clearly established that a responsibility rests in certain cases in the absence of any direct order for the commission of crimes.

3. The material contained in the regulations and the cases relating to such responsibility can be separated into two categories:

- (1) material illustrating how, on proof of certain circumstances, the burden of proof is shifted, so as to place on an accused the task of showing to the satisfaction of the Court that he was not

responsible for the offences committed by his troops,

(ii) material actually defining the extent to which a commander may be held responsible for his troops' offences.

The first type of material relates to a matter of evidence, the second type to a matter of substantive law.

4. Mainly of interest in connection with the shifting of the burden of proof are the Canadian provisions (see page 2) and the Trial of Kurt Meyer (see pages 2 - 6) which was held in pursuance thereof. The arguments quoted on pages 15 - 17 from the Trial of Kurt Student are of the same kind. Of particular importance is the stress placed on the repeated occurrence of offences by troops under one command as prima facie evidence of the responsibility of the commander for those offences (see pages 2 and 15 - 16). The Trial of Rauer (see pages 6 - 12) seems to suggest that responsibility may be inferred from surrounding circumstances, including the prevailing state of discipline in an army.

5. The above mentioned trials throw some light also on the facts which must be proved in order to make a commander responsible for the offences of his troops.

Thus, in the Trial of Student, Counsel and the Judge Advocate spoke in terms of "General Student's general policy", of no bomb being dropped "without Student knowing why" and of the troops believing either that the offences had been ordered by the commander or that their offences would be "condoned and appreciated". It is to be noted that the possibility of Student being made liable in the absence of knowledge, on the grounds that he ought to have found out whether offences were being committed or were likely to be committed, or that he ought to have effectively prevented their occurrence, is not mentioned.

In the Trial of Kurt Meyer, the Judge Advocate stated that anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavour to prevent, the killing

of prisoners, were matters affecting the question of the accused's responsibility.

Here it will be noted that the possibility of a commander being held responsible for offences on the grounds that he ought to have provided against them is not ruled out.

The Judge Advocate in the Trial of Rauer and Others (see page 9) stated that the words, contained in the charge against Rauer, "concerned in the killing" were a direct allegation that he either instigated murder or condoned it. The charge did not envisage negligence.

6. The enactments and cases which relate entirely to substantive law show the same divergence in the matter of the extent to which the commander can be held liable. The French enactment (see page 1) mentions only crimes "organised or tolerated". The accused Milch (see pages 27 - 29) was held not guilty of being implicated in the conducting of illegal experiments because the Tribunal was not satisfied that he knew of their illegal nature; no duty to find out whether they had such a nature is mentioned. While the Chinese enactment (see pages 1 - 2) does not define the extent of commanders' "duty to prevent crimes from being committed by their subordinates", the Tribunal which tried Takashi Sakai (see pages 30 - 31) was careful to point out that the accused must have known of the offence proved to have been committed by his subordinates.

On the other hand, the Supreme Court of the United States (see pages 23 - 25) held that General Yamashita had a duty to "take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population," that is to say to prevent offences against them from being committed. The use of the terms "appropriate in the circumstances" serves to underline the remark made previously, namely that a great discretion is left to the Court to decide exactly where the responsibility of the commander shall cease, since no international agreement or usage lays down what these measures are.

The Judge Advocate in the Trial of General Seeger (see page 18) also made it clear that a commander could be held to have occupied a military position which required him to take certain measures, the failure to take which would amount to a war crime.

The Prosecution in its opening statement in the Trial of Carl Krauch and others (the I.G. Farben Trial⁽¹⁾) seems to have followed the Yamashita doctrine in making the following observation:

"Moreover, even where a defendant may claim lack of actual knowledge of certain details, there can be no doubt that he could have found out had he, in the words of Military Tribunal No. 1 made "the slightest investigation". Each of the defendants, with the possible exception of the four who were not Vorstand members, was in such a position that he either knew what Farben was doing at Leuna, Bitterfeld, Berlin, Auschwitz, and elsewhere, or, if he had no actual knowledge of some particular activity, again in the words of Military Tribunal No. 1, "occupying the position that he did, the duty rested upon him to make some adequate investigation". One can not accept the prerogatives of authority without shouldering responsibility."

(1) Not yet completed.

Superior Orders, Duress and Coercion

The plea of superior orders has been raised by the Defence in war crime trials more frequently than any other. The most common form of the plea consists in the argument that the accused was ordered to commit the offence by a military superior and that under military discipline orders must be obeyed. A closely related argument is that which claims that had the accused not obeyed he would have been shot or otherwise punished; it is sometimes also maintained in court that reprisals would have been taken against his family. It has to be admitted that a serious conflict must inevitably exist in the mind of a soldier in particular, when faced with the choice between the probability of immediate punishment for insubordination, and the possibility of ultimate punishment as a war criminal should his country be defeated. Nevertheless, the rights of the unfortunate victim of the crime must equally be kept in mind.

Municipal enactments regarding the punishment of war crimes have shown a great reluctance to regard the plea of superior orders as a complete defence, and have preferred in most cases to admit that the fact that a war crime was committed under orders may constitute a mitigating circumstance and to leave to the court the power to consider each case on its merits.

Thus, the United States Mediterranean Regulations provide in Regulation 9:

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

The corresponding provisions of Regulation 16 (f) of the Pacific Regulations of September 1945, of Regulation 5 (d) (6) of the Pacific Regulations of December, 1945, of Regulation 16 (f) of the China Regulations provide as follows:

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

punishment if the commission determines that justice so requires."

Similarly Article 5 of the Norwegian Law of December 13th, 1946, on the Punishment of Foreign War Criminals provides that:

"Necessity and superior order cannot be pleaded in exculpation of any crime referred to in § 1 of the present law. The court may, however, take the circumstances into account and may impose a sentence less than the minimum laid down for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted."

Other provisions of a like nature are the following:

"The fact that an accused acted pursuant to the order of a superior or of his government shall not constitute an absolute defence to any charge under these Regulations; it may, however, be considered either as a defence or in mitigation of punishment if the military court before which the charge is tried determines that justice so requires." (Article 15 of the Canadian War Crimes Act of 31st August, 1946).

"The fact that the criminal deed was performed by a person acting under orders or in a subordinate capacity does not exempt the criminal from responsibility, but may be taken into consideration as an extenuating circumstance, and in specially extenuating circumstances the punishment may be waived altogether." (Article 4 of the Danish Act on the Punishment of War Crimes of July 12th, 1946).

"In the case of trials instituted under the provisions of Article 2 of the present law, the fact that the accused acted in accordance with the provisions of enemy laws or regulations, or at the orders of a superior officer cannot be regarded as a reason for justification, within the meaning of Article 70 of the Criminal Code, when the act committed constituted a flagrant violation of the laws and customs of war, or the laws of humanity. The plea may be taken into consideration as an extenuating circumstance." (Article 3 of the Belgian Law of 20th June relating to the Competence of Military Tribunals in the Matter of War Crimes).

"Laws decrees or regulation issued by the enemy authorities, orders or permits issued by these authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Article 327 of the penal code, but can only, in certain circumstances, be admitted as extenuating or exculpating circumstances." (Article 3 of the French Ordinance of August 28th, 1944, Concerning the Prosecution of War Criminals).

Article VIII (in paragraphs 1 - 2) of the Chinese Law of October 24th, 1946, simply provides that:

"The following circumstance under which offences have been committed shall not exonerate war criminals:

1. the fact that crimes were committed by order of Superior Officers.
2. the fact that crimes were committed as result of official duty."

The British Royal Warrant contains no provisions regarding the admissibility of the defence of Superior Orders, and there has been considerable discussion during trials before British Military Courts of the admissibility of this plea.

Chapter XIV of the British Manual of Military Law has often been quoted by Counsel as authority on this point. It must be stated at the outset that Chapter XIV (The Laws and Usages of War on Land) of the British Manual of Military Law is intended as a guide for the use of the military forces. It has not therefore the authority as a statement of International Law which attaches to an international treaty. Such publications, prepared for the benefit of the armed forces of various nations, are frequently used in argument in the same way as other interpretations of International Law, and, in so far as their provisions are acted upon, they mould state practice, which is itself a source of International Law. The British Manual of Military Law is not a legislative instrument; it is not a source of law like a statutory or prerogative order or a decision of a court, but is only a publication setting out the law. It has, therefore, itself no formal binding power,

but has to be either accepted or rejected on its merits, i.e. according to whether or not in the opinion of the Court it states the law correctly.

Until April, 1944, Chapter XIV of the British Manual of Military Law contained the much discussed statement (para. 443) that "members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or by their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to other means of obtaining redress"

This statement was based on the 5th edition of Oppenheim's International Law, Volume II, page 454. Considerable doubts were cast on the correctness of this statement by most writers upon the subject and it was replaced in the 6th edition of Oppenheim by its learned editor, Professor Lauterpacht, by a statement to the effect that the fact that a rule of warfare has been violated in pursuance of an order of a belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime.

The fallacy of the opinion expressed in the pre-1944 text (para. 443) of Chapter XIV) of the British Manual and the corresponding rule of the United States Rules of Land Warfare (para. 347 of the 1940 text), was demonstrated in an article by Professor Alexander N. Sack in the Law Quarterly Review (Vol. 60, January, 1944, p. 63). The relevance of plea of superior orders became also the subject of research and critical examination by official and semi-official international bodies which dealt with problems of war crimes during the second world war (United Nations War Crimes Commission; London International Assembly, etc.).

In April, 1944, the British Manual was altered, the sentences just quoted being replaced by the following statement of the law:

"The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a

war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity."

A similar though not identical alteration of the American Field Manual has been brought about by "Change No. 1 to the Rules of Land Warfare" dated 15th November, 1944.⁽¹⁾

In the course of the Pelius Trial,⁽²⁾ an objection was raised to the application of the law as stated in the amendment to the British Manual of Military Law and the decision of the British Privy Council in the Zamora case was invoked, where it had been stated that a British Prize Court administers International Law and not Municipal Law and although it may be bound by executive orders of the King in Council. If that be so, then it was said, a fortiori, the Court is not bound by an amendment published by the War Office.

This objection was not referred to by the Judge Advocate in his summing up, but it was implied in his direction to the Court that the plea of Superior Orders was not well founded.

The Judge Advocate accepted the law as stated in the 1944 amendment to the British Manual and advised the Court accordingly.

Counsel for the Defence, asked by the Judge Advocate whether he challenged the accuracy of the statement that the question was governed by the major principle that members of armed forces are bound to obey lawful orders only, stated that he was not prepared to challenge that.

The Court rejected the plea of superior orders.

A further discussion of the question arose during the Belsen Trial.⁽³⁾ Colonel Smith, in delivering a closing argument in defence of the accused

(1) See p. 41.

(2) See Law Reports of Trials of War Criminals, Vol. I, pp. 1-21.

(3) See Vol. II of the same series, especially pp. 69-78 and 104-110.

as a whole, submitted that the original text of paragraph 443 was correct in law and that the amended version was incorrect and he repeated that the Court was its own judge of law and was not bound to take it from the War Office, the Privy Council or any other authority.⁽¹⁾ The original text^{was} in accordance with the ordinary experience of the necessities of military discipline and was, moreover, in precise agreement with the American Manual.⁽²⁾ It would surely be most unfortunate if the Court were to condemn people, in cases where the defence of superior orders was pleaded, by virtue of an amendment to a British Manual, the text^{of which} was at variance with the American and other official manuals, as a result of a change introduced in April 1944, whereas the dates in the Charge Sheet began in October, 1942.

Replying to Colonel Smith's arguments, the Prosecutor in the Belsen Trial claimed that the amendment to the Manual was made, however, to bring it in line with almost every writer on the subject, including Professor Lauterpacht and Professor Brierly. It was in fact made in consultation with the American Judge Advocate General, and it was in line with the American law as set forth in American, as opposed to the American Manual, which had not yet been amended.

