LAW REPORTS OF TRIALS OF WAR CRIMINALS

Selected and prepared by

THE UNITED NATIONS
WAR CRIMES COMMISSION

VOLUME XV

DIGEST OF LAWS AND CASES

LONDON
PUBLISHED FOR
THE UNITED NATIONS WAR CRIMES COMMISSION
BY HIS MAJESTY'S STATIONERY OFFICE

1949

Price 5s. 0d. net

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One of the aims of this series of Reports has been to relate in summary form the course of the most important of the proceedings taken against persons accused of committing war crimes during the Second World War, apart from the major war criminals tried by the Nuremberg and Tokyo International Military Tribunals, but including those tried by United States Military Tribunals at Nuremberg. Of necessity, the trials reported in these volumes have been examples only, since the trials conducted before the various Allied Courts, of which the United Nations War Crimes Commission has had records, number over 1,600. The trials selected for reporting, however, have been those which were thought to be of the greatest interest legally and in which important points of municipal and international law arose and were settled.

Each report, however, has contained not only the outline of the proceedings in the trial under review, but also, in a separate section headed " Notes on the Case," such comments of an explanatory nature on the legal matters arising in that trial as it has been thought useful to include. These notes have provided also, at suitable points, general summaries and analyses of the decisions of the courts on specific points of law derived primarily from a study of relevant trials already reported upon in the series. Furthermore, the volumes have included, where necessary, Annexes on municipal war crimes laws, their aim being to explain the law on such matters as the legal basis and jurisdiction, composition and rules of procedure on the war crime courts of those countries before whose courts the trials reported upon in the various volumes were held.

Finally, each volume has included a Foreword by Lord Wright of Durley, Chairman of the United Nations War Crimes Commission.

continued inside back cover

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Corrigenda

Page 21, line 1, "jurist" *should read* "jurists"
„ 50, „ 8, "mentioned" *should read* "mention"
„ 91, Note 1, line 1. The reference is to Article 2 (2) of the French Ordinance in question
„ 155, Note 1, line 6, "918" *should read* "189"
„ 157, Note 2, "155" *should read* "156"
„ 182, Note 1, line 4, "law mission" *should read* "Commission"

LONDON: HIS MAJESTY'S STATIONERY OFFICE: 1949
July 1949

LONDON: PUBLISHED FOR
THE UNITED NATIONS WAR CRIMES COMMISSION
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FOREWORD

This Foreword might also be called " Epilogue " because the volume marks the completion, in March, 1949, of an undertaking commenced in the summer of 1946, namely the preparation of a collection of reports of representative trials of war criminals in connection with World War II. It has been pointed out that the main object of these Reports is to help to elucidate the law, i.e. that part of International Law which has been called the law of war. A very general idea of what that means can be found in the judgment of that great judge, the late C. J. Stone, in the Supreme Court of the United States, on Yamashita, reported in Volume IV on p. 38. Stone, C. J., said :

> " In *Ex parte Quirin*, 317 U.S. 1, we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offences against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, s. 8, Cl. 10 of the Constitution to ' define and punish . . . Offences against the law of Nations . . .', of which the Law of War is a part, had by the Articles of War (10 U.S.C., ss. 1471–1593) recognised the ' military commission ' appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offences against the Law of War. Article 15 declares that ' the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offences that by statute or by the Law of War may be triable by such military commissions . . . or other military tribunals.' See a similar provision of the Espionage Act of 1917, 50 U.S.C., s. 38. Article 2 includes among those persons subject to the Articles of War the personnel of our own military establishment. But this, as Article 12 indicates, does not exclude from the class of persons subject to trial by military commissions ' any other person who by the Law of War is subject to trial by military tribunals,' and who, under Article 12, may be tried by court martial, or under Article 15 by military commission.
>
> " We further pointed out that Congress, by sanctioning trial of enemy combatants for violations of the Law of War by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the pre-existing jurisdiction of military commissions created by appropriate military command, all offences which are defined as such by the Law of War, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognised and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis Powers were parties."

I quote this, here at the outset, to explain that the law of war is a system of law different in character from the ordinary municipal laws of the various countries ; it is International Law, not the law of any one State. Stone, C. J., is speaking of one type of Court (the Military Court) frequently made use of to administer and declare this law of war. It is, however, clear that it may be administered by the municipal courts of belligerent countries if these courts are specially commissioned for that object, and equipped if need be with special jurisdiction to enable them to discharge the trust.

The cases reported here will illustrate both types. In the Annexes to the different volumes will be found how different allied nations equipped their municipal courts with the necessary jurisdiction beyond or in modification of their normal functions for the administration of their municipal law. But each court when it so acts is deemed to be administering International Law. In the same way the mandate given to a Military Court, such as the International Military Tribunal and the United States Military Tribunals in which were held the Subsequent Proceedings at Nuremberg, is in general governed by International Law and these courts are municipal courts only in so far as their mandate deviates from International Law. Such a court is an international court, regardless of the circumstance that it is convened by and is administered by a national Government. A precise parallel is afforded by a Prize Court. As the law is International Law, it must not be confused with the municipal law of the convening Government. It is the law of nations, which cannot be created by the enactment of any particular national legislature. No doubt a court commissioned to try cases according to International Law may also be governed in part by some other law, because that law is included in the terms of its commission : a court cannot depart from the mandate given by its convening authority. Generally and substantially, however, the jurisdiction conferred on the courts we are concerned with, whatever their convening authority, will be found to be in accordance with International Law. But if the law of the court cannot be found in the acts of the particular national legislature or in the jurisprudence established by the courts of that country, where, it will be asked, is it to be found ? Answers to that question will emerge from considering the decisions reported in these volumes. Stone, C. J., in the judgment just referred to, gave a general answer. More detailed explanations may be extracted from other judgments reported in these volumes All I want to emphasise at the moment is that the law of war is a definite body of jurisprudence, giving a " standard certain ", to quote the words of Scott and Lancing in the Minority Report annexed to the Report of the Commission on Responsibilities issued at the end of World War I. When these distinguished lawyers spoke of a " standard certain " they were adopting the standards familiar to common lawyers who start with traditional rules and develop them to meet the demands of justice in view of the particular cases before them. The law of war has a long history. Some day that history will perhaps be written. At the moment what it is sought to indicate here (as it was in the History recently published of the United Nations War Crimes Commission) is the development of the law of war as illustrated by the decisions of courts of competent jurisdiction in and since the war. One characteristic feature of every law of the common law type, is the apparatus of law reports, which, whether regarded as of coercive authority or of merely persuasive authority, as in the case of the

common law or customary law of war, give legal life and substantial definition to what might otherwise be regarded as a mere collection of moral generalisations. Similarly the development of Prize Law can be traced in the authoritative reports of cases decided in the British Court of Admiralty and in the United States Reports.

The Fourth Hague Convention, which was a revised and enlarged version of the similar conventions which preceded it, sought to safeguard the rights in war, not merely as between the actual belligerent forces *inter se*, but also to secure protection to the civilian populations. This Convention, along with the Conventions for the protection of Prisoners of War (the Geneva Conventions) certainly fulfilled a great purpose in giving a legal form and substance to general rules which had been recognised to some extent in practice : particular instances of the enforcement of the law of war had been recorded, such as the execution of Major André as a spy by General Washington, but only after a fair trial, and the execution of the confederate Colonel Wirz during the American Civil War as a war criminal. But as Stone, C. J., points out in *Ex parte Quirin*, these were only two instances out of many of sentences by Military Tribunals over a long period of years, exemplifying offences against the law of war and enforcing the individual responsibility and the punishment of the offender. The object was to vindicate the rule of the law of war.

At the end of World War I, as everybody knows, there were admirable declarations that war crimes would be punished, and lists of criminals were prepared by a fact-finding committee, but nothing practical was effected towards identifying, tracing and apprehending accused individuals or putting them on trial, though an excellent report, with lists of war crimes, was prepared by the Commission on Responsibilities already referred to. The whole thing was abandoned after a few unsatisfactory trials, though at least one useful judgment was produced by the Leipzig Court in the Llandovery Castle case, and though the Leipzig cases (as they have been called) showed how hopeless it was to expect justice in these circumstances from the courts of the Reich. Hence it came about that the victorious Allies after World War II decided to try war criminals themselves, adopting either the system of the military courts or that of the national courts. They refused to think that Allied courts could not be impartial. Their decision has been amply justified by the trials that have been held. The International Military Tribunals, held one at Nuremberg and the other at Tokyo, stand as convincing proofs that impartial justice can in this way be administered. This has also been shown by the military and the national courts which have held hundreds of trials, a selection from which is contained in these volumes. The presence of neutral judges has been shown to be not essential to maintain a high standard of impartiality and this was in fact fortunate under the circumstances, because neutral judges were in fact not available. Nor had the accused any legal right to object to being tried by such courts ; all the accused were entitled to was a fair trial and that they got. Also, as I have stated, the types of courts employed were those traditionally recognised by International Law as competent for war crime trials. The necessity of a fair trial was universally insisted upon by the Allies, and indeed was traditional in this type of case. In Reports contained in Volumes V and VI will be found instances in which it has been held that the denial of a fair

trial was a war crime. There had been at a certain stage a strong effort in certain Allied quarters to dispense with a trial even in the case of the Major Criminals ; it was said that was unnecessary because their crimes were notorious to all the world. It would be enough, so it was said, to have a solemn arraignment, stating their crimes and then ordering their executions. That idea was strongly pressed but was successfully resisted as contrary to International Law. So to proceed would have been to substitute an act of power for the execution of impartial justice demonstrated by an open trial in the face of all the world. Justice was done and was seen to be done. By any other procedure the whole impressiveness of the punishment of war crimes would have been prejudiced and indeed completely lost. Incidentally, the advocates of the theory that would dispense with trials do generally accept that criminals such as the major criminals deserved their punishment and were justly punished. The only objection then was that the trial was unnecessary. They should, it is said, have been put to death without trial. The effect would have been paradoxical.

As to jurisdiction the traditional rule is that a Military Court, whether national or international, derives its jurisdiction over war crimes from the bare fact that the person charged is within the custody of the Court ; his nationality, the place where the offence was committed, the nationality of the victims are not generally material. This has been sometimes described as universality of jurisdiction as being contrary to the general rule that courts have a jurisdiction limited to the national territory or to the nationality of the injured person. In certain trials dealt with in these Reports, the accused came from several different nations and so also did the victims, and in some trials the crimes were committed on the High Seas or in allied or enemy countries. Where it was in Allied national courts that war crimes were tried, jurisdiction was defined by the national law under which they proceeded. This will be seen by consulting the constituent documents conferring jurisdiction in the various annexes to the volumes. The rules of evidence and the range of punishments will also be found there. The same may be said of the various Charters, Commissions or Warrants under which the Military Courts acted. By International Law the penalty for a war crime is death, subject however to the court imposing a lesser sentence.

As these volumes are intended to form a Case Book of War Crimes, what needs to be done is to state briefly and succinctly the basic and most general rules of this branch of law so that the reader of a particular Report may have before him the setting, or background, or surrounding circumstances (whichever simile is preferred), of law or procedure of the particular trial. Volume XV, which Mr. Brand has prepared, will, I think, be found to satisfy this requirement.

Certain differences may be noted in the trials reported. In some detailed and reasoned judgments are delivered, in others that feature is absent. Thus in the United States Military Commission trials, the reporter is compelled to extract from what happened at the trial the grounds of law on which the Court proceeded : there is almost invariably no reasoned judgment. The same is largely true of the British Military trials, subject to this difference, that in them a Judge Advocate usually gives his reading of the facts and law to the court. This furnishes some clue to the reasons for the decision. In the national courts the practice varies. In the Norwegian

and Netherlands Courts there are reasoned judgments, and other European Allies also adopt their ordinary forms of declaring their judgments. In the International Military Tribunals at Nuremberg and Tokyo, a very elaborate method of stating the grounds both of fact and law for the decision has been adopted. These latter trials lie outside the general scope of these Reports. The judgments are used by way of persuasive precedents only on specific points. But there is a very important series of trials held in Nuremberg after and as supplementary to the International Military trial, called the Subsequent Proceedings. These trials were initiated and conducted by and under the United States Government which provided administrative machinery, prosecutors and judges : the Tribunals involved were described as United States Military Tribunals. In these trials full judgments on fact and law were delivered. The Reports accordingly are fuller and more detailed than is possible where the reporter can only do the best he can with less satisfactory materials. International lawyers will not hesitate to express their appreciation of the help which these trials, conducted by the United States with General Telford Taylor as Chief Prosecutor, have given in the elucidation of the law. They will be indispensable to the student of this branch of law, even though he may criticise particular passages contained in them.

I may here observe that Mr. George Brand, in his valuable notes on most of the Subsequent Proceedings Cases, among other trials, has sought to elucidate what was decided, without criticising. I apologise for departing from that salutary rule in one case, that of the " Hostages ", in which I have ventured to express some criticism of the legality under International Law of the killing of hostages. That was one of the Subsequent Proceedings and I wish to make clear that it in no way detracts from my great respect for the valuable labours in the cause of International Law of the Judges, not only in that one but in all the Subsequent Proceedings.

I must, I think, say something of the sources of the International Law of War. The Common Lawyer will be puzzled by the absence of previous Law Reports in which he finds his precedents, and also by the relative absence of Legislative Acts in which a great deal of his law is found. Perhaps this comparative absence of legislation will seem almost more grievous to the civil lawyer who finds the great part of his law in Codes. It may be that after this last war (I should like to picture it as the " last " in the history of the future but I dare not do so) the decisions and rulings of the law of war recorded in these and other volumes, will provide more material. The Common Lawyer will be able to study and apply the precedents on which he relies so much, and so indeed will those lawyers who practise under a codified system of law, who have generally, I believe, availed themselves of the persuasive help of earlier decisions which they find collected in annotations to the codes. In either case, the law of war will be lifted from an area of generality and be able by analysis and synthesis to formulate more specific rules. This will have been one result of the great campaign of war crime punishment which has followed the war. But even before this happened, there was certain material of a more or less tangible character. Apart from evidence of custom and practice, there were books of authority like Grotius and Vattel in earlier days. These were books of authenticity comparable to Coke or Blackstone in Anglo-American law. There were also certain international agreements, conventions or treaties which approximate

in their importance to Legislative Acts, though of comparatively recent date. Of these the Hague Conventions on the laws of war and the Geneva Conventions on the treatment of prisoners are of supreme importance. It is easy with all the experience of recent years to point to defects in the Hague Conventions but they marked great advance in the humanization of war, both as between the actual military forces and also in the protection of the civilians. The future development of military operations is difficult to forecast to-day. The rules of law embodied in these Conventions have been tested in World War II which is ended. These Conventions may well be supplemented and revised, but their value cannot be overstated. They and the like are the nearest approach to legislation possible in the present state of international relations.

It would be wrong to look at any single document as constituting the source of the laws of war. The development of that branch of international law has had a long history and a great many traditional and customary rules have sprung up and have been followed, more or less, in regard to these questions. The time has, I hope, now come or is approaching, when it will be possible to show a homogeneous and scientific body of law, and that will have to be done without the aid of the legislature until there is a federated parliament of the world. Meantime that want is, to a large extent, filled by the system of international conventions representing all the civilised nations of the world who meet together to draw up a body of rules. These have the force of law in the same way as the law promulgated by a State has within its Courts. Their efficacy and force depends on the fact that they are recognised, accepted and agreed to by the various nations. In the war recently ended, it is striking to observe to what extent a code of law such as the provisions of the Geneva Conventions on Prisoners of War has been respected, at least in principle, though not always in fact. It would be wrong to treat these instruments merely as agreements between the various nations who were represented at the Conferences. For instance, the Hague Convention enables any assenting party to denounce it, but the true force of these Conventions in these days is that they represent a general consensus, in regard to the laws of war and these laws are binding upon belligerents whether they were originally parties or not, and whether, though originally parties, they have or have not denounced it.

The purpose of the Hague Convention can be inferred from the terms of the Convention itself. The Convention contains a number of specific regulations which, as the Convention says, have been inspired by the desire to diminish the evils of war so far as legitimate military requirements permit, and to serve as a general rule of conduct for the belligerents in their mutual relations and their relations with the inhabitants. That latter element, as we now see, has been of supreme importance, and that will be seen in the cases reported in these volumes. The Hague Convention goes on to say that it has not been found possible at present to concert stipulations covering all the circumstances which arose in practice, but on the other hand, the Parties to it do not intend that unforeseen cases should, in default of written agreement, be left to the arbitrary opinion of military commanders. The Convention then proceeds to state a wider principle in the famous language of the Belgian Delegate Mertens :

> " Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in

cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."

These provisions are the key note of these particular Regulations. They do not contain a list of war crimes, but they particularise a great many of them, leaving the remainder to the governing effect of that sovereign clause which, I think, does really in a few words state the whole animating and motivating principle of the law of war, and indeed of all law, because the object of all law is to secure as far as possible in the mutual relations of the human beings concerned the rule of law and of justice and of humanity. The language of the clause has sometimes been described as embodying the law of nature or natural law. That expression has been used during so many centuries from the days of the Romans and in so many different connotations and also has been invoked for the purposes of maintaining so many evil and disastrous practices and rules, that its use may perhaps be better abandoned. In truth and in fact, the true view of the law of nature has been the law which aims, however imperfectly, at giving effect to the sense of justice and of right and wrong and which is naturally inherent in all human beings except only the abandoned and vicious. The reader of this volume will not fail to reflect on the number of important principles which still need to be defined. I may note as an instance the question of the legality of the resistance movement on the part of a population unjustly invaded and terrorised by an aggressive nation. Another illustration is afforded by naval warfare.

Before I leave the Preamble to this Code, I may emphasise that the protection of the inhabitants of occupied territory is of primary importance in the modern law of war. It will be seen from the cases in these volumes that a very considerable proportion of the cases protect the interests of the inhabitants of territories which were either occupied or were the scene of belligerent operations. It is impossible to secure that the innocent inhabitants of such places can be entirely removed from the dangers and the destruction and the fatalities which are inevitable in such a situation, but the whole object of this part of the Hague Convention and other similar humanitarian instruments is, as they state, to diminish the evils of war so far as military requirements permit and that may be traced in the present Hague and Geneva Conventions and also in the cases which have been decided by the courts. It may be noted that the Hague Convention in particular had definitely a practical object. It required those who signed it or acceded to it to issue instructions to their armed land forces in conformity with the regulations respecting the laws and customs of war on land, which are annexed to the Convention. The result of the Convention has been that most important military nations have prepared manuals of military law which they have issued to their forces. These manuals are not authoritative sources of law in any sense, and some of the provisions contained in them have been subject to very proper criticism and amendment, but they are useful for purposes of reference and criticism and to some extent they may serve as evidence of the actual practices of nations, which is part of the material on which the customary law of war is based, along with the writings

of qualified authors. The decisions of courts are also of great value in defining the law of war. Hence the importance of these Reports.

The Hague Convention itself does not contain a list of war crimes. Such a list will be found in the Report of the Commission of Responsibilities of 1919, a list which is not comprehensive. Nor did the United Nations War Crimes Commission pretend to formulate a comprehensive list, but they did promulgate a list of war crimes for the purpose of guiding the Commission in its fact-finding activities. That provisional list, if I may call it so, was based on the report and recommendation of the Commission of Responsibilities, a document of very great value, and it was added to by the War Crimes Commission as a result of its experience and of the problems which came before it.

Mr. Brand, the Editor of this series of reports and the author of the present volume, has devoted section VI of the volume to a treatment of the types of offences which have been recognised. A list of these will be found in his table of contents under the heading " Types of Offences ". I should like particularly to refer to No. 6 of that list, under sub-heading B, which shows how the category of war crimes has over-flown the limits of offences committed during actual combat or offences committed against prisoners of war. The long list which is to be found in Item 6 are all offences committed against inhabitants of occupied territories, and there is no doubt at all, if one studies the history of war crimes during the last war, of the terrible character of these offences and the enormous scale on which they were committed by the Axis forces. It will be noticed that in some of these offences the object is the terrorism of civilians, their ill-treatment in various ways, often most atrocious, and the exploitation of human labour, often called slave labour, which was forced in the sense that inhabitants were seized and compelled to work for the Axis powers and for that purpose taken away from their homes which, in a vast number of cases, they never saw again. Some categories may seem novel but tragic and terrible experiences justify them.

There are some very striking instances of war crimes for which the reader must be referred to Mr. Brand's Section VI, sub-section B, which is based on actual decisions as reported in previous volumes. It is perhaps now a truism, but when I look at this list, and think of all the instances of each one of these crimes that come into my mind, I cannot help saying that so deliberate and so widespread and atrocious a system of inflicting human misery has never been known in the course of the world. Apart from these particular crimes, there are the crimes which Mr. Brand refers to under sub-headings C and D, crimes against humanity and crimes against peace. Crimes against humanity overlap to some extent war crimes generally, but the scope of the category of crimes against humanity has been limited by the requirements that to be punishable they should be carried out on a widespread scale and under governmental organisation, and apparently that they should have the particular object of political, racial or religious persecution.

Sub-section D contains a further category, crimes against peace. That category is based upon the effect of the Kellog-Briand Pact, or the Pact of Paris, which was a formal and solemn treaty entered into by practically all

the civilised nations of the world. Its essence is that those who are accused are charged with initiating or bringing about or waging an unjust or aggressive war. That conception has been much attacked but the charge has received effect from the important International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East at Tokyo. Its moral rightness is obvious because there can be no greater crime than the bringing about of a war with all its inevitable evils, unimaginable in extent. It is a crime, however, which deals primarily with initiation and waging of war as a matter of policy, which indeed, is the language of the prohibitive section, and the crime can usually only be committed by those persons who are able to determine the policy which causes the war. A further illustration of the crime has been given since I first wrote these words by the judgment in the Ministries Case, the last of the Nuremberg Subsequent Proceedings.

In the case of the last Great War there was, for a number of reasons, no difficulty in determining who were the policy makers. The material before the courts clearly showed that their purpose was aggression and that the war could not be justified on any legitimate ground such as self defence. That crime, if properly defined, can be charged against those who were called in the two trials I have mentioned, the " major war criminals " and others who, from their position and power were able to commit that particular offence which could not be charged against subordinate agents or instruments.

Membership of criminal organisations is a rather special piece of machinery which is devised to deal with the obvious difficulty of bringing within the range of punishment the various individuals who have taken part in the operations of associations or organisations, the object of which was the commission of war crimes.

I need not repeat what has so often been emphasised that to construct a system of common or customary law must necessarily involve a system of law reporting. The failure to appreciate the existence, character or scope of the law of war has almost entirely resulted from the absence of adequate reporting of decisions taken regarding acts coming under the law of war. It may be hoped that with the materials now available, it may be possible to evolve a homogeneous, scientific and constructive body of law though there is still no legislature to contribute to that result. That, however, is for the future.

I ought earlier to have observed that the principle of individual responsibility has until recently been regarded as a heresy in some quarters, instead of as being something which was obviously essential to any system of penal law. It has often been noted that the Hague Conventions do not contain any reference to personal responsibility in respect of war crimes, but all the same, as was pointed out by the Supreme Court of the United States, offenders against the laws of war have been punished. The principle of individual responsibility is a necessary condition of the establishment of a system of law ; what the law does is to define that responsibility. It is not content with the formulation of moral rules. It postulates personal sanctions. The Hague Convention, though it speaks of the responsibility of nations to make compensation for breaches of the Regulations, does not mention the personal responsibility of those guilty of breaches, but the same answer applies to such an objection, and that is that the punishment of war

criminals for breach of the rules of war has been recognised by the practice of nations and is part of the traditional law. For that, I may again refer to the decisions of the Supreme Court of the United States. The responsibility of fixing responsibility on particular agents is very noticeable.

Of course, I need not observe that that principle runs right through the series of trials which are reported in these volumes. I was, in fact, merely countering the conceivable though gratuitous and unfounded objection that, at least up to the time of the first World War, no such personal or individual responsibility was ever recognised in these matters ; it was recognised for instance in the Commission of Responsibilities, and also in the cases mentioned by the Supreme Court of the United States in the Yamashita case which has already been referred to in this Foreward, in particular may be noted cases where the offence was not a common law crime—as most of the war offences are—according to the normal rule of civilised people, but was only a crime in the particular area of military law, for instance the case of spying.

As was made clear at the outset, the trials reported in these volumes have been a selection of those of which records are in the possession of the United Nations War Crimes Commission. Only those of legal interest have been so selected for reporting, though most of those selected have also often been of importance in the history of the war. I may mention here some of the relevant figures relating to this process of selection :

Number of Trial Records Received	*Number of Trials Reported Upon*
809 United States	28
524 British	27
256 Australian	5
254 French	11
30 Netherlands	7
24 Polish	4
9 Norwegian	5
4 Canadian	1
1 Chinese	1

In addition, further trials which were not reported have been cited in either Volumes I–XIV, or in the present volume :

United States : 29
British : 17
Australian : 19
French : 17
Netherlands : 5
Norwegian : 2
Polish : 1
Canadian : 1
Greek : 1

It was never intended to report in these volumes the trials held by the International Military Tribunals in Nuremberg and Tokyo since it was felt that these trials would in any case be thoroughly discussed in the legal press and elsewhere and would form the subject of special reports, this has not, however, excluded reference to the judgments delivered in these trials where a quotation from the judgment has been useful in commenting upon the trials reported in these volumes. It will be freely admitted that the latter trials were not assured of general widespread treatment in the same way as those held before the two International Military Tribunals.

It will be observed that not all the countries whose courts have conducted war crime trials in recent years, nor all members of the Commission, are represented in the selection of trials reported in these volumes. The aim has been to make the series as internationally representative as was possible, but the achievement of this purpose has always depended upon and been limited by the transcripts actually submitted by various governments. All members of the Commission were invited to forward records of their trials, but not all did so for various reasons, and this lack of records explains the absence from these volumes of reports of trials held by the courts of certain countries. It may be added that where a country has not forwarded transcripts of court proceedings but has furnished the Commission with the texts of applicable war crimes laws, quotations from these laws have been included, wherever possible, in the general commentaries contained in previous volumes, and in the present volume.

The aim has been to derive from the records in the possession of the Commission all material containing any guidance for the building up of a jurisprudence of war crimes law, and it is felt that with three exceptions this aim has largely been achieved. The late arrival of the judgment in the Tokyo trial has caused one of these exceptions, and the late delivery of judgment in the Ministries case a second. The third concerns the day-to-day proceedings of the trials held before the United States Military Tribunals in Nuremberg. As is explained on page ix of Volume X, the reports which have been contained in these volumes on the Subsequent Proceedings trials have been based upon a study of the indictments and judgments in the respective trials and the speeches and briefs of prosecuting and defending counsel, but the time limitations, within which the Trust under which the reporting has been carried out has operated, have prevented a complete study of the rulings on procedural matters given in the course of these trials. I understand, however, that a study of these rulings on matters of procedure is contemplated by a United States lawyer who has had personal experience of these trials.

WRIGHT.

London, *March*, 1949.

I

INTRODUCTION

(i) This present Volume does not purport to be a *critical* discussion of international criminal law ; nor does it include a treatment of the history of the development of that law.

The intention of the volume is to summarise in a systematic way and analyse the legal outcome of the trials reported or cited in the previous fourteen volumes of the series, together with some others to which it has not been possible to give previous treatment in the Reports, and of the legal enactments national and international under which the relevant courts acted.

(ii) In general the reader will find that the actual text of the present volume consists of a summary of decisions and legal texts, together with advice of Judge Advocates acting with British and Commonwealth courts.

It will be recalled that the Judge Advocates' recommendations to British and Commonwealth courts, though of high authority, are not necessarily followed by the courts to which they are addressed.([1])

Thus, the Judge Advocate acting in the trial of Oscar Hans by a British Military Court in Hamburg, 18th-22nd August, 1948,([2]) offered to the court the following advice in opening his summing up :

> " We arrive at the stage where it is my duty to sum up this case to you, but you will bear in mind that whatever I say, I am here only in an advisory capacity. You are the judges of both law and fact in this matter, and although I am qualified to give you legal advice, you are, in fact, your own judges both of law and of fact."([3])

Nevertheless the advice of Judge Advocates has been thought of sufficient persuasive authority to be treated along with the actual decisions of courts. Neither the Judge Advocate's advice nor the decisions of courts are, in any case, binding on future courts in the sense of a strictly binding precedent.([4])

([1]) See Volume I, pp. 106-107.

([2]) Not previously treated in these volumes.

([3]) Two relevant provisions setting out some of the powers and duties of the Judge Advocate in British trials are made by the Rules of Procedure for Field General Courts Martial (regarding the applicability of which see Vol. I, p. 107). Rules 103(e) and (f) provide :

" (e) At the conclusion of the case he will, unless both he and the Court consider it unnecessary, sum up the evidence and advise the court upon the law relating to the case before the court proceed to deliberate upon their findings :

" (f) Upon any point of law or procedure which arises upon the trial which he attends, the court should be guided by his opinion, and not disregard it, except for very weighty reasons. The court are responsible for the legality of their decisions, but they must consider the grave consequences which may result from their disregard of the advice of the Judge-Advocate on any legal point. The Court, in following the opinion of the Judge-Advocate on a legal point, may record that they have decided in consequence of that opinion."

From these clauses it follows that, strictly speaking, a British Military Court is the final judge of the law as well as of the facts of a case, and that a Judge Advocate's summing up does not necessarily set out the law on which the court acted, although in practice his words carry a very high authority.

([4]) Compare pp. 17–19.

(iii) In the footnotes to the present Volume arguments of counsel and other material of lesser authority are occasionally mentioned, but for such comment having lesser authority than the decisions and Judge Advocates' advice appearing in the text the reader is mainly referred to the notes on the cases which have appeared in Volumes I–XIV. The footnotes to the present Volume provide also cross-references to the relevant parts of earlier volumes where the reader will find set out and discussed at greater length the matters treated in this Volume. One further technical point should be explained here. Where a cross-reference to a previous volume is supplied merely in order to enable the reader to trace where the statement first appeared in the reports, the reference is given as "Vol..... p. ....". Where, however, it is thought that the original text supplements or expands upon the statement made in the present Volume, the following is used : "*See* Vol. .... p.....".

It has been thought convenient in making footnote cross-references of the second type to make, on some subjects, only such references to the points in previous volumes where these topics have received their major treatment. At these previous points, however, further cross-references will be found, which will enable the reader to make a complete survey of the problem as set out in these volumes if desired. This applies, for instance, to the question of superior orders. This method has been thought preferable to a complete citation of references in this present volume which would not indicate which pages in the previous volumes were the most important to the issue under discussion.

References to pages in previous volumes must be taken therefore to include within their scope any further references contained in those pages.

(iv) In many cases it is not possible to determine with certainty on what ground the Court trying a war criminal came to its decision, since many types of war crime courts do not generally announce their legal or factual reasons for their findings.(1) The discussions of such courts are held in private sitting and usually only the final decision of guilty or not guilty and any sentence are announced. The arguments of Counsel are of interest insofar as they throw light on considerations which the Court may have had in mind during their deliberations but are not of course an infallible guide. In strict law, as has been seen, even the summing up of a Judge Advocate before a British, Canadian or Australian Military Court, when such an officer is appointed, is not a final indication even of the law on which the Court acted.

Nevertheless, while the trials in which some kind of reasoned judgment has been delivered have proved the most fruitful of legal precedent and so the most useful in compiling the present volume, trials of the other type have often proved of value too ; for instance, when there has been a simple finding of guilty upon a given charge an examination of that charge will often yield material which has been of use in preparing the section dealing with substantive offences.

Furthermore, as already stated, the advice of the Judge Advocate in British and Commonwealth Courts has been considered sufficiently authoritative to warrant its being treated along with the decisions of courts in the text of this present volume. Arguments of defence and prosecuting

(1) See pp. 19–20.

counsel have not in general been quoted in the present volume for reasons of space but full use thereof has been made in the actual reports and the points at which they have been quoted may be traced, according to subject-matter, by means of the footnote cross-references in this present volume.

(v) It is not the intention to attempt to indicate which of the decisions or pieces of advice by Judge Advocates which are to be set out are of greater authority and which of lesser authority. This would be entirely beyond the function of the present reports even if it would be possible to perform the task accurately. It is left to the student of international law to determine the degree of authority which exists for arriving at the conclusions which are set out in the present volume, and all that the text in this volume does is to indicate the authorities on which any statement is based. Where the authorities are not exhaustively set out in the present volume, they are referred to by footnote cross-references.

(vi) It is not the intention of the present volume to attempt to provide a full analysis of the Judgments delivered by the Nuremberg and Tokyo International Military Tribunals, since it is felt that these two judgments have received or will receive a treatment in the legal and general press much greater than that likely to be given to the trials which are reported in the present series. The limitations as to finance and time laid down by the Trust under which the Law Reporting has been carried out would, in any case, not enable a full treatment of these two judgments to be made. Never-the-less quotation from the two judgments has, from time to time, been made in the present volume where it has been thought useful to do so in connection with various topics discussed, in the same way as the Nuremberg judgment has been quoted in previous volumes. The Tokyo judgment has not been quoted in previous volumes because of the recent date of its delivery.

(vii) The usefulness from the point of view of the development of the international law of the future of the various decisions summarised in the present volume is not always the same. Decisions regarding, for instance, the scope of the various types of war crimes are of immediate importance in the development of international law, whereas, on the other hand, a decision that one type of organisation was to be regarded as a criminal organisation and that another was not could only be said to have an immediate importance since it refers to the possible liability of a limited number of members of certain organisations which have gone out of existence. The long-term importance of decisions such as those regarding the liability for membership in criminal organisations is in fact rather an indirect one. Its importance lies in the underlying basic principle involved rather than in the application of that principle to any specific organisations ; that underlying principle is examined briefly later in the present volume.[1] The important aspect of a decision from the point of view of the future of international law is not that this or that organisation was declared to be criminal, but that in applying the law relating to membership the courts have apparently made use of the concept of acting in pursuance of a common design to commit acts regarded as criminal.[2]

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[1] See pp. 98–9.

[2] Compare pp. 94–9.

Again, the decisions of the courts regarding crimes against humanity have spoken mainly in terms of crimes committed by Germans against Germans,[1] but it is clear that, from the point of view of international law, the important aspect of this development is rather the fact that offences committed by persons against their fellow nationals have been punished by the courts of other nations. Here again, the basic principle is of more importance, from the point of view of the development of international law, than the application made to individual nations, although it is the application to individual nations which has been of the greatest general interest at the time of the delivery of judgments. Furthermore, it must be admitted that a decision regarding the illegality of handing over prisoners of war to the S.D.[2] is of limited value from the point of view of international law except as one indication of the extent of a commander's general responsibility towards prisoners in his care.

[1] See pp. 134–8.
[2] See p. 106.

II

THE SOURCES OF INTERNATIONAL CRIMINAL LAW

The Judgment delivered in the *Hostages Trial* included the following statement :

> " The sources of International law which are usually enumerated are (1) customs and practices accepted by civilised nations generally, (2) treaties, conventions and other forms of interstate agreements, (3) the decisions of international tribunals, (4) the decisions of national tribunals dealing with international questions, (5) the opinions of qualified text writers, and (6) diplomatic papers."[1]

Similarly the Tribunal acting in the *Justice Trial* said :

> " International law is not the product of statute. Its content is not static. The absence from the world of any governmental body, authorised to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions.
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> > " ' It must be conceded that the circumstances which gives to principles of international conduct the dignity and authority of law is their general acceptance as such by civilised nations, which acceptance is manifested by international treaties, conventions, authoritative text-books, practice and judicial decisions.' (Hackworth *Digest of International Law*, Vol. 1, pp. 1–4.) "[2]

These may be accepted as useful definitions of the sources of the international criminal law[3] in particular, and the derivation of rules from most of these sources has been amply illustrated in the volumes of this series. The sources themselves, insofar as they have been touched upon in these volumes, are examined briefly in the present section.[4]

1. CUSTOMS AND PRACTICES ACCEPTED BY CIVILISED NATIONS GENERALLY

(i) A rule of international law can be valid without being stated in any international agreement. The statement just quoted from the judgment delivered in the *Justice Trial* was followed by the comment that " It does not, however, follow from the foregoing statements that general acceptance of a rule of international conduct must be manifested by express adoption thereof by all civilised States ". The judgment implicitly adopted a passage from Hyde's *International Law* pointing out that a binding rule of

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(1) Vol VIII, pp. 49–50.
(2) Vol. VI, pp. 34–5.
(3) The term " international criminal law " is here used to signify the international law relating to war crimes, crimes against humanity, crimes against peace and membership of criminal organisations.
(4) It will be observed that *Vol. XV as a whole* aims mainly at setting out and analysing the law derived during recent years from the second, third and fourth of the sources mentioned, and from the first insofar as municipal legislation illustrates the practices accepted by civilised nations, on the question of war crimes, crimes against humanity, crimes against peace and membership of criminal organisations.

law could become established even by " the failure of interested States to make appropriate objection to practical applications of it ". The *Hostages Trial* judgment stated : " In any event, the practices and usages of war *which gradually ripened into recognised customs with which belligerents were bound to comply,* recognised the crimes specified herein as crimes subject to punishment. It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognised customs and usages of war, *or* the general principles of criminal justice common to civilised nations generally."(1)

It is mainly through changes in generally recognised customs that international law has developed and displayed that progressive character to which attention has been drawn in the Judgments delivered in the *Justice* and *Hostages Trials.*(2) An illustration of the types of factors which are regarded as contributing to the causes of a change in customary international law is given by the statement of the Tribunal acting in the *Justice Trial* that Control Council Law No. 10 " is not limited to the punishment of persons guilty of violating the laws and customs of war in the narrow sense ; furthermore, it can no longer be said that violations of the laws and customs of war are the only offences recognised by common international law. The force of circumstance, the grim fact of world wide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law ".(3)

(ii) The expression " customs and practices accepted by civilised nations generally " could, however, mean either of two things :

(*a*) practices generally followed by states in their relations with one another (usually referred to as " state practice ") ; or

(*b*) practices generally followed by states in their own internal affairs.

The first type of practices are generally accepted as possible sources of international law, and as a much older source than the international conventions to be discussed presently,(4) but there is also a trend of opinion according to which, if a practice is generally regarded by states in their conduct of internal affairs as representing a principle of justice, it is also enforceable as a rule of customary international law.(5) This seems to be indicated by the use of the word " or " which has been italicised in the passage from the judgement in the *Hostages Trial* quoted above ; the Tribunal also stated that :

> " The tendency has been to apply the term ' customs and practices accepted by civilised nations generally ', as it is used in International Law, to the laws of war only. But the principle has no such restricted meaning. It applies as well to fundamental principles of justice which

(1) Vol. VIII, p. 53 (Italics inserted).
(2) See Vol. VI, pp. 34, 35 and 54 and Vol. VIII, p. 49.
(3) See Volume VI, pp. 45–48, where the Tribunal expands upon this statement by setting out a number of authorities showing how world opinion had grown to favour a right of humanitarian intervention.
(4) See Vol. VI, p. 58.
(5) See Vol. XI, pp. 72–73.

have been accepted and adopted by civilised nations generally. *In determining whether such a fundamental rule of justice is entitled to be declared a principle of International Law, an examination of the municipal laws of states in the family of nations will reveal the answer.* If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of International Law would seem to be fully justified. There is convincing evidence that this not only is but has been the rule. The rules applied in criminal trials regarding burden of proof, presumption of innocence, and the right of a defendant to appear personally to defend himself, are derived from this source. Can it be doubted that such a source of International Law would be applied to an insane defendant? Obviously he would not be subjected to trial during his incompetency. Clearly, such a holding would be based upon a fundamental principle of criminal law accepted by nations generally. If the rights of nations and the rights of individuals who become involved in international relations are to be respected and preserved, fundamental rules of justice and right which have become commonly accepted by nations must be applied. But the yardstick to be used must in all cases be a finding that the principle involved is a fundamental rule of justice which has been adopted or accepted by nations generally as such . . . .