It must be added, that, if a statement contained in the Manual was, as is stated in the footnote to the British Amendment No. 34, "inconsistent with the view of most writers upon the subject and also with the decision of the German Supreme Court in the case of the Llandovery Castle," there was no obstacle, constitutional, legal or otherwise, to correcting the mistake in the statement of law on the one hand, and to proceeding on the basis of the law, as it had thus been elucidated, on the other.

A second authority on which great reliance has been placed by Counsel, and which has been quoted as stating correct law by Judge Advocates,

(1) Like the Defence in the Peleus Trial, Colonel Smith also pointed to the parallel between a war crimes court and a prize court, in arguing that the Manual was not binding on the Court.

(2) Which was then unamended; See p. 41.

in British Trials⁽¹⁾ has been the celebrated work, International Law (Oppenheim-Lauterpacht), of which Volume II (6th Edition) contains, on pp. 452/3 a passage which is identical with the amended version of paragraph 443.⁽²⁾

The Judge Advocate acting in the Trial of Karl Buck and Ten Others by a British Military Court at Wuppertal, Germany, 6th - 10th May, 1946, after quoting this passage, added that an accused would be guilty if he committed a war crime in pursuance of an order, first if the order was obviously unlawful, secondly if the accused knew that the order was unlawful, or thirdly if he ought to have known it to be unlawful had he considered the circumstances in which it was given.

Despite the fact that most of the regulations governing trials by United States Military Commissions have included provisions defining the applicability of the plea of Superior Orders, reference has often been made, during trials before such Commissions, to the United States Basic Field Manual F.M. 27-10 (Rules of Land Warfare) which is similar in scope and purpose to the British Manual of Military Law.

Until November 15th, 1944, paragraph 347 of the United States Basic Field Manual provided that individuals of the Armed Forces would not be punished for war crimes if they were committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they were committed by their troops, might be punished by the belligerent into whose hands they fell. It will be appreciated that this provision of paragraph 347 of the American Rules of Land Warfare corresponds exactly to the original text of paragraph 443 of Chapter XIV of the British Manual of Military Law.

By Change No. 1 to the Rules of Land Warfare dated 15th November, 1944 the sentences quoted above from paragraph 347 of the Rules of Land Warfare have been omitted and the following provisions have been added to paragraph 345:-

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- (1) For instance the Judge Advocate in the Belsen Trial advised the court to follow the law laid down in this text on the question of Superior Orders.
- (2) Page 452 of this work sets out the literature on the subject.

"Individuals and organisations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished."

It will be seen that the statement of the law contained in the new text of the American Basic Field Manual differs somewhat from the 1944 text of the British Manual, though both abandon the sweeping statements contained in the former text regarding the plea of superior orders. The new British text appears to exclude an unlawful order as a defence, and it is interesting to compare both with Article 8 of the Charter of the International Military Tribunal of 8th August, 1945, under which superior orders were not to free a defendant from responsibility, but might be considered in mitigation of punishment.

The statement contained in the new text of paragraph 345 of the American Basic Field Manual makes it possible to consider superior orders or Government sanction in determining culpability, either by way of defence or in mitigation of punishment.

The provisions of the Field Manual on this point were quoted for instance by the Defence in the Trial of General Anton Dostler, by a United States Military Commission in Rome (8th - 12th October, 1945);⁽¹⁾ although this trial was held under the Regulations for the Trial of War Crimes issued for the Mediterranean Theatre of Operations on 23rd September, 1945, (see p.35), the provisions contained therein relating to the defence of superior orders were not referred to.

Sheldon Glueck, on pages 155 - 6 of his authoritative work, War Criminals, Their Prosecution and Punishment, also provides some guidance in the matter. Glueck, seeking to reconcile the dilemma in which a subordinate is placed by an order manifestly unlawful, compliance with which may later subject him to trial for a war crime, and refusal to comply with which may immediately subject him to disciplinary action,

(1) Law Reports of Trials of War Criminals, Vol.I, pp.22-34.

perhaps death, suggests that the following rule be applied: "An unlawful act of a soldier or officer in obedience to an order of his government or his military superior is not justifiable if when he committed it he actually knew, or, considering the circumstances, he had reasonable grounds for knowing that the act ordered is unlawful under (a) the laws and customs of warfare, or (b) the principles of criminal law generally prevailing in civilized nations, or (c) the law of his own country. In applying this rule, whenever the three legal systems clash, the last shall be subordinate."

Interesting material relating to the defence of superior orders is to be derived from a study of the Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy, before a United States Military Commission, United States Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, on 7th - 13th, December, 1945.

Masuda, who committed suicide before the trial, had ordered three subordinates in the Imperial Japanese Navy to shoot to death three United States airmen, who had become unarmed prisoners of war, and a fourth, who had custody of the prisoners, to hand them to the three executioners. These four were brought to trial for the part which they had played in the killing of the airmen.

The accused pleaded not guilty. They admitted their part in the execution of the American Prisoners of War, but claimed as a defence that, as military men of the Japanese Empire, they were acting under orders of a superior authority, which they were bound to obey.

One of the defending Counsel, himself a Lieutenant-Commander in the Imperial Japanese Navy, described the absolute discipline and obedience which was expected from the Japanese forces, and quoted an Imperial Rescript which included the words: "Subordinates should have the idea that the orders from their superiors are nothing but the orders personally from His Majesty the Emperor." The Japanese forces were exceptional

among the world's armed forces in this respect and, therefore, he claimed, it was impossible to apply therein "the liberal and individualistic ideas which rule usual societies unmodified to this totalistic and absolutistic military society." The strategic situation was so critical in early 1944 that the characteristic referred to was displayed in the Jaluit unit to an exceptional degree. Furthermore the order was given direct by a Rear-Admiral to "mere Warrant Officers and Petty Officers." If they had refused to obey it, "everyone would have fallen upon them."

As the accused had no criminal intent, it was clear that they had committed no crime.

The other defending Counsel pointed out that the executioners each requested that they should not be assigned the task of carrying out the killing, but when emphatically ordered by Masuda, a man of strong character, they had obeyed, in accordance with their training. Their actions were not of their own volition; they were the will of another.

Tasaki, the custodian of the prisoners of war, who arranged their handing over to the executioners, also merely acted in accordance with the orders of the Rear-Admiral. Certainly the latter had told him why he was to surrender the prisoners, but this fact in no way placed him in the position of a participant in the commission of a crime.

In presenting the case for the Prosecution, one of the two Judge Advocates quoted three authorities with the intention of securing the rejection by the Commission of the plea of superior orders. The Judge Advocate General, he said, had made reference, in Court Martial Orders 212-1919, to the following dictum in U.S. v. Carr (25 Fed. Cases 307): "Soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor by his oath to do it. So far from such an order being a justification it makes the party giving the order an accomplice in the crime."

In another case, involving the killing of a Nicaraguan citizen by a member of the United States forces, the Judge Advocate stated: "An order illegal in itself and not justified by the rules and usages of war, or in its substance clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that it was illegal, will afford no protection for a homicide, provided the act with which he may be charged has all the ingredients in it which may be necessary to constitute the same crime in law" (CMO 4-1929).

In the opinion of the Judge Advocate, however, the statement of the law most clearly in point was contained in "the rules promulgated by the Supreme Command of the Allied Powers for use in war crime cases. This body of international law, briefly known as the SCAP rules and adopted by the Commission at the direction of the Judge Advocate General of the Navy, has the following provision applicable to the defence raised by the accused, quoting sub-paragraph (f) of paragraph 16:

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

Two problems arise from the above arguments. In the first place the question may be asked what is meant, in three passages quoted by the Judge Advocate in securing the rejection of the defence of superior orders, and elsewhere in the literature on the subject, by the statement that a soldier is entitled under International Law to obey only commands which are lawful? Must these commands be lawful under the Municipal Law governing the soldier, or under International Law? The extract from the judgment in U.S. v. Carr leaves the point in doubt. So, strictly speaking, does the dictum taken from the Nicaraguan case since it is not clear whether the passage "and not justified by the rules of usages of war" is intended to amplify, or to be in addition to, the words "illegal in itself". If it were the latter, the word "illegal" could be taken to mean illegal "under Municipal Law".

The question is one of great importance. If an order is legal under International Law, it is difficult to see how an act committed in obedience to it could be illegal under that system. If the act were thus legal in itself there would be no need for an accused to have recourse to the defence of superior orders. On the other hand, if the order need only be legal under Municipal Law, it would be possible for the head of an authoritarian state to order the execution of all prisoners of war and for all his armed subordinates to carry out such an order and remain entirely innocent of any war criminality.

Secondly, if the plea of superior orders is to be recognised as a defence, or even only an argument in mitigation of sentence, some principle must be evolved which would determine the limits of its validity. Four possible criteria were touched upon during the trial:

- (1) The degree of military discipline governing the accused at the time of the commission of the alleged offence.

Defending counsel laid great stress on the exceptionally strict obedience to orders which was expected from a Japanese soldier. In so far as the plea of superior orders derives what strength it may have from the presence of conflicting loyalties in the mind of the accused, this argument is perfectly valid. On the other hand, in view of the fact that the Allied Powers included among their war aims the overthrow of the dictatorial system of government, it is not likely that the prevailing opinion would allow a person accused of war crimes to plead in defence the very disease against which the war was fought. Furthermore, general agreement will probably be given to the Judge Advocate's opinion that: "The Japanese Army must observe the same rules that the United States fighting man, the man from Russia and the man from Great Britain must observe. The law is no respecter of individual nations. If it is to be an effective law, it must govern the actions of all nations."

(ii) The relative positions in the military hierarchy of the person who gave and the person who received the order.

Counsel for the defence pointed out that the order was given by a Rear-Admiral, to "mere Warrant Officers and Petty Officers". Legally perhaps, such commands should bind the subordinate no more and no less than those of an immediate superior, yet it has to be recognised that, since the whole defence is based on a psychological condition, the state of mind of the accused, the argument of the defence has some weight.

(iii) The military situation at the time when the alleged offence was committed.

The defence pointed out that discipline at Jaluit was the stricter because of the nearness of the United States forces. This defence is not the same as that based on military necessity, when using which the accused pleads that, irrespective of any superior orders, he acted as he did because the military situation made it necessary for him to do so.

If this argument were to be admitted, it would be for the defence to prove that the situation had actually altered the accused's attitude towards his superiors so as to make him feel that his obligation to obey them had become stricter.

(iv) The degree to which "a man of ordinary sense and understanding", (quoting the Judge Advocate in the Nicaraguan case) would see that the order given was illegal.

This test is valid, whether legality under Municipal Law or under International Law is meant. For Anglo-Saxon lawyers its use would be reminiscent of the frequent references to the hypothetical "average reasonable man", and of a passage of Dicey's in reference to the analogous conflict between a soldier's duty to obey orders and his allegiance to the general law of the land: "...a soldier runs no substantial risk of punishment for obedience to orders which a man of common sense may honestly believe to involve no breach of law" (The Law of the Constitution 8th edition, p. 302, quoted by Professor Lauterpacht in British Yearbook of International Law, 1944, p. 72)

The first three of these suggested criteria demonstrate an awareness of the heavy pressure under which an accused may be acting in obeying an order. The International Military Tribunal at Nuremberg, commenting in its judgment on Article 8 of its Charter apparently had the same consideration in mind when it said: "The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible".(1)

Some instances in which the plea has been successful and some in which it has failed are now to be quoted in order to illustrate the extent of recognition given thereto.

The Judge Advocate in the Masuda trial, quoting the "SCAP" rules, admitted that the plea might be effective in mitigation of sentence. The custodian of the prisoners, in his evidence, stated: "I had no intent to kill them as well as no malice. All I did was to relay the order mechanically and let the flyers be released." The plea was effective in reducing his sentence to one of imprisonment for ten years.

Sitting from 23rd April to 3rd May, 1946, the French Permanent Military Tribunal of Strasburg tried ex-Gauleiter Wagner and certain of his underlings for offences committed by them in Alsace during the German occupation. One of the accused, Ludwig Luger, formerly Public Prosecutor at the Sondergericht of Strasbourg, was charged with having been an accomplice in murder. The charge was made in the Indictment that, during the trial of a group of 13 Alsatians accused of murdering a frontier guard during an attempted escape to Switzerland, Luger acknowledged that there was no evidence of the guard having been killed by any of the accused yet demanded the death sentence, which was passed on all 13 accused. Nevertheless Luger was acquitted, the Permanent Military Tribunal finding that he had acted under pressure from Wagner, then Gauleiter and Reich Governor of Alsace (The Indictment alleged that it

(1) British Command Paper, Cmd. 6964, p. 42.

was Wagner's normal routine to examine an Indictment before a trial was held before the Sondergericht, and to communicate to Luger his orders concerning the penalty which the latter was to demand).

This French case is interesting also because it represents an instance in which the defence of superior order was pleaded, and successfully, not by a member of the armed forces but by a civilian, a member of the German administration of an occupied territory.

The Supreme Court of Norway provides the next example. Hauptsturmführer Wilhelm Artur Konstatin Wagner was charged before the Lagmannsrett (District Court) at Eidsivating with having committed war crimes in that he, in violation of the laws of humanity, was concerned in the deportation and death of 521 Norwegian Jews. The Lagmannsrett found him guilty and sentenced him to death. He appealed to the Supreme Court on the grounds, inter alia, that the punishment decided by the Lagmannsrett was too severe, the majority of the judges having failed to consider that he had acted on superior orders and that in his capacity of a subordinate he could not have prevented the carrying out of the decision of the German and Quisling Governments.

When discussing the severity of the punishment decided upon by the Lagmannsrett, the President of the Court agreed with the minority of that Court that it had been established that the defendant held a very unimportant position in the Gestapo and that there was nothing to show that he had taken any initiative in the action. His part had been to pass on the orders from Berlin to the Chief of the State Police and to execute the orders of his superiors. He was sure that if the defendant had refused to obey orders, he would have had to pay for the refusal with his life.

On the other hand, it had been ascertained that the defendant, when superintending the embarkation of the Jews, had personally gone to see to it that more provisions were handed out to them.

He therefore suggested to fix the punishment to 20 years penal servitude. The sentence was carried by a majority of three to two.

Two more examples of trials in which the Court considered the circumstance that an accused acted under superior orders may be quoted, each relating to trials by United States Military Commissions. On January 24th, 1946, a General Military Government Court sitting at Ludwigsburg found two German civilians, Johann Melchior and Walter Hirschelmann guilty of aiding, abetting and participating in the killing of two prisoners of war by shooting them, but sentenced them to life imprisonment; the records make it clear that the death sentence was not inflicted because the accused had acted under the orders of a Kreisleiter. Karl Neuber was found guilty on April 26th, 1946, by a General Military Government Court at Ludwigsburg, of aiding, abetting and participating in the killing of prisoners of war. He had acted on the orders of Criminal Commissar Weger, in whose office he was a filing clerk. The sentence passed was one of imprisonment for seven years, and an examination of the record shows that the Court, in fixing the sentence, bore in mind the fact that Neuber acted under pressure of superior orders.

Trials in which the defence of superior orders, duress or coercion, has been unsuccessfully pleaded abound. In a number of these, reliance was placed by the Defence on either the so-called Führerbefehl of October 18th, 1942, or upon alleged orders that "terror flyers" were no longer to be granted the protection accorded to prisoners of war.

In Articles 3, 4 and 5 of the former, (1) Hitler addressed the following orders to all officers in the German army:

"3. Therefore I command that: Henceforth all enemy troops encountered by German troops during so-called commando operations, in Europe or in Africa, though they appear to be soldiers in uniform or demolition groups, armed or unarmed, are to be exterminated to the last man, either in combat or in pursuit. It matters not in the least whether they have been landed by ships or planes or dropped by parachute.

(1) According to the text produced by the Defence in the Trial of General Anton Dostler (see p.51).

If such men appear to be about to surrender, no quarter should be given them on general principle. A detailed report on this point is to be addressed in each case to the OKW for inclusion in the Wehrmacht communiqué.

4. If members of such commando units, acting as agents, saboteurs, etc., fall into the hands of the Wehrmacht through different channels (for example, through the police in occupied territories), they are to be handed over to the Sicherheitsdienst without delay. It is formally forbidden to keep them, even temporarily, under military supervision (for example, in P/W camps, etc.).

5. These provisions do not apply to enemy soldiers who surrender or are captured in actual combat within the limits of normal combat activities (offensives, large-scale air or seaborne landings). Nor do they apply to enemy troops captured during naval engagements, nor to aviators who have baled out to save lives, during aerial combat."

Unsuccessful reliance was placed upon these orders by the Defence in the Dostler Trial,⁽¹⁾ and upon similar orders (or perhaps the same orders,^a slightly different account of them being given in evidence) in the Trial of Karl Buck and Ten Others by a British Military Court in Wuppertal, Germany, May 6th - 10th, 1946, in the Trial of Karl Adam Golkel and Thirteen Others by a British Military Court, also in Wuppertal, May 15th - 21st, 1946, and in other trials.

(1) See War Crime Trial Law Reports, Volume I, pp. 22 - 34.

In a trial before a United States Military Commission at Freising, Germany, Bury, ex-police chief of Langenselbod, Kreis Hanau, Germany, and Hafner, ex-policeman in the same place, were accused of unlawfully killing a United States prisoner of war. It was alleged that the former accused delivered the prisoner to the latter, with instructions to kill him, and that Hafner carried out these orders. The airman was taken to a secluded spot and shot. Bury stated that he had orders that "terror flyers" were no longer to be granted the protection of prisoners of war and were to be killed by lynching or beating and that the police were not to protect "terror flyers" if the populace lynched them. Both accused were sentenced to death by hanging and the sentences were confirmed.

The plea of superior orders was raised on behalf of both accused, but the Commission rejected it.

It is worthy of note that his own testimony showed that Bury had some latitude in determining whether or not any specific flyer should be killed. He received no explicit order with respect to the victim, and there was nothing to show that the haste and callousness with which the American flyer was dispatched was made necessary by the circumstances. Hafner is not recorded as having made any protest against the order. When he reported to Bury that the job was done, Bury replied, "It is right so".

X X X

As was suggested at the beginning of this section,⁽¹⁾ the argument that a soldier cannot, under conditions of military discipline, lightly disobey an order is not without some weight, and the plea based on argument by Defence counsel in the Masuda Trial has often been repeated elsewhere. A variation is to be found in the argument of Counsel for Dr. Klein, one of the accused in the Bolson Trial;⁽²⁾ Counsel claimed that if a British soldier refused to obey an order he would face a Court Martial, where he would be able to contest the lawfulness of the order, whereas Dr. Klein had no such protection.

Nevertheless the rights of the unfortunate victim must also be kept

(1) See p.35.

(2) See War Crime Trial Law Reports, Volume II, p.79.

constantly in mind.

The material comprising this section has been of two kinds:

i) Material setting out the circumstances in which the plea may be or has been successfully put forward. Quotations from the various authorities which make the illegality, or the recognition of the illegality, or otherwise, of the order in some way or other the criterion fall into this category, as do also the descriptions of such trials as the Wagner Trial⁽¹⁾ and the Masuda Trial⁽²⁾ in which the plea had some effect.

It is difficult to say at present how far such criteria as those set out on pages 46 - 48 are followed by Courts and how far they constitute suggestions de lege ferenda, but indications of a realisation that all cases cannot be treated alike are not lacking. The Prosecution in its opening statement in the Trial of Wilhelm List and others,⁽³⁾ in discussing the controversy which had arisen over the trial of high-ranking ex-enemy commanders, said:

"Others and quite different doubts have been raised by some who, with a blurred vision of military discipline, suppose that military men are a sort of race apart, who are not responsible for their actions because they are expected to obey orders. But the law and code of the German Army itself says that it is the duty of every soldier to refuse to obey orders that he knows to be criminal. This may be hard for the ordinary soldier acting under pistol-point orders from his lieutenant. It is far less difficult for high-ranking commanders such as the men in the dock."⁽⁴⁾

ii) Material defining the legal effect of the plea when successfully put forward. The enactments and other authorities set out above make it clear that, while the Defence can never claim that superior orders represent an absolute defence which would remove the legal guilt of the prisoner (as

(1) See p. 48 - 9.

(2) See p. 48.

(3) By a United States Military Tribunal in Nuremberg. The trial has not yet been completed.

(4) Italics inserted.

would, for instance, a successful plea of insanity), the Court may consider the fact that an offence was committed under orders as a mitigating circumstance and may therefore inflict a lighter penalty than would have been imposed, or may impose no penalty at all.

The following translated extract from pages 243 - 5 of Professor Michel de Juglart's work, Répertoire Methodique de la Jurisprudence Militaire is reproduced here since it sums up, not only the problem involved in the admissibility or otherwise of the plea of superior orders, but also the various possible approaches to the question, and, in its conclusion, the solution generally adopted:

"Will it be necessary to punish without discrimination those who, in obedience to Superior Orders, have struck prisoners, shot hostages and pillaged property? A distinction has always been made in this connection between civilians and soldiers. Civilians are assumed to have an opportunity for consideration, for discussing the orders they received from their superiors, and one therefore considers in general that they commit an offence if they carry out an order which they regard as illegal ... On this question, the rules of (French) substantive law were in consequence sufficiently flexible and sufficiently precise to permit of the punishment of the many offences committed during the war against Frenchmen by German civilians in Germany or in France.

"For soldiers on the other hand the demands of hierarchical authority and of discipline profoundly alter the situation. But is it necessary to admit that a soldier shall escape all criminal consequences under the pretext that he was bound to obey the one who gave him illegal orders? This question occupied the minds of French penologists to a great extent during the war of 1914 to 1918, when the application of Municipal Law to acts of war in violation of International Law was being discussed by the Société des prisons. The majority agreed to recognise that **military** discipline was absolutely indispensable, that one could not admit that soldiers, non-commissioned officers, or even commissioned officers should discuss the orders which were given them, it being admitted that they

cannot in general estimate the legality of these orders. The extenuating circumstances described in Article 327⁽¹⁾ was thus in large part admitted. Consequently the extent of the application of punishment to acts of war was considerably reduced and there only remained, as a last resort, the possibility of the resort to reprisals, dangerous though it was for a people such as ours to make use of such a method.

" It was on this question that the legislator in 1944 was led to make a new departure. In amending the legal texts he had the choice between three alternatives. He could first conceive of legislation in which the circumstances set out in Article 327 would always have been excluded not only as a complete defence but also as an extenuating circumstance or an excuse from the moment he found himself faced with an offence committed by a civilian or a soldier during war. This was the solution which M. Huguonoy seems to approve, in a much more general way it is true, for orders given to officers, and he quoted the example of a colonel who received from his superior orders to make his troops intervene to support a coup d'état.⁽²⁾ It is not so much the manifest illegality of the order received as the very situation in which the accused is placed which explains this solution. For others it would seem best to examine in detail each particular case in order to find whether a criminal element is involved. Was he who committed the offence acting on specific orders? Was he, for example, a member of an execution squad? Then one should not condemn him because he could do no other; on the other hand was he relying on a kind of general order or a general authorisation which stated: "You may kill", and did he perform the killing in virtue of an order of this nature? He has committed a crime for which he is fully responsible.⁽³⁾ It is this approach which Judge Jackson seems to support in his report to President Truman, in which he writes:

(1) Article 327 of the French Code Pénal provides: "No crime or delict is committed when the homicide, wounding or striking was ordered by the law or by legal authority."