"The defendants invoke the defensive plea that the acts charged as crimes were carried out pursuant to orders of superior officers whom they were obliged to obey. This brings into operation the rule just announced. The rule that superior order is not a defence to a criminal act is a rule of fundamental criminal justice that has been adopted by civilised nations extensively. It is not disputed that the municipal law of civilised nations generally sustained the principle at the time the alleged criminal acts were committed. *This being true, it properly may be declared as an applicable rule of International Law.*"(1)

Of importations into war crimes proceedings of municipal law concepts there have been no lack in the trials reported in this series. The Tribunal acting in the *Hostages Trial* referred to generally accepted "rules applied in criminal trials regarding, burden of proof, presumption of innocence, and the right of a defendant to appear personally to defend himself", and it will be seen later in this present Volume that even more elaborate sets of rules have been recognised as constituting that fair trial which should have been accorded by German and Japanese accused before meting out punishment to Allied prisoners of war or inhabitants of occupied territories,(2) and which have been generally accorded to ex-enemy accused by Allied Courts conducting war crime trials.(3)

(1) Volume VIII, pp. 49–50 (Italics inserted). It may be thought that the famous passage from the Preamble to the Hague Convention No. IV is sufficiently broad in scope to constitute recognition as sources of international law of both types of practices described in the text:

"Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."

(2) See pp. 161–6.

(3) See pp. 189–97.

Furthermore, the courts, and Judge Advocates in British and Commonwealth trials, have relied heavily upon municipal laws for their legal terminology and for the definition of such terms as they have so imported from national criminal laws into war crimes proceedings. An example of such introduction of municipal law categories is provided by the *Jaluit Atoll Case*, in which various accused were found guilty of a charge of murder.(1) In two trials by Australian Military Courts, at Rabaul,(2) that of Masao Kudo and others on 30th March–1st April, 1946 and that of Daijiro Yamasaki, on 3rd–4th June, 1946, certain accused were charged of *murder* and found guilty of *manslaughter*.

Again in the trial of Arno Heering, by a British Military Court, at Hanover, on 24th–26th January, 1946, where ill-treatment of prisoners of war was charged, the Legal Member of the Court pointed out that certain words complained of were used to the prisoners' guards, not to the prisoners, and that mere words could not constitute an assault. Applying the analogy of the rules and principles applied in the Divorce Court in regard to the question of mental cruelty, he thought that the Prosecutor would have to prove first that there was something in the nature of mental cruelty, and secondly that there was some interference with health or well-being in consequence of it.(3)

In the *Essen Lynching Case* the Prosecutor pointed out that the charge alleged that the accused were concerned in the killing of three British airmen. That was the wording of the charge, but, the Prosecutor added, for the purpose of this trial he would invite the Court to take the view that this was a charge of murder and of nothing other than murder. The allegation would be that all these seven Germans in the dock were guilty either as an accessory before the fact or as principals in the murder of the three British airmen.

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(1) The specification stated that they " did, on or about 10th March, 1944, on the Island of Aineman, Jaluit Atoll, Marshall Islands, at a time when a state of war existed between the United States of America and the Japanese Empire, wilfully, feloniously, with malice aforethought without justifiable cause, and without trial or other due process, assault and kill, by shooting and stabbing to death, three American fliers, then and there attached to the Armed forces of the United States of America, and then and there captured and unarmed prisoners of war in the custody of the said accused . . . . ." In the course of the trial the Prosecution recalled that the charge against the accused was one of murder and proceeded to analyse in detail the elements of a definition of murder as " the unlawful killing of a human being with malice aforethought." As the notes to this case said, " At first sight it may appear that the introduction of the definition of murder, based on Anglo-Saxon rules of Municipal Law, was not strictly justifiable in a case where breaches of International Law on an island under Japanese mandate were alleged. The intention of the Prosecution, however, was not to charge the accused with breaches of United States law *as well as* of International Law. The use of the words in the specification, ' all in violation of . . . the International rules of warfare,' as applying to the charge of murder, clearly shows that the introduction of the terms used in United States law was intended merely to amplify and define the specification. In the present state of vagueness prevailing in many branches of the law of nations, even given the fact that there are no binding precedents in International Law, such introduction therein of tested concepts from municipal systems is all to the good, provided that they are recognised to be in amplification of, and not in substitution for, rules of International Law. This is so, even if it involves the use of tautology, inherent in some Common Law definitions, such as is exemplified in the phrase, ' wilfully, feloniously, with malice aforethought without justifiable cause . . . . ' in the specification." (Volume I, pp.72 and 80).

For other examples of arguments of Counsel introducing national criminal law concepts and definitions, see Vol. I, pp. 90 and 101, Vol. III, pp. 68–69 Vol. VII, pp. 78–79 and 81, and Vol. XI, pp. 75 and 76–77.

(2) Not previously dealt with in this series.

(3) Vol. XI, pp. 79–80.

This proposition was not accepted by the Court. The legal member pointed out that this was not a trial under English Law. Murder was the killing of a person under the King's peace. The charge here was not murder and if Counsel spoke of murder he was not using the word in the strict legal sense but in the popular sense. As long as everyone realised what was meant by the word " murder " for the purposes of this trial, the legal member did not think there was any difficulty. As to using words like " accessory before the fact " and so on, which are applicable to English law and to felonies, the legal member again saw no objection to that, as long as all concerned knew exactly what they were talking about. They were using the words almost in inverted commas as analogies to English law.(1)

The importation into war crimes proceedings of municipal law analogies on the question of complicity and " necessity " is illustrated elsewhere,(2) while the citing in the *I.G. Farben Trial* judgment of United States cases on conspiracy is also interesting here.(3)

Municipal law categories are imported not only into judgments and into the utterances of Judge Advocates and Legal Members but into the legal instruments under which trials are held.(4)

The importation of municipal law terms and definitions has been particularly marked in war crime trials held before courts of, for instance, France and Norway. The Norwegian legal approach towards the treatment of war criminals has stressed that, before punishment of any individual offender becomes legal, he must be shown to have offended against some specific provision of Norwegian municipal law as well as against the laws and usages of war.(5) Similarly, when a French Military Tribunal has tried an alleged war criminal, the usual practice has been for the judges to decide first whether a provision of the French Criminal Code has been violated and only secondly, whether this breach was justified by the laws and customs of war.(6)

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(1) See also Vol. I, p. 20 and Vol. VII, p. 81.

(2) See pp. 49–58 and 170–5, and compare Vol. III, pp. 68–69 and Vol. XI, p. 72.

(3) See Vol. X, p. 40.

(4) See for instance provisions dealing with complicity set out on pp. 52, 55 and 57.

(5) This point is elaborated in Vol. III, pp. 82–83. See, for instances, Vol. III, pp. 12 and 20–21, Vol. V, pp. 82 and 92.

(6) This comment is elaborated in Vol. III, pp. 53–54. For instances, see Vol. III, pp. 50–53 and 95–96, Vol. VII, pp. 68–70 and 74–75, Vol. VIII, pp. 26–31, 60–61, 62–65 and 67–74.

For examples of the similar application of provisions of Polish Law in war crime trials, see Vol. VII, pp. 5 and 18, Vol. XIII, pp. 106–107 and Vol. XIV, p. 40. For Netherlands examples see Vol. XIII, pp. 143–144.

By contrast, while it is true that certain instruments having validity in the respective municipal legal systems have always provided in general terms that British Military Courts and United States Military Commissions shall have jurisdiction to try alleged war criminals, the practice of these Courts and Commissions is to stress that a breach of the laws and usages of war must be shown ; provisions of municipal law are often quoted, as analogies, by counsel, and in British trials by the Judge Advocate or Legal Members, but the violation of any set of legal rules other than the laws and usages of war need not be shown. For instance the British Royal Warrant of 14th June, 1945 (Army Order 81/45) as amended provides the basis for trials of alleged war criminals by British Courts, but does not define the crimes to be tried beyond saying that the term " war crime " means " a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939 ". (See Volume I, p. 105).

The Netherlands East Indies legislation took this latter course from the outset, whereas the metropolitan Dutch legislation originally took the first course, but underwent a development at the end of which the original course was still preserved as far as the category of punishment is concerned, whereas rules of international law were made applicable in respect of the nature and substance of the acts punishable by Dutch courts as war crimes or crimes against humanity. (See Volume XI, pp. 87–8).

The result here again has been that the international law of war crimes has been enriched by the importation of concepts and definitions from municipal laws, This has been so for instance where war crimes committeed against property rights have been punished by French Military Tribunals.(1)

(iii) It would appear that for a practice to become a rule of international law it need not be a universally recognised practice, but only one accepted by civilised nations *in general.* The Judgment in the *Hostages Trial* refers to customs and practices accepted " by civilised nations generally ", while the *Justice Trial* Judgment to " general acceptance . . . by civilised nations " of certain principles.(2) The judgment in the *High Command Trial* stated that " absolute unanimity among all the states in the family of nations is not required to bring an International Common Law into being ".(3)

Elsewhere the Tribunal pointed out that " under general principles of law, an accused does not exculpate himself from a crime by showing that another [person] committed a similar crime . . . ."(4)

It would thus, in strict law, be no defence for an ex-enemy to plead that a certain practice had been departed from by one or more of the Allies themselves, unless such departure were great enough to constitute evidence of a change in usage. The Judgment delivered in the *High Command Trial* included these words : " It is no defence in the view of this Tribunal to assert that international crimes were committed by an adversary, but as evidence given to the interpretation of what constituted accepted use of prisoners of war under international law, such evidence is pertinent."(5) Elsewhere, the Judgment said that " The fact that the enemy was using prisoners of war for unlawful work as the defendant [Hoth] testified does not make their use by the defendant lawful but may be considered in mitigation of punishment ".

2. INTERSTATE AGREEMENTS

(i) The two international conventions upon which reliance has been mainly placed in war crime trials have been the Hague Convention No. IV of 1907 and the Geneva Prisoners of War Convention of 1929, while, in connection with the crime of aggressive war, the Briand-Kellogg Pact of 1928 is regarded as a document of major importance.

The Nuremberg International Military Tribunal was governed by the terms of its Charter, attached to the London Agreement of 8th August, 1945,(6) and its text and that of Control Council Law No. 10, into which it was incorporated by Article I of the latter,(7) have bound the United States Military Tribunals which have conducted the " Subsequent Proceedings Trials " in Nuremberg.

(1) See Vol. IX, p. 43. Compare also Vol. VII, p. 73.
(2) See p. 5.
(3) Vol. XII, p. 68 and 69–70.
(4) See Vol. XII, p. 64.
(5) Volume XII, p. 88.
(6) " Treaty Series No. 27 (1946) " British Command Paper Cmd. 6903.
(7) Article I of Law No. 10 reads :
" The Moscow Declaration of 30th October, 1943, " Concerning Responsibility of Hitlerites for Committed Atrocities " and the London Agreement of 8th August, 1945, " Concerning Prosecution and Punishment of Major War Criminals of the European Axis " are made integral parts of this Law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such Nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany."

(ii) It was pointed out by the Defence in the *Krupp Trial* that no references to direct individual responsibility under international law were made in the Hague and Geneva Conventions or in the Briand-Kellogg Pact.(1) Article 3 of the actual text of the Hague Convention No. IV only provides, for instance, that : " A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committeed by persons forming part of its armed forces." Article 41 of the Regulations attached to the Convention provides merely that : " A violation of the terms of the armistice by individuals acting on their own initiative only entitled the injured party to demand the punishment of the offenders and, if there is occasion for it, compensation for the losses sustained." The responsibility for breach of the Convention, according to the text, rests only on the States which are parties to it.(2)

The trend of opinion and the practice followed by the Courts,(3) however, has been to make the individual responsible for his acts in breach of international conventions, and this trend was illustrated on a high level by the decision pronounced by the International Military Tribunal at Nuremberg, that certain accused had made themselves criminals by waging war in breach of the terms of an inter-governmental agreement renouncing war undertaken as an instrument of national policy, the Briand-Kellogg Pact.(4) Indeed, the International Military Tribunal made use of the fact that the Hague Convention No. IV of 1907 had been enforced personally against its violaters. The judgment on this point runs :—

> " But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. 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 had 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. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention."(5)

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(1) Volume X, pp. 168–169.

(2) Compare Vol. II, pp. 72, 76–77 and 149.

(3) See for instance Vol. X, p. 133.

(4) " Treaty Series, No. 29 (1929) " British Command Paper Cmd. 3410.

(5) British Command Paper Cmd. 6964, p. 40. This reference to the Hague Regulations was relied upon by the Tribunal acting in the *Hostages Trial* when it pointed out that the fact that an international agreement did not set up courts or lay down penalties did not signify that that agreement did not lay down punishable crimes (Vol. VIII, pp. 53–54).

It cannot be said that every possible breach of the Hague and Geneva Conventions constitutes a war crime, because not every such breach has come before the Courts ; it is quite certain, however, that individual responsibility has been laid down in many cases on the basis of the terms of these Conventions and it may be taken that any breach thereof which causes appreciable injury to the persons protected would constitute a war crime,[1]

(iii) Furthermore, the dominant attitude taken by war crime courts has been to regard the Hague and the 1929 Prisoners of War Conventions as having by 1939 become mere codifications of existing customary law, at least insofar as their general principles are concerned. It has thus been possible for the courts to treat as irrelevant the " general participation " clause contained in the Hague Convention and to apply the general principles of that and of the Prisoners of War Convention to non-signatories thereof. The nature of the problem insofar as it relates to the Hague Convention, and the attitude of the Nuremberg International Military Tribunal is indicated by the following words from its judgment :

> " But it is argued that the Hague Convention does not apply in this case, because of the ' general participation ' clause in Article 2 of the Hague Convention of 1907. That clause provided :
>
> > " ' The provisions contained in the regulations (Rules of Land Warfare) referred to in Article 1 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.'
>
> " Several of the belligerents in the recent war were not parties to this Convention.
>
> " In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing interantional 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 . . .
>
> " Although Czechoslovakia was not a party to the Hague Convention of 1907, the rules of land warfare expressed in this Convention are declaratory of existing international law and hence are applicable."[2]

The International Military Tribunal for the Far East expressed the following opinion :

> " The effectiveness of some of the Conventions signed at The Hague on 18th October, 1907, as direct treaty obligations was considerably impaired by the incorporation of a so-called ' general participation clause ' in them, providing that the Convention would be binding only if all the belligerents were parties to it. The effect of this clause is, in strict law, to deprive some of the Conventions of their binding force as direct treaty obligations, either from the very beginning of a war

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[1] On this point see further Volume XIII, p. 148.

[2] British Command Paper Cmd. 6964, pp. 64–65 and 125.

> or in the course of it as soon as a non-signatory Power, however insignificant, joins the ranks of the Belligerents. Although the obligation to observe the provisions of the Convention as a binding treaty may be swept away by operation of the ' general participation clause ', or otherwise, the Convention remains as good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation."(1)

The Tribunal acting in the *High Command Trial substantially* adopted the opinion of the Nuremberg International Military Tribunal that the Hague Convention No. IV of 1907 had by 1939 become recognised as being merely declaratory of existing international law, and that its provisions bound all belligerents irrespective of signature and despite the " general participation " clause.(2) The Tribunal conducting the *Krupp Trial* fully concurred in the opinion of the International Military Tribunal.(3)

Any attempt to make an identical approach to the Prisoners of War Convention of 1929 (4) meets, however, with the possible objection, which was recognised,(5) that it contained " certain detailed provisions pertaining to the care and treatment of prisoners of war ", which can hardly be regarded as merely expressing accepted usages and customs of war. The Tribunal, in the *High Command Trial*, faced with this problem, was not content to declare, as it did, that the Convention was binding insofar as it was " in substance an expression of international law as accepted by the civilised nations of the world ",(6) but went further and cited a number of articles therefrom(7) which it regarded as definitely being " an expression of the accepted views of civilised nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia ".(8)

It will be seen that most of the provisions of the Geneva Convention which the Tribunal regarded as being merely declaratory of customary international law in fact provided against acts of obvious ill-treatment or neglect of prisoners of war. In rather a special category is Article 50, relating to the lenient punishment of prisoners of war for attempting to

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(1) Official Transcript of the *Judgment of the International Military Tribunal for the Far East*, p. 65.

(2) See Vol. XII, pp. 86–7.

(3) Vol. X, p. 133.

(4) The problem here is one of applicability of the provisions of the Convention to non-signatories, no " general participation " clause being involved.

(5) Vol. XII, p. 89.

(6) See Vol. XII, p. 88.

(7) And from the Hague Convention, indicating that the Tribunal did not regard the latter as being *completely* a codification of recognised usages.

(8) See Vol. XII, pp. 90–1. Regarding the position of Russia in relation to the Geneva Prisoner of War Convention. See also Vol. VI, pp. 119–120 and Vol. VII, pp. 43–44 and 58–61.

escape, which in effect recognised that prisoners of war must necessarily desire escape and feel under a duty to attempt it, if the opportunity presents itself.(1)

(iv) Certain points are worth noting regarding the extent of application of the Hague Regulations :

(*a*) Article 42 of the Hague Regulations provides the following :

> " Territory is considered occupied when *actually* placed under the authority of the hostile army.
>
> " The occupation extends only to the territory where such authority *has been established* and *is in a position* to assert itself."(2)

The setting up and maintenance of an actual and effective occupying administration makes the difference between occupation and mere invasion, and it thus appears that, when the occupant withdraws from a territory or is driven out of it, the occupation ceases to exist.(3)

The question whether an occupation exists is a question of fact. As the judgment delivered in the *Hostages Trial* states : " The question of criminality in many cases may well hinge on whether an invasion was in progress or an occupation accomplished. Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organised resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied."(4)

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(1) In the trial of Lieutenant Shigeru Sawada and Three Others and the trial of General Tanaka Hisakasu and Five Others, by United States Military Commissions, Shanghai, 27th February, 1946—15th April, 1946 and 13th August—3rd September, 1946, the Prosecution put in evidence that Japan had agreed to abide by the provisions of the Geneva Prisoners of War Convention ; this evidence took the form of a copy of a letter from the United States Legation in Berne, Switzerland, to the United States Secretary of State saying that, according to a telegraph message from the Swiss Minister in Tokyo, the Japanese Government had informed that Minister, first, that Japan was strictly observing the Geneva Red Cross Convention as a signatory State, and secondly, that " although not bound by the Convention relative treatment prisoners of war Japan will apply *mutatis mutandis* provisions of that Convention to American prisoners of war in its power." (Vol. V, p. 71.) In the *Jaluit Atoll Trial* it was also said : " Although Japan has not ratified or formally adhered to the Prisoners of War Convention, it has, through the Swiss Government agreed to apply the provisions thereof to prisoners of war under its control, and also, so far as practicable, to interned civilians." (Vol. 1, p. 80). This step by the Prosecutions was not, strictly speaking, necessary, in view of the tendency described above to regard the main principles of the Convention as being declaratory. The Netherlands Temporary Court-Martial at Macassor which tried Tanabe Koshiro decided that the Geneva Convention of 1929, concerning the treatment of prisoners of war, which Japan only signed but did not ratify, " must be regarded as containing generally accepted laws of war " to which " Japan is also bound, even without ratification." In this respect stress was laid on the fact that the Convention contained " a confirmation of general and already existing conceptions of international law " and was the " prevailing international law " accepted by other nations. (Vol. XI, p. 4).

The Judgment of the International Military Tribunal for the Far East contains (on pp. 73–74 of the official transcript) the following interpretation of the Japanese undertaking to apply the Geneva Convention *mutatis mutandis* :

> " Under this assurance Japan was bound to comply with the Convention save where its provisions could not be literally complied with owing to special conditions known to the parties to exist at the time the assurance was given, in which case Japan was obliged to apply the nearest possible equivalent to literal compliance."

(2) Italics inserted.

(3) Compare the discussions in Vol. VIII, pp. 16–19.

(4) Vol. VIII, pp. 55–56.

The Tribunal added : " It is clear that the German Armed Forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant."(1)

These findings, claimed the Tribunal, were consistent with Article 42 of the Hague Regulations of 1907, quote above.(2)

(*b*) The Judgment delivered in the *High Command Trial* said that an invasion of one state by another is the implementation of the national policy of the invading state by force even though the invaded state, due to fear or a sense of the futility of resistance in the face of superior force, adopts a policy of non-resistance and thus prevents the occurrence of any actual combat.(3)

The Tribunal was here discussing crimes against peace, however, and did not need to decide whether an unresisted invasion would lead to an occupancy to which the Hague Regulations would apply, and, on the other hand, the Tribunal acting in the *I.G. Farben Trial* ruled that, whatever were the moral rights involved, it had no jurisdiction to try offences against property committed in Austria (or the Sudetenland) ; such acts " would not constitute war crimes, as the incidents occurred in territory not under the belligerent occupation of Germany, as a state of actual warfare had not been shown to exist as to Austria, incorporated into Germany by the Anschluss."(4)

While not stating its reasons for so deciding, the Tribunal which conducted the *Krupp Trial* held that it had no jurisdiction to try an alleged offence involved in the acquisition of the Berndorfer plant in Austria by the Krupp firm.(5) A dissenting opinion by Judge Wilkins took the opposite view on the ground that the act, if proved, would constitute a war crime ; the International Military Tribunal had held that " the invasion of Austria was a premeditated aggressive step " and had found that the laws and customs of war were applicable to Bohemia and Moravia which, according to Judge Wilkins, were occupied by the Germans in a manner sufficiently similar to that used in Austria to make the same laws and customs applicable to that country.(6)

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(1) Vol. VIII, p. 56.

(2) This may be a convenient place to refer to the finding of certain courts regarding the status under International law of the Vichy authorities and of the Croat" government " ; these courts rejected pleas claiming that the bodies in question had agreed to conscript or to deport to Germany civilian workers or had agreed to the illegal use of prisoners of war in the German armament industry, and rejected the thesis that they were to be regarded as sovereign bodies under international law. (See Vol. VII, pp. 56–57 ; Vol. VIII, pp. 72–74 ; Vol. X, p. 141).

(3) Vol. XII, p. 66.

(4) See Vol. X, p. 42. The Tribunal must be taken to be discussing alleged offences against Austrian nationals. Offences against *Allied nationals committed in Austria* have certainly been regarded as war crimes ; see for instance Vol. XIV, p. 86. In the trial of Eduard Erb by a United States Military Government Court at Dachau, 25th March—2nd April, 1947 (not previously treated in these volumes), the Court rejected a defence plea that an offence committed against an Allied national in what had since become the Russian Zone of Austria was outside the jurisdiction of the court.

(5) See Vol. X, p. 140.

(6) See Vol. X, pp. 151–153. See also p. 18, note 3, of the present volume.

(*c*) The Convention is regarded as being in force in all occupied territories, however, as long as fighting is still in progress between the occupying power and either the government of the occupied country or its allies, and the protection of the Hague Convention is not taken away from the inhabitants of occupied territory by any mere declaration on the part of the occupying power that a certain territory is to be regarded as annexed to the territory of the occupier. In practice such claims were made by Germany in respect of Alsace and parts of Poland. The attitude taken by the Courts(1), as well as the legal significance of the question, has been summed up by the passage in the judgment of the International Military Tribunal at Nuremberg where it was stated :

> " 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."(2)

One outcome of this legal fact is that inhabitants of territory so declared " annexed " cannot be treated as subjects of the occupying state and punished for " treason ".(3)

(v) It need perhaps hardly be said that the Hague and Geneva Conventions do not purport to be exhaustive declarations of the laws and usages of war. Indeed the passage already quoted from the Preamble to the Hague Convention No. IV(4) makes this clear insofar as that Convention is concerned. The Judgment delivered in the *Krupp Trial* includes the following words :

> " It must also be pointed out that in the preamble to the Hague Convention No. IV it is made abundantly clear that in cases not included in the Regulations, the inhabitants and the belligerents remain under the protection and the rule of the principles of the Laws of Nations, as they result from the usages established among civilised peoples, from the laws of humanity, and dictates of the public conscience.
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> " As the records of the Hague Peace Conference of 1899 which enacted the Hague Regulations show, great emphasis was placed by the participants on the protection of invaded territories, and the preamble just cited, also known as ' Mertens Clause ', was inserted at the request of the Belgian delegate, Mertens, who was, as were others, not satisfied with the protection specifically guaranteed to belligerently occupied

(1) See Vol. II, p. 75–76 and 151, Vol. III, pp. 36–37 and 45, Vol. VI, pp. 29–32, 52–53, 62, 63, note 1, and pp. 91–93, Vol. X, p. 48 ; Vol. XIII, pp. 67–68 and 110–12.
(2) British Command Paper Cmd. 6964, p. 65.
(3) See Vol. VI, pp. 52–53 and 75.
(4) See p. 7, note 1.

territory. Hence, not only the wording (which specifically mentions the ' inhabitants ' before it mentions the ' belligerents '), but also the discussions which took place at the time make it clear that it refers specifically to belligerently occupied country. The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilised nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.''(1)

It must in fact be acknowledged that there are some important branches of law which are not touched upon by international agreements, or at least by no such agreement prior to the Charter of the International Military Tribunal. Thus the Hague Convention contains no word about the general right to punish war criminals and war traitors(2) on capture, or about the particular doctrine of the universality of jurisdiction over war crimes,(3) and the question of the killing of hostages has not been *specifically* made the subject of international agreement before the drafting of the Charter of the International Military Tribunal.(4) Even now, the defences which are open to alleged war criminals(5) are only partly based upon the texts of international agreements ; some derive from state practice and the principles of criminal law generally accepted by civilised nations.

3. THE DECISIONS OF INTERNATIONAL AND NATIONAL TRIBUNALS

(i) There is no rule of general international law conferring upon the decision of any tribunal the power to render *binding* precedents. Whether a court has power to render precedents binding on other courts depends, in municipal law, upon whether municipal law lays down that such a power shall exist, and, in international law, upon whether a special legal provision makes decisions of one court binding on another. Such special provisions have been made by Article II (d) of Control Council Law No. 10 and Article 10 of the Charter of the International Military Tribunal, and by Ordinance No. 7 of the United States Zone of Germany, which create certain legal links between the Judgment of the Nuremberg International Military Tribunal and the United States Military Tribunals operating also in Nuremberg. The first provision makes the decisions of the International Military Tribunal *on a matter of law* binding on the latter tribunals, by providing that : " Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal " shall be " regarded as a crime ". The Charter of the International Military Tribunal, which binds the United States Military Tribunals,(6) makes a provision of which the second sentence is the significant one in this connection :

" *Article* 10 : In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any

(1) Vol. X, p. 133.
(2) Compare Vol. V, p. 30.
(3) See pp. 26–7 and 43–7.
(4) See Vol. VIII, pp. 80–81.
(5) See pp. 155–88.
(6) See p. 10, note 7.

Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned."

The Military Tribunals are therefore obliged to accept the decisions of the International Military Tribunal as to the criminality or otherwise of groups and organisations.(1) These decisions have also been followed by United States Military Government Tribunals when dealing with allegations of membership in criminal organisations.(2)

Article X of Ordinance No. 7 provides that the decisions of the International Military Tribunal on certain *questions of fact*, and possibly on certain questions of law,(3) shall also be binding upon the United States Military Tribunals :

> "*Article X*: The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except in so far as the participation therein or knowledge thereof by any particular persons may be concerned. Statements of the International Military Tribunal in the judgment of Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."

On other questions the decisions of the International Military Tribunal are not binding on the later Tribunals, and that which conducted the *Flick Trial* while bound by the provisions of the *Charter* of the International Military Tribunal(4) was strictly speaking not bound by the *decisions* of the latter on the question of crimes against humanity.(5) The Judgment is nevertheless, strongly persuasive and has been constantly followed on points of law in the "Subsequent Proceedings" Trials ; for instance in the

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(1) This topic is further explored on pp. 43–45 and 48–49 of Vol. XIII.

(2) See Vol. XIII, pp. 65–67.

(3) On the question whether the provision refers to matters of law as well as fact, see Vol. IX, pp. 55–56. It may be argued that the Tribunals which conducted the *I. G. Farben* and *Krupp Trials* would appear not to have regarded it as referring to matters of law, since, had they thought themselves bound by decisions of the Nuremberg International Military Tribunal as to whether crimes against peace were committed in certain given circumstances, they would have followed the decision of the latter tribunal that "the invasion of Austria was a premeditated aggressive step." Had they accepted this decision, it may be said, it would have followed that the Hague Regulations would have protected the Austrian population, whereas the Tribunal conducting the *I. G. Farben Trial* held that the territory was "not under the belligerent occupation of Germany," while that conducting the *Krupp Trial*, without giving its reasons for so deciding, held that it had no jurisdiction to try an alleged offence involved in the acquisition of the Barndorfer plant in Austria by the Krupp firm. (See Vol. X, p. 63.) On the other hand, it may be argued that, since Austria was not one of the Allied powers engaged in the war against Germany, the annexation of the territory must be regarded as complete, and the Hague Regulations inapplicable. This would distinguish Austria from Bohemia and Moravia, to which, as Judge Wilkins pointed out, the International Military Tribunal had found the laws and customs of war to be applicable (Vol. X, pp. 151–153). If this second argument is accepted, the attitude taken by the Tribunals in the *I. G. Farben* and *Krupp Trials* is no guidance to their attitude to Article X of Ordinance No. 7.

(4) See Vol. IX, p. 57.

(5) See pp. 134–5.

judgments delivered in the *I.G. Farben Trial* and the *Krupp Trial* close attention was paid to the decisions of the International Military Tribunal on the question of crimes against peace.(1)

Turning to the legal inter-relation between the United States Military Tribunals themselves, it is safe to say that they are in no way able to bind one another. As the *Flick Trial* Judgment states, there is " no similar mandate " to that contained in Article X of Ordinance No. 7 " either as to findings of fact or conclusions of law contained in the judgments of Co-ordinate Tribunals ". The judgment concluded that " The Tribunal will take judicial notice of the judgments but will treat them as advisory only ".(2) As will be seen the Tribunals have arrived at different conclusions on one aspect of the law relating to crimes against humanity.(3) On the other hand, as an example of concurrence of opinion between the Tribunals, it may be remarked that, in the *Krupp Trial*(4) the Judgment relates that : " The law with respect to the deportation from occupied territory is dealt with by Judge Phillips in his concurring opinion in the United States *v.* Milch decided by Tribunal No. II.(5) We regard Judge Phillips statement of the applicable law as sound, and accordingly adopt it . . ."

Under Article II of Ordinance No. 11 of the United States Military Government, " a joint session of the Military Tribunals may be called by any of the presiding judges thereof or upon motion, addressed to each of the Tribunals, of the Chief of Counsel for War Crimes or of counsel for any defendant whose interests are affected, to hear argument upon and to review any interlocutory ruling by any of the Military Tribunals on a fundamental or important legal question either substantive or procedural, which ruling is in conflict with or is inconsistent with a prior ruling of another of the Military Tribunals ". The same applies to " conflicting or inconsistent final rulings contained in the decisions or judgments of any of the Military Tribunals on a fundamental or important legal question, either substantive or procedural ". Decisions by joint sessions of the Military Tribunals unless thereafter altered in another joint session, shall be binding upon all the Military Tribunals. In the case of the review of final rulings by joint sessions, the judgments reviewed may be confirmed or remanded for action consistent with the joint decision(6) It will be recalled that a joint session of the Military Tribunals was held to decide the question whether conspiracy to commit war crimes and crimes against humanity could be regarded as a separate offence.(7)

(ii) Any differences that may exist between the authoritativeness of the decisions of one court or type of courts and that of the decisions of another depends upon factors other than whether a reasoned decision has been handed down by the court or type of court or whether instead the latter

(1) See Vol. X of these Reports, pp. 30–40 and 102–30.

(2) See Vol. IX, pp. 17.

(3) See pp. 136–8.

(4) See Vol. X, p. 144.

(5) See Vol. VII, pp. 45–7.

(6) The full text of the Article appears in Vol. IX, pp. 58–9.

(7) See Vol. VI, p. 104. A plea by the defence that this ordinance should be applied to some of the decisions arrived at in the *High Command Trial* was rejected by the Tribunal which conducted that trial : see Vol. XII, p. 95.

has been content with a mere finding of guilty or not guilty and a passing of sentence on accused found guilty. Nevertheless it cannot be doubted that the courts which have given reasoned judgments have tended to add the most *detail* to the existing store of knowledge or the international law of war crimes.

There is no rule of customary International Law providing that a court delivering judgment in a war crime trial must state the reasons for its opinion ; consequently international practice on this point varies. British Military Courts and United States Military Commissions do not in general deliver reasoned judgments ;([1]) both have on very rare occasions departed from the rule, however, as when the Military Commission which tried General Yamashita set out in brief its reasons([2]) or when the Military Commission before which the trial of Lieutenant General Shigeru Sawada and others was conducted, described in certain " conclusions " some facts which they regarded as mitigating circumstances.([3]) The British Military Court before which the trial of Gozawa Sadaichi and others, Singapore, 21st January–4th February, 1946, ([4]) was held, made, on passing sentence, brief comment on the guilt of each accused found guilty. Most of these remarks concerned the subordinate position of certain accused and are quoted elsewhere.([5]) Even the act of the Judge Advocate acting in the trial of Gustav Alfred Jepsen, in explaining shortly to the accused why the death sentence was not to be meted out to him,([6]) was exceptional.

On the other hand, the United States Military Tribunals were bound by Article XV of Ordinance No. 7 of the United States Zone of Germany, which provides that : " The Judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based . . .", and the result has been the pronouncement of detailed reasoned judgments which provide the Tribunals' evidential and legal reasons for their findings as did those of the International Military Tribunals.([7]) Again the Norwegian,([8]) French([9]), Dutch([10]) and Chinese Courts ([11]) provide, in various degrees of fulness, the reasons for decisions arrived at ; the Norwegian judgments frequently enter into particularly detailed analysis and discussion of the relevant law and facts. Like the International Military Tribunals, among other Courts, the Polish Supreme National Tribunal is required to produce a reasoned judgment.([12]).

4. THE OPINIONS OF QUALIFIED TEXT WRITERS

(i) The Judge Advocate acting in the trial of Sergeant-Major Shigeru Ohashi and Six Others by an Australian Military Court, Rabaul, 20th–23rd March, 1946, stated in his summing up to the Court : " Text books by

([1]) See Vol. I, pp. ix–x.
([2]) See Vol. IV, pp. 33–35.
([3]) See Vol. V, pp. 6–7.
([4]) This, the first war crime trial held in South East Asia Command, has not been mentioned in previous volumes in this series.
([5]) See pp. 159 and 175.
([6]) See pp. 172–3.
([7]) Vol. III, p. 120.
([8]) See for instance Vol. III, pp. 2–11.
([9]) See for instance Vol. III, pp. 40–42.
([10]) See for instance, Vol. XIV, pp. 111–38.
([11]) See for instance Vol. XIV, pp. 1–7.
([12]) See Vol. VII, p. 95.

learned jurist, such as Oppenheim, and the Manual of Military Law in its explanatory passages are strongly persuasive and should be followed by this Court unless it is well satisfied to the contrary."(1)

Putting aside the problem of whether the works of outstanding international lawyers can properly be regarded as *sources* of international law,(2) there can be no doubting the reliance placed by war crime courts, and by Judge Advocates acting in British, Australian and Canadian Courts, on treatises such as Oppenheim-Lauterpacht, *International Law*, as authoritative *statements* of the law.

(ii) Official publications such as the British *Manual of Military Law* and the United States Basic Field Manual F.M. 27–10 (*Rules of Land Warfare*) are also recognised as persuasive statements of law but are not accepted as binding on the courts. The Tribunal acting in the *Hostages Trial* said the following of an opinion expressed by Professor Oppenheim on the plea of superior orders :

> " The fact that the British and American armies may have adopted it for the regulations of its own armies as a matter of policy, does not have the effect of enthroning it as a rule of International Law. We point out that army regulations are not a competent source of International Law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilised nations generally. It is possible, however, that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions have been put into general practice. It will be observed that the determination, whether a custom or practice exists, is a question of fact. Whether a fundamental principle of justice has been accepted, is a question of judicial or legislative declaration. In determining the former, military regulations may play an important rôle but, in the latter, they do not constitute an authoritative precedent.
>
> " Those who hold to the view that superior order is a complete defence to an International Law crime, base it largely on a conflict in the articles of war promulgated by several leading nations. While we are of the opinion that army regulations are not a competent source of International Law, where a fundamental rule of justice is concerned, we submit that the conflict in any event does not sustain the position claimed for it. If, for example, one be charged with an act recognised as criminal under applicable principles of International Law and pleads superior order as a defence thereto, the duty devolves upon the Court to examine the sources of International Law to determine the merits of such a plea. If the Court finds that the army regulations of some members of the family of nations provide that superior order is a complete defence and that the army regulations of other nations express a contrary view, the Court would be obliged to hold, assuming for the sake of argument only that such regulations constitute a competent source of International

(1) Vol. V, p. 27.
(2) A stimulating introduction to this problem among others is Schwarzenberger, *The Inductive Approach to International Law*, in *Harvard Law Review*, Vol. LX (1947), No. 4, p. 545.

> Law, that general acceptation or consent was lacking among the family of nations. Inasmuch as a substantial conflict exists among the nations whether superior order is a defence to a criminal charge, it could only result in a further finding that the basis does not exist for declaring superior order to be a defence to an International Law crime. But, as we have already stated, army regulations are not a competent source of International Law when a fundamental rule of justice is concerned. This leaves the way clear for the Court to affirmatively declare that superior order is not a defence to an International Law crime if it finds that the principle involved is a fundamental rule of justice and for that reason has found general acceptance."(1)

Insofar as they describe the state of International Law and do not simply reproduce the text of the Hague and Geneva Conventions, such publications as the British and United States Military Manuals, 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, *insofar as their provisions are acted upon*, they mould state practice, which is itself a source of International Law. They are not, however, legislative instruments ; they are not sources of law like a statutory or prerogative order or a decision of a court, but only publications setting out the law. They have, therefore, no formal binding power, but have to be either accepted or rejected on their merits, i.e. according to whether or not in the opinion of the Court they state the law correctly.(2)

(iii) Two agencies whose decisions have had a great influence upon the moulding of the international criminal law and which may be mentioned at this point are the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which was constituted by the Allied Powers on 25th January, 1919, at the Preliminary Peace Conference in Paris, and the United Nations War Crimes Commission, which functioned during and after the second World War. The former drew up a list of acts which it regarded as war crimes and this list was accepted and slightly expanded by the United Nations War Crimes Commission. The lists drawn up by the two bodies have had considerable influence for instance upon the definition of offences punishable under the Australian, Netherlands and Chinese War Crimes Laws.(3) The Report of the Commission on Responsibilities was specifically quoted by the Judgments delivered in the *Justice Trial*(4) and in the *Klinge Trial*(5).

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(1) Vol. VIII, pp. 51–52.

(2) See Vol. I, pp. 18–19, Vol. II, pp. 148–149, and Vol. IV, pp. 100 and 110.

(3) See Vol. V, p. 97, Vol. XI, pp. 93–95 and Vol. XIV, pp. 153–4. Compare Vol. VII, pp. 68–69 and Vol. XIII, p. 143. The United Nations War Crimes Commission has influenced the development of war crimes law in many other directions, not least through the work of its Committee I. This work is described in the *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, H.M. Stationery Office, 1948, Chapter XV.

(4) See Vol. VI, pp. 57 and 60. See also p. 23 of the present Volume.