(2) Huguonoy, Traité de droit pénal militaire, p.398.

(3) Normand, Société des prisons, 16th June 1915: Revue pénitentiaire, 1915, p.470.

" 'There exists a province in which obedience to superior orders shall prevail as a defence; if a soldier is placed in an execution squad he must not be made responsible for validity of the sentence. But the question is very different when a person, by reason of his rank or of the latitude of the orders which he has received has full liberty of action. Superior orders as a means of defence could not apply in the case of voluntary anticipation in an organisation of criminals or conspirators like the Gestapo or the S.S.'"

" There exists an intermediary approach which the legislators of the Ordinance of 1944 have adopted; it consists in excluding in general the command of the law or the orders of legitimate authority as a justifying circumstance, while retaining them as an extenuating factor or excuse. The criminal character of the act therefore always remains, but an individualisation of the penalty, imposed more or less severely according to the case, permits a modification of the consequences. It is by this system that the draftsmen of the Code Pénal and the Code de Justice Militaire have sometimes been inspired. It is thus that in the circumstance described in Article 441 of the Code Pénal and Article 221 paragraph 3 of the Code de Justice Militaire, a lessening of the penalty is provided for in the case of certain persons prosecuted for pillage in gangs, or destruction; for if these persons prove that they had with them persons who instigated or provoked the offence they may (by the first provision) or must (by the second) benefit from a lessening of the penalty. An examination of these texts shows that the legislator has two ways at his disposal of securing in this connection an individualisation of the penalty; he can in the first place impose a lessening of the penalty, and this is what he has done in Article 221 paragraph 3 of the Code de Justice Militaire, but he can also leave it to the Judge to apply where desirable (s'il y a lieu) a less severe penalty (Article 441 of the Code Pénal), or even to impose no penalty. It is the latter course which the Ordinance of the 28th October, 1944, had adopted....."

RIGHT OF THE ACCUSED TO A FAIR TRIAL

The rules relating to evidence and procedure which are applied in trials by courts of the various countries, and by the International Military Tribunals in Nuremberg and Tokyo, when viewed as a whole are seen to represent an attempt to secure to the accused his right to a fair trial while ensuring that the obviously guilty shall not escape punishment because of legal technicalities. Certain typical examples are examined in the following paragraphs.

1. Right of Accused to know the Substance of the Charge

Paragraph (a) of Article 16 of the Charter of the Nuremberg International Military Tribunal, which falls under the heading: IV-Fair Trial for Defendants, provides that:

"The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial."

Similarly, Article 9 (a) of Section III - Fair Trial for Accused - of the Tokyo International Military Tribunal runs as follows:

"(a) Indictment. The indictment shall consist of a plain, concise, and adequate statement of each offence charged. Each accused shall be furnished, in adequate time for defence, a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused."

The Pacific September and December Regulations and the China Regulations for trials by United States Military Commissions all provide that: "The accused shall be entitled: 'a. To have in advance of trial a copy of the charges and specifications, so worded as clearly to apprise the accused of each offence charged'."

The equivalent provision governing trials by British Military Courts is Rule of Procedure 15, which states that: "15 (A). The accused, before he is arraigned, shall be informed by an officer of every charge on which he is to be tried....the interval between his being so informed and his arraignment should not be less than twenty-four hours. (B). The officer, at the time of so informing the accused, shall give the accused a copy of the charge-sheet, and where the accused is a soldier, should, if necessary, explain the charge-sheet and charges to him, and should also, if he is illiterate, read the charges to him."

2. Right of Accused to be Present at Trial and to give Evidence.

Article 16 (e) of the Charter of the Nuremberg International Military Tribunal provides that:

"A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution."

Article 9 (d) of the Charter of the International Military Tribunal for the Far East runs as follows:

"d. Evidence for Defence. An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defence, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine."

Rule of Procedure 40 makes the following provision relating to trials by British Military Courts:

"40 (A). At the close of the evidence for the prosecution the accused shall be told by the court that he may, if he wishes, give evidence as a witness, but that if he gives evidence he will subject himself to cross-examination."

The practice is for the Judge Advocate or, if there is none, the President of the Court, to tell the accused that he has three alternatives: to give evidence on oath, to make a statement not on oath or to remain silent, and to explain to him his position along the lines set out in the following footnote to Rule of Procedure 40 (A): "The Judge Advocate or, if there is none, the president must explain in simple language to the accused, especially if he is not represented by counsel or defending officer, that he need not give evidence on oath unless he wishes to do so. He must also be told that if he gives sworn evidence he is liable to be cross-examined by the prosecutor and questioned by the court and judge advocate. He should also be informed that evidence upon oath will naturally carry more weight with the court than a mere statement not upon oath."

The right of an accused to appear at his own trial and to give evidence if he pleases is also safeguarded, either explicitly or implicitly, by the regulations governing trials by United States Military Commissions.

3. Right of Accused to have the aid of Counsel

Article 16 (d) of the Charter of the International Military Tribunal provides that:

"(d). A Defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel."

Article 9 (c) of the Charter of the International Military Tribunal for the Far East seems to go even further, in view of its final sentence:

"(c). Counsel for Accused. Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request

the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial."

Regulation 7 of the Royal Warrant provides that Counsel may appear on behalf of the Prosecutor and accused in like manner as if the Military Court were a General Court Martial. The appropriate provisions of the Rules of Procedure, 1926, apply accordingly. In practice accused persons tried as war criminals are defended either by advocates of their own nationality or by British serving officers appointed by the Convening Officer, who may or may not be lawyers.

The relevant United States provision assure a similar right to the accused. The following provision is contained in Article 5 b of the Pacific December Regulations:

"The accused shall be entitled:To be represented, prior to and during trial, by counsel appointed by the convening authority or counsel of his own choice, or to conduct his own defence.

To testify in his own behalf and have his counsel present relevant evidence at the trial in support of his defence, and cross-examine each adverse witness who personally appeared before the commission."

The corresponding wording in the China Regulations (Article 14 (b)), even contains a mandatory element:

"The accused shall be entitled:To be represented prior to and during trial by counsel of his own choice, or to conduct his own defence. If the accused fails to designate his counsel, the commission shall appoint competent counsel to represent or advise the accused."

4. The Right of the Accused to have the Proceedings
made Intelligible to him by Interpretation

Most persons accused of war crimes do not speak the same language as the members of the court, or of most of the witnesses (particularly those called by the Prosecution) or of counsel. Consequently the

question of making the proceedings intelligible to the accused usually arises.

Article 16 (c) of the Charter of the International Military Tribunals states that: "A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands".

Article 9 (b) of the Charter of the International Military Tribunal for the Far East provides as follows:

"b. Language. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested."

In Article 9, the United States European Directive lays down that:

"The accused shall have the right to have the proceedings of the commission interpreted into his own language if he so desires."

The Pacific September Regulations in Article 14 (d), provide that the accused shall be entitled:

"To have the charges and specifications, the proceedings and any documentary evidence translated when he is unable otherwise to understand them."

The China and Pacific December Regulations contain the same rule, except that the latter makes reference to "the substance of the charges and specifications" instead of "the charges and specification."

An examination of the records of war crime trials indicates that this right of the accused has been well preserved.

Thus, in the Belsen Trial, immediately before the hearing of the evidence of the Prosecution witness Dr. Ada Bimko, Lieutenant Jedrzejowicz, Defence Counsel to the Polish accused, 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 could not possibly know

how to cross-examine except on instructions from the accused whom he represented and his instructions must necessarily be determined by the evidence. The Judge Advocate advised the Court that he did not think that anybody should waive the rights of a person who did not understand a language when serious accusations of fact were being made. The Defending Officers were no doubt endeavouring to shorten the proceedings but he thought that the suggestion would be wrong in law.

The Court decided that the evidence must be translated into Polish so that the Polish accused would understand it, except in any case where a particular witness was called to make a specific accusation against one or two of the German accused and there was no question of that witness raising any point against the Polish accused. In cases where the Polish accused might be implicated by the witness, however, the evidence must be translated into Polish.

Again, in the trial of Erich Killinger and four others by a British Military Court, Wuppertal, November 26th - December 3rd, 1945, presumably since they were ex-members of an interrogation centre the accused all had a knowledge of English. The Court, after receiving a reassurance on the point from the Defence, permitted the non-translation of the oral evidence from English into German, while at the same time stating that a translation would be provided should any accused ask for it.

Some indication of the limits beyond which the courts would not be prepared to go in this matter is provided, however, by the Trial of Oberleutnant Gerhard Grumpelt by a British Military Court held at Hamburg, Germany, on 12th and 13th February, 1946.⁽¹⁾ At the very outset of the proceedings, defending Counsel applied for the whole of the proceedings to be translated to the accused. Counsel stated that he would himself address the Court and speak during the whole trial in German.

(1) The Scuttled U-Boats Case, see War Crime Trial Law Reports, Vol. I, pp. 55 - 70.

The Judge Advocate thereupon explained the position as follows:

"The language of the Court is English, and it is quite unusual for the Court to be addressed in German. What we normally do is to translate all the evidence so that the accused understands it, but it is quite unusual to translate everything the defending Counsel says."

After ascertaining that Counsel had some knowledge of English, the Judge Advocate requested that Counsel should do his best to address the Court in English, and so far as the evidence was concerned, that would be translated to the accused. The defending Counsel's reply was as follows:

"I must insist upon it that all the most important parts which will be decisive for the judges to judge Gerhard Grumpelt must be in the German language, and I must insist that the German language should be acknowledged here as having the same rights as the English language. I am quite satisfied that things which are not important need not be translated so that the proceedings should not be unduly interrupted, but my opening and closing speech, which are decisive, I shall give in German."

After the Court had conferred, the Judge Advocate provisionally ruled that all the evidence would be translated, but that the Prosecutor's opening address should not be translated in the ordinary way. Counsel stated that this was agreeable to him and added that he understood enough English to follow the Prosecutor, but not enough to deal with the witnesses when in the witness box or in his addresses to the Court. In fact, the defending Counsel's short opening address was made in German and translated at once, and the German text ^{his} final address, written by himself, was attached to the proceedings.

The interests of the accused in this case were fully safeguarded by the fact that two, and later on, during the evidence for the defence, a further three, officers and soldiers were detailed to act as interpreters.

It is to be noted that the rules of procedure as specified in the Royal Warrant do not contain any express provision either as to the language of the Military Courts trying war crimes cases, or as to the rights of the accused and duties of the defending Counsel as to the language in which they should address the court.

The rules of procedure followed in war crimes trials by British Military Courts are with certain exceptions those followed in English civil courts. It seems beyond doubt that an English Court would have a right to insist on Counsel addressing it in English. The English law on the rights of a non-English speaking accused is at present contained in an obiter dictum of Lord Reading, C.J., in R. v. Lee Kun (1916) 1 K.B. 337, to the following effect: When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence, and is not defended by Counsel, the evidence given at the trial must be translated to him, and compliance with this rule cannot be waived by prisoner. If he is defended by Counsel, the evidence must be translated to him unless he or his Counsel express a wish to dispense with the translation and the judge thinks fit to permit the omission, but the judge should not permit it unless he is of opinion that the accused substantially understands the nature of the evidence which is going to be given against him.

The action of the Court in the Grumpelt trial could in any case be fully explained by reference to two relevant provisions. Regulation 13 of the Royal Warrant states that "In any case not provided for in these Regulations such course will be adopted as appears best calculated to do justice." The same is provided by Rule 132 of the Rules of Procedure made under the authority of the Army Act.

5. Rules Regarding Appeal and Confirmation

An accused may be further preserved from any kind of summary treatment by provisions relating to appeal and confirmation.

While Article 26 of the Charter of the International Military Tribunal states that: "The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review," Article 29 provides for possible intervention by a higher agency in the determination of sentence: "In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof...."

While the question of appeal is not specifically mentioned in the Article, various of those sentenced at Nuremberg did in fact appeal to the Control Council for Germany, though without success.

Similarly Article 17 of the Charter of the International Military Tribunal for the Far East contains the following passage:

"Judgment and Review. The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action. Sentence will be carried out in accordance with the Order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity."

No right of appeal in the ordinary sense of that word exists against the decision of a British Military Court. The accused may, however, within 48 hours of the termination of proceedings in Court, give notice of his intention to submit a petition to the Confirming Officer against the finding or the sentence or both, and the petition must be submitted within 14 days. If it is against the finding it must be referred by the Confirming Officer to the Judge Advocate General or to his deputy.⁽¹⁾

Confirmation by higher military authority is in any case necessary. The finding and any sentence which the Court had jurisdiction to pass, if confirmed, are valid, notwithstanding any deviation from the Regulations or

(1) Regulation 10 of the Royal Warrant.

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." (1)

Similarly, the sentence of a United States Military Commission must not be carried into execution until it has been approved by the appointing authority. Death sentences must, in addition, be confirmed also by the Theatre Commander. The approving and confirming authorities have before them, in acting, a review and recommendation by the appropriate Judge Advocate. Thus, while no "appeal" as that term is used in judicial proceedings is provided for, every record of trial is scrutinised as to the facts and points of law, and the Commanding General has trained legal advice as to the right course to take.

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

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

The reviewing authority may, upon review, inter alia:

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

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

The proceedings shall not be invalidated nor any findings or sentences disapproved for any error or omission, technical or otherwise, occurring at any such proceedings, unless in the opinion of the reviewing authority it

(1) Regulation 11 of the Royal Warrant.

shall appear that the error or omission has resulted in injustice to the accused.

A war criminal sentenced by a Norwegian Lagmannsrett has the right to appeal to the Supreme Court of Norway on points of Law or on the question of the severity of sentence, but not on the facts.

French Law makes provisions regarding appeals from French Military Tribunals of which persons condemned by the Permanent Military Tribunals can avail themselves.

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

This appeal to a Permanent Military Appeal Tribunal is the only one possible in war time against a decision of a Permanent Military Tribunal. The former, in accordance with Article 133 of the Code de Justice Militaire is not concerned with reviewing the whole trial conducted by the inferior tribunal, but only with finding whether the judgment delivered thereby constituted a correct application of the law.⁽¹⁾

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

- (1) when the Military Tribunal has not been composed in accordance with the provisions of the Code,
- (2) when the rules of competence have been violated,

(1) The Permanent Military Appeal Tribunal does not, therefore, enquire into mere questions of fact.

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

According to the provisions of the Decree of 3rd November, 1939:

"In all cases where a Military Appeal Tribunal has been established, persons sentenced by Military Tribunals cannot appeal to the Court of Appeal (Cour de Cassation) against the decisions of Military Tribunals and of Military Appeal Tribunals."

In peace-time, in accordance with Article 100 of the Code de Justice Militaire, judgments delivered by Military Tribunals can only be challenged by way of an appeal to the Court of Appeal, for the reasons and under the conditions set out by Article 407 et seq of the Code d'Instruction Criminelle. A convicted person has three whole days, after that on which his sentence has been notified to him, in which to inform the Clerk of the Court of his desire to appeal.

6. The Stress placed on Expeditious Procedure

The care shown in ensuring to the accused his essential rights during trial is balanced by an attempt at ensuring that there shall be no unnecessary delays arising out of purely technical disputes.

Article 12 of the Charter of the International Military Tribunal for the Far East makes the following provisions in its paragraphs a - c (which are substantially the same as those made in Article 18 of the Charter of the Nuremberg International Military Tribunal):

"Conduct of Trial. The Tribunal shall:

- a. Confine the trial strictly to an expeditious hearing of the issues raised by the charges.
- b. Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever.
- c. Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges."

Similar provisions were laid down by the Pacific September and December and by the China Regulations.

The clearest examples of the attempt to avoid miscarriage of justice through unnecessary legal technicality are provided by the rules of evidence applied in war crime trials, to which attention is now turned.

7. Rules of Evidence in General

In general the rules of evidence applied in War Crime trials are less technical than those governing the proceedings of courts conducting trials in accordance with the ordinary criminal law. This is not to say that any unfairness is done to the accused; the aim has been to ensure that no guilty person will escape punishment by exploiting technical rules. The circumstances in which war crime trials are often held make it necessary to dispense with certain such rules. For instance many eye witnesses whose evidence was needed in trials in Europe had in the meantime returned to their homes overseas and been demobilized. To transport them to the scene of trial would not have been practical, and it was for that reason that affidavit evidence was permitted and so widely used. In the Belsen trial, the Prosecutor pointed out that although the trial was held under British law, the Regulations had made certain alterations in the laws of evidence for the obvious reason that otherwise many people would be bound to escape justice because of movements of witnesses. A number of affidavits had been taken from ex-prisoners from Belsen, but many of the deponents had since disappeared. Therefore the Prosecution would call all the witnesses available and would then put the affidavits before

the Court and ask for the evidence contained therein to be accepted.

Article 13 (Evidence) of the Charter of the Military Tribunal for the Far East provides as follows:

"a. Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible."⁽¹⁾

The President's order of 2nd July 1942, appointing a Military Commission for the trial of the alleged saboteurs,⁽²⁾ included the provision that "Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man." The provisions laid down in overseas theatres were clearly influenced by this drafting.

The Mediterranean Regulations (Regulation 10) provide expressly that the technical rules of evidence shall not be applied but any evidence shall be admitted which, in the opinion of the president of the Commission, has any probative value to a reasonable man. Similar provisions are contained in paragraph 3 of the European Directive, in Regulation 16 of the Pacific September Regulations, in Regulation 5(d) of the SCAP Rules and in Regulation 16 of the China Regulations.

In the Mediterranean Regulations it is added that without limiting the scope of this rule the following in particular will apply:

- "(a) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the president of the commission, unable to attend without undue delay, the commission may receive secondary evidence of statements made by or attributed to such witness.
- "(b) Any document purporting to have been signed or issued officially by any member of any allied or enemy force or by any official or agency of any allied, neutral or enemy government shall be admissible as evidence without proof of the issue or signature thereof.

(1) With the exception of the omission of the final sentence, Article 19 of the Charter of the International Military Tribunal of Nuremberg has the same wording.

(2) The Case Ex Parte Quirin, 317 U.S.1 (1942).

"(c) Any report by any person when it appears to the president of the commission that the person in making the report was acting within the scope of his duty may be admitted in evidence.

"(d) Any deposition or record of any military tribunal may be admitted in evidence.

"(e) Any diary, letter or other document may be received in evidence as to the facts therein stated.

"(f) If any original document cannot be produced, or, in the opinion of the president of the commission, cannot be produced without undue delay, a copy or translated copy of such document or other secondary evidence of its contents may be received in evidence. A translation of any document will be presumed to be a correct translation until the contrary is shown.

"(g) Photographs, printed and mimeographed matter, and true copies of papers are admissible without proof.

"(h) Confessions are admissible without proof of circumstances or that they were voluntarily made. The circumstances surrounding the taking of a confession may be shown by the accused and such showing may be considered in respect of the weight to be accorded it, but not in respect of its admissibility."

Similar but not identical provisions are contained in other United States instruments. ^{the} In SCAP Rules, for instance, it is also provided (Regulation 5(d) (2)) that the Commission shall take judicial notice of facts of common knowledge, official government documents of any nation and the proceedings, records and findings of Military or other Agencies of any of the United Nations, a provision which corresponds to Art. 21 of the Charter of the International Military Tribunal, annexed to the Four-Power Agreement of 8th August 1945.

The Royal Warrant provides 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 so far as applicable to the Military Courts for the trial of war criminals. In so far as rules of evidence are concerned exceptional provisions are made by paragraph 8 (i) and 8 (ii) of the Royal Warrant. Of

these, the former runs as follows:

"8 (1) At any hearing before a Military Court convened under these 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, and without prejudice to the generality of the foregoing in particular:-

- (a) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the Court, unable so to attend without undue delay, the Court may receive secondary evidence of statements made by or attributable to such witness;
- (b) any document purporting to have been signed or issued officially by any member of any Allied or enemy force or by any official or agency of any Allied, neutral or enemy government, shall be admissible as evidence without proof of the issue or signature thereof;
- (c) the Court may receive as evidence of the facts therein stated any report of the "Comite International de la Croix Rouge" or by any representative thereof, by any member of the medical profession or of any medical service, by any person acting as a "man of confidence" (homme de confiance), or by any other person whom the Court may consider was acting in the course of his duty when making the report;
- (d) the Court may receive as evidence of the facts therein stated any depositions or any record of any military Court of Inquiry or (any Summary) of any examination made by any officer detailed for the purpose by any military authority;
- (e) the Court may receive as evidence of the facts therein stated any diary, letter or other document appearing to contain information relating to the charge;
- (f) if any original document cannot be produced or, in the opinion of the Court, cannot be produced without undue delay, a copy of such document or other secondary evidence of its contents may be received in evidence;

It shall be the duty of the Court to judge of the weight to be attached to any evidence given in pursuance of this Regulation which would not otherwise be admissible."

A study of the application of these rules shows that the practice of the Courts has been to interpret them widely, so as to render admissible a considerable range of evidence and to allow the Court then to decide what weight to place on each item

8. The Admissibility of Affidavits

Much reliance as evidence has been placed during war crime trials on affidavits, that is to say on written sworn and signed statements by a witness. Defence Counsel have more than once protested against such evidence, mainly on the ground that, unlike a witness in the box, an affidavit cannot be cross-examined, but there can be no doubt as to their admissibility at least in proceedings before such courts as operate under the rules quoted under the last heading.

In this connection certain arguments which arose during the Belsen Trial are worth quoting, since the way in which they were decided strongly influenced the British practice in subsequent trials.

In his Opening Speech, the Prosecutor pointed out that although the trial was held under British law, the Regulations had made certain alterations in the laws of evidence for the obvious reason that otherwise many people would be bound to escape justice because of movements of witnesses. A number of affidavits had been taken from ex-prisoners from Belsen, but many of the deponents had since disappeared. Therefore the Prosecution would call all the witnesses available and would then put the affidavits before the Court and ask for the evidence contained therein to be accepted.

On October 3rd, the Judge Advocate asked the Prosecutor what he relied on in putting in the affidavits. The Prosecutor replied that he relied on Regulation 8 (i).

The Judge Advocate asked whether Regulation 8 (i) (a) was not intended to be read, at any rate so far as an affidavit was concerned, to the effect that the Court had first to be satisfied that the witness

was dead, or was unable to attend or to give evidence or was, in the opinion of the Court, unable to attend without undue delay.

The Prosecutor replied that the general introductory provision of Regulation 8 (1) made paragraph (a) academic by stating that Regulation 8 (1)(a) was "without prejudice to the generality of the foregoing". To the question whether the Prosecutor took the view that, even if there was a witness in the flesh who could be obtained, the Prosecutor would still be inclined to rely on the affidavits, the Prosecutor replied that technically he should take that view. It would, of course, be a matter for the Court to decide whether they considered that the statement or document appeared to be of assistance..

The Judge Advocate advised the Court that the regulation was so wide that the Prosecution's view of it was a correct one.

Captain Phillips then objected to the use of affidavit evidence, which would generally not be admissible before a Court. It was, he said, only admissible, if at all, as a result of Regulation 8 (1), and that Regulation, in his submission, was merely permissive. It said that the Court might take into consideration certain types of evidence. The objection of the Defence was that this was not a case in which the Court should receive such evidence. The Defence did not say that the Court could not do so, but they said that the Court had a discretion and that it should exercise its discretion here in favour of the Defence by refusing to accept the evidence. The whole of the evidence contained in these affidavits was, in the submission of the Defence, completely unreliable, thoroughly slipshod and incompetent.