(5) See Vol. III, p. 12. The *terms of reference* of the United Nations War Crimes Commission were relied upon by a Netherlands Temporary Court-Martial in the Trial of Susuki Motosuke in deciding that an offence against a victim who could not be regarded as a national of one of the United Nations was not to be treated as a war crime ; see Vol. XIII, pp. 127–129.

III

THE LEGAL BASIS OF COURTS ADMINISTERING INTERNATIONAL CRIMINAL LAW

A. PROVISIONS OF INTERNATIONAL LAW

(i) A footnote to the majority Judgment of the Supreme Court in the *Yamashita Case* included the statement that : " The Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties of the Versailles Peace Conference, which met after cessation of hostilities in the First World War, were of the view that violators of the Law of War could be tried by military tribunals. See Report of the Commission, 9th March, 1919, 14 American Journal of International Law 95, 121. See also memorandum of American commissioners concurring on this point, id., at p. 141. The treaties of peace concluded after World War I recognised the right of the Allies and of the United States to try such offenders before military tribunals. See Art. 228 of Treaty of Versailles, 28th June, 1919 ; Art. 173 of Treaty of St. Germain, 10th September, 1919 ; Art. 157 of Treaty of Trianon, 4th June, 1920.

" The terms of the agreement which ended hostilities in the Boer War reserved the right to try, before military tribunals, enemy combatants who had violated the Law of War. 95 British and Foreign State Papers (1901–1902) 160. See also trials cited in Colby, War Crimes, 23 Michigan Law Review 482, 496–7."[1]

The Judgment delivered in the *Justice Trial* stated :

> " As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognised that tribunals may be established and punishment imposed by the State into whose hands the perpetrators fall. Those rules of international law were recognised as paramount, and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the State or in occupied territory, has been unquestioned. (*Ex parte* Quirin, *supra* ; *In Re* : Yamashita, 90 L. ed. 343). However, enforcement of international law has been traditionally subject to practical limitations. Within the territorial boundaries of a State having a recognised, functioning government presently in the exercise of sovereign power throughout its territory, a violator of the rules of international law could be punished only by the authority of the officials of that State. The law is universal, but such a State reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions. Thus notwithstanding the paramount authority of the substantive rules of common international law the doctrines of national sovereignty have been preserved through the control of enforcement machinery. It must be admitted that Germans were not the only

[1] Vol. IV, p. 42, note 1.

ones who were guilty of committing war crimes ; other violations of international law could, no doubt, be tried and punished by the State of which they were nationals, by the offended State if it can secure jurisdiction of the person, or by an International Tribunal if of competent authorised jurisdiction . . . .

" Long prior to the Second World War the principle of personal responsibility had been recognised.

' The Council of the Conference of Paris of 1919 undertook, with the aid of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, to incorporate in the treaty of peace arrangements for the punishment of individuals charged with responsibility for certain offences.' (Hyde, *International Law* (2nd rev. ed.), Vol. III, p. 2409.)

" That Commission on Responsibility of Authors of the War found that :

' The war was carried on by the Central Empires, together with their Allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity.' (Hyde, *International Law* (2nd rev. ed.), Vol. III, pp. 2409–2410.)

" As its conclusion the Commission solemnly declared :

' All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.' (*American Journal of International Law*, Vol. 14 (1920), p. 117.) "[1]

Again, the Judgment in the *Flick Trial* included the following quotation from the Judgment of the Nuremberg International Military Tribunal :

" That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised. In the recent case of *Ex parte Quirin* (1942, 317 U.S. 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court said :

' From the very beginning of its history this court has applied the law of war as including that part of the law of nations which prescribed for the conduct of war, the status, rights and duties of enemy nations, as well as enemy individuals.' "

The *Flick Trial* judgment adds :

" The application of international law to individuals is no novelty."[2]

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[1] Vol. VI, pp. 37 and 44.

[2] Vol. IX, p. 18. See also pp. 172–173 of that Volume.

For statements by courts, by counsel, or by Judge Advocates in British and Commonwealth trials, regarding the right to punish individuals for certain breaches of international law, see also Vol. I, p. 11 ; Vol. II, pp. 8 and 106 ; Vol. III, p. 3 and Vol. X, p. 38. Compare a statement by the Netherlands Court of Cassation in Vol. XIV, p. 114.

The Chinese War Crimes Law makes provision for the punishment of offences committed during the war " or a period of hostilities " against China (see Vol. XIV, pp. 155–6), in order to cover the period during which a state of *de facto* belligerency existed between Japan and China.

The Tokyo International Military Tribunal rejected a defence argument that Chinese armed forces were not entitled to prisoner of war status if captured by the Japanese during such a period of *de facto* belligerency.

(ii) Chief Justice Stone, in delivering the majority judgment of the Supreme Court in the *Yamashita Case* stated that :

> " We cannot say that there is no authority to convene a commission after hositilities have ended to try violations of the Law of War committed before their cessation, at least until peace has been officially recognised by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the Law of War would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.
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> " No writer on International Law appears to have regarded the power of military tribunals, otherwise competent to try violations of the Law of War, as terminating before the formal state of war has ended. In our own military history there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offences against the Law of War committed before the cessation of hostilities.
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> " The extent to which the power to prosecute violations of the Law of War shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace. Here, peace has not been agreed upon or proclaimed. Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the Law of War. The conduct of the trial by the military commission has been authorised by the political branch of the Government, by military command, by International law and usage, and by the terms of the surrender of the Japanese Government."(1)

The dissenting judges made little objection to this point, although Mr. Justice Rutledge thought that there was less necessity for a military commission to be appointed after active hostilities were over, since " there is no longer the danger which always exists before surrender and armistice . . . The nation may be more secure now than at any time after peace is officially concluded."(2)

The position under customary International Law seems to be that whereas (as was recognised by the Supreme Court and by general international practice following the recent war) jurisdiction over war crimes exists without limitation beyond the cessation of fighting and up to the conclusion of peace, jurisdiction continues after this point only over such offences as are also infringements of the municipal law of the state whose courts are trying the alleged offender. Whether an offence fulfils this test of illegality under municipal law will depend upon the laws of each State, and the attitude which these laws reflect to the principle of the territoriality of criminal law.

This position under customary International Law can, of course, be altered by international agreement, as it has been by Articles 1–3 of the Peace

(1) See Vol. IV, pp. 41–42. The Supreme Court here also showed how jurisdiction under United States Law also continued after the cessation of hostilities.

(2) Vol. IV, p. 56.

Treaty between the Allied and Associated Powers and Italy[1] and by similar provisions in the Treaties of Peace with Roumania, Bulgaria, Hungary and Finland.

(iii) In so far as a Court tries enemy nationals for war crimes committed against nationals of the country whose authorities have established the Court, the jurisdiction of the Court is based on the undoubted right under international law, as acknowledged by the authorities quoted above[2], among many others, of a belligerent to punish, on capture of the offenders, violations of the laws and usages of war committed by enemy nationals against the nationals of that belligerent.

According to generally recognised doctrine, however, the right to punish war crimes is not confined to the State whose nationals have suffered or on whose territory the offence took place but is possessed by any independent State whatsoever, just as is the right to punish the offence of piracy. This doctrine, under which every independent State has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victims or the place where the offence was committed, a doctrine which has received the support of the United Nations War Crimes Commission and is generally accepted as sound, received exhaustive treatment by Professor Willard B. Cowles in an article entitled *Universality of Jurisdiction over War Crimes* (California Law Review, Vol. 33 (1945), p. 177), in which the learned author states : " . . . when it is a matter of doing justice in places where ordinary law enforcement is difficult or suspended, the military tribunals of the United States . . . have acted on the principle that crime should be punished because it is crime. They have no concern with ideas of territorial jurisdiction. . . . No evidence has been found that any of the decisions just discussed were the subject of protest by the governments of the accused persons. Certain it is that in none of these United States cases is there any evidence of a consciousness on the part of the courts of any duty not to assume jurisdiction." The author then argued that " while the state whose nationals were directly affected has a primary interest, all civilized states have a very real interest in the punishment of war crimes ", and that " an offence against the laws of war, as a violation of the law of nations, is a matter of general interest and concern ". He concluded that " every independent state has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offence was committed ".[3]

The Tribunal which conducted the *Hostages Trial* observed that :

> " An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction

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(1) These provisions are quoted in Vol. IV, p. 77.
This question of the legality of the trial of war criminals after the termination of hostilities and the related question of the permissibility under International Law of continuing, after the conclusion of peace, the operation of sentences passed on war criminals before that event, are somewhat further discussed in Vol. IV, pp. 76–77.

(2) On pp. 23–4.

(3) Similarly it is stated in Wheaton's *International Law*, Vol. I, Sixth Edition, p. 269, that every independent state has the judicial power to punish " piracy and other offences against the common law of nations by whomsoever and wheresoever committed."

of the state that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen.

" Some war crimes, such as spying, are not common law crimes at all ; they being pure war crimes punishable as such during the war and, in this particular case, only if the offender is captured before he rejoins his army. But some other crimes, such as mass murder, are punishable during and after the war.(1) But such crimes are also war crimes because they were committed under the authority or orders of the belligerent who, in ordering or permitting them, violated the rules of warfare. Such crimes are punishable by the country where the crime was committed or by the belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent. There are many reasons why this must be so, not the least of which is that war is usually followed by political repercussions and upheavals which at times place persons in power who are not, for one reason or another, inclined to punish the offenders. The captor belligerent is not required to surrender the alleged war criminal when such surrender is equivalent to a passport to freedom. The only adequate remedy is the concurrent jurisdictional principle to which we have heretofore adverted. The captor belligerent may therefore surrender the alleged criminal to the state where the offence was committed, or, on the other hand, it may retain the alleged criminal for trial under its own legal processes.

" It cannot be doubted that the occupying powers have the right to set up special courts to try those charged with the commission of War Crimes as they are defined by International Law. *Ex Parte Quirin*, 317 U.S. 1, *in re Yamashita*, 327 U.S. 1."(2)

(iv) In so far as Allied Courts have tried enemy nationals for offences which do not constitute war crimes in the usual sense, i.e. for crimes against humanity, crimes against peace and membership of criminal organisations, jurisdiction may in some instances be based on the undoubted right under international law of a belligerent, on the total breakdown of the enemy owing to *debellatio*, to take over the entire powers of the latter, including the power to make laws and to conduct trials. Thus, by the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on the 5th June, 1945, the four Allied Powers occupying Germany assumed supreme authority, including the power to create courts and declare offences.

(v) Some Courts have been given jurisdiction over crimes against humanity and/or crimes against peace by States which cannot be said to have taken over the powers of an enemy whose nationals are effected.(3) Here the right—long recognised under international law to try war crimes committed by enemy nationals has been extended so as to include a right to try crimes against humanity and crimes against peace as well.(4)

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(1) See pp. 47–8.
(2) Vol. VIII, pp. 54–55.
(3) See pp. 29, 30, 33 and 36 of this volume, and Vol. XI, pp. 90–1.
(4) On the development of the notion of crimes against humanity see Vol. VI, pp. 45–48. On that of the notion of crimes against peace, see the Judgment of the Nuremberg International Military Tribunal, British Command Paper, Cmd. 6964, pp. 39–41.

B. THE USE MADE BY VARIOUS ALLIED STATES AND COURTS OF THESE PROVISIONS OF INTERNATIONAL LAW

(i) The legal basis *under Municipal Law* of the various Courts, Commissions and Tribunals set up to try alleged war criminals and similar offenders necessarily varies somewhat from country to country, but it is not necessary in a survey of *international* criminal law to indulge in any extensive comparative study of the sources under Municipal Law of war crimes jurisdiction. It may, nevertheless, be of value to indicate briefly the relevant enactments and the type of courts to which, in each country, war crime trials have been referred, and also the jurisdiction provided for the courts by those enactments. Such a summary would illustrate the ways in which various States have interpreted or utilised those legal bases for trials, which are provided by international law, and which have been described above.(1)

(ii) It is generally agreed that, though an alleged war criminal may properly be tried by a military court, this does not prevent his captors from trying him by a municipal court with jurisdiction under municipal law should they choose to do so. For this point of view, the municipal enactments concerning the trial of war criminals fall into three categories, according to whether they (i) create new courts ; or (ii) refer cases of alleged war crimes to already existing military courts ; (iii) refer such cases to already existing civil courts.

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

(iii) *The jurisdiction of the British Military Courts* for the trial of war criminals is based on the Royal Warrant dated 14th June, 1945, Army Order 81/45 as amended. The Royal Warrant states that His Majesty " deems it expedient to make provision for the trial and punishment of violations of the laws and usages of war " committed during any war " in which he has been or may be engaged at any time after the 2nd September, 1939 ". It is His Majesty's " will and pleasure " that " the custody, trial and punishment of persons charged with such violations of the laws and usages of war " shall be governed by the Regulations attached to the Warrant. The Royal Warrant is based on the Royal Prerogative, which, in English law, is " nothing else than the residue of arbitrary authority which at any given time is legally left in the hands of the Crown " (Dicey's definition).(2)

Regulation 1 of the Royal Warrant provides that " war crime " means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939.

Provisions similar to those contained in the Royal Warrant have in the *Commonwealth of Australia* been made by or under an Act of Parliament

(1) Provisions of municipal law concerning the jurisdiction of courts are not in all instances to be quoted in full in this present section. Where Annexes on the relevant law and practice have been provided in the previous Volumes, references back to these are given. Jurisdictional provisions from the legislation of some further countries are quoted as Annex 1 to this present Volume and reference forward to these will from time to time be made in the present section.

(2) For further details of the legal basis in English law of British Military Courts for the trial of war criminals, see Vol. I, p. 105 and 41–42.

(War Crimes Act, 1945, No. 48/1945),[1] and in the *Dominion of Canada* by an Order in Council, made under the authority of the War Measures Act of Canada, and entitled *The War Crimes Regulations* (Canada) (P.C. 5831 of 30th August, 1945 ; Vol. II, No. 10, Canadian War Orders and Regulations). The latter were re-enacted in an Act of 31st August, 1946. The Canadian and Australian War Crime Courts are, like the British, Military Courts.[2]

In a way similar to Regulation 1 of the Royal Warrant, the Canadian Regulations define a war crime simply as " a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September 1939 ".[3] The jurisdiction of British and Canadian War Crimes Courts is limited, then. to the trial of violations of the laws and usages of war, and they have not jurisdiction over crimes against humanity, crimes against peace or membership of criminal organisations.

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

Article 3 of the Commonwealth of Australian War Crimes Act states that :

> " In this Act, unless the contrary intention appears . . .' war crime ' means :
>
> (*a*) a violation of the laws and usages of war ; or
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> (*b*) any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on the third day of September, one thousand nine hundred and forty-five, under the National Security (Inquiries) Regulations (being Statutory Rules 1941, No. 35, as amended by Statutory Rules 1941, Nos. 74 and 114 and Statutory Rules 1942, No. 273), committed in any place whatsoever, whether within or beyond Australia, during any war."[4]

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

> " (i) 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."

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

The Australian Act does not, on the other hand, comprise in its definition of " war crime " crimes against humanity within the meaning of Art. 6 (c) of the Charter of the International Military Tribunal, excepting of course " crimes against humanity " which also fall under the term " violations of the laws and customs of war."[5]

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[1] See Vol. V, p. 94.
[2] See Vol. IV, p. 125.
[3] See Vol. IV, p. 125.
[4] At another point, Section 3 provides that " unless the contrary intention appears ' any war ' means any war in which His Majesty has been engaged since the second day of September, One thousand nine hundred and thirty-nine."
[5] See Vol. V, pp. 94–97.

(iv) *The United States Military Commissions* are an old institution which existed prior to the Constitution of the United States of America. They have been described as the American Common Law War Courts. They were not created by statute, but are recognised by statute law. Whereas the British Royal Warrant of 14th June, 1945, has made regulations for the trial of war criminals for all British Military Courts in all theatres of operations and in all territories under the jurisdiction of the United Kingdom Government and armed forces, the United States authorities, on the other hand, have made different provisions for different territories, namely for the Mediterranean, European, Pacific and China Theatres of Operations.(1)

The jurisdictions conferred upon the United States Military Commissions operating these different theatres have not been the same in extent. The narrowest jurisdiction is that vested in the Military Commissions appointed in the Mediterranean Theatre of Operations. In the Mediterranean Regulations (Regulation 1) the expression " war crime " means a violation of the laws or customs of war. United States Commissions other than those appointed in the Mediterranean Theatre of Operation have, however, been empowered to try other offences in addition to war crimes. The European Directive adds violations of the laws of nations other than the laws or customs of war, and violations of the local law of the occupied territory, while the Regulations used in the Pacific theatre and in China in describing the offences subject to trial by Military Tribunals reflect the influence of the Four Power Agreement of 8th August, 1945, and particularly of Article 6 of the Charter of the International Military Tribunal annexed to it. Under the Charter the International Military Tribunal has jurisdiction over :

(*a*) Crimes against peace ;

(*b*) War Crimes, namely violation of the laws or customs of war ; and

(*c*) Crimes against humanity.(2)

(v) *The competence of French Military Tribunals* to try war criminals is based on the Ordinance of 28th August, 1944, concerning the suppression of war crimes, which, by virtue of Article 6 thereof, is applicable not only to Metropolitan France but also to Algeria and the Colonies.

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

The necessary starting point for a study of *Norwegian law relating to the trial of war criminals* is the law of 13th December, 1946 (No. 14) on the Punishment of Foreign War Criminals, the text of which differs only in one minor respect relating to punishment from that of a Provisional Decree of the same subject dated 4th May, 1945. In promulgating the Provisional Decree, the Norwegian Government in London acted in accordance with the resolution adopted by the Storting at Elverum on 9th April, 1940, and with

(1) See Vol. I, p. 52, Vol. III, pp. 103–105 and 56–57, 60, 62 and 65–66.
(2) See Vol. III, pp. 105–107. Records of trials, held before such Military Commissions, which have been forwarded to the United Nations War Crimes Commission have, however, in fact concerned only allegations of war crimes.
(3) See Vol. III, pp. 93 and 49–50.

s. 17 of the Norwegian Constitution, which provides that " The King may make or repeal regulations concerning commerce, customs, trade and industry and police ; they must not, however, be at variance with the Constitution or the laws passed by the Storting . . . They shall operate provisionally until the next Storting." The Law was passed by the Storting on 12th December, 1946, and was sanctioned by the King on 13th December, 1946. Paragraph 1 of the Law reads as follows :

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

One result of the words " are punished according to Norwegian law " is that in Norway no special Courts, military or otherwise, have been set up to try cases of alleged war crimes. Such proceedings are brought before the ordinary Courts of the land.(1)

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

The Law of 2nd August, 1947, of the Grand Duchy of Luxembourg provides for the *trial of alleged war criminals in Luxembourg* by a specially established War Crimes Court, which, according to Article 20 of the Law, was to have a mixed civil and military composition.

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

The first paragraph of Article I of the French Ordinance of 28th August, 1944, for instance, reads as follows : " Enemy nationals or agents of other than French nationality who are serving enemy administration or interests and who are guilty of crimes or delicts committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before 17th June, 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies, shall be tried by French Military Tribunals *in accordance with the French laws in force, and according to the provisions set out in the present Ordinance*, where such offences, even if committed at the time or under the pretext of an existing state of war, *are not justified by the laws and customs of war.*"(3) When a

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(1) See Vol. III, p. 81.

(2) For certain Belgian provisions relating to the jurisdiction of these Tribunals, see pp. 203–4.

(3) Italics inserted.

French Military Tribunal tries an alleged war criminal, the judges decide first whether a provision of the French Criminal Code has been violated and, only secondly, whether this breach was justified by the laws and customs of war.(1)

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

Similarly, Article 1 of the Danish Law of 12th July, 1946, on the Punishment of War Criminals provides that : " If a non-Danish subject, being in the service of Germany or serving under one of Germany's allies, has *infringed the rules and customs of international law governing* Occupation and War *and has performed*, in Denmark or to the detriment of Danish interests, *any deed punishable per se in Danish Law*, an action can be brought against such person in respect of the crime committed and a punishment imposed in a Danish Court in pursuance of this Act."(3)

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(1) See Vol. III, pp. 93–96.

(2) Italics inserted. See Vol. III, pp. 81–85. A commentary of the Norwegian Ministry of Justice and Police which explained the provisions of the Law claims that this attitude is the same as that adopted in the Moscow Declaration, which provided that war criminals other than major criminals were to be tried and punished in accordance with the laws of the liberated countries. The Ministry, quoting Art. 96 of the Constitution : " No one may be convicted except according to law, or be punished except according to judicial sentence . . .", then goes on to state that : " Norwegian courts can only inflict punishment according to provisions of Norwegian civil or military law. The principle laid down in Art. 96 of the Constitution must be interpreted in this connection so as to make an arbitrary application of an undefined provision of international law inadmissible. In Norway, international law is not incorporated into national law as an integral part, as in the case of various foreign legal systems. Before a rule of substantive international law can be applied by Norwegian Courts, it must be incorporated into Norwegian national law by a special act. A clear example of this is Art. 92 of our military criminal code, which fixes the punishment for a typical war crime committed by enemy soldiers. The paragraph is based on the international regulations which are to be found in the Geneva Convention of 1929, regarding the treatment of sick and wounded ; cf. Art. 23 of the Hague Regulations."

It is to be noted, however, that a Norwegian Court is not precluded from sentencing a war criminal to death by the fact that the municipal enactments enabling the supreme penalty to be exacted for his offence was not passed until after the commission thereof. Accordingly, judgment went against Karl Hans Hermann Klinge when he appealed to the Supreme Court of Norway against his being condemned to death as a war criminal by the Eidsivating Lagmannsrett. Counsel for Klinge claimed that the Lagmannsrett had unjustly applied the Provisional Decree of 4th May, 1945 ; as the crimes for which the defendant had been convicted had been committed before the passing of that Decree, the punishment should have been restricted to the limits set by Arts. 228, 229 and 62 of the Civil Criminal Code, according to which the death sentence could not have been passed ; his argument was based on Art. 97 of the Norwegian Constitution, which provides that : " No law may be given retroactive effect." For various reasons set out in Vol. III, pp. 3–6 and 10–11, a majority of the Supreme Court judges rejected these arguments. See also Vol. III, pp. 13–14.

(3) Italics inserted.

It should be added however, that paragraph 2 of the Danish Act states that "This Act shall apply . . . also to all acts which, though not specifically cited above, are covered by Art. 6 of the Charter of the International Military Tribunal. . . ."

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

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

The Anglo-American legal approach to war crime trials has been a little different in this respect. Instruments such as the British Royal Warrant or the United States Theatre Regulations and Directives, which have validity in the respective municipal legal systems, have provided in general terms that the Courts operating under them shall have jurisdiction over war crimes, but the practice of these Courts, insofar as they try war crimes *stricto sensu*, is to require only that a breach of the laws and usages of war must be shown. An enactment governing such a court may sometimes attempt to define the scope of the term " war crime ", and further, the provisions of municipal law are often quoted, as analogies,(2) by Counsel, and in British trials by the Judge Advocate or Legal Member, but the violation of any set of legal rules other than the laws and usages of war (possibly as interpreted in the enactment) need not be shown.(3)

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

That this possibility is not a merely theoretical one was shown by the successful appeal to the Cour de Cassation of Hugo Gruner, ex-Kreisleiter of Thann, against the sentence of death passed on him (as on Robert Wagner, ex-Gauleiter of Alsace, and others) by the Permanent Military Tribunal at Strasbourg, which sat from 23rd April to 3rd May, 1946.(4)

The requirement laid down by the French and Norwegian war crimes enactments, among others, to the effect that an alleged war crime must be shown to have offended not only the laws and usages of war but also municipal law, is not without other and similar accompanying difficulties, since municipal law may define more narrowly the offence or provide a lesser punishment.

(1) Italics inserted.
(2) See pp. 7–10.
(3) Concerning the application of municipal law provisions in war crime trials see an opinion expressed by Professor Brierly quoted in Vol. IX, p. x.
(4) See Vol. III, pp. 47–49.

Klinge was enabled thereby to claim that the retroactive application of the Ordinance under which he was sentenced to death was contrary to a more fundamental document having validity in the municipal law of Norway, namely the Norwegian Constitution. A minority of judges of the Supreme Court indeed voted in favour of his appeal.(1) A more general difficulty, however, arises out of the need on the part of the legislator to see to it that the municipal law is supplemented, where necessary, in order to ensure that the provisions of that law are wide enough to provide against those war crimes, as the term is understood in current legal thought, which it was the intention of the authorities concerned to try.

Thus Article 1 of the French Ordinance of 28th August, 1944, states that, " in particular " certain specified provisions of the *Code Pénal* and *Code de Justice Militaire* shall be the subject of prosecution. Further, Article 2 of the Ordinance lays down that certain specific war crimes shall be treated as violations of certain specified provisions of the Codes.(2)

Article 2 of the Luxembourg Law of 2nd August, 1947, contains a similar collection of paragraphs, interpreting provisions of the *Code Pénal* of Luxembourg so as to cover various types of war crimes, while Article 2 of the Norwegian Law on the Punishment of Foreign War Criminals(3) was passed into law due to the feeling of the Norwegian Ministry of Justice that : " The German economic exploitation of Norway stands in this respect in a class by itself. Its scale and the forms in which it has been carried out lie in some respects so far beyond the usual conception of criminal law that it is difficult or even impossible to regard the different acts as being within the scope of existing provisions of the Civil or Military Criminal Codes. In order to amend this deficiency the Ministry consider it necessary to lay down a special provision which covers every kind of German exploitation in Norway performed by force or threat thereof . . . Acts like the excessive issue of currency notes, unreasonable fixing of prices, irresponsible exploitation of clearing agreements, etc., can hardly be assimilated with any particular crime already defined and covered by the law. If criminal prosecution against those individually responsible in this connection should arise, it is deemed necessary that the law should give certain instructions to those administering the law. Those regulations, however, should be given a very comprehensive though general form, considering the very varied economic transactions which may arise in this connection."(4)

(vii) The trial of war criminals before *Dutch Courts* is regulated by two sets of rules. One set relates to the trials held by *metropolitan* Dutch courts, and the other to those conducted by courts of the *Netherlands East Indies*. In each of the two geographical areas concerned rules were enacted by the respective governments, the rules of Holland relying mainly on existing provisions of Dutch common penal law and those of the Netherlands East Indies on novel provisions introducing in the sphere of war crimes numerous exceptions to the Netherlands East Indies Penal Code. Metropolitan rules

(1) See Vol. III, pp. 6–10 and 11. For the treatment of a similar question by the Netherlands Court of Cassation, see Vol. XIV, pp. 118–23.

(2) See Vol. III, pp. 95–96.

(3) See Vol. III, pp. 84–85.

(4) Vol. III, p. 84.

are prescribed by a number of Decrees enacted by the Netherlands Government between 1943 and 1947, while trials of war criminals in the territories belonging to the Netherlands East Indies are regulated by several decrees which were enacted in 1946 by the Lieutenant Governor-General within his constitutional powers.(1)

While the Netherlands East Indies war crimes legislation from the outset applied international law directly, as do British Military Courts for instance, the metropolitan Dutch legislation originally treated war crimes as such offences under municipal penal law as were not justified by the laws and customs of war, but later adopted a compromise according to which international law was observed on questions relating to the definition of offences and municipal law relied upon to prescribe the punishment to be applied.(2)

(viii) The legal basis of war crime trials before *Polish courts* is provided by a number of texts which were embodied in the consolidated text of the Decree of 31st August, 1944, contained in the Schedule to the Proclamation of the Minister of Justice dated 11th December, 1946 (Official Gazette, No. 69, item 377). Polish trials of war criminals and traitors are held before civil courts, including a specially established Supreme National Tribunal.(3)

From a study of the offences which fall within the jurisdiction of the relevant Polish Courts(4) it appears that the Polish attitude towards the treatment of war criminals follows the general continental practice that before punishment is inflicted, an individual offender must be shown to have offended against some specific provision of Polish municipal law. An additional characteristic of the Polish system is that the violation of any set of international rules or the laws and customs of war need not be shown.

Consequently, the provisions of the Decree of 1944 dealing with crimes committed in connection with the war do not define the terms " war crime " and " war criminal ", but from the spirit of this law it seems to follow that the offences which have been made punishable are such infractions of Polish law as are not justified by the laws and customs of war. In general it appears that the Polish special legislation dealing with crimes committed in connection with the war comprise in fact war crimes, crimes against humanity and crimes against peace as envisaged by international enactments now in force although these specific types of crimes have not been specifically defined by Polish law and have only been referred to in a general way in those provisions of the Decree of 1944 which deal with criminal organisations.(5)

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

> " *Article XIV.* War crime cases shall be within the jurisdiction of the Military Tribunals for the Trial of War Criminals, attached to various Military Organisations by order of the Ministry of Defence."(6)

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(1) See Vol. XI, pp. 86–92 and 3–4, Vol. XIII, pp. 123–4 and Vol. XIV, pp. 111–14.
(2) See Vol. XI, pp. 87–88.
(3) See Vol. VII, pp. 4–5, 18, 82–83 and 91–92 for further details of the relevant Polish enactments.
(4) See Vol. VII, pp. 84–88.
(5) See Vol. VII, pp. 88–91.
(6) See Vol. XIV, p. 3 and 152.

A study of Articles II, III and IV of the law of 24th October, 1946, (1) shows that the Chinese War Crimes Law resembles the Australian in that both provide Courts acting under their provisions with jurisdiction to try, in addition to alleged war crimes proper (i.e., violations of the laws and usages of war), what may be termed " crimes against peace " (cf. Article II Section 1 of the Chinese Law) but not such crimes against humanity as do not at the same time represent war crimes. Thus, while offences against certain types of victims other than Chinese and Australian Nationals may be tried before Chinese and Australian Courts respectively (cf. Article VII of the Chinese provision and Article 12 of the Australian), offences by enemy nationals against enemy nationals definitely cannot be so tried.

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

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

(xi) Provisions for the *trial of war criminals and traitors in Czechoslovakia* was made by Decree No. 16 of 19th June, 1945, of the President of the Czechoslovak Republic, Law No. 22 of 24th January, 1946, of the Provisional National Assembly of the Republic, Law No. 245 of 18th December, 1946, of the Constituent National Assembly of the Republic, and Decrees Nos. 33/1945 and 57/1946 of the Slovak National Council. Such trials were to be held before specially appointed People's Courts.(3)

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

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

(xiii) Apart from the British and United States Military Courts and Commissions which have been established for the trial of alleged war criminals *in Germany* (for instance at Wuppertal and Hamburg in the British Zone

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(1) See Vol. XIV, p. 3–4 and 152–6.

(2) Certain provisions regarding the jurisdiction of these Courts are set out in Annex I to this Vol. pp. 207–9.

(3) For relevant jurisdictional provisions, see pp. 205–7.

and at Dachau in the United States Zone) *several systems of Military Government Courts* have also been set up, in the various zones, with power to try war crimes and other offences.

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

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

In his Ordinance No. 2, General Eisenhower, again acting as Supreme Commander, established Military Government Courts for the parts of Germany occupied by the western Allies. He also issued Rules of Procedure of Military Government Courts, and, further, Ordinance No. 1 (Crimes and Offences). The date of Promulgation of Ordinances Nos. 1 and 2 was 18th September, 1944.

In the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on 5th June, 1945,(2) however, *the four Allied Powers occupying Germany assumed supreme authority over Germany*. By the establishment of the Allied Control Council the same Allies set up a body which was to have supreme authority over " matters affecting Germany as a whole ".

The Declaration states, *inter alia*, that :

> " The Representative of the Supreme Commands of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the French Republic, hereinafter called the ' Allied Representatives ', acting by authority of their respective Governments and in the interests of the United Nations, accordingly make the following Declaration :
>
> > " The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption for the purposes stated above, of the said authority and powers does not affect the annexation of Germany."

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

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

(1) Italics inserted.
(2) British Command Paper (1945) Cmd. 6648.

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

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

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

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

When, after the Berlin Declaration of 5th June, 1945, General Eisenhower, in his capacity of Commander-in-Chief of the American Forces in Europe, took over the administration of the *American occupation zone*, he made a proclamation stating, *inter alia*, that all orders by the Military Government, including proclamations, laws, regulations and notices given by the Supreme Commander or on his instructions, remained in force in the American occupation zone unless repealed or altered by the Commander-in-Chief himself. The Military Government Ordinance No. 2 and the Rules of Procedure in Military Government Courts are, therefore, the basis of Military Government Courts established in the American zone of occupation.(1)

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

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

ARTICLE I

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

ARTICLE II

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

(1) Vol. III, pp. 113–114.

ARTICLE III

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

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

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

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

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

" 1. Each occupying authority, within its Zone of occupation,

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

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

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

The effect of Law No. 10 within the Zones of Germany must now be traced. By Article 1 of Ordinance No. 36 of 25th February, 1946, the French Zone

(1) See p. 41.
(2) Vol. III, pp. 100–101.

Commander has simply bestowed upon the existing Military Government Courts in the French Zone jurisdiction over the offences set out in Article II of Law No. 10.(1)

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

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

(xiv) The legal basis of these Courts set up in Germany having been described, it remains to describe their jurisdiction.

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(1) Vol. III, p. 101.

(2) Vol. III, p. 114, and see Vol. VI, pp. 26–33 for a further examination of the legal basis of Law No. 10 and Ordinance No. 7, taken from the Judgment delivered in the *Justice Trial.* Compare Vol. IX, pp. 16–17, Vol. X, pp. 130–31 and Vol. XII, pp. 59–62. Contrast Vol. VI, p. 74.

A hitherto unquoted passage from Judge Musmanno's judgment in the *Milch Trial* describes the legal basis of Law No. 10, as well as touching upon the plea that the law represented *ex post facto* legislation. (See also pp. 166–70) :

" It is sufficient for this Tribunal to cite Control Council Law No. 10 as authority for its action in this case. Since, however, the Control Council came into being after the ending of the War, and since the laws which it published necessarily also followed the termination of hostilities, it has been argued by Defence Counsel that it does not comport with justice and reason that a defendant should be condemned for an act which, prior to its commission, was not accepted in international law as a crime. From the day of surrender Germany has been without a government of its own, and as the Allied powers are exercising quasi-sovereign jurisdiction in practically all phases of German relations, both internal and external, the very circumstances of Germany's present political situation not only justifies but demands that the Control Council establish government in its three fundamental phases, namely, the judiciary, the executive and the legislative. Otherwise chaos would fling Germany into even a more precipitous abyss than the one into which she has fallen, and the supreme and perhaps irreparable disaster, arrested by Allied intervention, would be upon her.

" Yet it can be argued and it has been argued that despite the imperative need of an occupational force with its almost unlimited jurisdiction, such an occupying force simply represents the authority of victor over vanquished. In the discharge of its duties under the law which created it, this Tribunal is not called upon to answer the arguments just indicated, but a respect for the opinion of mankind invites a listing of the reasons which establishes the justice of the procedure here invoked and the reasons which must invest its judgment with the solemnity and solidity of accepted international law.

" In the first place, it is not Control Council Law No. 10 which makes abuse of civilian populations an international crime, nor even the decision of the International Military Tribunal, which in turn derived its power from the London Charter which had as its antecedent the Moscow Declaration of 1943. International Law is not a body of codes and statutes, but the gradual expression, case by case, of the moral judgments of the civilised world, and no International Law textbook of the last century ever sanctioned the deportation of a civilian population for labor."

The jurisdiction of the *Military Government Courts set up by General Eisenhower as Supreme Commander* was defined in Article II of Ordinance No. 2 as follows :

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

2. Military Government Courts shall have jurisdiction over :

(*a*) All offences against the laws and usages of war.

(*b*) All offences under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.

(*c*) All offences under the laws of the occupied territory or of any part thereof."

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

Paragraph 3 of Ordinance No. 68 makes a provision, which is similar to that of paragraph 2 of Article II of Ordinance No. 2, while paragraph 4 of Ordinance No. 68 adds a provision relating to civil jurisdiction.[1]

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

" ARTICLE 1.

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

" ARTICLE 2.

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

Article 1 of Ordinance No. 36 lays down that :

" Military Government Tribunals in the French Zone of Occupation in Germany are competent, in virtue of Law No. 10 of the Allied Control

[1] No use has, however, been made of the jurisdiction of Control Commission Courts to try offences against the laws and usages of war.

Council concerning the punishment of persons responsible for war crimes, crimes against peace and crimes against humanity, to try the crimes set out in that law."(1)

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

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

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

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

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

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

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

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

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(1) Vol. III, pp. 101–102.

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

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

"*Article II.* (a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8th August, 1945, certain tribunals to be known as ' Military Tribunals ' shall be established hereunder."(1)

Article II of Control Council Law No. 10, which is referred to in Article I of Ordinance No. 7 has already been quoted.(2)

(xv) Under the doctrine of the Universality of Jurisdiction over war crimes,(3) international law takes account of the crime itself rather than (*a*) the nationality of the victim (provided that he can be regarded as an Allied national or treated as such),(4) or (*b*) the nationality of the accused (provided that he can be regarded as having identified himself with the enemy), or (*c*) the place of the offence.

(*a*) There have been numerous reports in this series of trials by the Courts of one ally of offences committed against the nationals of another ally or of persons treated as Allied nationals, and in many trials no victims were involved of the nationality of the State conducting the trial.(5) It may be added that, in a trial at Maymyo, 18th July–1st August, 1947,(6) two Japanese accused, Yoshimasa Nishizama and Sadeharo Haratake were found guilty by a British Military Court of offences committed against Chinese and Indian inhabitants of territory occupied by Japan.

In the trial of Chogo Hashinoto by a United States Military Commission, Yokohama, Japan, 12th–17th February, 1947,(6) a Japanese accused was found guilty of ill-treatment of certain prisoners of war, all of whom were Canadian. Again, in a case held before a United States General Military Government Court in Dachau, 12th–14th August, 1947, Anton Stinglwagner and Max Lengfelder(6) were found guilty of participating in the killing of Polish and Czech inmates in Dachau Concentration Camp. This is only one example of many trials by United States Military Government Courts in which concentration camp victims of offences proved were shown to have been nationals of European allied countries.

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(1) Vol. III, pp. 115–116.

(2) See p. 42. Regarding Article 10 of the Charter of the International Military Tribunal, to which specific reference is made in Article II of Ordnance No. 7, and implicit reference in Article II, 1(d) of Law No. 10, see pp. 17–18.

(3) See pp. 26–27.

(4) See Vol. XIII, pp. 127–9.

(5) See for example Vol. I, pp. 42, 47, 52–53, 102–103 and 106 ; Vol. II, pp. 4 and 8 ; Vol. IV, p. 113 ; Vol. VII, p. 76 ; and Vol. XI, pp. 10, 81 and 84.

(6) Not previously treated in this series.

A considerable number of Australian war crime trials have concerned offences in which the victims have been wholly Chinese or Indian. Under Sections 7 and 12 of the Australian War Crimes Act, 1945, the Australian Military Courts have jurisdiction in all cases where the victim has been either resident in Australia or a British or an Allied subject.(1) Article 1 of the Norwegian Law of 13th December, 1946, provides not only against acts contrary to Norwegian interests but also against acts committed abroad to the prejudice of Allied legal interests or to interests which, as laid down by Royal proclamation, are deemed to be equivalent thereto.(2) The Chinese war crimes law provided that offences committed against Allied nations or their nationals or against aliens under the protection of the Chinese Government were also within the jurisdiction of Chinese courts.(3)

In the trial of Josef Remmele at Dachau, Germany, 9th–15th September, 1947, before a General Military Government Court,(4) it was alleged that two violations of the laws and usages of war were committed prior to the date the United States entered the war against Germany (11th December, 1941), the victims being Czechoslovak and Russian nationals. In finding the accused guilty on these charges the Court seems to have accepted the principle that, while the existence of a state of war is a necessary condition precedent to the existence of a " war crime ", it is not a *sine qua non* of the jurisdiction of an independent state to try and to punish an offence against the laws and customs of war. The fact that the accused may have committed the offence prior to the entry of the United States into war with Germany did not bar the United States from jurisdiction to try and to punish the accused for the offences charged. The Confirming Authority approved the finding of guilty as to the offence against the Soviet nationals. The same attitude has been taken to the same question in several other trials before United States Military Government Courts.