The Judge Advocate said that it was entirely a matter for the Court's discretion whether they accepted this evidence or not. It was for the Court to consider what weight should be attached to any affidavit. In his view, all these exhibits would be admissible in evidence, but what was left for the Court to decide was how much weight

they would attach to any particular document, having heard the whole of the circumstances and having considered it in the light of other evidence.

The Court decided that they would receive in evidence the affidavits tendered by the Prosecution. They added, however, that when they came to decide what weight should be attached to any particular affidavit, they would bear in mind any observation which the Defence might address to them.

On 19th September, 1945, the affidavit of Colonel Johnston 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. A difficulty arose from the fact that the Court must know what was in a paragraph in order to decide whether to admit it or not. The Prosecutor pointed out that this was inevitably so in a system of Courts Martial, under which the Court was judge both of law and of fact. The Court must, in fact read themselves, or have read to them, the paragraphs in order that they might 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 deponent was going rather outside his province. As to the two remaining paragraphs, the Court decided that there should not be entered the words "In short such orders and the carrying out of such orders was mass murder" and a reference to "accomplices in mass murder".

During the hearing of the evidence for the defence, the question arose whether, at that stage of the trial, affidavits made by witnesses who had been heard by the Court in person could be put in, in order to

show the unreliability not of the witnesses involved but of the affidavits as a whole, all of them having been produced by the same War Crimes Investigation Unit.

The Defence argued that it was essential, in the present case, where the evidence for the Prosecution was largely documentary, for the Defence to be able to challenge the whole system whereby that documentary evidence was produced by pointing out discrepancies between what witnesses had said in Court and what they had said in written statements not yet entered as evidence.

This was opposed by the Prosecution on the ground that the examination and the cross-examination of the respective witnesses was the proper time to point out discrepancies between the affidavits and the oral evidence of witnesses and that if the defending officers had missed this opportunity, they could not submit the affidavit at a time when the witnesses had no opportunity of explaining the alleged discrepancy in the course of their cross-examination.

The Court ruled that, if there were any witnesses who gave evidence in Court personally and were cross-examined in regard to affidavits that they had made, and if those affidavits were not put in as evidence, the Court would allow any Defending Officer to put in such affidavits during the course of his defence, for the purpose of establishing the manner in which these affidavits had been taken.

On the other hand the Court felt that, in the case of witnesses who gave evidence in person and were not cross-examined in regard to their affidavits, the Court should not admit such affidavits, because they would carry no weight with them unless accompanied by a cross-examination of the witnesses so that the Court could appreciate exactly what their evidence would be in regard to the taking of the affidavits.

During the trial of Erich Killinger and four others by a British Military Court, Wuppertal, November 26th - December 3rd, 1945, before

the entering of the affidavit evidence for the Prosecution, the Defence applied for one deponent to be produced in person. The Defence had been given to understand that the British Officer in question would be available for questioning. The Court decided, after hearing argument, that the deponent could not be produced "without undue delay" (in the wording of Regulation 8 (1) (a)), and the President of the Court added the significant statement that "we realise that this affidavit business does not carry the weight of the man himself here, as evidence, and when it is read we will hear what objections you have got to anything that the affidavit says, and we will give that, as a Court, due weight". The President's words may fairly be taken as a reference to the fact that if evidence is given by means of an affidavit the person providing the evidence is not present in Court to be examined, cross-examined and re-examined.

Nevertheless, in his summing up, the Judge Advocate in the trial of Karl Adam Golkel and thirteen others, by a British Military Court, Wuppertal, Germany, 15th - 21st May, 1946, stressed that: "There is no rule that evidence given in the witness box must be given more weight than evidence, statements, taken on oath outside the court. As I said earlier, take into account all the circumstances..." A discussion of the relative value as evidence of pre-trial statements produced in Court in documentary form and of oral testimony delivered in the witness box had arisen from the fact that four of the accused withdrew in Court wholly or in large part the evidence which they had given in pre-trial statements against five other accused. It may fairly be said that five accused, Pahl, Pilz, Limberg, Thilker and Bott, were found not guilty as a direct result of this fact. There were also less sensational but similar recantations of evidence relating to others among the accused.

9. The Admissibility of Pre-Trial Statements by one
Accused Against Another

In the Special Order appointing the Commission which conducted the trial of Albert Bury and "Wilhelm Hafner^a/United States Military Commission,

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sitting at Freising, Germany, 15th July, 1945, power was granted to it to make such rules for the conduct of the proceedings, consistent with the powers of a Military Commission, as were deemed necessary for a full and fair trial. The Commission announced at the outset that its proceedings were to "be governed generally by the rules of procedure and evidence as laid down in the Manual for Courts-Martial with the following changes. Statements made by the accused in the course of investigations which appear to be regularly and properly authenticated will be admitted in evidence, subject to such attack as the accused may desire to make. The statements made by the accused that are admitted in evidence will be received generally against all of the accused subject to such rebuttal as the accused or any of them may elect to make..."

During the Belsen Trial, on the 5th October, objection was raised by Major Cranfield, one of the Defence Counsel, to the admission of an affidavit made by the accused Kopper. It was submitted that the affidavit was objectionable as evidence against any of the other accused.

Major Cranfield pointed out that while this affidavit was admissible under Regulation 8 of the Royal Warrant, that provision was merely permissive. He called on the Court to reject the evidence as being completely worthless. The Prosecution's own witnesses had called Kopper an informer and one who lied. In support of his argument he quoted a passage from page 94 of the British Manual of Military Law governing the procedure followed in Courts Martial: "If the Prosecution find it necessary to call one suspected participator in a crime as a witness against the others the proper course is not to arraign him or, if he has been so arraigned, to offer no evidence and to take a verdict of acquittal." The reason was clear. The spectacle of one criminal turning on his fellow criminals to save his own skin was not one which was attractive to British justice.

The Prosecutor submitted that the meaning of the Regulation was that the Court could admit evidence that would not otherwise be admitted, but that if they found that they might accept it then they must accept it,

subject to such weight as they might attach to it afterwards. The Court had not a discretion to say: "all this evidence is legal and we will accept this part and reject that part". The case came within a specific category mentioned under Regulation 8 (i). Any deposition, any summary, or any examination made by any officer detailed for the purpose by any military authority was included, and the Court had heard that Major Champion and Major Smallwood, (two officers who had appeared as witnesses), were in fact Both detailed. Regulation 8 (ii) rendered it permissible to enter evidence by one accused against another.

Replying, Major Cranfield said that in his view the object of Regulation 8 (i) was to introduce into the law of procedure governing the Court the proposition that if one of the accused were proved a member of a unit, then evidence against another member of that unit would be evidence against the accused, merely because he was a member of the unit. Regulation 8 (ii) did not render the affidavit admissible.

After quoting Regulation 8 (i) the Judge Advocate said that he saw no reason in law why the Court should reject this affidavit. They would have to read the document and then say whether they were satisfied that it appeared to be an authentic document on the face of it. They must then say whether it was a document which would help in proving or disproving the charges.

The Court decided that the document would be admitted, while reserving the right to judge what weight to place on it.

One view of the attitude which a court might possibly be expected to take towards such evidence, whether in affidavit form or from a "live" witness, is provided, however, by the Judge Advocate in the trial of Werner Rohde and eight others by a British Military Court at Wuppertal, Germany, on 29th May - 1st June, 1946, who in his summing up, pointed out that a great deal of the evidence in the case was provided by accomplices "that is, persons who are also charged, or obviously could be charged, with having taken part in the same offence." He warned the Court "that the

evidence of an accomplice must be regarded always with the greatest suspicion. Every accomplice is giving evidence which is of a tainted nature. He may have many reasons for not telling the truth himself. He may be trying to exculpate himself and throw the blame on somebody else, and there may be a hundred and one reasons why he should not be telling the truth.... This does not mean that you cannot believe him or you cannot accept the evidence of an accomplice, but it means that before you do so you must first caution yourselves on those lines. If, having done so and in spite of having so warned yourselves, you believe that what he is saying is true, you are perfectly free to act upon his evidence." He added: "When you are looking for corroboration of an accomplice's evidence, one accomplice cannot corroborate another."

In making these remarks the Judge Advocate was applying to the case the practice followed in English Criminal Law, according to which, "where a witness was himself an Accomplice in the very crime to which an indictment relates, it is the duty of the judge to caution the jury strongly as to the invariable danger of convicting upon such evidence without corroboration. Moreover this corroboration must confirm not merely a material particular of the witness's story, but some particular which connects the prisoner himself with it..... Corroboration by another accomplice, or even by several accomplices, does not suffice..... But these common-law rules as to the necessity of corroborating accomplices amount only to a caution and not to a command." (1)

10. The Admissibility of Hearsay Evidence

Further examples of the more drastic rules of evidence permissible before courts trying war criminals are found in the frequency with which "hearsay" evidence is admitted. For instance, in English Civil Courts, subject to exceptions, a statement, whether oral or written, made by a person who is not called as a witness is not admissible to prove the truth

(1) Kenny, Outlines of Criminal Law, 15th Edition, pp. 459 - 61.

of any matter contained in that statement (see Harris and Wilshire's Criminal Law, Seventeenth Edition, p. 482). Such evidence is rendered permissible by Regulation 8 (1) of the Royal Warrant provided it satisfied the conditions laid down therein.⁽¹⁾ In the Belsen Trial much hearsay evidence was admitted, including some contained in the affidavits entered.

11. Accused not Entitled to the Rights of a Prisoner of War as Regards Trial

In the trial of General Anton Dostler, Commander of the 75th German Army Corps by a United States Military Commission in Rome, 8th - 12th October, 1945, and in the Trial of General Yamashita by a United States Military Tribunal at Manila, Philippine Islands, October 29th - November 7th, 1945, the Defence unsuccessfully claimed on behalf of the accused and in connection with their trial the benefits of the 1929 Geneva Prisoners of War Convention. The reply of the Prosecutor in the former trial was that the provisions of the Geneva Convention with regard to the trial of prisoners of war, which the Defence had put forward, pertained to offences committed by a prisoner of war in captivity, and did not pertain to offences committed against the Law of Nations prior to his becoming a prisoner of war.

If the argument of the Defence regarding the interpretation of the Geneva Convention were correct, it would have far-reaching consequences with regard to the trial of such war criminals as had been members of the armed forces of the enemy and had therefore, on being captured, acquired the status of prisoners of war. War Criminals would be protected by Article 63 of the Geneva Convention which provides that: "A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power." This Article would guarantee them, within

(1) See p.72

the United States jurisdiction, the statutory safeguards of the Articles of War and the protection of the "due process of law" clause of the Fifth Amendment, and in other jurisdictions all the procedural rights granted by the law of the capturing State to its own soldiers. Furthermore the interpretation of the Defence would make the provisions of Articles 60 - 66 of the Geneva Convention applicable. It would therefore, be necessary for the authorities instituting the proceedings to notify the representative of the Protecting Power (Art. 60), the representative of the protecting Power would have the right to attend the hearing of the case (Art. 62, para. 3), the alleged war criminal would have the right of appeal against any sentence against him in the same manner as persons belonging to the armed forces of the detaining Power (Art. 64), sentences pronounced against prisoners of war would have to be communicated immediately to the Protecting Power (Art. 65) and, if sentence of death were passed on a prisoner of war, a communication setting forth in detail the nature and the circumstances of the offence would have to be addressed to the representative of the protecting Power for transmission to the Power in whose armed forces the prisoner served (Art. 66, para. 1); and it would, finally, be forbidden to carry out the sentence before the expiration of a period of at least three months from the date of the receipt of this communication by the protecting Power (Art. 66, para. 2).

The Military Commission in the Dostler trial decided that the provisions of Art. 63 of the Geneva Convention were not applicable to the case. As is customary, the reasons of the Military Commission were not given.

The decision of the Military Commission on this point is in accordance with the decision of the majority of the Supreme Court of the United States in the case of the Japanese General Yamashita (delivered on 4th February, 1946). The Supreme Court, per Stone, C.J., held that Art. 63 (and Art. 60) of the Geneva Convention have reference only to offences committed by a prisoner of war while a prisoner of war and not to violations of the law of

war committed while a combatant. This conclusion of the majority of the Supreme Court is based upon the setting in which these articles are placed in the Geneva Convention. Art. 63 of the Convention appears in Part 3 ("Judicial Suits") of Chapter 3, entitled "Penalties applicable to Prisoners of War." This forms part of Section V, "Prisoners' Relations with the Authorities," one of the sections of title III, "Captivity." All taken together relate only to the conduct and control of prisoners of war while in captivity; Chapter 3 is a comprehensive description of the substantive offences which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offences, and of the procedure by which guilt may be adjudged and sentence pronounced. The majority of the Supreme Court therefore thought it clear that Part 3, and Art. 63 which it includes, apply only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war.

Mr. Justice Rutledge, in his minority opinion, in which Mr. Justice Murphy joined, held that the context in which Arts. 60 and 63 are placed did not give any support to the argument of the majority of the Court. Neither Art. 60 nor Art. 63 contained, in the opinion of the minority, such a restriction of meaning as the majority read into them. In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before the capture or later. In Mr. Justice Rutledge's opinion, policy supported this view. For such a construction was required for the security of United States soldiers, taken prisoner, as much as for that of prisoners taken by the United States. And the opposite view would leave prisoners of war open to any form of trial and punishment, for offences against the law of war, which their captors might wish to use, while safeguarding them, to the extent of the treaty limitations, in cases of disciplinary offences. This, in many instances, the minority contended, would be to make the treaty strain at a gnat and swallow a camel.

The view that an alleged war criminal is not entitled to the status of a prisoner of war was, however, taken also by the French Cour de Cassation in the appeal of Robert Wagner, Ex-Gauleiter of Alsace, and others against the sentences of death passed on them by the Permanent Military Tribunal at Strasbourg on 3rd May 1946. The attitude of the Court on the question here under discussion arose out of one of the less important arguments put forward by the appellants, a plea put forward by Wagner, Röhn and Schuppel, and based upon the alleged violation of Art.156 of the Code de Justice Militaire, claiming that the Military Tribunal was irregularly composed because Wagner had the rank of a General commanding an Army Corps and the Tribunal could not, therefore, properly be presided over by a Colonel.

The Judgment of the Court of Appeal pointed out that, according to Art.5 of the Ordinance of 28th August 1944, "For adjudicating on war crimes the Military Tribunal shall be constituted in the way laid down in the Code de Justice Militaire."

The provisions of Art.10 et seq. and 156 of the Code de Justice Militaire, which varied the composition of Military Tribunals according to the rank of the accused, applied only to French military personnel and to persons treated as such.

Paragraph 13 of Art.10, according to which Military Tribunals called upon to try prisoners of war are composed in the same way as for the trial of French military personnel, that is according to rank, would not be applied to Wagner, who was not sent before a Military Court as a prisoner of war. It is therefore right that the appellants were brought before a Military Tribunal composed in accordance with Arts.156 and 186 of the Code de Justice Militaire.

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(This section on the rights of the accused is to be completed by the addition of a few additional relevant provisions and a final paragraph is to be added summarising how the contents of the section demonstrate the way in which the regulations, under which war crime trials are held, "represent an attempt to secure to the accused his right to a fair trial while ensuring that the obviously guilty shall not escape punishment because of legal technicalities.")

III/113
20th October 1947.

UNITED NATIONS WAR CRIMES COMMISSION.
HUMAN RIGHTS REPORT: PRELIMINARY PAPERS.

THE NUREMBERG TRIAL.

Rapporteur: Dr. J. LITAWSKI.

PAPER I. (1)

LEGAL BASIS AND JURISDICTION OF THE TRIBUNAL.

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petrators.- The degree of responsibility.- Attempts.-
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(1)

For the list of other instalments envisaged to cover the sub-
ject of Human Rights in the Nuremberg Trial, see Covering
Note to Doc. III/107.

A. LEGAL BASIS OF THE TRIBUNAL.

The Nuremberg Tribunal found its being in the Agreement entered into in London on August 8, 1945, by the Four Major Powers, in which they provided for the establishment of an International Military Tribunal for the trial of war criminals whose offences have no "particular geographical location", and, in an Annex to the Agreement, they provided also a Charter of the Tribunal setting forth in 30 articles the constitution, jurisdiction and general principles, and powers of the Tribunal, the procedure to be followed in the course of the preliminary investigations and conduct of the trial, and the provisions concerning the judgment and sentence.⁽¹⁾

In accordance with Article 5 of the Agreement 19
(2)
Governments of the United Nations have expressed their adherence to the Agreement, and the Charter, both of which had been concluded by the Four Powers "acting in the interests

(1)

Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of The Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed in London on 8th August, 1945, H.M.S.O. Cmd. 6668.

(2)

These Governments are the following:
Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxemburg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay.

of all the United Nations." (1)

The establishment of the Tribunal was a natural and logical outcome of the many declarations made from time to time during the recent war by the Governments of the United Nations of their intention that War Criminals should be brought to justice. (2) After recalling in the Preamble that, in accordance with the Moscow Declaration of 30th October 1943, those Germans who have been responsible for or have taken a consenting part in atrocities and crimes will be "sent back to the countries in which their abominable deeds were done" in order that they may be tried by the National Courts of those countries, the Agreement provides in Article 1, as already indicated, that an International Tribunal shall be established "for the trial of war criminals whose offences have no particular geographical location", these being the major war criminals.

This decision of the Signatories is also re-stated in Article 1 of the Charter itself with the addition that the Tribunal shall be established for the just and prompt trial and punishment of these criminals.

The Tribunal was invested by the Charter with power to try and punish persons who had committed crimes against peace, war crimes and crimes against humanity as defined in the Charter.

In its Judgment the Tribunal stated that in creating the Tribunal the Signatory Powers "have done together what any one of them might have done singly; for it is not to be doubted

(1) The Preamble to the Agreement, paragraph 4.

(2) See, by this Rapporteur, Historical Survey of the Problem of Violations of Human Rights, Part II, 1939-1945.

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that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants (were) entitled to ask (was) to receive a fair trial on the facts and law". (1)

In addition, the Tribunal expressed the opinion that the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world. (2)

These brief statements of the Tribunal, as well as the relevant provisions of the Agreement and the Charter, raise a number of intrinsic problems and questions as to the exact status of the Nuremberg Tribunal and its military, international, judicial and ad hoc characteristics which are of primary relevance for assessing properly the importance of the Nuremberg Trial and the authority of the Nuremberg Judgment for the development of International Law in general, and in the sphere of the protection of human rights in particular. Here, the problem also arises whether and to what extent the attitude of the Tribunal with regard particularly to the question of violations of human rights which come within the notion of crimes against humanity, and its interpretation of the law in general, was or is binding for the decision in other cases tried or to be tried before other courts, be it the International Military Tribunal for the Far East, or municipal, occupational or military tribunals of other United Nations or other countries.

(1) Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg 1946, H.M.S.O., Cmd. 6964, p. 38.

(2) Ibid, p. 38.

Analysis of all these highly important problems can however be made only after all preliminary questions as to the law of the Charter, as well as the exposition of the facts related to the violations of human rights, as they have been established by the Tribunal, have been dealt with. They must therefore be left for one of the concluding sections of this part of the Report.

In accordance with Article 2 of the Charter, the Tribunal consisted of four members, each with an alternate, one member and one alternate having been appointed by each of the Signatories. (1)

B. JURISDICTION OF THE TRIBUNAL.

Part II of the Charter of the International Military Tribunal at Nuremberg (2) which sets forth the jurisdiction and general principles to be followed in the conduct of the trial of the major war criminals of the

(1)

These members were the following:

Lord Justice LAWRENCE, Member for the United Kingdom of Great Britain and Northern Ireland; Mr. Justice BIRKETT, Alternate Member.

Mr. Francis BIDDLE, Member for the United States of America; Judge John J. PARKER, Alternate Member.

M. le Professeur Donnedieu de VABRES, Member for the French Republic; M. Le Conseiller R. FALCO, Alternate Member.

Major General I. T. NIKITCHENKO, Member for the Union of Soviet Socialist Republics; Lieutenant Colonel A.F. VOLCHKOV, Alternate Member.

Lord Justice Lawrence was elected President of the Tribunal for the Trial at Nuremberg, in accordance with Article 4 (b) of the Charter.

(2) Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed in London, on 8th August, 1945.

European Axis countries, and in particular its Articles 6, 7, 8 and 9, is technically speaking the law which the Charter required the Tribunal to administer, and by which the Tribunal was bound.

Article 6 provides that the 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". According to the specific provisions of this article "the following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:-

- "(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- "(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- "(c) Crimes against humanity: 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.

"Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan".

The above text of sub-paragraph (c) is the English text as amended by the Berlin Protocol of 6th October, 1945,⁽¹⁾ by virtue of which the semi-colon originally put between "the war" and "or persecutions" was replaced by a comma following the discrepancy which had been found to exist between the originals of Article 6, paragraph (c) of the Charter in the Russian language, on the one hand, and the originals in the English and French languages, on the other, all of which have equal authenticity.

Consequently, the Protocol declares that Article 6 (c) in the Russian text is correct, and that the meaning and intention of the Agreement and Charter require that the said semi-colon in the English text should be changed to a comma, and that the French text should be amended to read as follows:

"LES CRIMES CONTRE L'HUMANITÉ, c'est à dire, l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux, ou religieux, lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime".

The original French text of Article 6 (c) prior to the amendment, was as follows:-

"LES CRIMES CONTRE L'HUMANITÉ: c'est à dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre; ou bien les persécutions pour des motifs politiques, raciaux, ou religieux, commises à la suite de tout crime rentrant dans la compétence du Tribunal International ou s'y rattachant, que ces persécutions aient constitué ou non une violation du droit interne du pays où elles ont été perpétrées."

(1) Protocol Rectifying Discrepancy in Text of Charter, drawn up by the Governments who had concluded the Agreement of 8th August, 1945; published in "Trial of the Major War Criminals before the International Military Tribunal", Vol. I., Official Documents, Nuremberg, 1947.

The corrections made by the Berlin Protocol have an important bearing on the interpretation of the notion of crimes against humanity. The consequence is also that the words "in execution of or in connection with any crime within the jurisdiction of the Tribunal" refer now to the whole text of Article 6 (c). (1)

It has been said at the outset that the Charter is the law by which the Tribunal was bound. The general attitude of the Tribunal in regard to this particular question found its expression in the Judgment which says that "the law of the Charter is decisive, and binding upon the Tribunal." (2) As to the character of the Charter itself the Tribunal made the following declaration, which has already been referred to in part when discussing the legal basis of the Tribunal:

"The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law". (3)

(1) See under I (b), Jurisdiction over Crimes against Humanity.

(2) The Judgment, p. 3.

(3) Ibid., p. 38.