A State may of course limit the jurisdiction of its war crime Courts so as not to take full benefit of the principle of the universality of jurisdiction. Article 1 of the French Ordinance of 28th August, 1944, makes detailed provisions regarding the possible victims of war crimes which may be tried before French Military Tribunals.(5) In accordance with this provision, in many war crime trials before French Military Tribunals, punishment has been meted out for offences against Russian, Polish and Italian prisoners of war or civilian deportees *committed on French territory*, but, under Article 1 of the Ordinance offences committed against non-French Allied nationals outside France or " territories under the authority of France " would *in general* (but with certain exceptions as stated) fall outside the jurisdiction of French Military Tribunals. The fact that one of the accused found guilty in the *Wagner Trial* before a French Military Tribunal at Strasbourg made a successful appeal on these grounds has been noted.(6) On the other hand Albert Wagner was found guilty of an offence committed in Germany

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(1) See Vol. V, pp. 97–98.
(2) See Vol. III, pp. 83 and 84.
(3) See Vol. XIV, pp. 156–7.
(4) Not previously referred to in these Reports.
(5) See p. 31.
(6) See p. 33.

by a French Military Government Court although the victim was a Russian national, since the Court's jurisdiction was framed more widely than that of French Military Tribunals for the trial of war criminals.(1)

(*b*) While the nationality of the accused in war crime trials has usually been that of the country which is the enemy when looked at from the point of view of the nation conducting the trial,(2) this has not been invariably the case. The jurisdiction of war crime courts has on suitable occasions, been interpreted so as to include within its scope not only enemy nationals but also neutral and even Allied nationals who had in some way identified themselves with the policies of the enemy authorities.

Thus, six of the accused in the *Belsen Trial* who were found guilty were Poles, that is to say nationals of a country allied to the United Kingdom, before one of whose Military Courts the trial was held. Their Counsel had claimed that the offences which they were alleged to have committed against Poles and other nationals could not amount to war crimes. By finding them guilty, however, the Court approved the argument of the Prosecution that if the Polish accused, whether to save themselves from being beaten or from whatever motive, accepted positions of responsibility in the camp under the S.S. and beat and ill-treated prisoners, acting on behalf of the S.S., they had identified themselves with the Germans, and were as guilty as the S.S. themselves.(4)

It will be recalled(5) that the first paragraph of Article 1 of the French Ordinance of 28th August, 1944, provides that " Enemy nationals *or agents of other than French nationality who are serving the enemy administration or* interests "(6) and who commit certain offences, shall be punishable by French Military Tribunals.

Thus a national of Luxembourg, an Allied country, was found guilty of war crimes by a French Military Tribunal at Lyon on 23rd November, 1945.(7) The accused, a Lucien Fromes, joined the ranks of the Gestapo as a Hauptsturmführer and was tried for murder, pillage and wanton destruction of property committed on French territory. Found guilty on all counts, he was condemned to death.

Again, the Military Tribunal in Paris on 25th April, 1947, at least assumed jurisdiction over Lendines Monte, a national of a non-belligerent country, Spain. He was tried on two different counts : for " violations against the external security of the State ", and for " murder and ill-treatment ". In both cases the place of the alleged crimes was in Germany, where the defendant was interned in concentration camps from 1940–1945 after having been found in France as a Spanish Republican refugee. On the first count he was charged with having " maintained relations during the war with

(1) See Vol. XIII, p. 119.

(2) Most of the trials reported in these volumes have in fact involved German or Japanese accused. The trials selected for reporting have been chosen for their legal interest and it should be noted that a number of records of trials of Italian accused were also available to the United Nations War Crimes Commission.

(3) Compare also interesting Chinese provisions regarding the nationality of the accused : see Vol. XIV, p. 155.

(4) Vol. II, p. 150.

(5) See p. 31.

(6) Italics inserted.

(7) Trial not previously treated in this series.

subjects and agents of an enemy country ", acting against the security of the French state, and on the second count with having physically ill-treated French, Belgian and Spanish inmates in the camps and with having killed a Spaniard. The defendant was acquitted on the first count and on the second the Court ordered additional investigations. The essence of the second charge was that, as an inmate in German concentration camps, he allied himself with the German authorities and ill-treated other inmates in the same way as did the authorities themselves.

In a third French trial, that of Albert Raskin, held before the Permanent Military Tribunal at Lyon (Judgment delivered on 16th January, 1947) the accused was a Belgian compulsorily enrolled (*enrôlé de force*) in the German army. He was found guilty of conspiracy (*association de malfaiteurs*)(1).

In the trial of Joaquin Espinosa by a United States General Military Government Court in Germany, 9th–12th May, 1947(2), a Spanish national was found guilty of violations of the laws and usages of war in that, as an inmate of the Gusen Concentration Camps, sub-camps of Mauthausen, he did " wrongfully encourage, aid, abet and participated in" the ill-treatment of other inmates. The findings and sentence of three years' imprisonment was confirmed.

In the trial of Gustav Alfred Jepson (a Danish National) and two German accused, by a British Military Court in Luneburg, 13th–23rd August, 1946, the Prosecutor began his opening address with the following words :

> " May it please the court, a War Crime, under the terms of the Royal Warrant embodying the Regulations for the trial of War Criminals, means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged any time since the 2nd September, 1939.
>
> " I read out that definition because of the unusual feature in this case presented by the presence of a Danish national amongst the accused. It is superfluous for me to say that he has been extradited to stand his trial with, or course, the consent of the Danish Government. In practice in this Zone a War Crime has come to mean any violation of the usages of war committed either by the Germans or by any person in German employ in which the victims were British or Allied nationals."

The Danish accused was found guilty of ill-treatment and killings of " Allied nationals, internees of concentration camps, during a train journey", and sentenced to imprisonment for life. His sentence was confirmed.(3)

Again in the *Ravensbruck Trial* (Trial of Johann Schwarzhüber and 15 others before a British Military Court at Hamburg, 5th December, 1946 to 3rd February, 1947),(4) one of the accused who was found guilty was of Swiss nationality, and in the *Mauthausen Concentration Camp Trial* (the Trial

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(1) These three French trials have not previously been referred to in this series. Regarding the third trial, see also p. 91. Although the accused was forcibly enrolled into the German army, the actual offence for which he was condemned was that of having *voluntarily* participated in an undertaking arrived at for the purpose of preparing or committing crimes against persons or property.

(2) Not previously treated in these Reports.

(3) See also pp. 20 and 172.

(4) Not previously dealt with in these Reports.

of Altfuldisch and Others),[1] also, certain of those sentenced were Allied nationals. Among the accused found guilty of violation of the laws and usages of war in the *Flossenburg Trial* (Trial of Friedrich Becker and Others by a United States Military Government Court, 14th May, 1946—22nd January, 1947 at Dachau),[2] were a Netherlands National and a Yugoslav National.

(*c*) In the trial of Tanaka Hisakasu and others,[3] a United States Military Commission overruled a plea to the jurisdiction of the Commission based on the fact that the offence took place in Hong Kong, a British Crown Colony. Similarly the offences punished in the trial of Lieutenant-General Shigeru Sawada and three others by a United States Military Commission at Shanghai, were committed on Chinese territory[4] as those punished in the *Almelo Trial* by a British Military Court were committed in the Netherlands.[5] In the trial of Erich Wippermann and in the trial of Hans Heitkamp by a United States Military Government Court at Dachau 16th–23rd May, 1947 and 7–8 August, 1947 respectively[6] the defence unsuccessfully objected to the jurisdiction of the Courts on the ground that the offences had been committed on territory which at the time of the trial was respectively in the British and French Zones of Occupation in Germany. After a trial by a United States Military Government Court at Dachau, 26–27th August, 1946,[6] Franz Umstatter was found guilty of an offence against a prisoner of war, the charge not specifying the place of the alleged crime. It may be added that, among others, the Netherlands legislation provides jurisdiction over war crimes committed on non-Netherlands territory.[7]

(xvi) The Judgment delivered in the *Hostages Trial* pointed out that " Some war crimes, such as spying, are not common law crimes at all ; they being pure war crimes punishable as such during the war and, in this particular case, only if the offender is captured before he rejoins his army. But some other crimes, such as mass murder, are punishable during and after the war."[8]

It would be possible to analyse offences against international criminal law into the following two categories :

(*a*) Those which correspond roughly to offences prescribed by systems of municipal law in general.

(*b*) Those which do not so correspond.

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[1] See Vol. XI, p. 15. According to an explanatory memorandum of the Norwegian Ministry of Justice, the Norwegian Law of 13th December " applies to foreigners regardless of nationality, who have voluntarily entered the country [Norway] in order to work in German public or private enterprises. Foreign slave labourers and Allied prisoners of war or internees naturally do not come under the Decree." (Vol. III, pp. 83–4).

[2] Not previously dealt with in these Reports.

[3] See Vol. V, p. 66.

[4] See Vol. V, p. 9.

[5] See Vol. I, p. 42.

[6] Not previously treated in these volumes.

[7] See Vol. XI, p. 97.

It may be added here that jurisdiction over war criminals does not appear even to depend upon the state whose courts conduct the trial having actual custody of the accused, since certain French war crime Tribunals, for instance, have declared persons guilty *in their absence*. Thus the Tribunal acting in the *Trial of ex-Gauleiter Wagner* sentenced the accused Huber to death in his absence. (See Vol. III, pp. 42 and 98–9). A United States Military Government Court may also proceed in the absence of an accused. (Vol. III, p. 117). The Nuremberg International Military Tribunal sentenced to death the accused Borman in his absence.

[8] Vol. VIII, p. 54. Compare p. 25 of the present volume.

An example of the second is breach of armistice. In general, however, development of war crimes law has been in the direction of extending to allied victims, and in certain circumstances even to ex-enemy victims, the protection of laws analogous to those which would have protected them under systems of municipal law in peace time. One indication that war crime jurisdiction is largely the applying of a missing link in the jurisdiction over criminal offences is the fact that no direct physical (as distinct from temporal) connection with operations of war need be shown. The term " war crimes " has been interpreted so as to include within its scope many offences by an enemy against Allied nationals committed during war time on enemy soil or occupied territory, with no direct connection with the war. Thus, for instance, war crimes have been found to include offences committed against allied civilians in concentration camps, in civilian hospitals, and in the streets of towns. Nor need it be shown that the accused was a member of the enemy's armed forces.(1) Another indication of the same kind is the development of the law relating to crimes against humanity, whereby some protection under international law is extended to ex-enemy nationals.(2)

(2) See p. 59.
(3) See pp. 134–8.

IV

THE PARTIES TO CRIMES

A. RULES RELATING TO COMPLICITY

(i) The possible range of persons who may be held guilty of war crimes or crimes against humanity(1) is not limited to those who physically performed the illegal deed. Many others have been held to be sufficiently connected with an offence to be held criminally liable and here the generally established rules relating to complicity have proved a useful guide to the courts.

(ii) The British practice has been to charge an accused with being " concerned in " the committing of a specific war crime and the English law relating to principals and accessories has often been set out, by Judge Advocates as well as counsel, as providing analogies on which the Court might act.

Thus in the trial of Franz Schonfeld and nine others by a British Military Court, Essen, 11th–26th June, 1946, the Judge Advocate went to some pains to expound the law concerning parties to an offence in relation to a charge of being " concerned in " a killing, departing incidentally from the analogy of English law by exempting from liability all persons who, under that law, would be regarded as accessories after the fact, persons whose activities related to the time after the commission of the offence : " Conduct on the part of an accused subsequent to the death, while it may throw light on the nature of the killing and the reason for it, that is to say whether it was justifiable or a crime, cannot by itself be regarded as constituting the offence of ' being concerned in the killing ', or any degree thereof ".

The Judge Advocate proceeded as follows :

> " An Accessory before the Fact to Felony is one who, though absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony.
>
> " If the party is actually or constructively present when the felony is committed, he is an aider and abettor. It is essential, to constitute the offence of accessory, that the party should be absent at the time the offence is committed. A tacit acquiescence, or words which amount to a bare permission will not be sufficient to constitute this offence.
>
> " If the accessory orders or advises one crime and the principal intentionally commits another ; that is to say that the principal offender is ordered to burn a house and instead commits a larceny, a theft, the accessory before the fact will not be answerable in law for the theft. If, however, the principal commits the offence of murder upon A—and you may think that this is important—when he has been ordered to commit it upon B, and he does that by mistake, the accessory will be liable in respect of the murder upon A.

(1) The relevant aspects of crimes against peace and membership of criminal organisations are dealt with separately on p. 58.

"The accessory is, however, liable for all that ensues upon the execution of the unlawful act commanded ; that is to say if A commands B to beat C, and B beats C so that he dies, A is accessory to the murder of C. There must be some active proceeding on the part of the accessory, that is, he must procure, incite or in some other way encourage the act done by the principal.

"A principal in the first degree, of whom you have already heard mentioned in this case, is one who is the actor, or actual perpetrator of the fact. It is not necessary that he should be actually present when the offence is consummated, nor, if he is present, is it necessary that the act should be perpetrated with his own hands. If the agent, that is the perpetrator, is aware of the nature of his act—even if the employer is absent—he is a principal in the first degree. If the employer is present, the agent, that is the person who commits the act, is liable as a principal in the second degree.

"Those who are present at the commission of an offence, and aid and abet its commission, are principals in the second degree.

"The presence of a person at the scene of the crime may be actual in the sense that he is there, or it may be constructive. It is not necessary that the party should be actually present, an eye-witness or ear-witness of the transaction ; he is, in construction of law, present, aiding and abetting if, with the intention of giving assistance, he is near enough to afford it should occasion arise. Thus, if he is outside the house, watching, to prevent a surprise, or the like, whilst his companions are in the house committing a felony, such a constructive presence is sufficient to make him a principal in the second degree . . . but he must be near enough to give assistance. There must also be a participation in the act ; for even if a man is present whilst a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony. It is not necessary, however, to prove that the party actually aided in the commission of the offence ; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present aiding and abetting."(1)

In the trial of Karl Adam Golkel and thirteen others by a British Military Court, Wuppertal, Germany, 15th–21st May, 1946, the Judge Advocate, speaking in his summing up of the words "concerned in the killing" of prisoners of war (which was the offence alleged) made the following comment :

"It is for the members of the Court to decide what participation is fairly within the meaning of those words. But it is quite clear that those words do not mean that a man actually had to be present at the site of the shooting ; a man would be concerned in the shooting if he was

(1) Vol. XI, pp. 69–70. For an example of a citation by Counsel of the rules of English law on complicity, see Vol. XI, p. 75.

50 miles away if he had ordered it and had taken the executive steps to set the shooting in motion. You must consider not only physical acts done at the scene of the shooting, but whether a particular accused ordered it or took any part in organising it, even if he was not present at the wood."(1)

Similar advice was offered by the Judge Advocate acting in the trial of Werner Rohde and eight others by a British Military Court, Wuppertal, Germany, 29th May–1st June, 1946. Regarding the meaning of the term " concerned in the killing ", contained in the charge, the Judge Advocate explained that to be concerned in a killing it was not necessary that a person should actually have been present. None of the accused was actually charged with killing any of the women concerned. If two or more men set out on a murder and one stood half a mile away from where the actual murder was committed, perhaps to keep guard, although he was not actually present when the murder was done, if he was taking part with the other man with the knowledge that that other man was going to put the killing into effect then he was just as guilty as the person who fired the shot or delivered the blow.(2)

The application of these rules relating to complicity may be seen if a study is made of persons found guilty by British war crimes courts in the light of the actual degree of connection between themselves and the crime proved, and the last two mentioned trials are of legal interest in that they do illustrate the various courses of action which have been held to make an accused guilty of the war crime of being " concerned in the killing " of prisoners of war.(3) It will be noted that in the former certain of those found guilty of being concerned in the killing of certain Allied victims had driven them to the wood where they were shot or kept watch during the execution ; while in the latter trial one accused, a first-aid N.C.O. at Natzweiler, admitted that he obeyed an order to bring the lethal drug and that he heard, in conversations between the doctors and other officers in the camp, references to " the four women spies," " we cannot escape the order " and " execution " ; he received a sentence of four years' imprisonment. A second accused received a five years' sentence apparently for complicity as what would be called in English law an accessory after the fact ; he was a prisoner whose task was to work the oven of the crematorium in which the bodies of the victims were burnt. He admitted that he lit the oven on the occasion but without knowing that there was anything unusual in the circumstances. No one claimed that he took part in the actual killing.

An example in the British courts of liability both for instigation and for inaction while under a duty to act is provided by the *Essen Lynching Case.* Here a German private and a German captain were held guilty of being concerned in the killing of three British prisoners of war, the former having refrained from interfering with a crowd which murdered the prisoners, although entrusted with their custody, the latter having ordered the escort not to interfere in any way with the crowd if they should molest the prisoners. It was confirmed by some German witnesses, though not admitted by the

(1) Vol. V, p. 53.

(2) Compare certain advice by the Judge Advocate acting in the *Stalag Luft Trial.* See Vol. XI, pp. 43–4 and 46.

(3) See Vol. V, pp. 45–47 and 54–55.

captain, that he made remarks to the effect that the airmen ought to be shot or that they would be shot(1). In the *Zyklon B Trial*, two accused were condemned to death for *arranging* for the supply of (not supplying) lethal gas to concentration camps, knowing that it was to be used for the illegal killing of inmates there.(2)

(iii) The United States Military Tribunals operating in Nuremberg have acted under the very broad terms of Article II, 2 of Law No. 10 of the Control Council :

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

The Supplemental Judgment, dated 11th August, 1948, of the Tribunal which tried Oswald Pohl and others(3) contains the following observation :

> " An elaborate and complex operation, such as the deportation and extermination of the Jews and the appropriation of all their property, is obviously a task for more than one man. Launching or promulgating such a programme may originate in the mind of one man or a group of men. Working out the details of the plan may fall to another. Procurement of personnel and the issuing of actual operational orders may fall to others. The actual execution of the plan in the field involves the operation of another, or it may be several other persons or groups. Marshalling and distributing the loot, or allocating the victims, is another phase of the operations which may be entrusted to an individual or a group far removed from the original planners. As may be expected, we find the various participants in the programme tossing the shuttlecock of responsibility from one to the other. The originator says : ' It is true that I thought of the programme, but I did not carry it out.' The

(1) See Vol. I, pp. 88–92. The court did not pronounce any reasons for its findings in this trial and there was no Judge Advocate attached to the Court. While it would be legally sound to suppose that the Captain could have been found guilty as instigator of *the offence committed by the private*, the Prosecution claimed that the Captain had given to the escort instructions that they should take the prisoners to the nearest Luftwaffe unit for interrogation, and that this order, though on the face of it correct, was given out to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. It was alleged that he had ordered the escort not to interfere in any way with the crowd if they should molest the prisoners. The Prosecutor expressly stated that he was not suggesting that the mere fact of passing on the secret order *to the escort* that they should not interfere to protect the prisoners against the crowd was sufficiently proximate to the killing, so that on that alone the Captain was concerned in the killing. The Prosecutor submitted that, if the Court was not satisfied beyond reasonable doubt that he had incited *the crowd* to lynch these airmen, he was then entitled to acquittal, but, if the Court was satisfied that he did in fact say these people were to be shot, and did in fact incite the crowd to kill the airmen, he was guilty. (Vol. I, pp. 89–90).

(2) See Vol. I, p. 93.

(3) See Vol. VII, p. 49 and footnote 1 thereto.

next in line says : ' It is true I laid the plan out on paper and designated the modus operandi but it was not my plan and I did not actually carry it out.' The third in line says : ' It is true I shot people, but I was merely carrying out orders from above.' The next in line says : ' It is true that I received the loot from this programme and inventoried it and disposed of it, but I did not steal it nor kill the owners of it. I was only carrying out orders from a higher level.' To invoke a parallelism, let us assume that four men are charged with robbing a bank. The first makes a preliminary observation, draws a ground sketch of the bank and of the best means of escape. The second drives the others to the bank at the time of the robbery and spirits them away after its completion. The third actually enters the bank and at the point of a gun steals the money. The fourth undertakes to hide or dispose of the loot, with knowledge of its origin. Under these circumstances, the acts of any one of the four, within the scope of the overall plan, become the acts of all the others. Control Council Law No. 10 recognises this principle of confederacy when it provides in Article II 2 ' any person . . . . is deemed to have committed a crime as defined in paragraph 1 of this article, if he was (*a*) a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission . . . .' "(1)

Elsewhere the judgment again made clear that the Tribunal intended criminal liability to cover accessories after the fact. (The Tribunal is speaking of Action Reinhardt) :

" The fact that Pohl himself did not actually transport the stolen goods to the Reich or did not himself remove the gold from the teeth of dead inmates, does not exculpate him. This was a broad criminal programme, requiring the co-operation of many persons, and Pohl's part was *to conserve and account for the loot.* Having knowledge of the illegal purposes of the Action and of the crimes which accompanied it, his active participation *even in the after-phases* of the Action make him *particeps criminis* in the whole affair. . . .

" Assuming that Frank ultimately heard of the extermination measures, can it be said as a matter of law that his participation in the distribution of the personal property of the inmates exterminated makes him a participant or an accessory in the actual murders ? Any participation of Frank's was *post facto* participation and was confined entirely to the distribution of property previously seized by others. *Unquestionably this makes him a participant in the criminal conversion of the chattels,* but not in the murders which preceded the confiscation."(2)

As the Judgment delivered in the *Justice Trial* stated : " The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime ".(3)

Indeed the *Justice Trial* is a striking illustration of the operation of Article II, 2, including the widely worded sub-paragraph (d) thereof.(4) Here the

(1) For another judicial reference to Article II, 2, see Vol. X, p. 50.
(2) Italics inserted.
(3) Vol. VI, p. 62.
(4) On this point see also pp. 95–6.

Tribunal in its Judgment called for a recognition of the fact that, *inter alia*, the form of the indictment was "not governed by the familiar rules of American criminal law and procedure". It was pointed out that no defendant was specifically charged with the murder or abuse of any particular person. The charge did not concern isolated offences, but was one of "conscious participation in a nation-wide governmentally organised system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice and through the instrumentality of the courts. . . . Thus it is that apparent generality of the indictment was not only necessary but proper. No indictment couched in specific terms and in the manner of the common law could have encompassed within practicable limits the generality of the offence with which these defendants stand charged".(1)

A glance at the terms of the indictment reveals the characteristic to which the Tribunal made reference.(2) It will be seen, for instance, that the defendants were accused of committing war crimes and crimes against humanity in that "they were principals in, accessories to, ordered, abetted, took a consenting part in, *and were connected with* plans and enterprises involving the commission of offences against thousands of persons."(3) That the Tribunal approved this wording may be judged from the fact that it stated more than once that: "The essential elements to prove a defendant guilty under the indictment in this case are that a defendant had knowledge of an offence charged in the indictment and established by the evidence, and that *he was connected* with the commission of that offence".(3)

In view of the nature of the offences alleged, as reflected by the indictment, it was not unnatural that a considerable proportion of the evidence placed before the Tribunal aimed at showing the general character of the degradation of the German judicial system after 1933, of the use made by that system, in pursuance of Nazi policy, of the Nacht und Nebel scheme, and of the persecution of Jews and Poles; and that the Tribunal devoted a considerable portion of its Judgment to a description of these features before passing on to ascertaining the extent to which each accused could be held liable for the many offences inevitably involved in their furtherance. Nor is it surprising that the Judgment contains some interesting illustrations of the ways in which an accused can be said to be sufficiently "connected with" the offences to make him guilty of complicity therein. The Tribunal would seem to have approved the following submission, made in the Prosecution's Opening Speech, and based upon an analysis of the Judgment of the International Military Tribunal(4):

> "It seems clear . . . that *there need not be pre-arrangement with or subsequent request by the person or persons who actually commits the crime and a defendant to make him guilty as the International Military Tribunal interpreted the words 'being connected with'*. It would appear to be sufficient that the defendant knew that a crime was being committed, and with that knowledge acted in relation to it in any of the relationships set out in paragraph 2 of article II which we have heretofore been discussing." (Italics inserted.)

(1) See Vol. VI, p. 50.
(2) See Vol. VI, pp. 2–5.
(3) Italics inserted.
(4) See Vol. VI, p. 84, note 4.

A study of the attitude of the Tribunal to the evidence relating to the defendant Joel[1] revealed, in the first place, that Joel was not said to have been directly responsible for the death or ill-treatment of specific persons ; the aim instead was to show his relation to a scheme or system of which the final results were in fact criminal. In the second place, the Tribunal clearly regarded as important not only evidence of positive action on the part of Joel but also proof of knowledge of acts on the part of others which were done in furtherance of the Nacht und Nebel plan.

No official was protected by his high rank, and the wording of the Judgment suggests that the Tribunal was willing to hold persons who held the positions of overall responsibility in the Ministry of Justice responsible for the large-scale enterprises carried out by the Ministry, which were involved in the Nacht und Nebel scheme and the persecutions on political and racial grounds, provided that those accused could be said to have had knowledge of these schemes[2]. Since the defendants were accused of participation in certain illegal *enterprises*, however, it was naturally not necessary in every case to show that the illegal acts for which Ministry officials were alleged to be responsible were actually committed under the auspices of the Ministry of Justice.[3]

The question of knowledge was treated by the Tribunal as one of the highest importance, and repeated reference was made in the Judgment to the fact that various accused had knowledge, or must be assumed to have had knowledge, of the use made of the German legal system by Hitler and his associates, of the Nacht und Nebel plan and of the schemes for racial persecution. It would seem inevitable that this stress should be placed upon evidence of knowledge in a trial where the main allegations made related not to individual offences but to complicity in carrying out large-scale schemes which involved at some point the commission of criminal acts.

The necessity for knowledge to be shown or to be legitimately assumed caused the Tribunal to refer very frequently in its Judgment to the fact that documents, reports and orders were not *issued* but *received* by various

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[1] See Vol. VI, pp. 86–87.

[2] See for, an instance, Vol. VI, p. 87. Similarly the Judgment in the *I. G. Farben Trial* includes the following passage :

" It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term Farben as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the Prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act *or that, being aware thereof, he authorised or approved it*. Responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the Vorstand. Conversely, one may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids orders, or abets. But the evidence must establish action of the character we have indicated, with knowledge of the essential elements of the crime." (Vol. X, p. 52. Italics inserted).

The Judgment delivered in the *Pohl Trial* conceded that : " Perhaps in the case of a person who had power or authority to either start or stop a criminal act, knowledge of the fact coupled with silence could be interpreted as consent," which would involve criminal liability according to the Tribunal.

[3] See Vol. VI, pp. 87–88.

accused.(1) At a number of points in its Judgment the Tribunal presumed knowledge on the part of an accused and in view of the nature of the facts of the case it was inevitable that the Tribunal should regard this course in certain instances as a necessary and a safe one to take.(2)

The novel difficulties arising from the need to show a relation between an accused and certain large-scale illegal enterprises carried out by many persons at many places and over a period of time may be thought to explain also the introduction of two further types of evidence (also summarised in the Judgment of the Tribunal)—first, evidence showing the support given by certain accused to Nazi doctrines, and secondly, evidence of acts of the accused before the outbreak of war in 1939.(3) Immediately before reviewing the evidence relating to the changes to the German legal system made under Nazi rule from 1933 onwards, the Tribunal said : " . . . . Though the overt acts with which the defendants are charged occurred after September, 1939, the evidence now to be considered will make clear the conditions under which the defendants acted *and will show knowledge, intent and motive* on their part, for in the period of preparation some of the defendants played a leading part in moulding the judicial system which they later employed."

The evidence which the Tribunal then proceeded to summarise included considerable information on the acts of the accused between 1933 and 1939 and the Tribunal was also careful to set out the relevant official positions held in and after 1933 by all those accused who were found guilty of any of the charges against them.(4)

Regulation 5 of the United States Pacific Regulations governing the trial of war criminals, of 24th September, 1945, after defining the substantive crimes punishable under that instrument(5) refers to " participation in a common plan or conspiracy to accomplish any of the foregoing " and states that " Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan of conspiracy."(6) The same passage is included in the United States China Regulations.(7)

(iv) In French war crime trials, complicity in a crime is often involved.

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

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(1) See, for instance, Vol. VI, p. 88. Sometimes it appears at first sight that the Tribunal regarded mere knowledge as sufficient evidence of guilt. It seems safe to assume, however, that it was the intention of the Tribunal to signify that when certain accused took part in the Night and Fog programme it was not without knowledge of its criminal features that they did so. (See Vol. VI, p. 88.)

(2) See, for instance, Vol. VI, p. 89.

(3) See, for instances, Vol. VI, p. 89.

(4) See Vol. VI, pp. 89–90. As an indication of the limits placed upon the doctrine of complicity compare the finding in the *Flick Trial* of not guilty under Count Two of the accused, Weiss, Burkart and Kaletsch apparently on the ground mainly that, while they supplied information and even advice to Flick relating to the Rombach plant (and presumably must be said to have had knowledge of the offence committed), they were merely Flick's salaried employees and had no power to make decisions. (Vol. IX, p. 24.)

(5) See p. 30.

(6) Vol. III, p. 106.

(7) Vol. III, p. 107. Concerning " common design." See also p. 94.

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

Article 60 of the *Code Pénal* defines as an accomplice to a crime or delict : " Any person who, by gifts, promises, threats, abuse of power or authority, or guilty machinations or devices (*artifices*), has instigated a crime or delict or given orders for the perpetration of a crime or delict ; any person who has supplied the arms, tools or any other means that have been used in the commission of the crime or offence, knowing that they would be so used ; or who has wittingly aided or assisted the author or authors of the crime or offence in any acts preparatory to, or facilitating its perpetration, or in its execution. . . ."

Article 4 of the French Ordinance of 28th August, 1944, lays down that " Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices insofar as they have organised or tolerated the criminal acts of their subordinates."

All the accused in the *Wagner Trial* except Grüner, who was charged with premeditated murder, were charged with complicity in that crime. Consequently a large proportion of the questions put by the President to the Judges in the Wagner trial enquired whether the accused had been accomplices in the commission of the various acts alleged. The Judges were asked whether Wagner had been an accomplice, " in abuse of authority or power," in the passing of the illegal sentences alleged in the case, and in the shooting of the prisoners of war. The Judges were also asked whether Röhn, in like manner, had been an accomplice in the latter crime. Some of the accused were found guilty of having been accomplices in premeditated murder, and one was found guilty of having actually committed premeditated murder.(1)

(v) Complicity in crimes is also expressly made punishable by Article 4 of the Norwegian War Crimes Law(2) and by Netherlands war crimes law,(3) while rules relating to complicity have been applied in trials of war criminals by the courts of other countries.(4)

(vi) In the *Essen Lynching Case*, as stated above, an accused was found guilty on the grounds of having failed to intervene to protect prisoners of war under his care. Of crimes of omission in general, it may be said that the extent of liability depends upon the extent of the duty to act which international law imposes in the circumstances of the case. Examples of the operation of this rule are provided by cases of the responsibility of commanders who take no action to prevent offences from being committed by their troops(5) and by the cases in which accused were found guilty of criminal neglect of children placed under their care.(6)

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(1) Vol. III, pp. 24, 40–42 and 94–95. For further examples from the French courts see Vol. VII, pp. 70–2, Vol. VIII, p. 21 (apparently) and 31–3.

(2) Quoted on p. 89.

(3) See Vol. XI, pp. 97–8.

(4) For a dictum by the Polish Supreme National Tribunal on responsibility for incitement see Vol. XIII, p. 116.

(5) See pp. 62–76.

(6) See p. 61.

(vii) In connection with liability for crimes against peace, sub-paragraph (*f*) of Article II. 2 of Control Council Law No. 10, quoted above[1] is of interest, since it makes a special provision, separate from those made in sub-paragraphs (*a*)—(*e*), for such liability which appears to render automatically guilty of crimes against peace anyone who " held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or Satellites or held high position in the financial, industrial or economic life of any such country." In practice, however, Tribunals acting under Law No. 10 have not availed themselves of the wide scope of this provision in trying persons accused of crimes against peace and have instead evolved a body of rules on this crime which, briefly, require knowledge and effective participation as pre-requisites of guilt.[2]

(viii) The Judgment delivered in the *Flick Trial* includes the following statement :

> " One who knowingly *by his influence and money contributes to the support thereof* must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes. So there can be no force in the argument that when, from 1939 on, these two defendants were associated with Himmler and through him with the S.S., they could not be liable because there had been no statute nor judgment declaring the S.S. a criminal organisation and incriminating those who were members *or in other manner contributed to its support.*"[3]

At first sight it may appear that the Tribunal is here laying down a rule relating to *complicity* in membership of criminal organisations according to which an accused may be found guilty without having actually been a member of a criminal organisation. A glance at the indictment reveals, however, that there were two counts involved in the trial which in some way concerned criminal organisations and that only one of these two counts had been brought against *both* the accused referred to in the quotation (Flick and Steinbrinck). This, the fourth count, charged not pure membership of criminal organisation (as did the fifth, which was brought against Steinbrinck alone) but a wider type of support of *specific criminal activities* on the part of the S.S., *such support amounting to the committing of war crimes and crimes against humanity on the part of these two accused.*[4] Both accused were found guilty under this count, and Steinbrinck was found guilty under Count V, charging membership.[5]

B. CATEGORIES OF CRIMINALS

In most systems of criminal law it is of little general interest to examine the possible criminal liability of different occupational groups within a population. Subject to certain exceptions in the case of special categories

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(1) See p. 52.

(2) See pp. 142–7.

(3) Vol. IX, p. 29. Italics inserted.

(4) See Vol. IX, p. 5.

(5) It has been suggested on pp. 98–9 that the law relating to membership in criminal organisations is in essence an application of the principle of joint responsibility for crimes committed in pursuance of a common criminal design. It may be though that the finding of guilty against the accused Flick and Steinbrinck under Count IV is another application of that principle, *formal " membership " of the organisation in this instance not being involved.*

such as minors or lunatics, all persons are usually equally bound by the general provisions of the applicable criminal law. With the international criminal law as it has developed in recent years the position is different. In many instances rules have developed in relation to particular categories such as commanding generals and staff officers. Furthermore to itemise the different categories of persons who have been found guilty of war crimes and related offences is important in view of the argument sometimes previously advanced(1) that only military personnel could be held so guilty. Those actually found so guilty have included not only soldiers, but civilians coming within the categories of administrators, political party officials, industrialists, judges, prosecutors, doctors, nurses, prison wardens, and concentration camp inmates. Soldiers held guilty have included not only the rank and file, but high-ranking officers and chiefs of staff. It is clear that the mere fact of being a civilian affords no protection whatever to a charge based upon international criminal law. In an early British trial the *Essen Lynching Case* civilians appeared among persons found guilty of being concerned in the killing of three British prisoners of war.(2) These accused were of no particular known vocation ; indeed their calling was irrelevant.

(i) PARTY OFFICIALS AND ADMINISTRATORS. As an example of the guilt of political party officials and civilian administrators for war crimes, reference may be made to the trial of Robert Wagner, Gauleiter and Head of the Civil Government of Alsace during the Occupation, and six others, by a Permanent Military Tribunal at Strasbourg, 23rd April—3rd May, 1946, and the French Court of Appeal, 24th July, 1946.(3) Those found guilty included Wagner himself, and an ex-deputy Gauleiter of Alsace, two ex-members of the Civil Administration of Alsace, and the ex-Kreisleiter of Thann. Most of the accused found guilty of war crimes or crimes against humanity in the *Justice Trial* were ex-members of the Reich Ministry of Justice and were tried mainly for their acts as such.(4)

(ii) INDUSTRALISTS AND BUSINESS MEN. In the *Zyklon B Case* two German industrialists, undoubtedly civilians, were sentenced to death as war criminals for having been instrumental in the supply of poison gas to concentration camps, knowing of its use there in murdering allied nationals.(5)

Other trials involving business men for crimes committed as such, irrespective of official connections, are the *Flick*, *I.G. Farben*, and *Krupp Trials*. In these proceedings the Defence denied that such private individuals, having no official functions, could be found guilty of crimes under international law, while the Prosecution successfully claimed that they could be held so guilty.(6)

The Judgment in the *Flick Trial* includes the following words :

> " Except as to some of Steinbrinck's activities the accused were not officially connected with Nazi Government, but were private citizens engaged as business men in the heavy industry of Germany. . . .

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(1) For instance by the Defence in the *Belsen Trial* ; see Vol. II, pp. 72, 105 and 152.
(2) See Vol. I, pp. 88–92. Compare Vol. IX, pp. 65–6.
(3) See Vol. III, pp. 23–55, especially 24–27.
(4) See Vol. VI, pp. 1–110, especially 10–26 and 62. Compare Vol. XIII, pp. 136–7.
(5) See Vol. I, pp. 93–103.
(6) See Vol. X, pp. 168–172.

"The question of the responsibility of individuals for such breaches of international law as constitute crimes, has been widely discussed and is settled in part by the judgment of the I.M.T. It cannot longer be successfully maintained that international law is concerned only with the actions of sovereign States and provides no punishment for individuals...

"But the International Military Tribunal was dealing with officials and agencies of the State, and it is argued that individuals holding no public offices and not representing the State, do not, and should not, come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender *in propria persona*. The application of international law to individuals is no novelty. (See *The Nuremberg Trial and Aggressive War*, by Sheldon Glueck, Chapter V, pp. 60–7 inclusive, and cases there cited.) There is no justification for a limitation of responsibility to public officials."(1)

Parts of these passages were cited with approval in the *I.G. Farben Judgment*(2) while the judgment delivered in the *Krupp Trial* states, *inter alia*, that: "The laws and customs of war are binding no less upon private individuals than upon government officials and military personnel. In case they are violated there may be a difference in the degree of guilt, depending upon the circumstances, but none in the fact of guilt."(3)

(iii) JUDGES. Many of the accused found guilty of war crimes in the trials reported in Volume V(4) were held responsible for offences committed as Chief Judge, Judge or Legal Member of courts which passed unjustified sentences upon allied victims, such sentences being carried out. In the *Wagner Trial* the accused Huber who had been President of the Special Court at Strasbourg, was sentenced (in his absence) to death, having been found guilty of complicity in the murder of 14 victims, on whom he had passed unjustified death sentences which were carried out.(5) Again, in the *Justice Trial*, Judges appeared among the accused and were found guilty of war crimes or crimes against humanity committed by them in their capacity as judges.(6) In the *Latza Trial*, Judge Schei of the Norwegian Supreme Court pointed out that the fact that a war crime had been committed by an enemy citizen in his capacity as judge did not mean that such a crime was beyond the scope of the Norwegian law on war crimes.(1)

(1) See Vol. IX, pp. 17–18.
(2) Vol. X, p. 47.
(3) Vol. X, p. 150. Regarding a British Trial which further illustrates the responsibility for the welfare of prisoners of war employed in factories of civilians in charge of such establishments, see Vol. X, pp. 167–8. Compare Vol. XI, p. 51. The Tribunal acting in the *Krupp Trial* applied the usual rules relating to complicity in judging the responsibility of the accused: "The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient . . ." (See Vol. X, p. 150).
(4) See Vol. V, pp. 77–78.
(5) See Vol. III, pp. 27, 31, 32 and 42.
(6) See Vol. VI, pp. 22–26, 62 and 76.
(7) See Vol. XIV, p. 63.