The Tribunal was of course bound by the law of the Charter also in regard to the definition which the Charter gives both of war crimes and crimes against humanity. (1) This particular question is the subject of some specific and more elaborated statements made by the Tribunal in the Judgment. Before coming however to the exposition of what was the attitude of the Tribunal to the substantive law as laid down in the Charter, it will be necessary to analyse first, but as briefly as possible, the relevant provisions of the Charter and to point out their most characteristic features. For only through the examination of the rules laid down therein and then by contrasting with them the manner in which the Tribunal applied these provisions and the effect it gave them in its considerations and judgment can we find a correct answer to the question to what extent and in what way human rights violated by various crimes are or are not protected by the existing rules of International Law. When discussing the attitude of the Tribunal, we shall take into account only its general considerations, reserving a detailed exposition to a further Section of this part of the Report where the subject of violations of the rights of the victims will be presented.

I. Jurisdiction over offences

a) War Crimes.

In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as lawful members of armed forces, and in contradistinction to all

(1)
The Judgment, p. 64.

sorts of force or means applied by a belligerent against enemy armed forces and other enemy persons or property, and directed to the overpowering of the enemy as well as to the occupying and administering of the enemy territory by all legitimate means, war crimes in the conventional sense are such acts of soldiers or other individuals which constitute violations of the laws and customs of warfare. They include acts contrary to International Law perpetrated in violation of the laws of the criminals's own State, as well as criminal acts contrary to the laws of war committed by order and/or on behalf of the enemy State. Such acts constitute violations of municipal penal laws, of international conventions, and of the general principles of criminal law as derived from the criminal law of all civilised nations. To that extent the notion of war crimes is based on the view that States and their organs are subject to criminal responsibility under International Law.

The right of the belligerent to punish during the war, war criminals as fall into his hands is a well-recognised principle of International Law. It is a right of which he may effectively avail himself after he has occupied all or part of enemy territory, and is thus in the position to seize war criminals who happen to be there. He may, as a condition of the armistice, impose upon the authorities of the defeated State the duty to hand over persons charged with having committed war crimes, regardless of whether such persons are present in the territory actually occupied by him or in the territory which, at the successful end of hostilities, he is in the position to occupy. For in both cases the accused are, in effect, in his power. And although the Treaty of Peace brings to an end the right to prosecute war criminals, no rule of International Law

prevents the victorious belligerent from imposing upon the defeated State the duty, as one of the provisions of the armistice or of the Peace Treaty, to surrender for trial persons accused of war crimes. (1)

In spite of the uniform designation of various acts as war crimes, a number of different kinds and types of war crimes can be distinguished on account of the essentially different character of the acts, namely: a) according to whether these acts have been committed by members of the enemy armed forces or by individuals who belong to or represent enemy authorities other than military, or are acting in the interest of the enemy; b) according to what rights of individual persons or groups of peoples have been violated, and/or what legitimate interests of other belligerents or general interests of the community of nations have been outraged.

It will be observed that, without exception, all the crimes specifically enumerated in Article 6 (b) of the Charter as constituting war crimes in their technical sense, are crimes which constitute attacks on the integrity of the physical being of individuals or groups of people, and of property, thus violating the inherent human rights. But, from the law as stated in that article, and in particular from the words: "Such violations (i.e. of the laws or customs of war) shall include, but not be limited to, ..." it is clear that these crimes are not the only ones which the authors of the Charter had in mind and with which the Tribunal was

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L. Oppenheim, International Law, Vol II., Sixth Edition, Longmans Green & Co., London, 1944, pp.450-458.

As to examples in the past of provisions of the Peace Treaties imposing upon the defeated State the duty to surrender for trial of persons accused of war crimes, see, by this Rapporteur, Historical Survey of the Problem of Violations of Human Rights.

expected to be concerned in the Trial. It follows also that not only crimes of the atrocities type but also violations of any other law or custom of war may be considered war crimes irrespective of whether such crimes might or might not violate certain human rights and if in the latter case they constitute a purely technical offence only.

We shall see later in more detail and in the light of the Indictment and the Judgment what human rights have in fact been violated in connection with specific war crimes committed, and how they have been violated. Here, we are only concerned with the law relating to war crimes. As has already been pointed out the Tribunal considered itself bound by the Charter, in the definition which it gives of war crimes. However, the Tribunal stated that the crimes defined by Article 6 (b) "were already recognised as war crimes under International Law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument".⁽¹⁾

However, when explaining the law of the Charter in connection with the criminality of the planning or waging of a war of aggression, and in particular when dealing with a fundamental principle of all law that there can be no punishment of crime without a pre-existing law, the Tribunal found an opportunity of touching indirectly upon this question and expressed its view in the following way:

(1)

The Judgment, p. 64.

"The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions have been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention." (1)

The Tribunal said further that it must be remembered that International Law is not the product of an international legislature, and that international agreements have to deal with general principles of law, and not with administrative matters of procedure. The Tribunal went on to say that:

"The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference

(1) The Judgment, p. 40.

"the principles of law already existing". (1)

The Tribunal thought it also important to recall that in Article 228 of the Treaty of Versailles, the German Government expressly recognised the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. (2)

Dealing with the Defence argument that the Hague Convention does not apply in this case, because of the "general participation clause" contained in Article 2 of the Hague Convention of 1907, to which several of the belligerents in the recent war were not parties, (3) the Tribunal expressed the opinion that it was not necessary to decide this question, and added:

"The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war,' which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter."

(1) The Judgment, p. 40.

(2) Ibid., p. 41.

(3) This clause provides: "The provisions contained in the regulations (Rules of Land Warfare) referred to in Article I as well as in the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention".

"A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war, because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them". (2)

b) Crimes against humanity. (1)

As has already been pointed out, the Nuremberg Charter is the first international legal enactment which has formulated the

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For a detailed analysis of the notion of crimes against humanity reference is made to the article of E. Schwellb on "Crimes against Humanity", written for The British Year Book of International Law, 1947, and which has been used as the basis for the drafting of this section, with the author's kind permission.

A number of preparatory papers on this subject issued by the Commission for purposes other than this Report have also been utilised.

(2) The Judgment p.65

definition of crimes against humanity, though the conception of them is not entirely novel.

The provision of sub-paragraph (c) of Article 6 of the Charter appears prima facie to lay down a set of novel principles or, at least, to pave the way for considerable progress in the relationship between the community of nations, its member states and individual citizens of these states, and between International Law and municipal law.

The following three elements of the definitions of crimes against humanity as laid down in Article 6 (c) appear to contain these novel principles:

- (1) "before and during the war",
- (2) "against any civilian population",
- (3) "whether or not in violation of the domestic law of the country where perpetrated".

We shall therefore analyse in more detail each of these elements as they appear from the context of Article 6 (c) as well as in the light of the Judgment pronounced by the Nuremberg Tribunal.

The first principle indicated by the words "before or during the war" apparently implies that International Law contains penal sanctions against individuals, applicable not only in time of war, but also in time of peace. This means that there is in existence a system of international criminal law under which individuals are responsible to the community of nations for violations of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of peoples and of individual persons, i.e. inhuman acts, constitute not only in time of war, but also in time of peace, in certain circumstances, international crimes.

The adoption by the Charter of this principle taken

together with the principle that it is irrelevant whether or not such crimes are committed in violation of the domestic law of the country where perpetrated, has found its expression in the creation of the international judicial organs, (1) which were called upon to determine the guilt or innocence of a certain category of the alleged criminals responsible for the commission of such inhuman acts, thus overriding the national sovereignty and the municipal law of the states of which the perpetrators are subjects and where the crimes had been committed.

However, it must be pointed out at once that this principle finds a considerable limitation in the specific qualification laid down by the provision, as amended by the Berlin Protocol, namely, that in order to constitute crimes against humanity which call for international penal sanction and which are of special concern to the international community, the inhumane acts specifically enumerated in Article 6 (c) must be committed in "execution of or in connection with any crime within the jurisdiction of the Tribunal", i.e. only if it is established that they were connected with a crime against peace or a war crime proper. This qualification constitutes a very important restriction of the scope of the concept of crimes against humanity, which thus, under the Charter, have no independent status, with a further consequence that their greatest practical importance in peace time is seriously affected. (2)

The second principle expressed by the words "against any civilian population" is to the effect that any civilian population is under the protection of international criminal

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- (1) Reference is made here to the Nuremberg and Tokyo Tribunals.
- (2) The position under Law No. 10 of the Control Council of Germany is different.

law and that the nationality of the victims affected is irrelevant. It seems also to imply that such protection has been extended also to cases where the alleged violations of human rights have been perpetrated by a State against its own subjects. The term, therefore, includes crimes both against allied and against enemy nationals.

In particular, it follows that a civilian population remains under the protection of the provisions regarding crimes against humanity irrespective of whether it is a): the population of a territory which is under belligerent occupation which was effected with or without resorting to war (e.g. Austria and parts of Czechoslovakia in 1938 and 1939); or b): the population of other States not under occupation, where armed forces of one belligerent were stationed (e.g. German forces in Italy), or of countries neighbouring on a certain belligerent (e.g. persons who were subject to kidnapping or other violence); or c): the population of a belligerent itself (e.g. German or Italian nationals of the same or different race in their relation to the respective State authorities or other national bodies).

From the words "civilian population" it appears that the term "crimes against humanity" is restricted to inhumane acts committed against civilian populations as distinct from members of the armed forces, which are outside the scope of the provision.

The word "population" appears to indicate that a larger body of victims is visualised and that single or isolated acts committed against individuals should decide on the scope of the concept of crimes against humanity.

A violation of a certain human right protected by Article 6 (c) may or may not simultaneously constitute a violation of the laws and customs of war and therefore a war crime sensu stricto, coming under Article 6 (b). This results from

the fact that the terms "crimes against humanity" and "war crimes" as has already been indicated, overlap to a certain extent. We shall see in more detail later how this particular problem has been dealt with by the Prosecution in the Indictment and by the Tribunal in its Judgment. Here, it will be sufficient to point out the following.

The provision dealing with war crimes (Article 6 (b)) expressly states that its enumeration of specific criminal acts is not exhaustive. No such statement is to be found in Article 6 (c). The wide scope of the term "other inhumane acts" indicates, however, that the enumeration of Article 6 (c) is also not exhaustive at least so far as the substance is concerned.

There are two types of crimes against humanity: crimes of the "murder-type", namely, murder, extermination, enslavement, deportation, and other inhumane acts; and "persecutions". With regard to the latter the provision requires that they must have been committed on political, racial or religious grounds.

The acts of the "murder-type" enumerated in Article 6 (c) as crimes against humanity are similar to, but not identical with, those which are mentioned as war crimes in Article 6 (b).

Murder is included both in the list contained in Article 6 (b) and (c). Extermination, mentioned only in Article 6 (c) is apparently to be interpreted as murder on a large scale (mass murder). The inclusion of "extermination" in addition to "murder" may be taken to indicate that taking part in laying down a policy of extermination and/or other activities in its implementation not directly connected with actual criminal acts of murder, may be punishable as complicity in the crime of extermination.

Whether there is a difference between "deportation to slave labour or for other purposes" as mentioned under (b), and the two separate items "enslavement" and "deportation" mentioned under (c) is difficult to decide at this stage. "Ill-treatment

which is contained in sub-para. (b), has been omitted in sub-para. (c). Whether or not this particular crime falls under "other inhumane acts" depends on the general interpretation of the latter expression.

Finally, the third principle that it is irrelevant whether an offence alleged to be a crime against humanity was or was not committed in violation of the domestic law of the country where perpetrated, means that it is no defence that the act alleged to be a crime against humanity was legal under the domestic law of that country. The exclusion of this plea is closely connected with the provisions of the Charter contained in Article 8 and regarding the defence of superior orders.

We come now to the question of the attitude of the Tribunal to the law relating to crimes against humanity.

As already indicated, the Tribunal stated that it is bound by the Charter, in definition which it gives of crimes against humanity. (1) The general considerations of the Tribunal on the law as to crimes against humanity are contained in the following statement:

"With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany, before the war of 1939 who were likely to be hostile to the Government, was most ruthlessly carried out.

(1) The Judgment, p. 64.