(iv) PROSECUTORS. The *Wagner Trial*, the *Justice Trial* and the trials reported in Volume V are also authorities for assessing the possible responsibility of prosecutors for war crimes and crimes against humanity involved in the passing of false sentences which are carried out.(1) A study of the *Wagner Trial* and of the trials reported upon in Volume V showed that the courts and the confirming authorities have been less willing to punish persons accused of committing war crimes purely in the capacity of a prosecutor than they have been in the case of judges. This may arise out a feeling that, while a judge has a duty to be impartial, a prosecutor is of course expected to do his best, within certain limits, to secure a conviction. It may also be the result of a feeling that the acts of a prosecutor are more remote from the carrying out of sentence than are those of a judge.

An offender cannot rely upon the fact that some intervening cause may upset his purposes, however, and, in finding Lautz and Joel guilty, the Tribunal in the *Justice Trial* clearly held that the argument based on lack of causation must fail. Its decision is an indication that public prosecutors can be found guilty of war crimes and crimes against humanity for acts performed by them when acting as such.

(v) DOCTORS AND NURSES. In the *Hadamar Trial* civilian personnel of a medical institution were found guilty of unlawfully putting to death Russian and Polish nationals.(2) They included a doctor and nurses. Doctors were found guilty of war crimes and crimes against humanity also in the *Trial of Karl Brandt and others* by a United States Military Tribunal in Nuremberg,(3) and both doctors and children's nurses in the *Velpke Children's Home Case* and the *Trial of Georg Tyrolt and others* by a British Military Court, Helmstedt, 20th May–24th June, 1946.(4)

(vi) EXECUTIONERS. Executioners of Allied victims have been found guilty of a war crime if they knew that no fair trial had been accorded to the victims or (perhaps) if it was not reasonable for them to assume that such a trial had been accorded.(5) In the trial of Oscar Hans by a British Military Court, Hamburg, 18th–25th August, 1948,(6) the Judge Advocate made the question of the actual knowledge of the executioner the only test : " If he did not know that there had not been a legal trial, again let him be acquitted ".

(vii) CONCENTRATION CAMP INMATES. In the *Belsen Trial*, some of the accused found guilty were members of the S.S., which could be regarded as a military formation, but others were inmates of the camp and possessed an undisputable civilian status.(7) There are many other instances of such persons being held guilty of war crimes.

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(1) See Vol. III, pp. 27, 31–32 and 42, Vol. V, p. 78, and Vol. VI, pp. 85–86.

(2) See Vol. I, pp. 53–54.

(3) See Vol. VII, pp. 49–53.

(4) See Vol. VII, pp. 76–81. In the former trial the Court inflicted a term of ten years' imprisonment on a Dr. Demmerick, who had never received official instructions to tend the babies in a children's home, but who, according to the Prosecution, had by his acts " assumed the care of those children in place of their mothers ".

(5) See Vol. I, pp. 72 and 76 and Vol. V, pp. 79–81.

(6) Not previously treated in these Volumes.

(7) See Vol. II, pp. 153–4.

(viii) MILITARY OFFICERS AND OTHER SUPERIORS. The question of the extent of responsibility of superiors, particularly superior officers, for the offences of their subordinates has been the subject of comment at several points in these Volumes.(1)

There have been many trials in which an officer who has been shown to have ordered the commission of an offence has been held guilty of its perpetration.

One example among many is the trial of General Anton Dostler, by a United States Military Commission, Rome, 8th–12th October, 1945, in which the accused was found guilty of having ordered the illegal shooting of fifteen prisoners of war.(2) Another example is the trial of Generals Mueller and Braeuer by a Greek Court Martial at Athens ;(3) these accused were found guilty of ordering others to commit war crimes, and were sentenced to death.

While the principle of the responsibility of such officers is not in doubt, it is nevertheless interesting to note that it has even been specifically laid down in certain texts which have been used as authorities in war crime trials. For instance, paragraph 345 of the United States Basic Field Manual, F.M. 27–10, in dealing with the admissibility of the defence of Superior Orders, ends with the words : " . . . The person giving such orders may also be punished."

Similarly the Judge Advocate acting in the Trial of Kurt Meyer by a Canadian Military Court at Aurich advised the court that if an officer, though not a participant in or present at the commission of a war crime incited, counselled, instigated or procured the commission of a war crime, and, *a fortiori*, if he ordered its commission, he might be punished as a war criminal(4), and the judgment delivered in the *High Command Trial* contains a number of examples of this well-established responsibility of a superior for offences ordered by him.(5)

The more interesting question, however, is the extent to which a commander of troops can be held liable for offences committed by troops under his command which he has not been shown to have ordered, on the grounds that he ought to have used his authority to prevent their being committed or their continued perpetration, or that he must, taking into account all the circumstances, be presumed to have either ordered or condoned the offences. The extent to which such liability can be admitted is not easy to lay down, either legally or morally. The principles governing this sphere of international law have not yet crystallised, but at least it can be said that it is not in every instance necessary to prove explicitly that the commander actually ordered the offences, and it has frequently been laid down in enactments and in judicial decisions that a commander has a duty to prevent crimes from being committed by his subordinates.

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

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(1) See Vol. IV, pp. 83–96, Vol. V, pp. 78–79, Vol. VI, p. 87, note 2, Vol. VII, pp. 61–64, Vol. VIII, pp. 88–89, Vol. IX, p. 54, Vol. XI, pp. 70–1 and Vol. XII, pp. 105–12.

(2) See Vol. I, pp. 22–34.

(3) Not previously treated in this series.

(4) Vol. IV, p. 107.

(5) See Vol. XII, p. 106.

responsible for such offence of his troops as he has not been explicitly proved to have ordered. The relevant trials and municipal law enactments may be classified under the following two categories :

(i) 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.

(*a*) TRIALS AND PROVISIONS RELEVANT TO THE QUESTION OF THE BURDEN OF PROOF

Of interest in connection with the shifting of the burden of proof are Regulations 10(3), (4) and (5) of the War Crimes Regulations (Canada). These Regulations lay down that, in certain stated circumstances, the proof of offences committed by groups of persons shall constitute *prima facie* evidence of responsibility on the part of certain individuals. Of these provisions, Regulations 10(3), of which the effect is substantially the same as that of Regulation 8(ii) of the British Royal Warrant,[1] runs as follows :

" Where there is evidence that a war crime has been the result of concerted action upon the part of a formation, unit, body, or group of persons, evidence given upon any charge relating to that crime against any member of such a formation, unit, body, or group may be received as *prima facie* evidence of the responsibility of each member of that formation, unit, body, or group for that crime ; in any such case all or any members of any such formation, unit, body, or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the court."

The Canadian Regulations 10(4) and (5) make the following provisions :

" (4). Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as *prima facie* evidence of the responsibility of the commander for those crimes.

" (5). Where there is evidence that a war crime has been committed by members of a formation, unit, body, or group and that an officer or non-commissioned officer was present at or immediately before the time when such offence was committed, the court may receive that evidence as *prima facie* evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body, or group, for that crime."

It is clear that these provisions do not purport to define the extent to which a commander is legally liable for offences committed by the troops under

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[1] See p. 92.

his command ; they relate to matters of evidence and no substantive law. Furthermore, they provide discretionary powers and are not mandatory in nature.(1)

During the Trial of Kurt Meyer by a Canadian Military Court at Aurich the Court heard discussion of the effect of Regulation 10 (3), (4) and (5).(2) The Judge Advocate advised the Court that by virtue of these Regulations, it was unnecessary, as far as the second, fourth and fifth charges made in the trial were concerned, for the Prosecution to establish by evidence that the accused ordered the commission of a war crime, or verbally or tacitly acquiesced in its commission, or knowingly failed to prevent its commission. The facts proved by the Prosecution must, however, be such as to establish the responsibility of the accused for the crime in question or to justify the Court in inferring such responsibility. The secondary onus, the burden of adducing evidence to show that he was not in fact responsible for any particular war crime then shifted to the accused. All the facts and circumstances must then be considered to determine whether the accused was in fact responsible for the killing of prisoners referred to in the various charges. The rank of the accused, the duties and responsibilities of the accused by virtue of the command he held, the training of the men under his command, their age and experience, 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.(3)

The Judge Advocate also made some remarks on the proving by circumstantial evidence of the giving of a *direct order*. Dealing with the third charge, the Judge Advocate said : " There is no evidence that anyone heard any particular words uttered by the accused which would constitute an order, but it is not essential that such evidence be adduced. The giving of the order may be proved circumstantially ; that is to say, you may consider the facts you find to be proved bearing upon the question whether the alleged order was given, and if you find that the only reasonable inference is that an order that the prisoners be killed was given by the accused at the time and place alleged, and that the prisoners were killed as result of that order, you may properly find the accused guilty of the third charge." He drew attention, however, to paragraph 42 of Chapter VI of the *Manual of Military Law* regarding circumstantial evidence which states : " . . . before the Court finds an accused person guilty on circumstantial evidence, it must be satisfied not only that the circumstances are consistent with the accused having committed the act " (that is, said the Judge Advocate, that he gave the order) " but that they are inconsistent with any other rational conclusion than that the accused was the guilty person."(4)

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(1) Vol. IV, pp. 128–129.

(2) Insofar as *Counsel* touched upon these matters, their remarks are set out in Vol. IV, pp. 110–112. The arguments quoted in Vol. IV, pp. 123–124, from the *Trial of Kurt Student* by a British Military Court also deal with questions of evidence.

(3) Vol. IV, p. 108. During the trial proceedings, a discussion arose as to the extent to which evidence not directly connected with the offences alleged on the Charge Sheet could be rendered admissible by Regulation 10(4). (See Vol. IV, pp. 111–2).

(4) Vol. IV, p. 108.

The Trial of Karl Rauer and Six Others by a British Military Court at Wuppertal seems to suggest that responsibility may be inferred from surrounding circumstances, including the prevailing state of discipline in an army.(1) It is also worthy of note that the participation in offences of officers standing in the chain of command between an accused commander and the main body of his troops may be regarded as some evidence of the responsibility of the commander for the offences of those troops.(2) Regulation 10 (5) of the Canadian Regulations makes it possible for a Court to regard even the *presence* of an officer at the scene of the war crime, either at or immediately before its commission, as *prima facie* evidence of the responsibility not merely of the officer but also of the commander of the formation, unit, body or group whose members committed the crime.(3) Regulation 8 (ii) of the British Royal Warrant, like Regulation 10 (3) of the Canadian Regulations, may be applied so as to enable suitable evidence to be introduced as *prima facie* evidence of a commander's responsibility in the same way as it may be as evidence of the responsibility of any other member of a unit or group.(4)

Also of interest in connection with the question of circumstantial evidence as indicating that a superior *must be taken to have* ordered or connived at offences on the part of his subordinates is a passage from the Judgment of the International Military Tribunal for the Far East :

> " During a period of several months the Tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all theatres of war on a scale *so vast, yet following so common a pattern* in all theatres that *only one conclusion is possible*— the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces."(5)

(*b*) TRIALS AND PROVISIONS RELEVANT TO THE QUESTION OF SUBSTANTIVE LAW

It is clearly established that a responsibility may arise in the absence of any direct proof of the giving of an order for the commission of crimes.

The principle that a duty rests on a commander to prevent his troops from committing crimes, the *omission* to fulfil which would give rise to liability, is illustrated by a number of trials, of which three trials by United States Military Commissions in the Far East and various trials by Australian

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(1) Vol. IV, pp. 113–117.

(2) Compare the words of the Commission which tried Yamashita, set out on pp. 34 and 35 of Vol. IV.

(3) See p. 63.

(4) See p. 92. For a discussion during the *Belsen Trial* of the application of Regulation 8(ii) and of the possible operation against Kramer, Kommandant of Belsen Concentration Camp, reference should be made to pp. 140–141 of Vol. II.

(5) Official transcript of the *Judgment of the International Military Tribunal for the Far East*, p. 1001. (Italics inserted).

Stress was also placed, in the discussions referred to on p. 64 footnote 2, and in Regulation 10(4) quoted above, on the repeated occurrence of offences by troops under one command as *prima facie* evidence of the responsibility of the commander for those offences. For an example of the same line of thought in the *Yamashita Trial* see pp. 17, 34 and 35 of Vol. IV, and a comment on p. 94 of that Volume.

Military Courts have been described or referred to on pages 86–87 of Volume IV.(1) The Judgment of the majority of the United States Supreme Court on the *Yamashita Case* included these words :

> " It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war [as had been charged against Yamashita] are recognised in International Law as violations of the Law of War. Articles 4, 28, 46 and 47, Annex to Fourth Hague Convention, 1907, 36 Stat. 2277, 2296, 2303, 2306–7. But 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 charge 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.
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> " 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 its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.
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> " This is recognised 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 fulfil in order to be accorded the rights of lawful belligerents, that it must be ' commanded by a person responsible for his subordinates.' 36 Stat. 2295. 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.' 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2992, 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

(1) One of the Australian trials mentioned, that of Babu Masao has been more fully reported in Vol. XI, at pp. 56–61. See especially pp. 57–60 where, *inter alia*, some further examples of this type of responsibility are set out.

Fourth Hague Convention, 36 Stat. 2306, 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 penalised by our own military tribunals. A like principle has been applied so as to impose liability on the United States in international arbitrations. *Case of Jenaud,* 3 Moore, International Arbitrations, 3000; *Case of 'The Zafiro,'* 5 Hackworth, Digest of International Law, 707."(1)

During the *Belsen Trial*, the Judge Advocate, speaking of the allegations regarding Kramer's actions at Belsen, said that he did not think it mattered very much whether he acted wilfully or merely with culpable neglect; the question was whether the Prosecution had proved that Kramer did not carry out his duties as far as he was able to do and that he had caused at any rate physical suffering upon Allied nationals by reason of his actions? Further, there was no charge against Dr. Klein of any deliberate acts of cruelty, and it was for the Court to consider whether Klein had a fair opportunity to do anything with regard to the conditions in Belsen and whether he so failed to act that the Court would have to find him guilty of the charge. What had to be decided was whether, in the time when he was really responsible and could improve matters, he failed either deliberately or in a culpable way deserving of punishment to do what he should have done.(2)

The principles governing this type of liability, however, are not yet settled. The question seems to have three aspects.

(i) How far can a commander be held liable for not taking steps before the committing of offences, to prevent their possible perpetration?

(ii) How far must he be shown to have known of the committing of offences in order to be made liable for not intervening to stop offences already being perpetrated?

(iii) How far has he a duty to discover whether offences are being committed?

Certain relevant provisions of municipal law exist. Thus, Article 4 of the French Ordinance of 28th August, 1944, Concerning the Suppression of War Crimes, provides that:

"Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates."(3)

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(1) Vol. IV, pp. 43–44 (Italics inserted). For the dissenting opinions on this point see pp. 51–54, 57 and 58–61 of that Volume.

(2) Vol. II, p. 120.

(3) Vol. III, p. 94.

In a similar manner, Article 3 of Law of 2nd August, 1947, of the Grand Duchy of Luxemberg, on the Suppression of War Crimes, reads as follows :

> " Without prejudice to the provisions of Articles 66 and 67 of the *Code Pénal*, the following may be charged, according to the circumstances, as co-authors or as accomplices in the crimes and delicts set out in Article 1 of the present Law : superiors in rank who have tolerated the criminal activities of their subordinates, and those who, without being the superiors in rank of the principal authors, have aided these crimes or delicts."

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

> " Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals."(1)

A special provision was also made in the Netherlands relating to the responsibility of a superior for war crimes committed by his subordinates, The Law of July, 1947, adds *inter alia*, the following provision to the Extraordinary Penal Law Decree of 22nd December, 1943 :

> " *Article* 27 (*a*) (3) : Any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment as laid down in paragraphs 1 and 2."

A similar provision is contained in Article 9 of the N.E.I. Statute Book Decree No. 45 of 1946, which reads :

> " He whose subordinate has committed a war crime shall be equally punishable for that war crime, if he has tolerated its commission by his subordinate whilst knowing, or at least must have reasonably supposed, that it was being or would be committed."(2)

It will be seen that the French enactment mentions only crimes " organised or tolerated," the Luxembourg provision only those " tolerated " and the Netherlands enactments only those deliberately permitted or knowingly tolerated. A reference to an element of knowledge enters into the drafting of each of these three texts.

The Chinese enactment does not define the extent of the duty of commanders " to prevent crimes from being committed by their subordinates." but the extent to which the Chinese Courts have been willing to go in pinning responsibility of this kind on to 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. Here 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.(3)

It seems implicit in the Judge Advocate's words in the trial by a British Military Court at Wuppertal, 10th and 11th July, 1946, of General Victor Seeger that some kind of knowledge on the accused's part was necessary to

(1) Vol. XIV, p. 158.
(2) See Vol. XI, pp. 100–1.
(3) See Vol. IV, p. 88 and Vol. XIV, p. 7.

make him guilty,(1) and the three reports by British and Canadian trials contained in Volume IV also provide, *inter alia*, some evidence that an accused must have had knowledge of the offences of his troops.(2) Similarly, in the trial of Baba Masao by an Australian Military Court at Rabaul, the Judge Advocate advised the Court that " In order to succeed the prosecution must prove . . . that war crimes were committed as a result of the accused's failure to discharge his duties as a commander *either by deliberately failing in his duties or by culpably or wilfully disregarding them*, not caring whether this resulted in the commission of a war crime or not ".(3)

A study of a passage from the judgment delivered in the *Trial of Field Marshal Erhard Milch* by a United States Military Tribunal at Nuremberg, from 2nd January, 1947, to 17th April, 1947, in which the Tribunal dealt with the accused's alleged responsibility under Count Two, has shown that the accused was held not guilty of being implicated in the conducting of the illegal experiments referred to because the Tribunal was not satisfied that he knew of their illegal nature ; no duty to find whether they had such a nature is mentioned.(4) Similarly the type of liability described by the Judge Advocate in the Trial of Frans Schonfeld and nine others by a British Military Court, Essen, 11th–26th June, 1946, assumed knowledge on the part of the accused : " Criminal responsibility might also arise, in the case of a person occupying a position of authority, through culpable negligence, for example, if Harders had reasonable grounds for supposing that his men were going to indulge in committing a war crime against their opponents—whether they be Dutch Resistance opponents or Allied airmen opponents—and in fact they did so, and he failed to take all reasonable steps to prevent such an occurrence. I think, if such a doctrine were to be invoked in this case, the court, before acting upon it to the detriment of Harders would require to be satisfied that Hardegan, prior to leaving for Tilburg on 9th July, 1944, had apprised Harders that it was their intention to murder any suspicious characters they found. In any event, the court would have to be satisfied that the crimes alleged were the natural result of the negligence of the accused ; in other words, that a direction from Harders, given at the correct time, would have prevented any unjustifiable killing taking place."(5)

Among the accused in the trials reported on in Volume V there appeared two higher officers alleged to have had an overall responsibility for certain purported proceedings taken against Allied victims by persons under their command. Reference should be made in this connection to the evidence relating to Major General Shigeru Sawada(6) and General Tanaka Hisakasu.(7) Both were found guilty, but the Confirming Authority disapproved the sentences passed on the second accused. It will be recalled that both generals were away from the scene at the time when the purported trials were held. Whereas Shigeru Sawada was *personally informed of the proceedings* on his return, however, and also admitted having had jurisdiction

(1) See Vol. IV, pp. 88–89.
(2) See Vol. IV, p. 89.
(3) Vol. XI, p. 60.
(4) See Vol. IV, pp. 89–91 and Vol. VII, pp. 61–63.
(5) Vol. XI, pp. 70–1.
(6) See pp. 1, 4–5 and 8 of Vol. V.
(7) See pp. 66, 68 and 70 of Vol. V.

over the prison where certain of the victims had been incarcerated under the conditions described on p. 6 of Volume V, Tanaka Hisakasu did not return to his command headquarters until after the execution of the victim and *was not proved to have known* in advance that the trial would not be fair or to have known or had reasonable grounds to believe that, if the prisoner should be convicted, the execution of the sentence would be carried out without his consent, which was required by Japanese law.(1)

In the judgment in the *Pohl Trial*, the accused Erwin Tschentscher, who had been a battalion commander of a supply column, and a company commander, on the Russian Front during 1941, was held not responsible for the murder of Jewish civilians and other non-combatants in Poland and the Ukraine by members of his commands at that time. The Tribunal found that he had no " actual knowledge " of these offences, and added that the decision of the Supreme Court in the *Yamashita Trial* " does not apply to the defendant Tschentscher ", for, " conceding the evidence of the Prosecution to be true as to the participation of subordinates under his command, such participation by them was *not of sufficient magnitude or duration* to constitute *notice* to the defendant, and thus give an opportunity to control their actions. Therefore, the Tribunal finds and adjudges that the defendant Tschentscher is not guilty of participating in the murders and atrocities committed in the Russian campaign as alleged by the prosecution."(2)

The Judgment in the *High Command Trial* stated that a high commander " has the right to assume that details entrusted to responsible subordinates will be legally executed ". Criminal responsibility does not automatically attach to him for all acts of his subordinates. There must be an unlawful act on his part or a failure to supervise his subordinates constituting criminal negligence on his part. Later the Tribunal stated explicitly that " the commander must have knowledge of these offences and acquiesce or participate or criminally neglect to interfere in their commission and that the offences committed must be patently criminal ".(3) A similar test was applied to offences committed by units taking orders from other authorities : " The sole question then as to such defendants in this case is whether or not they knew of the criminal activities of the Einsatzgruppen or the Security Police and S.D. and neglected to suppress them. . . . When we discuss the evidence against the various defendants, we shall treat with greater detail the evidence relating to the activities of the Einsatzgruppen in the commands of the various defendants, and to what extent, if any, such activities were known to and acquiesced in or supported by them."(4)

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(1) Vol. V, pp. 78–79.

(2) Vol. VII, pp. 63–64. (Italics inserted). In the *Flick Trial*, the accused Flick was shown to have had " knowledge and approval " of the acts of a subordinate, Weiss, for which he was held jointly responsible : See Vol. IX, p. 54.

(3) It will be noted that the last nine words of the passage quoted add a further restriction to the commander's responsibility, one not recognised in other trials reported upon in these volunes, in which trials it was assumed that if the commander knew that his subordinates were carrying out acts which were in fact illegal he would not then be able to plead that he did not know that such acts *were* illegal.

(4) See Vol. XII, pp. 110–111, where other examples of the Tribunal's attitude to this question of knowledge are set out or referred to.

It appears however that, in suitable circumstances, the requirement of knowledge may be dispensed with. On certain occasions(1) the Tribunal laid down that accused " *should have had* . . . knowledge " of reports made to them of offences committed, and the Tribunal adopted " as a correct statement of law " the opinion of the Tribunal in the *Hostages Trial* that :

> " Want of knowledge of the contents of reports made to him [i.e. to the Commanding General] is not a defence. Reports to Commanding Generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf."(2)

Some support is given, in fact, as will be shown, to the view that a commander has a duty, not only to prevent crimes of which he has knowledge or which seem to him likely to occur, but also to take reasonable steps to discover the standard of conduct of his troops, and it may be that this view will gain ground.

The Supreme Court of the United States 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 term " appropriate in the circumstances " serves to underline the remark made previously 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 Commission which tried Yamashita seemed to assume that he had had a duty to " *discover* and control " the acts of his subordinates:

> " It is absurd . . . to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, 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."(3)

The majority judgment of the Supreme Court would appear to have left open the possibility that, in certain circumstances, such a duty could exist. In dissenting, Mr. Justice Murphy expressed the opinion that : " Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different".

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(1) Quoted in Vol. XII, pp. 111–112.

(2) See Vol. VIII, p. 71 and Vol. XII, p. 112. In the notes to the *Yamashita Trial* it was suggested that : " Short of maintaining that a Commander has a duty to *discover* the state of discipline prevailing among his troops, Courts dealing with cases such as those at present under discussion may in suitable instances have regarded means of knowledge as being the same as knowledge itself. This presumption has been defined as follows :

> " ' Means of knowledge and knowledge itself are, in legal effect, the same thing where there is enough to put a party on inquiry. Knowledge which one has or ought to have under the circumstances is imputed to him. . . . In other words, whatever fairly puts a person on inquiry is sufficient notice where the means of knowledge are at hand ; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. A person has no right to shut his eyes or his ears to avoid information, and then say that he had no notice ; he does wrong not to heed to " signs and signals " seen by him.' (39 Am. Jur., pp. 236–237, Sec. 12.)" (Vol. IV, pp. 94–95.)

(3) Vol. IV, p. 35.

Certain passages from the judgment of the United States Military Tribunal which tried Karl Brandt and Others at Nuremburg, from 9th December, 1946, to 20th August, 1947 (*The Doctors' Trial*), which have been quoted on pages 91–93 of Volume IV, indicate that the Military Tribunal which conducted that trial assumed that certain accused were under a duty to make active investigations to find whether certain experiments made by their subordinates were legal, especially in the sense that the subjects had given their voluntary consent. The Tribunal stated, *inter alia* : " The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs, or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity".

Elsewhere, the Judgment in the *Doctors' Trial* stated that : " Occupying the position he did and being a physician of ability and experience, the duty rested upon him [Karl Brandt] to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps," and it may be that the fact that Milch was not " a physician of ability and experience," and the circumstance that " His position involved vast responsibilities covering a wide industrial field, and there were certainly countless subordinate fields within the Luftwaffe of which he had only cursory knowledge," including the conduct of medical experiments, go far towards explaining why his judges excused Milch of a duty to discover whether the experiments carried out by persons within his general command were of a legal character.(1)

Speaking of one of the accused before it, the Tribunal acting in the *Pohl Trial* said :

> " Mummenthy's assertions that he did not know what was happening in the labour camps and enterprises under his jurisdiction does not exonerate him. *It was his duty* to know."(2)

The Judgment delivered in the *Tokyo Trial* includes an interesting passage on responsibility for offences against prisoners of war which, apart from its general interest, is significant as showing that the International Military Tribunal of the Far East also was willing to postulate *a duty* on the part of a superior *to find out* whether offences were being committed by his subordinates :

> " In general the responsibility for prisoners held by Japan may be stated to have rested upon :
>
> (1) Members of the Government ;
>
> (2) Military or Naval Officers in command of formations having prisoners in their possession ;
>
> (3) Officials in those departments which were concerned with the well-being of prisoners ;
>
> (4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.

(1) Vol. VII, p. 63.
(2) Italics inserted.

" It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners if :

(1) They fail to establish such a system ;

(2) Having established such a system, they fail to secure its continued and efficient working.

" Each of such persons has *a duty to ascertain* that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter *neglecting to learn* of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance.

" Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for, and conventional war crimes be committed, unless :

(1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or,

(2) They are at fault *in having failed to acquire such knowledge.*

" If such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his office required or permitted him to take any action to prevent such crimes. On the other hand, it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether these assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

" A member of a Cabinet which, collectively, as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet, thereby continuing to participate in its collective responsibility for protection of prisoners, he willingly assumes responsibility for any ill-treatment in the future.

" Army or Navy Commanders can, by order, secure proper treatment and prevent ill-treatment of prisoners. So can Ministers of War and

of the Navy. If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.

"Departmental officials having knowledge of ill-treatment of prisoners are not responsible for reason of their failure to resign ; but if their functions included the administration of the system of protection of prisoners and if they had or should have had knowledge of crimes and did nothing effective, to the extent of their powers, to prevent their occurrence in the future, then they are responsible for such future crimes,"(1)

The Tribunal acting in the *High Command Trial* dealt with, *inter alia*, the position of a commanding officer who knows that men under his command are committing violations of international law in pursuance of orders from his superiors passed down independently of him. While admitting the difficulty of his position,(2) the Tribunal held that "by doing nothing he cannot wash his hands of international responsibility. His only defence lies in the fact that the order was from a superior, which Control Council Law No. 10 declares constitutes only a mitigating circumstance."(3)

The Tribunal was willing to admit that a commanding General's responsibility under international law for conditions in territory under the occupation of his troops could to some extent be affected by his status under the military and other municipal laws of his country.(4) The responsibility of commanders of occupied territories was said to be fixed, *inter alia*, by "the authority of the commander which has been delegated to him by his own government. . . . It must be borne in mind that a military commander, whether it be of an occupied territory or otherwise, is subject both to the orders of his military superior and the State itself as to his jurisdiction and functions." The *Yamashita Case* was distinguished from the present on the grounds of a differing extent of authority permitted by the State to the accused involved.

In the Tribunal's opinion, however, the doctrine that a commander's governmental authorities may in effect relieve him of certain of his responsibility under international law has its limits : ". . . under international law and accepted usages of civilised nations" a military commander in an occupied area "has certain responsibilities which he cannot set aside or ignore by reason of activities of his own State within his area". Furthermore, the Tribunal seems to have felt that, while none of the accused had the

(1) Official Transcript of the *Judgment of the International Military Tribunal for the Far East*, pp. 29–32. (Italics inserted).
(2) See Vol. XII, p. 74.
(3) An application of this ruling by the Tribunal is described in Vol. XII, pp. 106–107.
(4) This possibility has not received attention in other reasoned Judgments reported in these volumes. The decision of the Supreme Court in the *Yamashita Case* laid down the duty of a commander to take such measures as were *within his power* and appropriate in the circumstances to protect prisoners of war and the civilian population (see Vol. IV, pp. 42–44). The Supreme Court did not use the words "within his authority" and would appear to have meant "within his physical power".

wide powers of a Yamashita, their authority was nevertheless very extensive. The accused would be responsible for all crimes committed by the Einsatzgruppen of the Security Police and S.D. of which they had knowledge and which they neglected to suppress.

The specific reference to the Einsatzgruppen arose from the fact that the Defence had asserted " that the executive power of field commanders did not extend to the activities of certain economic and police agencies which operated within their areas ". It will be recalled that the Tribunal before which the *Hostages Trial* was held expressed the same opinion as the present Tribunal and a part of the Judgment in that Trial was quoted, *inter alia*, by the Tribunal acting in the *High Command Trial* :

> " It is the duty of the commanding general in occupied territory to maintain peace and order, punish crime and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territory having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain S.S. units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent or approval of these defendants. But this cannot be a defence for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence."(1)

Further, it appears that, just as a commanding general has wide responsibilities under international law, so also is he allowed considerable latitude in the ways in which he fulfills these responsibilities ; the Tribunal held that " the duty imposed upon a military commander is the protection of the civilian population. Whether this protection be assured by the prosecution of soldiers charged with offences against the civilian population, or whether it be assured by disciplinary measures or otherwise, is immaterial from an international standpoint."(2)

The judgment delivered in the *Hostages Trial* has already been referred to in these pages on the question of the extent to which a commanding general in occupied territory may be held liable for the offences of troops under his command. It may be convenient to summarise the relevant passages.(3) Three points in particular are worthy of note : (*a*) a commander having executive authority over occupied territory—in effect the person on whom rests principally the obligations laid down in Section III (*Military Authority over the Territory of the Hostile State*) of Hague Convention No. IV of 1907 —shall not be able to plead that offences were committed, within the occupied territory under his authority, by persons taking orders from authorities other than himself, as the S.S. took orders directly from Himmler, and the same applies to subordinate commanders to whom executive powers have been delegated ; (*b*) such a commander—and indeed any commander—will

(1) See Vol. VII, pp. 69–70 and Vol. XII, pp. 107–110.
(2) See Vol. XII, p. 83.
(3) These are set out in Vol. VIII, pp. 69–70.

not usually be permitted to deny knowledge of the contents of reports made specially for his benefit ; and (*c*) a commanding general will usually be held liable for events during his temporary absence from headquarters which arise out of a " general prescribed policy formulated by him."

The judgment elsewhere reinforced the first principle by stating that a commanding general of occupied territory " cannot escape responsibility by a claim of a want of authority. The authority is inherent in his position as commanding general of occupied territory. The primary responsibility for the prevention and punishment of crime lies with the commanding general, a responsibility from which he cannot escape by denying his authority over the perpetrators." From this rule it follows that a commanding general cannot hide behind a " puppet government " and plead that he is not responsible for their acts ; the Tribunal applied this conclusion to the accused von Leyser who was commanding general of a corps area.(1) Elsewhere, the Tribunal repeated : " We must assert again, in view of the defendant's statement that the responsibility for the taking of reprisal measures rested with the divisional commanders and the Croatian government, that a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about."

(ix) STAFF OFFICERS

A comparison of the evidence relating to the accused Foertsch and von Geitner(2), two of the accused in the *Hostages Trial*, and the findings of the Tribunal upon them indicates the limits beyond which the Tribunal found it impossible to hold a chief of staff liable for the acts of the subordinates of his commander. The Tribunal took the view, for instance, that a chief of staff could not be held responsible for the outcome of his commander's orders which he approved from the point of view of form, and issued on the latter's behalf.

Of Foertsch the Tribunal concluded that " the nature of the position of the defendant Foertsch as Chief of Staff, his entire want of command authority in the field, his attempts to procure the rescission of certain unlawful orders and the mitigation of others, as well as the want of direct evidence placing responsibility upon him, leads us to conclude that the Prosecution has failed to make a case against the defendant. No overt act from which a criminal intent could be inferred, has been established.

> " That he had knowledge of the doing of acts which we have herein held to be unlawful under International Law cannot be doubted. It is not enough to say that he must have been a guilty participant. It must be shown by some responsible act that he was. Many of these acts were committed by organisations over which the Wehrmacht, with the exception of the commanding general, had no control at all. Many others were carried out through regular channels over his voiced objection or passive resistence. The evidence fails to show the commission of an unlawful act which was the result of any action, affirmative or passive, on the part of this defendant. His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal

(1) See Vol. VIII, pp. 72–74.
(2) For this evidence see Vol. VIII, pp. 42–43.

law. He must be one who orders, abets or takes a consenting part in the crime. We cannot say that the defendant met the foregoing requirements as to participation. We are required to say therefore that the evidence does not show beyond a reasonable doubt that the defendant Foertsch is guilty on any of the counts charged."

Von Geitner was also found not guilty, on the grounds of his not having been shown to have taken any consenting part in illegal acts, " coupled with the nature and responsibilities of his position and the want of authority on his part to prevent the execution of the unlawful acts charged."(1)

On the other hand, two trials reported in Volume V of this series have shown that a Chief of Staff may be held guilty of committing war crimes(2). Certainly the position of Chief of Staff provides no immunity upon its holder and the responsibility of such a person for war crimes must be judged upon the facts of each case. An examination of the relevant facts of the two trials mentioned above shows that the chiefs of staff who were held guilty took a closer and more willing and active part in the offences charged than did Foertsch and von Geitner.(3)

The question of the extent of responsibility of staff officers arose again in the *High Command Trial.* Here the Tribunal held(4) that the fact that Geitner and Foertsch were acquitted in the *Hostages Trial* did not signify that staff officers were absolved from all criminal responsibility for matters in which their commanding officer could be held responsible. The Tribunal regarded as sound the finding in the previous trial but held that " the facts in that case are not applicable to any defendant on trial in this case."

On the other hand the Tribunal ruled that " If the basic idea is criminal under international law, the staff officer who puts that idea into the form of a military order, either himself or through subordinates under him, or takes personal action to see that it is properly distributed to those units where it becomes effective commits a criminal act under international law " ; whereas the preparation, and approval as to form, of criminal orders, and the distribution of such orders, appeared among the duties of either Foertsch or von Geitner, who were nevertheless acquitted. It should be added, however, that the detailed legal drafting of these orders was in the hands of a legal department or officer outside the authority of the two accused named.(5)

A chief of staff cannot, apparently, be held guilty of crimes of omission as a commanding general may be.(6) " A failure to properly exercise command authority ", said the Judgment, " is not the responsibility of a chief of staff ".(7) The Tribunal pointed out that " it was of course the duty of a chief of staff to keep [his] commander informed of the activities which took place within the field of his command insofar at least as they were considered of sufficient importance by such commander ", but it appears from the context that the Tribunal regarded such duty as being one laid down by German military law and not one existing under international

(1) Vol. VIII, pp. 75–76.
(2) See Vol. V, p. 79.
(3) Compare Vol. V, pp. 62, 63, 67, 68 and 69 with pp. 42–43 of Vol. VIII.
(4) See Vol. XII, p. 80.
(5) See Vol. VIII, pp. 42–43.
(6) See p. 62.
(7) See Vol. XII, p. 81.

law.(1) If it were laid down by international law that a chief of staff must keep his commanding officer informed of certain matters then it would be possible for the chief of staff to be guilty of a war crime of omission, i.e. a failure to fulfil *his own duty* as a staff officer not his superiors " command authority " referred to above. The Tribunal's words do not, however, allow it to be said that a chief of staff may be guilty of such a war crime of omission.

This conclusion is borne out by other words of the Tribunal indicating that only positive action can make a chief of staff guilty : " In the absence of participation in criminal orders or their execution within a command, a chief of staff does not become criminally responsible for criminal acts occurring therein "(2)

The opportunity of a chief of staff to commit war crimes seems, in the opinion of the Tribunal, to arise from his power " to issue orders and directives in the name of his commander ", a power which varies widely in practice but which may allow sufficient exercise of initiative and discretion to involve the chief of staff in the commission of offences under the laws and usages of war.(3)

Extracts made in Volume XII from the Judgment of the Tribunal on the accused Woehler(4) seemed to indicate that a chief of staff may be held responsible for war crimes committed as a result of his orders if such orders are not " basic orders " such as " necessarily would be submitted to a commander-in-chief " but orders which " a chief of staff would normally issue of his own volition."

The fact that the making of a substantial contribution to the drafting of an illegal order (as distinct from approving it from the point of view of form) may make an accused criminally liable was shown by the passages from the Judgment dealing with the accused Lehmann (5) and Warlimont.(6)

The International Military Tribunal for the Far East had no hesitation in declaring a Chief-of-Staff responsible for war crimes, but it will be observed that the following passage from its Judgment indicates that the accused involved had been " in a position to influence policy " :

> " In October, 1944, Muto became Chief-of-Staff to Yamashita in the Philippines. He held that post until the Surrender. His position was now very different from that which he held during the so-called " Rape of Nanking ". He was now in a position to influence policy. During his tenure or office as such Chief-of-Staff a campaign of massacre, torture and other atrocities was waged by the Japanese troops on the civilian population and prisoners of war and civilian internees were starved, tortured and murdered. Muto shares responsibility for these gross breaches of the Laws of War. We reject his defence that he knew nothing of these occurrences. It is wholly incredible. The Tribunal finds Muto guilty on Counts 54 and 55."(7)

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(1) See Vol. XII, pp. 80–81.
(2) See Vol. XII, p. 81.
(3) See Vol. XII, pp. 81–82.
(4) See Vol. XII, pp. 113–115.
(5) See Vol. XII, pp. 116–118.
(6) See Vol. XII, p. 118.
(7) Official transcript of the *Judgment of the International Military Tribunal for the Far East*, p. 1186.

(x) PARACHUTE TROOPS

In the trial of Kurt Student by a British Military Court, Luneberg, Germany, 6th–10th May, 1946, the accused claimed that the temporary detailing of prisoners to work in the fighting zone was unavoidable in airborne operations. In his summing up, the Judge Advocate made an interesting observation on the question whether parachute troops should occupy the same position as others in relation to the provisions of the International Conventions on the Conduct of Warfare. "Parachutists," he said to the Court, "are not like ordinary soldiers. They have difficult situations to deal with and they often have to work in small numbers. They have to work on their own initiative and it is for you, as soldiers, to say whether the same standard must be adopted by a parachutist when he is dropped in hostile country in small numbers as with the ordinary soldier in the ordinary infantry attack and it is for you to decide whether on this expedition those paratroops would not be told that they would have to be ruthless, that they would have to fight hard and they would have difficult circumstances to get over but their paramount object must be to carry out the plan. Now, gentlemen, I invite you later on to consider how parachutists are trained and how they must be trained for their difficult duties. I am bound to say here that the Defence are saying in the case of this particular formation trained by Student that it was trained most humanely, that they would be clear as to what to do and that they would behave strictly in accordance with the laws and usages of war. I will say no more on that point but it is one, no doubt, which will occur to you and you will have to consider the conduct of the parachute troops in the positions in which they were brought. I think you will take the view that the Defence feels that the Hague Convention and International Agreements are out of date in that they act rather harshly on the parachutist, and they would make them read no doubt so that the parachutist would not come under this International Law which is intended to make fighting less severe for non-combatants and combatants alike."(1)

This question has not been the subject of authoritative pronouncement in any other trial brought to the notice of the United Nations War Crimes Commission.

(1) Vol. IV, p. 112.

V

SOME TYPES OF VICTIMS OF CRIMES

Some words should be said regarding some of the categories of person protected by international criminal law as it now exists, in order to demonstrate the extent of the protection afforded.

1. PRISONERS OF WAR

(i) If a captive has not been a lawful belligerent before capture, he does not become entitled to full prisoner of war protection on being taken prisoner. The categories who are entitled to such protection on capture are those who fall within the terms of Articles 1–3 of the Hague Regulations :

> " *Article* 1. The laws, rights and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions :
>
> (1) They must be commanded by a person responsible for his subordinates ;
>
> (2) They must have a fixed distinctive sign recognizable at a distance;
>
> (3) They must carry arms openly ; and
>
> (4) They must conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ' army.'
>
> *Article* 2. The inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly, and if they respect the laws and customs of war.
>
> *Article* 3. The armed forces of the belligerents may consist of combatants and non-combatants. In the case of capture by the enemy, both have the right to be treated as prisoners of war."

The Tribunal acting in the *Hostages Trial* was faced with the question whether certain belligerent units could be regarded as lawful under international law as laid down in the Hague Regulations :

> " There is convincing evidence in the record that certain band units in both Yugoslavia and Greece complied with the requirements of International Law entitling them to the status of a lawful belligerent. But the greater portion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent. The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents.

" The evidence shows that the bands were sometimes designated as units common to military organisation. They, however, had no common uniform. They generally wore civilian clothes although parts of German, Italian and Serbian uniforms were used to the extent they could be obtained. The Soviet Star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. There is some evidence that various groups of the resistance forces were commanded by a centralised command, such as the partisans of Marshal Tito, the Chetniks of Draja Mihailovitch and the Edes of General Zervas. It is in evidence also that a few partisan bands met the requirements of lawful belligerency. The bands, however, with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franctireurs. . . .

" Guerrilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities by harassing the enemy with unorganised forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured, may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applies to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured. . . . Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.

" It is contended by the prosecution that the so-called guerrillas were in fact irregular troops. A preliminary discussion of the subject is essential to a proper determination of the applicable law. Members of militia or a volunteer corps, even though they are not a part of the regular army, are lawful combatants if (*a*) they are commanded by a responsible person, (*b*) if they possess some distinctive insignia which can be observed at a distance, (*c*) if they carry arms openly and (*d*) if they observe the laws and customs of war. See Chapter I, Article I, Hague Regulations of 1907. In considering the evidence adduced on

this subject, the foregoing rules will be applied. The question whether a captured fighter is a guerrilla or an irregular is sometimes a close one that can be determined only by a careful evaluation of the evidence before the court.

"The question of the rights of the population of an invaded and occupied country to resist has been the subject of many conventional debates. (Brussels Conference of 1874; Hague Peace Conference of 1899.) A review of the positions assumed by the various nations can serve no useful purpose here for the simple reason that a compromise (Hague Regulations, 1907) was reached which has remained the controlling authority in the fixing of a legal belligerency. If the requirements of the Hague Regulations, 1907, are met, a lawful belligerency exists; if they are not met, it is an unlawful one."(1)

It would seem that in the Tribunal's opinion, it would be possible for a fighting group to be entitled to belligerent status under Article 1 of the Convention, even though not "supported by an organised government".(2)

If a combatant falls outside the category of legal combatant he becomes guilty of a type of war crime called war treason and may be executed on capture subject to the right to a fair trial.(3)

(ii) Article 23(*c*) of the Hague Regulations forbids the killing or wounding of an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion.(4) The Regulations were drafted long before the possibility of airmen escaping from aircraft by parachute was a practical possibility; nevertheless, Article 23(*c*) has been interpreted so as to protect baled-out airmen, whether captured by armed forces or civilians.(5)

On the other hand, the decision of the United States Military Court at Dachau which tried Josef Hangolb shows that the mere fact of having baled out of an aircraft does not automatically entitle an airman to prisoner of war status.(6)

(iii) Furthermore, there is no doubt that the protection afforded by the Hague and Geneva Conventions and by customary international law to prisoners of war attaches to them wherever they are. This protection has been applied to prisoners interned not only in prisoner of war camps but

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(1) Vol. VIII, pp. 56–59 and 75. Elsewhere the Tribunal was called upon to decide whether a certain group of Italian troops who resisted German demands for surrender could legally be shot on capture. The Tribunal found, on the contrary, that the Italian forces which so continued to resist "met all the requirements of the Hague Regulations as to belligerent status". (See Vol. VIII, pp. 71–72). For a further discussion of the application of Article 1 of the Hague Regulations, see Vol. XI, pp. 27–29, and *cf* Vol. XII, pp. 85–6 and 94.

(2) Vol. VIII, p. 58. In the Trial of Carl Bauer, Ernst Schrameck and Herbert Falten, a Permanent Military Tribunal at Dijon held that certain irregular combatants in France were entitled to prisoner of war treatment on capture but did not indicate whether it relied upon Article 1 or Article 2 of the Hague Regulations. See Vol. VIII, pp. 16–19.

(3) See pp. 111–112 and 113.

(4) See p. 99.

(5) For two instances among many, see Vol. I, pp. 85–86 and 91.

(6) Vol. XIV, p. 88.

also in concentration camps.(1) Again, the Geneva Prisoners of War Convention tends to speak in terms of the conditions of prisoner of war camps and the treatment of prisoners of war while in such camps ; nevertheless the provisions of the Convention or the rules of customary law codified therein have been held applicable also to the conditions of prisoners of war while on the line of march between camps or while on the sea on their way to camps.

Thus, in the trial of Arno Heering, held before a British Military Court at Hanover, 24th–26th January, 1946, a member of a guard company was accused of ill-treating members of the British army and other British and Allied nationals while on the march with a column of prisoners of war from Marienburg to Brunswick. The accused was found guilty, the prosecutor having submitted that the column of march described in the trial was to all intents the same and in the same position as a Prisoner of War Camp. All the duties set out in the Geneva Prisoner of War Convention, he claimed, fell on the shoulders of the accused.(2)

Similarly, in the trial of Shoichi Yamamoto and others by an Australian Military Court at Rabaul, 20th–27th May, 1946, several accused were found guilty of " ill-treatment of prisoners of war between Sandakan and Ranau between 29th January 1945 and 28th February 1945 compelled prisoners of war in their charge to march long forced marches under difficult condition when sick and underfed as a result whereof many of the said prisoners of war died". The offence proved took place when about 450 prisoners of war were being moved from one camp to another.

That the protection of the laws and customs of war attaches to prisoners of war wherever they may be is further proved by the trial of Kishio Uchiyama and Mitsugu Fukuda by an Australian Military Court at Singapore, 18th–29th April, 1947. Here the accused were found guilty of " committing a war crime in that they on the high seas, between 4th July 1944 and 8th September 1944 on a voyage from Singapore to Moji (Japan) abroad the s.s. " Rashin Maru " as officer in charge and non-commissioned officer second in charge respectively of a draft of Allied prisoners of war

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(1) During the course of the *Belsen Trial*, Colonel Smith (Defence Counsel) pointed out that in one of the instances charged, where victims were prisoners of war, a British subject who had been captured as a prisoner of war was transferred to the Concentration Camp. This was a clear international wrong, but the wrong consisted in ceasing to treat him as a prisoner of war, in taking him out of the camp, where he was protected by the Geneva Convention, and putting him in a concentration camp where he was exposed to the same treatment as any other inmate. The responsibility rested with those who sent him to Auschwitz or Belsen, but the responsibility of the people at Auschwitz and Belsen was the same in regard to that man as to any other inmate. Counsel did not know whether they even knew he was a prisoner of war. In any case they had no option but to treat him as anyone else.

In his closing address, the Prosecutor claimed that Colonel Smith had suggested that the crime involved was the moving of the prisoner of war from the prisoner of war camp into the concentration camp and that anything which happened to him thereafter was thereby excused. The Prosecutor found it difficult to accept the suggestion that if a man was ill-treated in a prisoner of war camp that was a war crime, but if the ill-treatment took place outside in the street or in a concentration camp, it was not. Insofar as it did not arrive at a special finding regarding the victim in question, who was mentioned on the Belsen Charge Sheet, the Court would appear to have rejected Colonel Smith's argument. (Vol. II, pp. 74, 106 and 121–122).

(2) See Vol. XI, pp. 79–80.

for whose well being they were responsible were, in violation of the laws and usages of war together concerned in the inhumane treatment of the said prisoners of war thereby contributing to the physical and mental suffering of the said prisoners of war."[1]

2. Civilians in Occupied Territory and Allied Civilians in Enemy Territory

(i) The Hague Regulations are often assumed to protect the nationals of an occupied territory, but the use of the expressions "inhabitants" and "population" in Articles 44, 45, 50 and 52 of the Regulations attached to the Convention suggests that protection may also extend to certain inhabitants of occupied territory who are not at the same time nationals of the country occupied, for instance, neutrals. The Preamble to the Convention states that the provisions thereof are intended "to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants". The word "inhabitants" is also used in the more well-known paragraph of the Preamble which has appeared from time to time in these Volumes.[2]

The Tribunal acting in the *Justice Trial* said the following of the definition of "war crimes" in the Charter of the International Military Tribunal and in Law No. 10 :

> "The scope of enquiry as to war crimes is, of course, limited by the provisions, properly construed, of the Charter and C.C. Law 10. In this particular, the two enactments are in substantial harmony. Both indicate by inclusion and exclusion the intent that the term 'war crimes' shall be employed to cover acts in violation of the laws and customs of war directed against non-Germans, and shall not include atrocities committed by Germans against their own nationals. It will be observed that Article VI of the Charter enumerates as war crimes acts against prisoners of war, persons on the seas, hostages, wanton destruction of cities and the like, devastation not justified by military necessity, plunder of public or private property (obviously not property of Germany or Germans), and 'ill-treatment or deportation to slave labour, or for any other purpose, of civilian population *of, or in,* occupied territory'. C.C. Law 10, *supra,* employs similar language. It reads :
>
> > '. . . ill-treatment or deportation to slave labour or for any other purpose *of civilian population from occupied territory.*' "[3]

It would be going too far to claim that this tendency to regard the Hague Convention as protecting civilians other than Allied civilians signifies that ex-enemies are protected,[4] but it should be noted that the protection of war crime courts has been extended to certain neutrals, according to the municipal

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[1] Vol. XI, p. 80, note 1.

[2] See p. 7, note 1.

[3] Vol. VI, pp. 38–39. (Italics are in the original). Compare the quotation from the *Krupp Trial* judgment, on pp. 16–17.

[4] See pp. 86–88.

legislation of some countries. For instance, Article 1 of the Norwegian Law of 13th December, 1946, on the Punishment of Foreign War Criminals provides :

> " Acts which, by reason of their character, come within the scope of Norwegian criminal legislation are punishable, according to Norwegian law, if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norway or were directed against Norwegian citizens or Norwegian interests. In accordance with the terms of the Civil Criminal Code No. 12, paragraph 4, with which should be read No. 13, paragraphs 1 and 3, the above provision applies also to acts committed abroad to the prejudice of Allied legal rights *or of rights which, as laid down by Royal Proclamation, are deemed to be equivalent thereto.*"(1)

Certain categories of neutral citizens would seem also be be protected by Article 1 of the French Ordinance of 28th August, 1944, concerning the prosecution of war criminals, which provides as follows :

> " *Article* 1. Enemy nationals or agents of other than French nationality who are serving enemy administration or interests and who are guilty of crimes or offences committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before 17th June, 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies, shall be prosecuted by French military tribunals and shall be judged in accordance with the French laws in force, and according to the provisions set out in the present ordinance where such offences, even if committed at the time or under the pretext of an eixsting state of war, are not justified by the laws and customs of war."(2)

Article VII of the Chinese Law of 24th October, 1946, governing the trial of war criminals, provides that :

> " Alien combatants and non-combatants who committed any of the offences provided under Article II against the Allied Nations or their nationals, *or against aliens under the protection of the Chinese Government,* are subject to the application of the present law."(3)

(ii) On a narrow interpretation, the Hague Convention does not protect civilians outside of occupied territory since the heading of Section II of the Hague Convention is " Military authority over the territory of the Hostile State ", but this has not in fact prevented courts from extending the protection of the laws and usages of war not only to Allied civilians on enemy soil but also to their children born on enemy soil.

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(1) Vol. III, p. 83 (Italics inserted). An explanatory memorandum of the Norwegian Ministry of Justice and Police dealing with this law states that, in referring to rights which are equivalent to Allied rights, the draftsmen had in mind particularly : (a) Danish citizens and their economic interests, and (b) neutral citizens in Norway or other Allied armed forces or persons employed in other Allied war work. (Vol. III, p. 84).

(2) Vol. III, p. 93.

(3) Vol. XIV, pp. 156–7. (Italics inserted).

In the *Hadamar Trial* (the trial of Alphons Klein and six others before an American Military Commission at Wiesbaden), various accused were found guilty of taking part in the deliberate killing of, among other people, over 400 Polish and Soviet nationals, many if not most of whom were civilians, by injections of poisonous drugs. Here, the fact that the offences took place in Hadamar, Germany and not in occupied territory, was treated as entirely irrelevant.(1)

Another example among the many, is the *Belsen Trial.* In this trial, the offences committed in Auschwitz and those committed in Belsen were treated by the court as being on entirely the same footing, the fact that Belsen was on German territory and Auschwitz in occupied Poland being treated as beside the point from the legal point of view.(2)

In the trial of Heinrich Gerike and seven others (the *Velpke Children's Home case*), various accused were found guilty of being concerned in the killing by wilful neglect of Polish children born on German territory.(3) A similar trial was that of Georg Tyrolt and others by a British Military Court, Helmstedt, 20th May–24th June, 1946.(4)

It is clear that the rules laid down in the Hague Regulations must be followed in respect of inhabitants of occupied territory who have been sent into the country of the occupant for forced labour, as had the mothers of the children who were sent into the Velpke home, and to children born to them while in captivity.(5)

3. Ex-Enemy Nationals

Enemy nationals are left unprotected in war crime trials proper, by contrast with trials of what are known as " crimes against humanity." For instance,

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(1) Vol. I, pp. 46–54.

(2) Vol. II, pp. 4 and 121–122. In his opening statement in the trial, the Prosecutor quoted paragraphs 442 and 443 of the British *Manual of Military Law :*

" 442. War crimes may be divided into four different classes :

(i) Violations of the recognised rules of warfare by members of the armed forces . . .

" 443. The more important violations are the following : ill-treatment of prisoners of war ; . . . ill-treatment of inhabitants in occupied territory . . ."

The prosecutor claimed that although the words " inhabitants in occupied countries " were used, it was obvious that they should be extended to " all inhabitants of occupied countries who have been deported from their own country," the deportation, in fact, being a further infringement of the law.

(3) Vol. VII, p. 80.

(4) Vol. VIII, p. 81.

(5) It was pointed out by the Prosecutor in the *Velpke Trial* that such deportation was itself contrary to international law. It could have been argued by the Defence that the offence of deportation was committed by persons other than the accused ; nevertheless, it seems reasonable to assume that the inhabitants of an occupied territory keep their rights under international law when forced to leave their own country, even though this is not expressly provided in the Hague Convention. Indeed, the Tribunal which conducted the *Justice Trial* stated clearly that the transfer of " Night and Fog " prisoners from occupied territories to Germany did not cleanse the " Night and Fog " Plan of its iniquity " or render it legal in any respect." (Vol. VI, p. 56).

Similarly, the Judge Advocate acting in the Trial of Georg Tyrolt and others by a British Military Court, said of the victims of the offences charged in that case : " Quite obviously if it is wrong to show lack of respect to their family life and individual life in their own country, you cannot get out of that obligation simply by taking them to your country and then ill-treating them there." (Vol. VII, p. 81).

the British Royal Warrant provides, in Regulation 1, that the offences to be tried by British Military Courts shall only be *violations of the laws and usages of war* committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939.(1)

In the trial of Susuki Motosuke by a Netherlands Temporary Court-Martial, the accused was found not guilty of a war crime, as charged, but guilty of a breach of the Netherlands East Indies Penal Code, in respect of one of the victims of whose killing he was alleged to have been responsible ; the Court came to this decision in view of the fact that this one victim could not be regarded as being a national of one of the United Nations since he had freely joined the Japanese Army in the Netherlands East Indies, and had therefore been in " foreign military service without the permission " of the Dutch Government, and was therefore not a Netherlands subject at the time of his execution.(2)

Nevertheless, certain offences against ex-enemy nationals do fall within the jurisdiction of some courts under the title " crimes against humanity." The types of courts referred to and the relevant jurisdictional provisions have already been described or cited,(3) while the general characteristics of such crimes are set out later.(4) Here it is necessary only to indicate what persons, according to various rulings, have been protected by jurisdictional provisions binding upon certain Allied courts which have tried cases after the Second World War.

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(1) Vol. I, p. 105. The question received some discussion during the course of the *Belsen Trial*. The defence objected to the proposal of the prosecution to put in affidavits which included the allegation of an offence committed against a Hungarian girl. Defence counsel pointed out that the charge against the accused referred to the committing of a war crime which involved the ill-treatment and killing of allied nationals. Counsel also thought that it was within the knowledge of the court that a war crime could not be committed by a German against a Hungarian since the latter would not be an Allied national. The Prosecutor made two points in replying : Hungary, he said, left the Axis before April, 1945, and had come on to the Allied side ; at that time, therefore, the Hungarians were at least some form of Allies, though Counsel did not know to what extent. A more general point made by the Prosecutor was that what he was trying to prove was the treatment of the Allied inmates of the camp. He thought that he was perfectly entitled to put before the court evidence of the treatment of other persons in the camp. If there were ten people and he wanted to prove that one of them was badly treated, in the Prosecutor's submission, he was perfectly entitled to prove that the ten were badly treated. The treatment of all the inmates in the camp was relevant to show the treatment of any individual inmate. The Court decided that the paragraph be included in the evidence before the Court.

Colonel Smith (Counsel for the defendants in general) claimed that only offences against Allied nationals could be regarded by the Court as war crimes, and that " Allied nationals " meant nationals of the United Nations. The term therefore excluded Hungarians and Italians. As has been seen, the Prosecutor himself in effect disclaimed any intention of charging the accused of crimes against persons other than Allied nationals. Both Prosecution and Defence therefore recognised that, under the Royal Warrant, the jurisdiction of British Military Courts is limited to the trial of war crimes proper and excludes crimes against humanity as defined in Article 6(c) of the Charter of the International Military Tribunal. British Military Courts deal with such crimes only if they are also violations of the laws and usages of war. (Vol. II, pp. 150–151).

(2) See Vol. XIII, pp. 127–128.

(3) See p. 27, note 3, and pp. 40–3.

(4) See pp. 134–8.

According to the Judgment delivered in the *Justice Trial*, crimes against humanity may have been committed by German nationals against other German nationals or any stateless person.(1) According to the Judgment in the *Milch Trial*,(2) the words " or nationals of Hungary and Rumania " could be added to the possible victims of this dictum. Further, according to the Judgment in the *Einsatzgruppen Trial*, Law No. 10, when it deals with crimes against humanity, is not restricted as to the nationality of the victim.(3)

(1) See Vol. VI, pp. 39–40.
(2) See Vol. VII, p. 40.
(3) See Vol. IX, p. 47.

VI

TYPES OF OFFENCES

A. INCHOATE OFFENCES

1. Incitement

That incitement to commit a war crime may be itself punishable, irrespective of whether that crime is ever committed, is proved by cases in which the giving of criminal orders which were never carried out, has nevertheless been punished by the courts.(1)

2. Attempts

Some recognition has been given to the possibility that a person may be guilty of a war crime even though he merely attempted to commit an offence and the offence was never completed. Thus, Article 4 of the Norwegian Law of 13th December, 1946, on the punishment of foreign war criminals, provides that :

> " The attempted commission of any crime referred to in Article No. 1 of the present law is subject to the same punishment as an accomplished act. Complicity is likewise punishable."

For an application of this provision, reference should be made to page 120 of Volume VI.

Again, Article 13(1) of a Yugoslav Law of 25th August, 1945, which provides for the trial of war criminals and traitors, lays down that :

> " An attempt to commit acts outlined in this Law shall be punishable as a complete criminal act."

Under the Dutch war crimes laws, an attempt to commit a war crime is equally punishable with the crime itself.(2)

Neither are convictions for attempts at war crimes unknown in French practice. Thus, Jean Georges Stucker was sentenced to imprisonment for two years, for the offence of having attempted to secure the arrest or detention of a French national, by a French Military Tribunal at Metz, 25th November, 1947.(3)

The relevant French provision is Article 2 of the *Code Pénal* which states that :

> " Any attempted crime which is manifested by the commencement of its execution, if it has been stopped or has lost its effect only by virtue of circumstances independent of the will of its author, is considered to be the same as the completed crime."

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(1) See p. 133.
(2) See Vol. XI, pp. 97-98.
(3) See Vol. VII, p. 73.

3. CONSPIRACIES

The existence as a separate offence of conspiracy to commit the crime of waging aggressive war does not seem to have been doubted by the United States Military Tribunals ;([1]) in this they accepted the view of the Nuremberg International Military Tribunal.([2]) On the other hand, again following the decision of the International Military Tribunal,([3]) they have not recognised as a separate offence conspiracy to commit war crimes or crimes against humanity.

On 9th July, 1947, a joint session of five United States Military Tribunals was held in order to hear counsel argue regarding the sufficiency of counts which charged defendants with conspiracy to commit war crimes and crimes against humanity as a separate offence. Such counts had been brought against the accused in the *Justice Trial*, in the trial of Karl Brandt and others (*The Doctors' Trial*) and in the trial of Oswold Pohl and others, which were also being held before certain of the Military Tribunals mentioned above. Counsel for the defendants in these three trials challenged the sufficiency of these counts while General Telford Taylor, who led the prosecution in these trials, argued in support of it.

After arguments had been heard([4]) the Tribunals decided in favour of the defence submission, and the Tribunal conducting the *Justice Trial* ruled accordingly, as follows :

> " Count 1 of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully, wilfully and knowingly did conspire and agree together to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, Article 2. It is charged that the alleged crime was committed between January, 1933 and April, 1945.
>
> " It is the ruling of this Tribunal that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime ; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offence. . . ."([5])

War Crime trials involving charges of conspiracy have not, however, been unknown. Article 265 of the French *Code Pénal* provides that " Any association formed, whatever its duration or the number of its members, and any undertaking arrived at for the purpose of preparing or committing crimes against persons or against property, constitutes a crime against the public peace." This provision, *inter alia*, was relied upon in the trial of Henri Georges Stadelhofer by a French Military Tribunal at Marseilles, 15th April, 1948 ; in finding him guilty of the crime of *association de malfaiteurs*, among other offences, the Tribunal gave an affirmative answer to the question whether he, a German national, was guilty, during time of war, of " having formed with various members of the German Gestapo an

([1]) See p. 148.
([2]) See British Command Paper Cmd. 6964, pp. 42–44.
([3]) *Ibid*, p. 44.
([4]) These arguments are summarised in Vol. VI, pp. 105–109.
([5]) Vol. VI, p. 5.

association with the aim of preparing or committing crimes against persons or property, without justification under the laws and usages of war.(1) A further example of a French prosecution for conspiracy is the trial of Horst Hebestreit,(2) once chief of the S.D. at St. Girons. In the trial of Albert Raskin by a French Military Tribunal at Lyon, 16th January, 1947, the only charge was that of *association de malfaiteurs*, the accused being found guilty and sentenced to two years' imprisonment. His offence was that of having taken part in the work of German units which exercised police functions in France.

Provisions were also made in the Netherlands laws for the punishment of conspiracy to commit a war crime equally with the crime itself.(3)

The application of laws regarding conspiracy must be distinguished from the following : (4)

(i) procedural provisions permitting the holding of joint trials ;

(ii) Regulation 8 (ii) of the British Royal Warrant of 14th June, 1945, Army Order 81/45, as amended, and similar provisions made by other countries ;

(iii) the concept of common design ; and

(iv) the law relating to criminal organisations.

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(1) Vol. VI, p. 106, note 1. Article 2(2) of the French Ordinance of 28th August, 1944, makes the provision quoted above applicable to " organisations or agencies engaged in systematic terrorism." (Vol. III, p. 95). In the course of his dissenting judgment in the *Justice Trial*, Judge Blair made some remarks concerning the decision in that trial which is recorded above. His opinion was that : " Since the language of paragraph 2 of Law No. 10 expressly provides that any person connected with plans involving the commission of a war crime or crime against humanity is deemed to have committed such crimes, it is equivalent to providing that the crime is committed by acts constituting a conspiracy under the ordinary meaning of the term. Manifestly it was not necessary to place the label ' conspiracy ' upon acts which themselves define and constitute in fact and in law a conspiracy. Paragraph 2 was so interpreted by the Zone Commander when he issued Military Government Ordinance No. 7, which authorised the creation of this and similar military tribunals, and which provides in Article 1 that :

' The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes.' "

The Tribunal, he concluded, " should therefore declare that military tribunals as created by Ordinance No. 7 have jurisdiction over ' conspiracy to commit ' any and all crimes defined in Article II of Law No. 10." (Vol. VI, p. 110.)

(2) Not previously considered in this series.

(3) See Vol. XI, p. 98.

(4) One of the striking features of the type of warfare waged by the Axis Powers in general and by the Nazi regime in particular was the phenomenon of mass criminality for which certain organisations were responsible. In a great number of official and non-official statements, programmes and recommendations, attention was drawn to this fact, which was bound to confront the authorities charged with the meting out of just retribution with a formidable task and with great difficulties of a procedural and perhaps also of a substantive legal nature. For instance, the United Nations War Crimes Commission adopted on 16th May, 1945, a recommendation to its Member Governments in which it was said that the Commission had " ascertained that countless crimes have been committed during the war by organised gangs, Gestapo groups, S.S. or Military Units, sometimes entire formations". In order to secure the punishment of the guilty, the Commission recommended, *inter alia*, the committing for trial, either jointly or individually, of all those who, as members of these criminal gangs, had taken part in any way in the carrying out of crimes committed collectively by groups, formations and units. These statements and recommendations may be thought to have been the inspiring force behind the provisions now to be discussed but it is important to recognise their mutual differences and the differences between each and the concept of conspiracy.

The relevant distinctions are set out below.

(i) *A joint charge* is one on which two or more accused are tried for the same offence by the same court at the same time. In his summing up in the trial of Georg Tyrolt and others, before a British Military Court, Helmstedt, Germany, from 20th May–24th June, 1946, the Judge Advocate said that : " There is nothing magic about a joint charge except that it enables you to try more than one person at one time. . . ."[1]

Offences thus charged have been various ; examples of such charges have appeared in the reports on the *Belsen Trial*[2] and in most of the trials held before United States Military Tribunals in Nuremberg.[3]

(ii) *Regulation 8 (ii)* of the Royal Warrant *and similar provisions.* Regulation 8 (ii), as amended, provides :

> " Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime. In any such case all or any members of any such unit or group may be tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the court."

Substantially the same provision is made by Regulation 10 (3) of the Canadian War Crimes Regulations.[4] Regulation 12 of the Regulations made under the Australian War Crimes Act of 1945 has exactly the same terms as Regulation 8 (ii) quoted above.[5] The United States China Regulations contain the following provisions (16 (d) and (e)) :

> " (d) If the accused is charged with an offence involving concerted criminal action upon the part of a military or naval unit, or any group or organisation, evidence which has been given previously at a trial of any other member of that unit, group or organisation, relative to that concerted offence, may be received as *prima facie* evidence that the accused likewise is guilty of that offence.
>
> (e) The findings and judgment of a commission in any trial of a unit, group or organisation with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial by that or any other commission of an individual person charged with criminal responsibility through membership in such unit, group or organisation convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein."

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(1) See Vol. XI, p. 45, note 1.

(2) See Vol. II, p. 4.

(3) Reported in Vols. VI, VII, VIII, IX, X, XII, XIII and XIV.

(4) Vol. IV, p. 128.

(5) Vol. V, p. 100.

Similar provisions were contained in the SCAP Regulations, but were deleted by the letter of 27th December, 1946.(1)

A directive was issued by Headquarters, European Theatre dated 14th October, 1946, relating to United States Military Government Courts. The directive contains in its paragraph 12 detailed provisions under the heading "Mass Atrocity Subsequent Proceedings". It is there recalled that "certain mass atrocity cases have heretofore been tried, i.e., Hadamar, Dachau and Mauthausen cases, wherein the principal participants of the respective mass atrocities were charged with violating the laws and usages of war under particulars alleging that they acted in pursuance of a common design to subject persons to killings, beatings, torture, starvation, abuses and indignities, or particulars substantially to the same effect. The courts pronounced sentences in those cases involving imprisonment and death and of necessity, in view of the issues involved therein, found that the mass atrocity operation involved in each was criminal in nature and that those involved in the mass atrocities acting in pursuance of a common design did subject persons to killings, beatings, tortures, etc." The Directive provides, with regard to subsequent proceedings against accused other than those involved in initial or "parent" mass atrocity cases, *inter alia*, that: "In such trial of additional participants in the mass atrocity, the prosecuting officer will furnish the court certified copies of the charge and particulars of the findings and the sentences pronounced in the parent case." Thereupon the court "will take judicial notice of the decision rendered in the parent case, including the finding of the court (in the parent case) that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, did subject persons to killings, beatings, tortures, etc., and no examination of the record in such parent case need be made for this purpose. In such trials of additional participants in the mass atrocity, *the court will presume, subject to being rebutted by appropriate evidence*, that those shown by competent evidence to have participated in the mass atrocity knew of the criminal nature thereof."(2)

It will be seen that all of these provisions relate to questions of proof and define no forms of criminal liability. They thus differ from provisions regarding conspiracy, which do define a type of crime.

Regulation 8(ii) was extensively discussed in the course of the *Belsen Trial*. It is impossible to state whether and how far the court acted on Regulation 8(ii) in convicting various accused. Reference has been made, however, to the interpretations placed on this provision by Counsel.(3) Both Defence and Prosecution were agreed in fact that, before this provision could operate against any individual accused, it must have been proved that he knowingly took part in a common plan to ill-treat the prisoners in the two camps. The classification of Regulation 8(ii) as a provision relating to evidence and not as one of substantive law is justified, despite the references made by the Prosecutor to the English law of conspiracy.(4)

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(1) Vol. III, p. 111.

(2) (Italics inserted). This provision has received some discussion in the notes to the *Dachau Trial* in Vol. XI, pp. 16–17.

(3) See Vol. II, pp. 139–141.

(4) See Vol. II, pp. 108–109.

Such arguments were intended simply to elucidate the meaning of the term "concerted action," and Regulation 8(ii) as a whole appears to be relevant only for purposes of assessing evidence. What is to be proved or disproved remains "the responsibility of *each* member of that unit or group for that crime." Evidence rendered admissible by the Regulation is not more than *prima facie* evidence.(1)

The Judge Advocate acting in the trial of Willi Tessmann and others by a British Military Court in Hamburg, 1st–24th September, 1947, advised the Court as follows :

> "The first point of law to be remembered, I think, is this : there are nine Accused, and the charge sheet with which they are confronted contains three charges. Herr Dr. Breymeier in his final address and Herr Dr. Graener both submitted that in spite of the terms of Regulation 8(ii) of the Regulations governing our procedure, the case of each Accused must be considered quite separately. In my view that is correct in the circumstances of this case. The regulation referred to says in effect that if you are dealing with a group of people or a unit and there is evidence against some, that is prima facie evidence against the others ; but I think it would be right here to say that when all is heard and the whole of the evidence has been produced, then you must look at each individual case and each charge quite separately."

In the absence of reasoned judgments it is impossible to say how far the courts have in fact applied the evidential provisions just quoted, with the exception of that made by the directive of 14th October, 1946.(2)

(iii) *Common design*(3) In a large number of trials held before United States Military Government Courts the charges made were charges that accused "acted in pursuance of a common design to commit" certain stated offences ; an example of such wording is provided by the charge made in the *Dachau Trial.*(4)

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(1) In the notes to the Trial of Franz Schonfeld and nine others, by a British Military Court at Essen, it has been suggested that an examination of the text of this provision shows that, in order for effect to be given to it, the following circumstances must prevail :

(*a*) there must be evidence that a war crime was the result of *concerted action,* but it is not said that the aim of such action must be illegal or that it must be the commission of the offence which was in fact committed ;

(*b*) the war crime must have been in some way the *result* of such concerted action, though, again according to the strict letter of the Regulation, not necessarily the intended result. (See Vol. XI, p. 71, and compare Vol. III, pp. 69–70).

(2) See page 93.

(3) See also pages 52–56.

(4) See Vol. XI, pp. 5 and 14. The importance placed by the prosecution in that trial on the concept of common design may be judged from p. 12 of Vol. XI. Compare the use of the words "acting in pursuance of a common interest" in the *Hadamar Trial* indictment (Vol. I, p. 47).

It would appear that to prove guilt under a charge of acting in pursuance of a common design it must be shown (i) that there was a system(1) in force to commit certain offences ; (ii) that the accused was aware of the system(2) and (iii) that the accused participated in operating the system.(3) It seems to have been acknowledged by the United States Courts trying cases in which acting in pursuance of a common design is charged that such charges are not the same as conspiracy charges ; to prove the former there must be evidence not only of agreement but also of action in furtherance of it.

The charge in the *Justice Trial* was similar, though the words " common design " were not used. It was charged, *inter alia*, that all the accused unlawfully, wilfully and knowingly committed war crimes and crimes against humanity " in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with *plans and enterprises* involving the commission of " certain offences.(4) The Tribunal acting in the trial pointed out in its Judgment that " no defendant was specifically charged with the murder or abuse of any particular person. The charge did not concern isolated offences, but was one of ' conscious participation in a nation-wide governmentally organised system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice and through the instrumentality of the courts."(5) The Tribunal stated more than once that : " The essential elements to prove a defendant guilty under the indictment in this case are that a defendant had knowledge of an offence charged in the

(1) It has been suggested in the notes to the *Dachau Trial* that it may be that the facts needed to prove the existence of this system would not always suffice to prove conspiracy as a separate offence. (See Vol. XI, p. 14). While the matter is in doubt, the Prosecution in the *Flossenburg Trial* (Trial of Friedrich Becker and others by a United States Military Court at Dachau, 14th May, 1946—22nd January, 1947), would appear to have taken this view. The Prosecutor claimed that Counsel for the defence wanted to persuade the court that it was a case of conspiracy that the court was trying, and that, once having convinced the court that the accused were charged with conspiracy, their next step would be to maintain that there had been a failure of proof of any conspiracy : " They would say that in every conspiracy there must be an agreement, either expressed or implied, to do an unlawful act or to do a lawful act by unlawful means." Then, said the Prosecutor, the defence counsel would claim " that such an agreement between the S.S. and the capos would be ridiculous on its face ; that such agreement would be impossible on the face of the evidence which reveals that not all of the accused were present at Flossenburg at the same time, nor at the same place, nor even knew each other." The Prosecutor observed that " Such a contention would be clearly valid if the offence charged were a conspiracy. But the offence with which these accused stand charged is *not* a conspiracy . . . in the case at bar, even though it may be contended that the capos and the S.S. were at each other's throats, and even though it be shown that not all of the accused were present at Flossenburg at the same time, and even though it be shown that some of the accused never knew nor spoke to one another, still it is submitted that each of the accused was capable of and *did* entertain the common intent or design to subject the inmates of Flossenburg to beatings, killings, tortures, starvation, and other indignities."

(2) In the *Mauthausen Trial*, the court, having regard to the general facts, assumed this knowledge to exist on the part of the accused. (See Vol. XI, pp. 15–16).

(3) See Vol. XI, pp. 12–13.

(4) See Vol. VI, pp. 3 and 4. (Italics inserted). This wording was based upon that of Article II, 2, of Control Council Law No. 10 and was used also in for instance, the indictment in the *Milch Trial* ; see Vol. VII, pp. 27–28.

(5) Using similar language the Prosecution in the *Flossenburg Trial* claimed that : " Again, let me emphasize, this Court is not trying these accused for their own specific acts of murder, but you are trying them for their part in aiding, abetting, or participating in a common design to subject the prisoners to beatings, killings and tortures."

indictment and established by the evidence, and that *he was connected with* the commission of that offence."(1) Speaking of racial persecution in particular, the Judgment said, *inter alia* : " The record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offence charged in the indictment. The defendants are not now charged with conspiracy as a separate and substantive offence, but it is alleged that they participated in carrying out a governmental plan and programme for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency."(2)

It will be observed that the Tribunal acted upon the principle that acting in pursuance of a common design is not the same as entering into a conspiracy.

What, it may be asked, is there to be gained from charging that an accused acted in pursuance of a common design to commit certain offences instead of charging the simple perpetration of those crimes ? The answer seems to be that, while the prosecution has the additional task of proving the existence of a common design, yet once that is proved the prosecution can rely upon the rule which exists in many systems of law that those who take part in a common design to commit an offence which is carried out by one of them are all fully responsible for that offence in the eyes of the criminal law.(3) The Judge Advocate acting in the trial of Franz Schonfeld and nine others before a British Military Court, in his summing up, stressed this rule as it exists in English Law :

> " In our law if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them, in carrying out the purpose, kills a man, it is murder in all who are

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(1) See Vol. VI, p. 84 and see pp. 52–56 of this present volume where this type of complicity is further examined.

(2) Vol. VI, p. 62.

(3) Although Count One in the *Justice Trial* was the subject of a special ruling on the part of the Tribunal (see Vol. VI, pp. 5–6) paragraph 3 of that count is worth quoting as setting out the very principle mentioned above :

" All of the defendants herein, acting in concert with each other and with others, unlawfully, wilfully, and knowingly participated as leaders, organisers, instigators and accomplices in the formulation and execution of the same common design, conspiracy, plans and enterprises to commit, and which involved the commission of, War Crimes and Crimes against Humanity, and accordingly are individually responsible for their own acts and for all acts performed by any person or persons in execution of the said common design, conspiracy, plans, and enterprises." (Vol. VI, p. 2).

In the *Dachau Trial*, the prosecution quoted from Wharton, " Criminal Law," 12th edition, Vol. I, p. 341 : If any perpetrators be " outside of an enclosure watching to prevent surprise or for the purpose of keeping guard while his confederates inside are committing a felony, such constructive presence is sufficient to make him a principal in the second degree. No matter how wide may be the separation of the confederates, if they are all engaged in a common plan for the execution of the felony and all take their part in the furtherance of the common design, all are liable as principals." (Vol. XI, p. 13).

present, whether they actually did or abet or not, provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly."(1)

It will be recalled that in the *Essen Lynching Case* certain of the accused were found guilty of killing three prisoners of war because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been actually proved that they had individually shot or given the blows which caused the death.(2)

It may be added that while the charge in the *Belsen Trial* approached no nearer to the concept of common design than the statement that the accused "were together concerned as parties to the ill-treatment of" certain persons,(3) there were nevertheless references in the speeches of Counsel and the summing up of the Judge Advocate to an alleged agreement, either tacit or express, to ill-treat or kill victims.(4) In this particular trial such references may have been made in view either of the principle of responsibility mentioned immediately above,(5) or of Regulation 8(ii) which has been treated previously.(6)

In conclusion it may be repeated that the difference between a charge of conspiracy and one of acting in pursuance of a common design is that the

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(1) See Vol. XI, p. 68 ; and compare p. 71 of that volume. See also Vol. II, p. 141 and footnote 3 thereto. In the *Almelo Trial*, the Judge Advocate pointed out that if people were all present together at the same time taking part in a common enterprise which was unlawful, each one in his own way assisting the common purpose of all, they were all equally guilty in law. (Vol. I, p. 40).

The Tribunal which conducted the *Krupp Trial* would appear to have been unwilling to apply one aspect of this rule to crimes against peace :

"Under a widely accepted, less conservative theory of conspiracy, those who, with knowledge of the criminal plan, enter into the common enterprise at a later date, become responsible for everything that was done under the conspiracy previously started. Hence, had the Tribunal adopted that doctrine, it would have had to determine whether Gustav Krupp had the requisite state of mind, and whether, when the defendants reached highly responsible positions, they became parties to his plan, or, in other words, his co-conspirators. For, I am convinced that when the defendants reached their top positions within the Krupp concern, they knew the basic policy of the concern and of Gustav Krupp. "As said before, the Tribunal did not adopt this line . . ." (Vol. X, p. 130).

(2) See Vol. I, pp. 88–92. It was the submission of the Prosecution in this trial that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen, was guilty in that he was concerned in the killing. It was impossible to separate any one of these acts from another ; they all made up what is known as a lynching. From the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men. Compare Vol. XI, pp. 76 and 77.

(3) Vol. II, p. 4.

(4) See, for instance, Vol. II, pp. 118, 120 and 121.

(5) Thus the Judge Advocate recalled that : "The case for the Prosecution was that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened." Vol. II, p. 120. For a presentation of this point by the Prosecution in the trial see Vol. II, p. 9.

(6) See pp. 92–94.

first would claim that an agreement to commit offences had been made[1] while the second would allege not only the making of an agreement but the performance of acts pursuant to it.

(iv) *Membership of criminal organisations* is discussed elsewhere in this volume.[2] Here it is necessary only to compare or contrast it with the crime of conspiracy.

The Judgment of the Nuremberg International Military Tribunal, whose opinions[3] have been regarded as strongly persuasive by the United States Military Tribunals acting under Law No. 10, made the following comment, among others, in a section of its Judgment headed *The Accused Organisations* :

> " A criminal organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the Organisation. Membership alone is not enough to come within the scope of these declarations."[4]

The International Military Tribunal's definition of the crime of membership comes very near to that of a pure conspiracy. It speaks of a group " formed *or* used in connection with the commission of crimes . . ." not of a group so formed *and* used. This leaves the impression that such a group *formed* for the commission of crimes would itself constitute an organisation of which membership would be criminal, irrespective of whether the group was also *used* for criminal acts. On the other hand the Tribunal speaks of " co-operation for criminal purposes ", not of mere agreement for such purposes. Furthermore, Article 9 of the Charter under which the Tribunal operated stated, *inter alia* that " At the trial of any individual member of any group or organisation the Tribunal may declare (*in connection with any act* of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation . . ." and the history of the development of the concept of membership[5] suggests strongly that what it was to punish was no mere conspiracy to commit crimes but a knowing and voluntary membership of organisations which

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(1) Acts done pursuant to a conspiracy may be admitted as *proof* that a conspiracy existed but are not are not part of the offence as defined by criminal law.

(2) See pp. 150–154.

(3) i.e. those which are not actually legally binding on the Military Tribunals ; see pp. 17–19.

(4) British Command Paper, Cmd. 6964, p. 67.

(5) See Vol. XIII, pp. 42–43.

did in fact commit crimes, and those on a wide scale. Viewed in this light, membership resembles more the crime of acting in pursuance of a common design than it does that of conspiracy.(1)

B. WAR CRIMES

1. OFFENCES AGAINST PRISONERS OF WAR

(i) The *killing of prisoners of war without due cause* is a clear violation of both customary and conventional international law. Thus, Article 23 of the Hague Convention provides that :

> " Article 23. In addition to the prohibitions provided by special Conventions, it is particularly forbidden—
>
> . . . . . .
>
> " (c) To kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion."

A great many war crime trials have involved convictions on charges alleging responsibility for such killings.(2)

(ii) It is open to a person accused of killing a prisoner of war to plead that the execution was in face a legal killing ; this plea is dealt with elsewhere under the section on defence pleas.(3) Apart from the possibility that on the facts of any given case an accused may fail to substantiate his defence of legitimate killing, there is further possibility that the courts have recognised as a separate positive crime the *denial of a fair trial to prisoners of war*, the committing of which would make an accused guilty of a war crime irrespective of whether the victims actually suffered or not.(4) It is felt that the courts would require the same evidence to prove the perpetration of this positive offence, assuming it to be recognised, as they would regard as vitiating a plea that a killing was a legitimate one.(5)

The material relating to these two possible criminal aspects of the denial of a fair trial to prisoners of war which has appeared in Volumes V and VI has been taken from trials in which the accused were faced with charges of the denial of that right to prisoners of war accused of offences *committed before they became prisoners of war*.(6) It will be recalled that Allied war crime courts have several times ruled that the provisions of Part 3 (Judicial Proceedings) of Part III, Section V, Chapter 3 of the Geneva Prisoners of War Convention of 1929 do not apply to the trial of a person accused of a war crime as distinct from an offence committed while a prisoner,(7) and

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(1) It may be added here that, as defined by the International Military Tribunal, the " crime of membership " is much less an innovation than an examination of the provisions of the Charter of the Tribunal (see pp. 17–18 and 98) may have suggested. To hold a person guilty of voluntarily participating in the activities of an organisation knowing that such organisation possessed illegal purposes or carried out illegal acts would not be contrary to the municipal laws of most countries.

(2) See, for instance, Vol. I, pp. 22–23, 35, 72, 82 and 88 ; Vol. II, p. 1 ; Vol. III, pp. 23, 56, 60, 62 and 65 ; Vol. IV, pp. 99, 107, 108, 109 and 113–114. Vol. VIII, pp. 15, 19–20, and reports contained in Vol. XI.

(3) See pp. 161–166 and 186–187.

(4) For a discussion of this point see Vol. VI, pp. 102–103.

(5) See pp. 162–166.

(6) Cf. Vol. V, pp. 71–73.

(7) See Vol. I, pp. 23 and 29–31, Vol. III, pp. 42–43, and 50 ; Vol. VIII, p. 55, Vol. XI, pp. 9–10 Vol. XII, pp. 63–64 and Vol. XIV, pp. 114–118. The same attitude has been taken by the International Military Tribunal of the Far East (pp. 27–28 of the official transcript of the Judgment).

that this view has been approved by the United States Supreme Court in the *Yamashita Case*, when, after an analysis of the structure and contents of the Geneva Convention, it ruled that :

> " We think it clear, from the context of these recited provisions, that part 3, and Article 63 which it contains, apply only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war. . . ."(1)

For the trial of prisoners of war for offences committed while in captivity the provisions of Part 3 (Judicial Proceedings) provide safeguards additional to those recognised by the courts acting in the trials reported upon in Volumes V and VI, but no trial has come to the writer's notice in which an allegation based upon Part 3 has led undisputedly to a conviction.(2) In the trial of General Yamashita by a United States Military Commission a breach of the Geneva Prisoners of War Convention has implied by paragraph 89 of the Supplemental Bill of Particulars, which alleged that, during the month of December, 1944, at Manila, the crimes were committed against various prisoners of war, named and unnamed, of " subjecting to trial without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel ; denying opportunity to appeal from the sentence pronounced ; and executing a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offence charged ". The remarks made by the President of the Commission in delivery of its findings did not, however, reveal whether this particular allegation was found to be substantiated.(3)

(iii) A number of war crime trials have involved the physical *ill-treatment of prisoners of war*.(4) The Judgment delivered in the *High Command Trial* regarded as declaratory of customary law the provision of Article 4 of the Hague Regulations that " Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They

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(1) See Vol. IV, pp. 46–47, 48–49 and 78. Mr. Justice Rutledge's dissenting opinion also touched on this point ; see pp. 69–73 of that Volume. The question had already been touched upon in the original trial ; see p. 15 of the Volume.

(2) The part of the Convention in question comprises Article 60–67.

Article 60 states : " At the commencement of a judicial hearing against a prisoner of war, the detaining Power shall notify the representative of the protecting Power as soon as possible, and in any case before the date fixed for the opening of the hearing. . . ."

Articles 63–66 make the following provisions :

" Article 63. 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 Powers.

" Article 64. Every prisoner of war shall 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.

" Article 65. Sentences pronounced against prisoners of war shall be communicated immediately to the protecting Power.

" Article 66. If sentence of death is passed on a prisoner of war, a communication setting forth in detail the nature and the circumstances of the offence shall be addressed as soon as possible to the representative of the protecting Power for transmission to the Power in whose armed forces the prisoner served.

" The sentence shall not be carried out before the expiration of a period of at least three months from the date of the receipt of this communication by the protecting Power."

(3) Vol. IV, pp. 5–6 and 34.

(4) See for instance Vol. III, p. 67 and Vol. XI, p. 5, 56, 62 and 79.

must be humanely treated . . ." and the provision of Article 2 of the Geneva Convention that prisoners of war " shall at all times be humanely treated and protected particularly against acts of violence, from insults and from public curiosity ".(1)

The latter provision received specific application in the trial of Kurt Maelzer, by a United States Military Commission at Florence ; here the accused was found guilty on a charge of " exposing prisoners of war . . . in his custody . . . to acts of violence, insults and public curiosity."(2)

The Judgment in the *High Command Trial* also regarded as declaratory of customary law that part of Article 3 of the Geneva Convention which provides : " Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex " ; that part of Article 46 which states : " All forms of corporal punishment confinement in premises not lighted by daylight and, in general, all forms of cruelty whatsoever, are prohibited." ; (3) and also the following passage from Article 56 : " In no case shall prisoners of war be transferred to penitentiary establishments (prisons, penitentiaries, convict establishments, &c.) in order to undergo disciplinary sentence there."(4)

(iv) In other trials the allegations made concerned the *denial to prisoners of war of the minimum conditions conducive to life and health* whose provision is made compulsory by the Geneva Convention.(5)

Relevant provisions stated to be declaratory of customary international law by the Judgment in the *High Command Trial* were the following Articles from the Geneva Convention :

> " Article 4. The detaining Power is required to provide for the maintenance of prisoners of war in its charge.

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(1) See Vol. XII, p. 90 ; and see p. 13, note 4, of the present volume for the effect of such decisions on the part of the Tribunal which conducted the trial.

(2) See Vol. XI, pp. 53–55.

(3) Article 46 was relied upon among other provisions by Judge Skau in the *Klinge Trial* (see Vol. III, p. 12).

(4) Vol. XII, pp. 90–91. In the trial of Yoshio Makizawa, a Major of the Japanese Army, held before a United States Military Commission in Shanghai, China, on 9–10 May, 1946, the accused was found guilty of torturing an American prisoner of war in an effort to extract military information. Attempts to extract such information are forbidden by Article 5 of the Geneva Convention of 1929 which provides as follows :

> " Every prisoner of war is required to declare, if he is interrogated on the subject, his true names and rank, or his regimental number.
>
> " If he infringes this rule, he exposes himself to a restriction of the privileges accorded to prisoners of his category.
>
> " No pressure shall be exerted on prisoners to obtain information regarding the situation in their armed forces or their country. Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever . . . ."

The charge brought in this trial was one of ill-treatment and did not mention that the purpose thereof was the wrongful extraction of information. It is not possible therefore to state definitely whether such extraction of information has been recognized as a separate punishable war crime. The facts of the trial of Erich Killinger and others by a British Military Court at Wuppertal are similar ; the charge on which certain accused were found guilty was one of " ill-treatment of British Prisoners of War," while the Prosecution claimed that the purpose of the ill-treatment was the obtaining from such prisoners of information which under the Geneva Convention they were not bound to give. See Vol. III, p. 67. See also p. 105, note 2, of the present volume.

(5) In the trial of Arno Heering by a British Military Court at Hanover the accused was found guilty of ill-treatment of a British national, the Prosecution having alleged that he failed to provide prisoners under his charge with sufficient food, adequate billets or any medical supplies. See Vol. XI, pp. 79–80.

" Differences of treatment between prisoners are permissible only if such differences are based on the military rank, the state or physical or mental health, the professional abilities, or the sex of those who benefit from them ; "

" Article 7. As soon as possible after their capture, prisoners of war shall be evacuated to depots sufficiently removed from the fighting zone for them to be out of danger. . . . ; "

" Article 9. . . . Prisoners captured in districts which are unhealthy or whose climate is deleterious to persons coming from temperate climates shall be removed as soon as possible to a more favourable climate. . . .

" No prisoner may at any time be sent to an area where he would be exposed to the fire of the fighting zone, or be employed to render by his presence certain points or areas immune from bombardment " ;

" Article 10. Prisoners of war shall be lodged in buildings or huts which afford all possible safeguards as regards hygiene and salubrity. . . ." ;

" Article 11. The food ration of prisoners of war shall be equivalent in quantity and quality to that of the depot troops. . . .

" Sufficient drinking water shall be supplied to them . . ." ;

" Article 12. Clothing, underwear and footwear shall be supplied to prisoners of war by the detaining Power . . ." ;

" Article 13. Belligerents shall be required to take all necessary hygienic measures to ensure the cleanliness and salubrity of camps and to prevent epidemics . . ." ;

" Article 25. Unless the course of military operations demands it, sick and wounded prisoners of war shall not be transferred if their recovery might be prejudiced by the journey " ; and

" Article 29. No prisoner of war may be employed on work for which he is physically unsuited."[1]

The Judgment regarded as falling into the same category the provision in Article 6 of the Hague Regulations that " . . . The work [on which the captor State may employ prisoners of war] shall not be excessive ".[2]

In the Judgment delivered in the *Krupp Trial* the following additional relevant provisions of the Geneval Convention were also cited, and it would seem to follow that their breach would constitute a war crime :

" Article 30. The duration of the daily work of prisoners of war including the time of the journey to and from work, shall not be excessive, and shall in no case exceed that permitted for civil workers of the locality employed on the same work. Each prisoner shall be allowed a rest of twenty-four consecutive hours each week, preferably on Sunday."

" Article 32. . . . Conditions of work shall not be rendered more arduous by disciplinary measures."[3]

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[1] This provision was cited also in the Judgment in the *Krupp Trial* (Vol. X, p. 140).

[2] Vol. XII, pp. 90–1. A relevant part of Article 2 of the Geneva Convention has also been cited in war crime trials : " Measures of reprisal against them [prisoners of war] are forbidden." (See pp. 177–182).

[3] Vol. X, p. 140–1.

The second of the paragraphs quoted above from Article 9 of the Geneva Convention was cited also by Judge Musmanno in the *Milch Trial*.[1] As was said in the Judgment in the *High Command Trial* : " To use prisoners of war as a shield for the troops is contrary to International Law."[2]

It will be recalled that Kurt Student was charged, *inter alia*, with "the use . . . of British prisoners of war as a screen for the advance of German troops " when tried by a British Military Court at Luneberg.[3] Although he was found not to have been responsible for such acts and although the charge also alleged that certain of the prisoners were killed while being used as a shield, there seems little doubt that, if proved, the mere act of forcing prisoners of war to go ahead of advancing enemy troops, thereby acting as a shield to the latter, would itself constitute another type of war crime. Indeed, Article 2 (7) of the French Ordinance of 28th August, 1944, specifically provided that : " Illegal restraint, as specified in the last paragraph of Article 344 of the *Code Pénal*, shall include the employment of prisoners of war or civilians in order to protect the enemy."[4]

(v) *Causing prisoners of war to perform unhealthy or dangerous work* is a clearly recognised war crime.[5] Article 32 of the Geneva Convention provides that : " It is forbidden to employ prisoners of war on unhealthy or dangerous work . . .", and the judgment delivered in the *High Command Trial* placed this provision among those which it regarded as being merely declaratory of existing customary law.[6]

This provision has been applied so as to render illegal the use of prisoners of war in work which is dangerous either in itself or because of the locality in which it takes place. The loading of ammunition and mine clearing have been declared to constitute dangerous work, and the use of prisoners of war in the construction of field fortifications or with combat units has also been regarded as criminal.[7]

(vi) There is, however, some little doubt regarding the extent or scope of the war crime of *causing prisoners of war to perform work having a direct connection with the operations of war.*

Article 31 of the Geneva Convention provides that :

> " Work done by prisoners of war shall have no direct connection with the operations of war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units . . ."

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[1] Vol. VII, p. 44.

[2] See Vol. XII, pp. 104–105.

[3] See Vol. IV, pp. 118–124.

[4] Vol. III, p. 96.

[5] There is nothing illegal in the mere employment of prisoners of war. Article 27 of the Geneva Convention provides : " Belligerents may employ as workmen prisoners of war who are physically fit, other than officers and persons of equivalent status according to their rank and their ability.

" Nevertheless, if officers or persons of equivalent status ask for suitable work, this shall be found for them as far as possible.

" Non-commissioned officers who are prisoners of war may be compelled to undertake only supervisory work, unless they expressly request remunerative occupation."

[6] Vol. XII, p. 91.

[7] See Vol. XII, p. 98.

This Article was specifically applied in the *Milch Trial*,(1) in the trial before a Netherlands Temporary Court Martial of Tanabe Koshiro, when the court decided that the building of ammunition dumps constituted " work connected with the operations of war "(2) and in the trial before the International Military Tribunal at Nuremberg.(3)

In the *I.G. Farben Trial* the Tribunal pointed out that the use of prisoners of war in war operations and in work having a direct relation to such operations was prohibited by the Geneva Convention.(4) The Judgment delivered in the *Krupp Trial* cited the first paragraph of Article 31 of the Geneva Convention (and Article 6 of the Hague Convention) among a number of Articles from the Hague and Geneva Conventions and said that " practically everyone of the foregoing provisions were violated in the Krupp enterprises ".(5)

In the *Flick Trial*, one of the offences found by the Tribunal to have been proved was that of voluntarily employing prisoners of war on work " bearing a direct relation to war operations ".(6) The Tribunal would appear to have found the use of prisoners of war for the production of freight cars to be contrary to the Hague Regulations.(7)

Article 2 (6) of the French Ordinance of 28th August, 1944, should also be quoted at this point :

> " Illegal restraint, as specified in paragraphs 1 and 2 of Article 344 of the *Code Pénal*, shall include the employment on war work of prisoners of war or conscripted civilians."(8)

On the other hand the Tribunal acting in the *High Command Trial* did not list Article 31 among those which it regarded as being an expression of existing customary law and held that " in view of the uncertainty of the international law " as to the question of the " use of prisoners of war in the construction of fortifications " (which might not unreasonably have been regarded as work having a direct connection with the operations of war)

(1) See Vol. VII, pp. 43 and 47. The Tribunal relied also upon Article 6 of the Hague Regulations which reads : " The State may employ the labour of prisoners of war, other than officers, according to their rank and capacity. The work shall not be excessive, and shall have no connection with the operations of the war." (Vol. VII, p. 43). Judge Phillips' judgment included the words : " The Tribunal holds as a matter of law that it is illegal to use prisoners of war in armament factories and factories engaged in the manufacture of airplanes for use in war effort." (Vol. VII, p. 47).

(2) See Vol. XI, pp. 1–3. The Court relied also upon Article 6 of the Hague Convention.

(3) See British Command Paper, Cmd. 6964, p. 59, quoted in Vol. XII, p. 100.

(4) Vol. X, p. 54. The Tribunal would appear to have agreed however, that there was some doubt as to the extent of application of the prohibition of such use of prisoners of war. Of the employment of prisoners of war, the Tribunal said : " The use of prisoners of war in war operations and in work having a direct relation to such operations was prohibited by the Geneva Convention. Under Count III the defendants are charged with violations of this prohibition. To attempt a general statement in definition or clarification of the term ' direct relation to war operations ' would be to enter a field that the writer and students of international law have found highly controversial. We therefore limit our observations to the particular facts presented by this record " ; and at an earlier point : " The use of prisoners of war in coal mines in the manner and under the conditions disclosed by this record we find to be a violation of the regulations of the Geneva Convention, and therefore, a war crime."

(5) Vol. X, pp. 140–1.

(6) See Vol. IX, p. 53.

(7) See Vol. IX, pp. 20–21.

(8) Vol. III, p. 96.

" orders providing for such use from superior authorities, not involving the use of prisoners of war in dangeous areas, were not criminal on their face. . . ."[1] It has been conceded in the notes to the *High Command Trial* that " prosecuting staffs have preferred to charge accused with exposing prisoners of war to danger rather than with employing them in work directly connected with operations of war, when the facts of cases could have given reasonable prospects of a conviction on either."[2]

(vii) In the trial of Tanaka Chuichi and two others by an Australian Military Court,[3] the accused was found guilty of ill-treatment of prisoners of war. Prominent among the evidence against the accused was the fact that they cut off the prisoners' hair and beards and forced a prisoner to smoke. Since the prisoners were Sikhs, such acts were a violation of their religious feelings. In this trial therefore, an *infringement of the religious rights of prisoners of war* was apparently punished but since the Court did not deliver a reasoned judgment it cannot be stated definitely that such infringements of the religious rights of prisoners of war were regarded as separate punishable war crimes.[4]

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[1] See Vol. XII, pp. 97–98.

[2] Vol. XII, p. 101. An act in some ways similar to causing prisoners of war to perform work having a direct connection with the operations of war is that of interrogating them regarding the situation of their own armed forces or their country. In the Trial of Eric Killinger and four others by a British Military Court, Wuppertal, 26th November—3rd December, 1945, the Prosecutor rested his case on the Geneva Prisoners of War Convention of 1929 and in particular Articles 2 and 5. Article 5 reads as follows :

" Article 5. Every prisoner of war is required to declare, if he is interrogated on the subject, his true names and rank, or his regimental number. If he infringes this rule, he exposes himself to a restriction of the privileges accorded to prisoners of his category.

" No pressure shall be exerted on prisoners to obtain information regarding the situation of their armed forces or their country. Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever.

" If, by reason of his physical or mental condition, a prisoner is incapable of stating his identity, he shall be handed over to the Medical Service."

There is no indication whether the court regarded a mere breach of this article as constituting a war crime but it is interesting to note that one of the Defence Counsel made three submissions regarding the scope of the Convention, to which the court expressed its agreement. The first was that under the Geneva Convention interrogation as such was not unlawful. The second was that to obtain information by a trick was not unlawful, under the same Convention. The third point was that to interrogate a wounded prisoner was not in itself unlawful unless it could be proved that that interrogation amounted to what could be described as physical or mental ill-treatment. (Vol. III, pp. 67–68). It thus appears that if a breach of the Article is criminal, it is only so when some form of pressure has been found to have been exerted on prisoners to obtain information regarding the situation of their forces or country.

[3] See Vol. XI, pp. 62–63.

[4] Article 18 of the Hague Convention and Article 16, first paragraph, of the Geneva Prisoners of War Convention protect other aspects of the religious rights of prisoners of war :

" Article 18. Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of their own Church, on the sole condition that they comply with the police regulations issued by the military authorities."

" Article 16. Prisoners of war shall be permitted complete freedom in the performance of their religious duties, including attendance at the services of their faith, on the sole condition that they comply with the routine and police regulations prescribed by the military authorities."

(viii) The balance of judicial authority seems to indicate that the mere act of *handing over prisoners of war to the S.D.* within his command territory made a German commander who did so guilty of a war crime, irrespective of the actual fate of the prisoners.[1] The Judgment delivered in the *High Command Trial* ruled however that it was legal for German field commands to transfer prisoners of war *to the Reich* and that " thereafter their control of such prisoners terminated."[2]

2. OFFENCES AGAINST THE SICK AND WOUNDED

Special provision is made for the protection of the sick and wounded by the Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Of this Convention, Articles 1 and 2 were quoted in the Prosecution in the trial of Kurt Meyer.[3] They provide as follows :

Article 1 :

" Officers and soldiers and other persons officially attached to the armed forces who are wounded or sick shall be respected and protected in all circumstances ; they shall be treated with humanity and cared for medically without distinction of nationality, by the belligerent in whose power they may be.

" Nevertheless, the belligerent who is compelled to abandon wounded or sick to the enemy, shall, as far as military exigencies permit, leave with them a portion of his medical personnel and material to help with their treatment ; " and

Article 2 :

" Except as regards the treatment to be provided for them in virtue of the preceding article, the wounded and sick of an army who fall into the hands of the enemy shall be prisoners of war, and the general provisions of international law concerning prisoners of war shall be applicable to them.

" Belligerents shall, however, be free to prescribe, for the benefit of wounded or sick prisoners, such arrangements as they may think fit beyond the limits of the existing obligations."

It is not possible, however, to say whether, in finding the accused guilty on certain charges the Canadian Military Court which tried him applied these specific provisions.

The infrequency with which the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field has been relied upon in war crime trials may be due to the fact that most actual situations

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(1) Relevant authorities on this question are examined in Vol. XII, pp. 102–4.

(2) Vol. XII, p.102.

(3) See Vol. IV, pp. 97–112.

which have arisen to which it would apply have also been provided for by the Prisoners of War Convention, on which Prosecuting Staffs have preferred to rely.(1)

3. OFFENCES AGAINST SURVIVORS OF SUNKEN SHIPS

After a naval engagement, both belligerents must, as far as military interests permit, take steps to search for the shipwrecked, wounded and sick, and to protect them.(2) Some few violations of this rule have come before Allied courts in recent years.

In the *Peleus Trial* certain accused were found guilty of being concerned in the killing of members of the crew of a sunken steamship by firing and throwing grenades at them while on rafts.(3) In the trial of von Ruchteschell by a British Military Court at Hamburg, the accused was found guilty of, *inter alia*, sinking an enemy merchant vessel without making any provision for the safety of the survivors ; the finding of guilty on this, the fourth charge, was confirmed.(4) In the trial of Karl-Heinz Moehle a British Military Court found that the mere giving of an order that subordinate U-Boat commanders were to destroy ships *and their crews* was a war crime.(5)

Clearly, no operational necessity could excuse the outright killing of survivors, and, of the three trials referred to above, the second is the most interesting since it shows the limits beyond which an accused could not plead that " military interests " necessitated a neglect to look after survivors.(6) It illustrates the limits of the scope of the rule expressed by the Judge Advocate acting in the *Moehle Trial* when he said : " I think we all concede that the real important duty of the submarine commander is to ensure the safety of his own ship, and if it is a question of saving life or saving his ship, then clearly he must save his ship."(7)

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(1) Rare also is the application of the provisions of the Wounded and Sick Convention relating to medical personnel. Provision is made for the safeguarding of the personal security of medical personnel by Arts. 6 and 9 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, which provide as follows :

Article 6 :

" Mobile medical formations, that is to say, those which are intended to accompany armies in the field, and the fixed establishments of the medical service shall be respected and protected by the belligerents."

Article 9 :

" The personnel engaged exclusively in the collection, transport and treatment of the wounded and sick, and in the administration of medical formations and establishments, and chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war.

" Soldiers specially trained to be employed, in case of necessity, as auxiliary nurses or stretcher-bearers for the collection, transport and treatment of the wounded and sick, and furnished with a proof of identity, shall enjoy the same treatment as the permanent medical personnel if they are taken prisoners while carrying out these functions."

It will be noted that medical personnel are not to be treated as prisoners of war on capture, but are presumably to receive a high standard of treatment.

Kurt Student was charged with being responsible for, *inter alia*, bombing of a hospital and the use of medical personnel to shield his troops but the British Military Court which tried him found him not guilty on these charges (see Vol. IV, pp. 118 and 120).

(2) This duty is elaborated upon in Vol. IX, pp. 78 and 88.

(3) See Vol. I, pp. 2 and 13.

(4) See Vol. IX, pp. 82, 85 and 86.

(5) See Vol. IX, pp. 75, 78 and 80.

(6) The relevant circumstances are set out in Vol. IX, p. 85.

(7) Vol. IX, p. 78.

4. THE KILLING WITHOUT TRIAL OF CAPTURED SPIES

Articles 29 and 30 of the Hague Convention makes the following provisions relating to captured spies :

Article 29 :

"A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

"Accordingly soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army for the purpose of obtaining information are not considered spies. Similarly, the following are not considered spies : Soldiers and civilians entrusted with the delivery of despatches intended either for their own army or for the enemy's army, and carrying out their mission openly. To this class likewise belong persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory."

Article 30 :

"A spy taken in the act shall not be punished without previous trial."

In very few trials was it admitted by the Prosecution or the Court that the victim of a killing might have been a spy, but it has sometimes been stressed that, even if he was a spy, his killing *without trial* was a war crime.

In the *Almelo Trial* the defence claimed that a British victim who had been found in hiding and in Dutch clothes was a spy and that his being shot was therefore legal. The Judge Advocate acting in this British trial advised the court, however, that it was not relevant whether or not the circumstances under which the Pilot Officer had been apprehended gave rise to the suspicion that he was engaged in espionage against Germany, and that it was decisive whether the accused honestly believed that the victim had been tried according to law and that they further believed that in shooting him they were carrying out a lawful execution.(1)

In the trial of Werner Rohde and others by a British Military Court at Wuppertal, the defence claimed that the victims whose killing was the subject of the charge had been executed as spies. In reply to these arguments, the Prosecutor admitted that, while the victims' mission was not connected with espionage, they might nevertheless, on the least favourable interpretation, be possibly classified as spies. Had they had a trial by a competent court and subsequently been lawfully executed by shooting this case would never have been brought. The Defence, however, had not shown that there was any trial. The Judge Advocate said that the Court might choose to regard as spies " persons sent by aircraft for the purpose of maintaining communications ". He went on, however, to say that, if the victims had been obviously spies, their being such might have been a mitigating circumstance which the accused could possibly plead, but the doubt which existed on the point made it all the more clear that they should have been given a trial.

(1) See Vol. I, pp. 43–44.

The Judge Advocate, after reviewing the evidence on the point, concluded that he could see no proof that a trial in any real sense was held. A separate issue was whether or not the accused actually regarded the execution as being a judicial one ; the Judge Advocate thought it legally sound to plead that the accused did so, if it could be proved in fact.(1) Here again, therefore, the main stress was placed on the question of a prior trial, as it was also in the trial of Karl Buck and others by a British Military Court at Wuppertal.(2)

5. OFFENCES COMMITTED DURING ACTUAL COMBAT

(i) Those rules of international law which relate to the actual conduct of hostilities have only infrequently been made the basis of war crime trial proceedings.(3) Such provisions include Articles 22 and 24–28, and most of Article 23, of the Hague Regulations (Articles 22–28 are the contents of Chapter 1, *Means of Injuring the Enemy, Seiges and Bombardments*, of Section II, *Of Hostilities*, of the Regulations).

Otto Skorzeny and others were accused of participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing on and killing members of the armed forces of the United States, but they were all acquitted by the United States Military Government Court which tried them, possibly on the facts appearing in the evidence.(4)

In the trial of S.S. Brigadefuhrer Kurt Meyer, held by a Canadian Military Court at Aurich from 10th–28th December, 1945, it was alleged, *inter alia*, that the accused, in violation of the laws and usages of war, during the fighting in 1943–44, in Belgium and France, " incited and counselled troops under his command to deny quarter to allied troops ", and this was one of the charges on which Meyer was found guilty. Nevertheless, it is doubtful whether such offences should be classified as offences against the members of armed forces or offences against prisoners of war. They are specifically prohibited by Article 23 (d) of the Hague Convention which provides :

> *Article* 23 :
>
> " In addition to the prohibitions provided by special Conventions, it is particularly forbidden :
>
> " (d) To declare that no quarter will be given."(5)

In the *Ruchteschell Trial*, the accused was found guilty on, among others, a charge of continuing to fire on a British merchant vessel after the latter had indicated surrender.(6)

As the Prosecutor acting in that trial admitted, the question of the legality of attacks made on various merchant ships by the accused before their surrender did not arise in the proceedings taken against him.(7) Furthermore, in the *Peleus Trial*, the Prosecution preferred not to charge an illegal sinking of the steamship. Here the accused were charged with :

> " Committing a war crime in that you in the Atlantic Ocean on the night of 13th/14th March, 1944, when Captain and members of the crew of Unterseeboat 852 which had sunk the steamship ' Peleus ' in

(1) See Vol. V, pp. 55–58.
(2) See Vol. V, p. 44. Compare Vol. XI, p. 73.
(3) Compare Vol. X, pp. 48–49.
(4) See Vol. IX, pp. 90–3.
(5) Vol. IV, pp. 98, 100 and 108.
(6) See Vol. IX, pp. 83, 83–4, 86 and 89.
(7) See Vol. IX, pp. 86–7.

violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, Allied nations, by firing and throwing grenades at them."

It was submitted on behalf of the Defence that the charge might be read in two different ways, according to which the phrase " in violation of the laws and usages of war " could qualify either the word " sunk " or the word " concerned ", and what followed it.

The first interpretation would mean that the steamship " Peleus " was sunk in violation of the laws and usages of war. The second construction would mean that the killing of members of the crew was in violation of the laws and usages of war.

It was made clear at the outset by the Prosecution that the phrase " in violation of the laws and usages of war " qualified the words that follow it, and not the words that precede it, or in other words, that the prisoners were accused of having violated the laws and usages of war not by *sinking* the merchantman, but by *firing* and *throwing grenades* on the *survivors* of the sunken ship.(1)

(ii) No records of trials in which allegations were made of the illegal conduct of air warfare have been brought to the notice of the United Nations War Crimes Commission, and since the indiscriminate bombing of Allied cities by the German air force was not made the subject of a charge against any of the major German war criminals, the judgment of the Nuremberg International Military Tribunal did not contain any ruling as to the limits of legal air warfare.(2) It should be added however that the " deliberate bombardment of undefended places " is declared a war crime by the Australian, Netherlands and Chinese laws ; so too is the use of poison gases.(3)

In dealing with a defence plea, however, the Tribunal acting in the *Einsatzgruppen Trial* made some incidental remarks regarding aerial bombardment :

" Then it was submitted that the defendants must be exonerated from the charge of killing civilian populations since every Allied nation brought about the death of non-combatants through the instrumentality of bombing. Any person, who, without cause, strikes another may not later complain if the other in repelling the attack uses sufficient force to overcome the original adversary. That is fundamental law between nations as well.

" It has already been adjudicated by a competent tribunal that Germany under its Nazi rulers started an aggressive war. The bombing of Berlin, Dresden, Hamburg, Cologne and other German cities followed the bombing of London, Coventry, Rotterdam, Warsaw and other Allied cities ; the bombing of German cities succeeded, in point of time, the acts discussed here. But even if it were German cities without Germans having bombed Allied cities, there still is no parallelism between *an act of legitimate warfare, namely the bombing of a city*, with

(1) See Vol. I, p. 2. The interesting decision of the International Military Tribunal not to assess Doenitz's sentence on the ground of his breaches of the international law of submarine warfare is quoted in Vol. IX, pp. 79–80.

(2) The United Nations War Crimes Commission, in its production of lists of persons against whom a *prima facie* case of having committed a war crime had been established, consistently rejected cases alleging illegitimate bombardment, if on the evidence before the Commission on the bombarded places contained military objectives, and listed only such persons as were held responsible for having intentionally bombarded places containing no military objectives.

(3) See Vol. V, p. 95 ; Vol. XI, p. 94 and Vol. XIV, p. 154.

a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory.

" *A city is bombed for tactical purposes :* communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. *The civilians are not individualised.* The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women and children and shooting them.

" It was argued in behalf of the defendants that there was no normal distinction between shooting civilians with rifles and killing them by means of atomic bombs. There is no doubt that the invention of the atomic bomb, when used, was not aimed at non-combatants. Like any other aerial bomb employed during the war, it was dropped to overcome military resistance.

" Thus, as grave a military action as is an air bombardment, whether with the usual bombs or by atomic bomb, the one and only purpose of the bombing is to effect the surrender of the bombed nation. The people of that nation, through their representatives, may surrender and, with the surrender, the bombing ceases, the killing is ended. Furthermore, *a city is assured of not being bombed by the law-abiding belligerent if it is declared an open city.* With the Jews it was entirely different. Even if the nation surrendered they still were killed as individuals."[1]

(iii) Rulings relating to certain offences which are analogous to war crimes and which may be regarded as offences committed during the course of hostilities have been made during Allied trials of ex-enemies accused of having punished Allied persons on the grounds that they committed such offences. Thus in the trial of Sergeant-Major Shigeru Ohashi and Six Others by an Australian Military Court, Rabaul, 20th–23rd March, 1946, the Judge Advocate advised the court that :

" By the laws and usages of war inhabitants of occupied territories have not only certain rights but owe certain duties to the occupant, who may punish any violation of those duties.

" Certain acts if committed by such inhabitants are punishable by the enemy as war crimes.

" Amongst such acts are :

(*a*) Illegitimate hostilities in arms committed by individuals who are not members of the armed forces ;

(*b*) Espionage and war treason.

" The deceased would, being civilian inhabitants of an occupied territory, be guilty of the war crime known as War Rebellion if they rose in arms against the occupant.

" War treason includes such acts by private individuals as damage to war material or conspiracy against the armed forces or against members of them."

[1] Italics inserted.

After stating that the allegations of the accused that the deceased had been guilty of acts of hostility against the Japanese armed forces had not been rebutted and were entitled to be believed, the Judge Advocate contined :

" Their actions rendered the deceased liable to punishment as war criminals.

" Charges of war crimes may be dealt with by military courts or such courts as the belligerent concerned may direct.

" In every case there must be a trial before punishment and the utmost care must be taken to confine the punishment to the actual offender.

" All war crimes are liable to be punished by death."(1)

Similarly in the trial of Captain Eikichi Kato, by an Australian Military Court, Rabaul, 7th May, 1946, the Judge Advocate drew the court's attention to the provisions of international law regarding espionage and war treason as described in two paragraphs in Chapter XIV of the Australian *Manual of Military Law* :

" 158. It is lawful to employ spies and secret agents, and even to gain over by bribery or other means enemy soldiers or private enemy subjects. Yet the fact that these methods are lawful does not prevent the punishment, under certain conditions, of the individuals who are engaged in procuring intelligence in other than an open manner as combatants. Custom admits their punishment by death, although a more lenient penalty may be inflicted.

" 159. The offence is punishable whether or not the individuals succeed in obtaining the information and conveying it to the enemy."

The Judge Advocate also made reference to Articles 29 and 30 of the Hague Convention relating to spies and their right to a trial.(2)

The Tribunal acting in the *Hostages Trial*, whose words regarding legal and illegal combatants have already been quoted(3) said : " We think the rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal. Fighting is legitimate only for the combatant personnel of a country."(4) A war crime may, however, be committed against illegal combatants insofar as they may be killed or otherwise punished without a fair trial.(5)

Similarly the Tribunal which conducted the *Justice Trial* conceded that " in territory under belligerent occupation the military authorities of the occupant may, under the laws and customs of war, punish local residents who engage in Fifth Column activities hostile to the occupant ", but stated that this rule would not justify punishment by death of Poles who attempted to escape from the Reich in order to join the Allied forces.(6)

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(1) See Vol. V, pp. 27–30. See also p. 35 of that Volume.
(2) Vol. V, pp. 37–38. Regarding the Articles cited see p. 108.
(3) See pp. 80–82.
(4) Vol. VIII, p. 58.
(5) See pp. 113 and 161–166.
(6) See Vol. VI, pp. 53 and 93–4.
It should be added here that the Norwegian Supreme Court in the *Klinge Trial* and certain Netherlands Courts have stated that acts of resistance on the part of inhabitants of occupied territory (like espionage), while they can legally be punished by the occupant, may yet be at the same time in some sense not contrary to international law ; see Vol. III, pp. 21–2 and Vol. XIV, pp. 127–129 and 135–137.

6. OFFENCES AGAINST INHABITANTS OF OCCUPIED TERRITORIES

The protection afforded by international law to inhabitants of occupied territories derives largely from the Regulations attached to the Hague Convention No. IV of 1907 and from the rules of customary law of which these Regulations are a codification.(1) The relevant Articles of the Hague Regulations are Articles 42–56, which fall under the heading : *Section III—Military Authority over the Territory of the Hostile State.* Of these, Article 50 is quoted on page 179 and Articles 43 and 46 provide as follows :

Article 43 :

" The authority of the power of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country."

Article 46 :

" Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected.

" Private property may not be confiscated."(2)

(i) The *unwarranted killing of inhabitants of occupied territories* is a war crime and has often been made the subject of war crimes proceedings.(3)

(ii) It is open to a person accused of killing a civilian inhabitant to plead that the execution was in fact a legal killing ; this plea is dealt with elsewhere.(4) Just as there is possibly a substantive offence of the denial of a fair trial to a prisoner of war(5), however, so also is it arguable that the *denial of a fair trial to inhabitants of occupied territories* has been recognised separate war crime or crime against humanity. Here also it is felt that the courts would require the same evidence to prove the perpetration of the positive offence, assuming it to be recognised, as they would regard as vitiating a plea that the killing was a legal one.(6) Illegal combatants(7) may be executed on capture, but only after a fair trial.(8)

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(1) See pp. 12–13.

(2) Of this provision the parts protecting life and property have been directly enforced in war crime trials. Family honour and rights have been only indirectly protected, in that the violation of family rights have not been explicitly made the subject of a charge.

Many of the offences for which war criminals have been condemned have, however, constituted violations of family rights. Examples are provided by the splitting up of families for purposes of deportation to slave labour, and in the operation of the *Nacht und Nebel Plan* as the Tribunal which conducted the *Justice Trial* pointed out (see Vol. VI, pp. 56 and 57).

In the Trial of Heinrich Gerike and seven others before a British Military Court at Brunswick from 20th March to 3rd April, 1946 (the *Velpke Children's Home Case*), the prosecution relied upon Art. 46. In this case, various accused were found guilty of being " concerned in the killing by wilful neglect of a number of children, Polish nationals." It was shown that they were implicated in the establishment and running of a home to which Polish female workers in a district of Germany were forced to send their children, the object being to free the parents for forced labour for the benefit of the German economy. Many of the children died through neglect. (See Vol. VII, pp. 76–81).

As to the protection of religious rights, see pp. 123–124.

(3) See for example Vol. I, pp. 36, 47, 93 and 103 ; Vol. II, p. 4 ; Vol. III, pp. 40 and 76 ; Vol. IV, p. 4 ; Vol. V, pp. 25, 37 and 42 ; Vol. VI, pp. 3 and 111 ; Vol. VII, p. 17 ; Vol. VIII, pp. 1, 9, 15, 22 and 34 ; and Vol. XIII, p. 112 and 126. Concerning the shooting of escaping civilian prisoners, see Vol. XIII, pp. 119–21.

(4) See pp. 161–166.

(5) See p. 99.

(6) This point is discussed in Vol. VI, pp. 102–103.

(7) See pp. 111–112.

(8) See Vol. V, p. 28, 35 and 52. In the trial of Susuki Motosuki, a Netherlands Temporary Court Martial found a Japanese responsible for the illegal killing of certain Indonesians without an adequate trial even though the victims had in fact committed punishable offences. See Vol. XIII. pp. 129–30.

(iii) The *ill-treatment of inhabitants of occupied territories* is also a recognised war crime, and there have been many trials in which this offence has been charged.(1)

(iv) A special type of ill-treatment which has received attention in Volume VII of these Reports, and which has been the fate of many concentration camp inmates, is *subjection to illegal experiments.*(2) It may safely be said that subjection to experiments is *prima facie* ill-treatment and requires justification.

The trial in which the judges came nearest to laying down the conditions under which experiments could be regarded as legal was the trial of Erhard Milch by a United States Military Tribunal in Nuremberg. While finding Milch himself not guilty under Count Two, the Tribunal expressed certain opinions as to the characteristics of legal and illegal medical experiments.

The judgment of the Tribunal indicated that the *corpus delicti*, as far as Count Two of the Indictment was concerned, would be established if it were shown that low-pressure and freezing experiments were carried on which were " of a character to inflict torture and death on the subjects."(3) In finding that the *corpus delicti* had been proved the Tribunal pointed out (i) that the experiments were carried out " under the specious guise of science " and that under the specific guidance of Dr. Rascher, the air pressure was reduced to a point which no flier would ever be required to undergo ";(4) and (ii) that there was no credible evidence that the subjects of the experiments were " habitual criminals who had been sentenced to death ".(5)

From Judge Musmanno's remarks(6) it seems that, in his opinion, the experiments would not be legal unless they were performed upon prisoners actually condemned to death previously by a court with authority to declare " that the execution would be accomplished by means of a low-pressure chamber ", by a court which actually did so declare, and " after bona fide proof that the subject had committed murder or any other legally recognised capital offence " ; and even then only if the experiments were painless and were of scientific value. Judge Musmanno made it clear that " political prisoners marked for extermination " would not fall within the category of persons found to have committed a " legally recognised capital offence ".

Allegations of responsibility for illegal experiments were made also in the *Trial of Karl Brandt and Others* (The *Doctor's Trial*) and in the *Trial of Oswald Pohl and Others*, each held also before United States Military Tribunals. As has been shown in the notes to the *Milch Trial*,(7) however, the judgment in the *Pohl Trial*, which was delivered after those in the *Milch*

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(1) See for instance Vol. II, p. 4 ; Vol. III, pp. 1, 12 and 15 ; Vol. XIII, pp. 71, 105, 121 and 131.

(2) This offence has been committed against prisoners of war (see for instance a reference to such acts in Vol. VII, p. 51) but the victims have mainly been civilians of occupied territories or German nationals. (In the case of the latter, the offence punished might constitute a crime against humanity but not a war crime.)

(3) See Vol. VII, p. 35.

(4) See Vol. VII, p. 36.

(5) See Vol. VII, p. 36.

(6) See Vol. VII, p. 45.

(7) See Vol. VII, pp. 49–53.

Trial and *Doctors' Trial*, did not expand upon the legal aspects of the conducting of medical experiments and, while the judgment delivered in the *Doctors' Trial* elaborated " ten principles " which were introduced as being based on " moral, ethical and legal concepts ", the Tribunal did not differentiate between those legally necessary and those not, either in enumerating them or in setting out its reasons for finding, on the evidence, that they " were much more frequently honoured in their breach than in their observance ".(1) In another passage, however, the Tribunal may be thought to have had legal concepts only in mind :

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(1) The Judgment delivered in the *Doctors' Trial* includes the passages mentioned in the text under a heading : *Permissible Medical Experiments* :

" The great weight of the evidence before us is to the effect that certain types of medical experiments on human beings, when kept within reasonably well defined bounds, conform to the ethics of the medical profession generally. The protagonists of the practice of human experimentation justify their views on the basis that such experiments yield results for the good of society that are unprocurable by other methods or means of study. All agree, however, that certain basic principles must be observed in order to satisfy moral, ethical and legal concepts :

" 1. The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent ; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion ; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment ; the method and means by which it is to be conducted ; all inconveniences and hazards reasonably to be expected ; and the effects upon his health or person which may possibly come from his participation in the experiment.

" The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

" 2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.

" 3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiments.

" 4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

" 5. No experiment should be conducted where there is an *a priori* reason to believe that death or disabling injury will occur ; except, perhaps, in those experiments where the experimental physicians also serve as subjects.

" 6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

" 7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.

" 8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.

" 9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.

" 10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

" Of the ten principles which have been enumerated our judicial concern, of course, is with those requirements which are purely legal in nature—or which at least are so closely and clearly related to matters legal that they assist us in determining criminal culpability and punishment. To go beyond that point would lead us into a field that would be beyond our sphere of competence. . . ." (Vol. VII, pp. 49–50.)

"In every single instance appearing in the record, subjects were used who did not consent to the experiments ; indeed, as to some of the experiments, it is not even contended by the defendants that the subjects occupied the status of volunteers. In no case was the experimental subject at liberty of his own free choice to withdraw from any experiment. In many cases experiments were performed by unqualified persons ; were conducted at random for no adequate scientific reason, and under revolting physical conditions. All of the experiments were conducted with unnecessary suffering and injury and but very little, if any, precautions were taken to protect or safeguard the human subjects from the possibilities of injury, disability, or death. In every one of the experiments the subjects experienced extreme pain or torture, and in most of them they suffered permanent injury, mutilation, or death, either as a direct result of the experiments or because of lack of adequate follow-up care.

"Obviously all of these experiments involving brutalities, tortures, disabling injury and death were performed in complete disregard of international conventions, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilised nations, and Control Council Law No. 10. Manifestly human experiments under such conditions are contrary to 'the principles of the laws of nations as they result from the usages established among civilised peoples, from the laws of humanity, and from the dictates of public conscience'."

The conducting of numerous illegal experiments at Auschwitz Concentration Camp was proved in the trial of Rudolf Hoess by the Supreme National Tribunal of Poland, but the Tribunal did not lay down any general principles according to which the legality under international law of experiments was to be determined.(1)

Again, the subjecting of inmates to inhuman experiments figured among the facts proved in the *Dachau Concentration Camp Case*,(2) but the trial does not indicate what could be regarded as legal experiment.

Nevertheless, the Judgments in the *Milch Trial* and in the *Doctors' Trial* go some way towards elaborating the nature of such experiments as may constitute war crimes or crimes against humanity. It may also be noted that the relevant Counts contained in the Indictment in the *Doctors' Trial* and in the *Milch Trial* charged, *inter alia*, responsibility for "plans and enterprises involving medical experiments *without the subjects consent*" (Italics inserted), and that the analogous wording in the Indictment in the *Pohl Trial* was : "The murders, torture and ill-treatment charged were

(1) See Vol. VII, pp. 14–16 and 24–26. The following facts concerning these experiments which were proved in evidence may, however, be repeated here :

"Experiments were always carried out under compulsion and in many cases physical violence was used. They were often performed by unqualified doctors and in appalling conditions. They did not serve any scientific purpose. They were performed with unnecessary suffering and injury and without proper protection against the risks of disability or death. The subjects experienced extreme pain and torture, and permanent injury or death followed in many cases. The doctors and the personnel performing experiments did not show any care or give any assistance to persons frequently seriously ill in consequence of the experiments."

(2) See Vol. XI, p. 6.

carried out by the defendants by divers methods, including . . . medical, surgical, and biological experimentation on *involuntary* human subjects ". (Italics inserted.)

Furthermore, Article II of the Chinese War Crimes Law of 24th October, 1946, makes a definite provision on a related point :

> " A person who commits an offence which falls under any one of the following categories shall be considered a war criminal. . . . Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as . . . forcing people to consume or be innoculated with poison, or destroying their power of procreation."(1)

(v) A further recognised war crime is the *deportation of inhabitants of occupied territories.*(2) Judge Phillips, in his concurring opinion in the *Milch Trial*, made some interesting remarks on deportation of civilians as a war crime or crime against humanity, and based his views upon, *inter alia*, Article 52 of the Hague Regulations and Article II (1) of Control Council Law No. 10.(3) He pointed out that : " International Law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime ".

These conditions he enunciated as follows : " If the transfer is carried out without a legal title, as in the case where people are deported from a country occupied by an invader while the occupied enemy still has an army in the field and is still resisting, the deportation is contrary to international law. The rationale of this rule lies in the supposition that the occupying power has temporarily prevented the rightful sovereign from exercising its power over its citizens. Articles 43, 46, 49, 52, 55 and 56, Hague Regulations, which limit the rights of the belligerent occupant, do not expressly specify as crime the deportation of civilians from an occupied territory. Article 52 states the following provisions and conditions under which services may be demanded from the inhabitants of occupied countries.

1. They must be for the needs of the army of occupation.

2. They must be in proportion to the resources of the country.

3. They must be of such a nature as not to involve the inhabitants in the obligation to take part in military operations against their own country.

" In so far as this section limits the conscription of labour to that required for the needs of the army of occupation, it is manifestly clear that the use of labour from occupied territories outside of the area of occupation is forbidden by the Hague Regulation.

" The second condition under which deportation becomes a crime occurs when the purpose of the displacement is illegal, such as deportation for the purpose of compelling the deportees to manufacture weapons

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(1) Vol. XIV, p. 153.

(2) On this point see Vol. VII, pp. 53–58 and 75. The offence was proved in the *Greiser Trial*, but the Polish Supreme National Tribunal does not appear to have analysed at any length the law on this particular point ; see Vol. XIII, p. 112.

(3) *Ibid*, pp. 45–47 ; and see pp. 55–56 of that Volume.

for use against their homeland or to be assimilated in the working economy of the occupying country. The defence as contained in this case is that persons were deported from France into Germany legally and for a lawful purpose by contending that such deportations were authorised by agreements and contracts between Nazi and Vichy French authorities. The Tribunal holds that this defence is both technically and substantially deficient. The Tribunal takes judicial notice of the fact that after the capitulation of France and the subsequent occupation of French territory by the German army that a puppet government was established in France and located at Vichy. This government was established at the instance of the German army and was controlled by its officials according to the dictates and demands of the occupying army and that in a contract made by the German Reich with such a government as was established in France amounted to in truth and in fact a contract that on its face was null and void. The Vichy Government, until the Allies regained control of the French Republic, amounted to no more than a tool of the German Reich. It will be borne in mind that at no time during the Vichy régime a Peace Treaty had been signed between the French Republic and the German Reich but merely a cessation of hostilities and an armistice prevailed, and that French resistance had at no time ceased and that France at all times still had an army in the field resisting the German Reich.

"The third and final condition under which deportation becomes illegal occurs whenever generally recognised standards of decency and humanity are disregarded. This flows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner. A close study of the pertinent parts of Control Council Law No. 10 strengthens the conclusions of the foregoing statements that deportation of the population is criminal whenever there is no title in the deporting authority or whenever the purpose of the displacement is illegal or whenever the deportation is characterised by inhumane or illegal methods."

The judgment then continued :

"Article II (1) (*c*) of Control Council Law No. 10 specifies certain crimes against humanity. Among those is listed the deportation of any civilian population. The general language of this subsection as applied to deportation indicates that Control Council Law No. 10 has unconditionally contended as a crime against humanity every instance of the deportation of civilians. Article II (1) (*b*) names deportation to slave labour as a war crime. Article II (1) (*c*) states that the enslavement of any civilian population is a crime against humanity. Thus Law No. 10 treats as separate crimes and different types of crime 'deportation of slave labour' and 'enslavement'. The Tribunal holds that the deportation, the transportation, the retention, the unlawful use and the inhumane treatment of civilian populations by an occupying Power are crimes against humanity."

This statement was adopted by the Military Tribunal which conducted the *Krupp Trial*.[1]

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[1] Vol. X, pp. 144–5. Compare Vol. XII, pp. 92–3.

While in practice cases of alleged deportation and " slave labour " have usually arisen for treatment together, for deportation to become a war crime or a crime against humanity it need not have enslavement as its object. This conclusion appears to have been accepted by the Tribunal acting in the *Milch Trial*[1] and is certainly established by a study of certain French, Australian, Chinese and Yugoslav provisions relating to the trial of war criminals.

Thus, the French Ordinance of 28th August, 1944, concerning the suppression of war crimes, provides, in its Article 2 (5) that :

> " (5) Illegal restraint, as specified in Articles 341, 342 and 343 of the *Code Pénal*, shall include forced labour of civilians and deportation for any reason whatever of any detained or interned person against whom no sentence which is in accordance with the laws and customs of war has been pronounced."[2]

The definition of " war crime " under Australian Law also includes " deportation of civilians,"[3] as did the list of war crimes drawn up by the Responsibilities Commission of the Paris Peace Conference in 1919, on which the Australian catalogue of war crimes was based. According to Article II of the Chinese War Crimes Law of 24th October, 1946, the term " war criminal " includes " Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as (*a*) killing, starving, massacring, enslaving, or mass deportation of its nationals " ; while Article 3 (3) of the Yugoslav War Crimes Law of 25th August, 1945, provides, *inter alia*, that " forced deportation or removal to concentration camps " by enemy nationals are war crimes. The jurisdictional provisions of most of the instruments governing United States Military Commissions state that " deportation to slave labour or for any other purpose of civilian population of or in occupied territory " or " deportation to slave labour or for any other illegal purpose " of such persons, shall be regarded as war crimes.[4]

In the trial of Robert Wagner and others by a French Military Tribunal, in which Wagner was found guilty of, *inter alia*, being responsible for the deportation of Frenchmen to Germany, the Article 2 (5), quoted above, of the French Ordinance of 28th August, 1944, was among the provisions applied by the Tribunal.[5]

(vi) Conversely, *putting civilians to forced labour* may in certain circumstances be a war crime. The French provision just quoted makes " forced labour of civilians " a war crime,[6] and the Chinese provision also mentions

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(1) See Vol. VII, pp. 46–47 and 54.

(2) See Vol. III, p. 96. This provision among others was enforced in the *Wagner Trial* (see Vol. III, p. 52).

(3) See Vol. V, p. 95.

(4) See Vol. XIV, p. 153 ; p. 208 of the present volume ; and Vol. III, pp. 106–107.

(5) See Vol. III, pp. 34–35, 51 and 52.

(6) Compare also Article 2(6) of the Ordinance, quoted on p. 104.

" enslaving " as such a crime, while the matter is covered in greater detail by Article 52 of the Hague Convention insofar as it deals with " requisitions in services " :

> " Requisitions in kind and services shall not be demanded from local authorities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation to taking part in military operations against their own country.
>
> " Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.
>
> " Contributions in kind shall as far as possible be paid for in ready money ; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible."

The Tribunal which conducted the *Krupp Trial* found that this Article had been violated by the employment of deportees in armament production in the Krupp enterprise,(1) and in the *Milch Trial*, Judge Musmanno found that it had been violated by the Nazi programme for the forcible recruitment of foreign workers for employment in German industry.(2) The same question arose in the *Flick*, and *I.G. Farben Trials* but the Tribunals acting in these cases did not enter into any detailed analysis of the relevant law.(3) In the Judgment delivered in the *High Command Trial* it was said that " it is apparent that the compulsory labour of the civilian population for the purpose of carrying out military operations against their own country is illegal.(4)

It may be added that the Nuremberg International Military Tribunal also ruled that " The laws relating to forced labour by the inhabitants of occupied territories are found in Article 52 of the Hague Convention ".(5) The Judgment, after quoting the Article, continues : " The policy of the German occupation authorities was in flagrant violation of the terms of this convention," and the account which it gave to illustrate this finding indicates that it interpreted widely the words " taking part in military operations against their own country " so as to include any work for the German war effort, including " German industry and agriculture ", and not merely " work on German fortifications and military installations " : all of the foregoing types of labour are mentioned in the Judgment.(6)

The crime of enslavement may be committed without any ingredient of ill-treatment. The Judgment delivered in the trial of *Oswald Pohl and others* by a United States Military Tribunal in Nuremberg, 13th January–3rd November, 1947, contains the following passage :

> " Slavery may exist even without torture. Slaves may be well fed and well clothed and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation and beating and other barbarous acts, but the admitted fact

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(1) See Vol. X, p. 167.
(2) Vol. VII, p. 43.
(3) See Vol. IX, pp. 52–4 and Vol. X, p. 53.
(4) See Vol. XII, pp. 92–93.
(5) British Command Paper Cmd. 6964, p. 56.
(6) Ibid, pp. 57–60. This point is dealt with at greater length in Chapter IX of the *History of the United Nations War Crimes Commission*, London, 1948, pp. 227–229.

> of slavery . . . compulsory uncompensated labour . . . would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery."(1)

(vii) *Enforced prostitution* was punished as a war crime in the trial before a Netherlands Temporary Court-Martial in Batavia of Washio Awochi.(2) It is also punishable under the Australian and Chinese laws.(3)

(viii) Under the Australian(4) and Chinese (5) war crimes laws, to mention two that refer to wrongful internment of civilians specifically, it is internment " under inhuman conditions " that is described as a war crime. While *false imprisonment* alone seems to have been comparatively rarely charged,(6) there seems to be no reason for not regarding it as illegal under some conditions merely to imprison civilians from occupied territories. The opinion of the Tribunal which conducted the *Justice Trial* declared the taking away of " Nacht und Nebel " prisoners to be illegal, but as the Tribunal pointed out, the " Nacht und Nebel " scheme involved deportation, internment under inhuman conditions, torture and starvation, in addition to the inhumane treatment of friends and relatives.(7)

A Netherlands provision declaring criminal " indiscriminate mass arrests ", however, was enforced in the trial of Shigeki Motomura and others at Macassar(8) while the following French provision, Article 341 of the *Code Pénal*, was enforced in several French trials, including the *Wagner Trial*.(9)

> " Those who, without order of the proper authorities and excepting cases in which the law prescribes the seizure of accused persons, arrest, detain or restrain any persons, shall be punished with a term of hard labour."

Illegal detention, as such, was punished by Netherlands courts in the *Rauter* and *Zuehlke Trials*.(10)

(ix) Certain types of *denunciation to the occupying authorities* of inhabitants of an occupied territory have been declared criminal by a French Ordinance of 31st January, 1944, concerning the Suppression of Acts of Denunciation, which would possibly cover such acts on the part of alleged war criminals.(11)

(x) The main judicial authority reported in this series on the war crime of *illegal recruiting into armed forces* is the trial of Robert Wagner and others by a French Military Tribunal.(12)

(xi) The same is true of the war crime of *incitement of civilians to take up arms against their own country*.(13) It may be added that in the trial by a

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(1) Vol. IX, p. 53.
(2) See Vol. XIII, pp. 122 and 124–125.
(3) See Vol. V, p. 95 and Vol. XIV, p. 154.
(4) Vol. V, p. 95.
(5) Vol. XIV, p. 154.
(6) In the *Belsen Trial*, the Judge Advocate stressed that the Prosecution did not ask the Court to consider whether the taking of Allied nationals to Auschwitz was right or wrong. The true charge was one of ill-treatment and killing. (Vol. II, p. 117).
(7) See Vol. VI, pp. 56–57 and 59–60.
(8) See Vol. XIII, pp. 142–143.
(9) See Vol. VII, pp. 68–69 and Vol. III, pp. 40–41 and 52. Compare Art. 2(5) of the Ordinance of 28th August, 1944, quoted on p. 119.
(10) See Vol. XIV, pp. 89, 107, 109 and 145.
(11) See Vol. VII, p. 72. The question of denunciation is further discussed in Vol. VII, pp. 71–72 and 74–75, and Vol. XI, pp. 95–96.
(12) See Vol. III, pp. 23–55, especially pp. 40–41 and 52.
(13) *Ibid*, pp. 40–41 and 51.

British Military Court at Hamburg of Karl Rath and Otto Schutz, 14th–22nd January, 1948[1] on a charge of being concerned in the unlawful execution of certain Luxembourg nationals, the Judge Advocate advised the Court that a German order purporting to conscript Luxembourg nationals was illegal under international law.

(xii) The offence of *genocide*[2] has received a detailed treatment in the notes to the *Greifelt Trial*[3], held before a United States Military Tribunal, and to the *Goeth* and *Hoess Trials*, held before the Polish Supreme National Tribunal.[4]

The Judgment of the Tribunals which conducted these trials did not in fact use the term " genocide " (the United States and Polish Prosecutions, however, did so)[5] but the term has received judicial recognition from the Tribunal which conducted the *Justice Trial*, in whose judgment it is used to signify a type of crime against humanity which may be committed either by enemy nationals against enemy nationals[6] or by enemy nationals against Allied nationals.[7] The Tribunal quoted with approval a resolution of the United Nations General Assembly which defined Genocide as " a denial of the right of existence of entire human groups as homicide is a denial of the right to live of individual human beings."[8]

In its judgment in the *Greiser Trial*, the Supreme National Tribunal of Poland stated in a summary way that certain groups of crimes had been committed against the Polish population, including the following of which the words italicised are of particular significance in this connection.

> (*a*) *Illegal creation of an exceptional legal status for the Poles* in respect of their rights of property, employment, *education, use of their national language*, and in respect of the special penal code enforced against them ;
>
> (*b*) *Repression, genocidal in character, of the religion of the local population* by mass murder and incarceration in concentration camps of Polish priests, including bishops ; *by restriction of religious practices to the minimum* ; and by destruction of churches, cemeteries and the property of the Church ;
>
> (*c*) *Equally genocidal attacks on Polish culture and learning* ;
>
> (*f*) *Debasement of the dignity of the nation* (degradation of the Poles to citizens of a lower class, *Schutzbefohlene*, in accordance with the distinction drawn between German " masters " and Polish " servants ");
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> " The accused," said the Tribunal, " ordered, countenanced and facilitated, as is shown by the evidence, criminal attempts on the life, health and property of thousands of Polish inhabitants of the ' occupied ' part of Poland in question, and at the same time was concerned in

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(1) Not previously treated in these volumes.
(2) See also p. 138.
(3) See Vol. XIII, pp. 36–42.
(4) See Vol. VII, pp. 7–9 and 24–26.
(5) See Vol. VII, p. 7 and Vol. XIII, p. 37. Genocide was also charged as such in the *Einsatzgruppen* Trial.
(6) See Vol. VI, pp. 32, 75 and 99.
(7) See Vol. VI, pp. 48, 75 and 99.
(8) See Vol. VI, p. 48.

bringing about in that territory the general totalitarian genocidal attack on the rights of the small and medium nations to exist, and to have an identity and culture of their own."(1)

(xiii) A category of war crime which is older established, in the matter of recognition as such, than genocide, although apparently narrower in scope,(2) is that of *denationalisation*, and here some of the findings of the Tribunal in the *Greifelt Trial* are of interest.(3) Apart from finding various accused guilty of crimes such as forced evacuation, plunder of property and enslavement, which are dealt with as war crimes elsewhere in this volume, and of such offences as kidnapping and forced abortion which as unjustifiable invasions of personal integrity were clearly war crimes, the Tribunal found certain of the accused guilty of a separate crime of " forced Germanization ". The substance of what the Tribunal regarded as constituting this offence may be judged from a study of a summary of the relevant evidence which was derived from the judgment of the Tribunal.(4)

It may be added that under the Australian and Netherlands War Crimes Law the expression " war crime " includes " attempts to denationalise the inhabitants of occupied territory ",(5) and that Article III of the Chinese War Crimes Law of 24th October, 1946, includes within the definition of " war crime " " scheming to enslave the inhabitants of occupied territory or to deprive them of their status and rights as nationals of the occupied country ". In a sense the entire paragraph 3 of Article II of the Chinese law is relevant here :

> " *Article II.* A person who commits an offence which falls under any one of the following categories shall be considered a war criminal . . .
>
> " 3. Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as (*a*) killing, starving, massacring, enslaving, or mass deportation of its nationals, (*b*) stupefying the mind and controlling the thought of its nationals, (*c*) distributing, spreading, or forcing people to consume, narcotic drugs or forcing them to cultivate plants for making such drugs, (*d*) forcing people to consume or be inoculated with poison, or destroy their power of procreation, or oppressing and tyrannising them under racial or religious pretext, or treating them inhumanly ".(6)

(xiv) Some recognition has been given to *invasion of the religious rights of inhabitants of occupied territories* as an offence under international criminal law.(7) In the trial of Willy Zuehlke, the Netherlands Special Court of Cassation held that " This Court . . . is of the opinion that the refusal to

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(1) Vol. XIII, pp. 112 and 114. See further the Indictment in the trial (Vol. XIII, pp. 71–74) whose charges the Tribunal found to have been substantiated (p. 105 of Vol. XIII).
(2) See Vol. VII, pp. 7–9 and Vol. XIII, p. 42.
(3) Vol. XIII, pp. 28–36.
(4) See Vol. XIII, pp. 17–24.
(5) Vol. V, p. 95 and Vol. XI, p. 94.
(6) Vol. XIV, pp. 152–153.
(7) It will be recalled (see p. 113) that Art. 46 of the Hague Regulations protects, *inter alia*, " religious convictions and worship ".

allow spiritual assistance to someone under sentence of death does . . . in itself definitely constitute a crime, both a war crime and a crime against humanity."(1)

" Forced conversion to another faith " is declared criminal by Article 3 (3) of the Yugoslav War Crimes Law of 25th August, 1945, and Article II (3) of the Chinese War Crimes Law of 24th October, 1946, states that :

> " A person who commits an offence which falls under any one of the following categories shall be considered a war criminal . . . Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as . . . oppressing and tyrannising them under racial or religious pretext."(2)

The Polish Supreme National Tribunal has regarded " repression, genocidal in character, of the religion of the local population " by, *inter alia*, the restriction of religious practices to a minimum, as representing an offence under international law.(3)

(xv) The punishable criminality of a *wholesale substitution of existing courts of law* in an occupied territory by courts set up by the occupying power (as distinct from the possible actual harm done to the population by substituted courts when in operation) is a debatable point. The Tribunal in the *High Command Trial* apparently felt that it did not constitute a distinct crime ; the Tribunal held that the populace were not entitled even to a court-martial system provided that their treatment was just. Speaking of that part of the Barbarossa order which dispensed with court-martial jurisdiction over the civilian population of occupied territory, the Tribunal said : " court-martial jurisdiction of civilians is not considered under international law as inherent right of a civilian population and is not an inherent prerogative of a military commander. The obligation towards civilian populations concerns their fair treatment."(4)

On the other hand such substitution of courts may clearly be in some circumstances contrary to Article 43 of the Hague Regulations which provides :

> " *Article 43.* The authority of the legitimate power having, in fact, passed into the hands of the occupant, the latter 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 law enforced in the country."

The judgment delivered in the *Justice Trial*(5) includes the statement that : " The undisputed evidence in this case shows that Germany violated during the recent war every principle of the law of military occupation. Not only

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(1) Vol. XIV, pp. 152–153.

(2) Vol. XIV, p. 146.

(3) See p. 122.

(4) Vol. XII, p. 82.

(5) The indictment in this trial had claimed that " extraordinary irregular courts, superimposed upon the regular court system", were used by the accused to suppress opposition in occupied territories to the Nazi régime." (Vol. VI, p. 96).

under NN proceedings but in all occupations she immediately, upon occupation of invaded areas and territories, set aside the laws and courts of the occupied territories. She abolished the courts of the occupied lands and set up courts manned by members of the Nazi totalitarian régime and system."

The Tribunal immediately went on to say, however, that " these laws of occupation were cruel and extreme beyond belief, and were enforced by the Nazi courts in a cruel and ruthless manner against the inhabitants of the occupied territories, resulting in grave outrages against humanity, against human rights and morality and religion, and against international law, and against the law as declared by Control Council Law No. 10, by authority of which this court exercises its jurisdiction in the instant case. The evidence adduced herein provides undeniable and positive proof of the ill-treatment of the subjugated peoples by the Nazi Ministry of Justice and prosecutors to such an extent that jurists as well as civilians of civilised nations who respect human rights and human personality and dignity can hardly believe that the Nazi judicial system could possibly have been so cruel and ruthless in its treatment of the population of occupied areas and territories."(1)

The enforcement of such laws as that of 4th December, 1941, against the Poles and Jews, so clearly exceeded what was demanded by the needs of " public order and safety " that the Tribunal was not called upon to analyse Article 43 of the Hague Convention any more than it was Article 23 (h),(2) and the Tribunal did not in fact rely so much upon a claim that German courts were illegally set up in occupied territories as upon the illegality under international law of the law which they applied and upon the many departures from " fundamental principles of human justice recognised by civilised peoples and incorporated in the preamble of Hague Convention IV of 1907 " which occurred during trials held before such courts.(3)

(xvi) On *offences against property*(4) in occupied territories the principal judicial authorities are those treated in Volumes IX and X of these Reports,

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(1) Vol. VI, p. 59. Apart from Article 43 the Tribunal, in summing up the provisions violated by the Nacht und Nebel scheme and the persecution of the Jews and Poles, quoted Art. 23(h) of the Regulations which, however, related to a slightly different question from that under discussion above :

" Art. 23(h) . . . It is expressly forbidden to declare abolished, suspended or inadmissible in a court of law the rights and actions of the hostile party." (Vol. VI, pp. 59 and 63).

This provision refers, not to substitution of existing courts, but the deprivation of rights of access to courts. The Netherlands special Court of Cassation delivering judgment in the *Rauter Trial* stated that its scope was limited to the bringing of civil claims. See Vol. XIV, p. 120. Compare p. 144 of that volume.

(2) As to the precise significance of Art. 43 there is also, in fact, a difference of opinion. See a further discussion on the point in Vol. VI, pp. 94–6.

(3) See Vol. VI, pp. 96–104.

(4) A study of the Judgments delivered in the *Flick*, *I. G. Farben* and *Krupp Trials* has revealed that the terminology relating to war crimes committed against property rights could profitably undergo some further development. See Vol. IX, pp. 40 and 43, and Vol. X, p. 160.

which include the *Flick*, *I.G. Farben* and *Krupp Trials*. The main conclusions derived from a study of the reports contained in these two volumes are briefly the following :(1)

(*a*) In the numerous attempts which have been made at defining the precise limits of the war crime of pillage, plunder or spoilation, stress has been placed on one or both of the following two possible aspects of the offence :

(i) that private property rights were infringed ;

(ii) that the ultimate outcome of the alleged offences was that the economy of the occupied territory was injured and/or that of the occupying State benefitted.

In so far as *private property* is concerned it seems sounder to base a definition of a war crime involved upon the first aspect, namely the infringement of the property rights of individual inhabitants of the occupied territory. The gist of the matter appears in the words which occur in the *Krupp Judgment* :

" Article 46 (of the Hague Regulations) stipulates that ' private property . . . must be respected '. However, if, for example, a factory is being taken over in a manner which prevents the rightful owner from using it and depriving him from lawfully exercising his prerogative as owner, it cannot be said that his property ' is respected ' under Article 46 as it must be."(2)

It would appear that, at least in the view of the Tribunals which conducted the *Flick Trial*, and the *I.G. Farben Trial*,(3) provided a sufficient infringement of private property rights has been proved to bring the offence within the terms of the Hague Regulation,(4) the more public effects of the act are not necessary to constitute the crime.(5) There is also *some* authority for saying that, conversely, if no illegal breach of private property rights has occurred no war crime can be said to have been committed, irrespective of the effects of the act upon the general economy of the occupied territory of the enemy State. Thus, the Tribunal before which the *I.G. Farben Trial* was held could not " deduce from Article 46 through 55 of the Hague Regulations any principle of the breadth of application " of the claim of the Prosecution in that case that " the crime of spoilation is a ' crime against the country concerned in that it disrupts the economy, alienates its industry from

(1) In their words concerning the law as to plunder and spoilation, the Tribunals whose judgments are relevant in this connection concentrated their attention upon the detailed provisions made in Arts. 46 *et seq.* of the Hague Convention No. IV of 1907 and upon the attitude taken by the International Military Tribunal to these provisions. For completeness, it should be added that Control Council Law No. 10 in its Article II includes under the definition of war crimes, the " plunder of public and private property." This provision was binding on the Military Tribunals which conducted the *Flick*, *I. G. Farben* and *Krupp Trials*.

(2) Vol. X, p. 137.

(3) See Vol. X, pp. 160–2.

(4) The Prosecution in the *Krupp Trial* was probably correct in claiming that violation of Art. 46 of the Hague Regulations " need not reach the status of confiscation. Interference with any of the normal incidents of enjoyment of quiet occupancy and use, we submit, is forbidden. Such incidents include, *inter alia*, the right to personal possession, control of the purpose for which the property is to be used, disposition of such property, and the right to the enjoyment of the income derived from the property."

(5) Except perhaps in relation to the punishment awarded.

its inherent purpose, makes it subservient to the interest of the occupying power, and interferes with the natural connection between the spoilated industry and the local economy. As far as this aspect is concerned, the consent of the owner or owners, or their representatives, even if genuine, does not affect the criminal character of the act.' " The Tribunal added that the provisions of the Hague Convention regarding private property " relate to plunder, confiscation, and requisition which, in turn, imply action in relation to property committed against the will and without the consent of the owner. We look in vain for any provision in the Hague Regulations which would justify the broad assertion that private citizens of the nation of the military occupant may not enter into agreements respecting property in occupied territories when consent of the owner, is, in fact, freely given."(1)

In the *Krupp Trial* Judgment, it may be thought that rather more stress was placed on the second possible approach(2) to war crimes committed against property rights. Here it was stated that " Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner ". The Tribunal added later :

" Spoilation of private property, then, is forbidden under two aspects ; firstly, the individual private owner of property must not be deprived of it ; secondly, the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort—always with the proviso that there are exemptions from this rule which are strictly limited to the needs of the army of occupation in so far as such needs do not exceed the economic strength of the occupied territory ".(3)

(*b*) As is stated in the Judgments delivered in the *I.G. Farben* and *Krupp Trials*, however, some invasions of private property rights are permissible under the law relating to occupied territories. It was stated in the Judgment on the latter trial that Article 43 of the Hague Regulations " permits the occupying power to expropriate either public or private property in order to preserve and maintain public order and safety ".(4) Articles 52 and 53 of the Regulations make further inroads into the principle of the inviolability of private property ;(5) and the

(1) See Vol. X, p. 46.
(2) See p. 126.
(3) See Vol. X, p. 162–3.
It could be argued that the words " must not be taken over by that occupant " cannot include within their scope agreements between private individuals freely arrived at, that the Tribunal tacitly excluded from its meaning transfers of property effected by such agreements, and that, while the public effects of war crimes committed against property are highly significant, there is no crime at all (if the property is private property) unless a private property right has been infringed in violation of Art. 46 of the Hague Regulations.
The question of the two possible approaches to offences against property rights is dealt with further in Vol. X, pp. 160–3.
(4) See Vol. X, p. 135.
(5) See Vol. IX, p. 22 and Vol. X, pp. 135 and 137. It is worth repeating that in the opinion of the International Military Tribunal the general effect of the relevant provisions of the Hague Convention is that " the economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonable be expected to bear."

possible effect, in legalising the destruction or seizure of property, of " imperative necessity for the conduct of military operations " was also mentioned in a treatment of Article 23 (g) of the Regulations.[1]

The parts of the Hague Regulations referred to read as follows :

" Article 23. . . . it is particularly forbidden . . .

" (g) To destroy or seize enemy property, unless such destruction or seizure be imperatively demanded by the necessities of war " ;

" Article 43. The authority of the power of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country " ;

" Article 52. Requisitions in kind and services shall not be demanded from local authorities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligations of taking part in military operations against their own country.

" Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

" Contributions in kind shall as far as possible be paid for in ready money ; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible " ; and

" Article 53. An army of occupation shall only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots or arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

" Except in cases governed by naval law, all appliances adapted for the transmission of news, or for the transport of persons or goods, whether on land, at sea, or in the air, depots of arms, and, in general, all kinds of war material may be seized, even if they belong to private individuals, but they must be restored at the conclusion of peace, and indemnities must be paid for them."

The Judgment of the Netherlands Special Court of Cassation in the Appeal of the Chief Prosecutor of the Special Court in 's-Hertogenbosch against the acquittal by the latter Court of Abraham Robert Esau[2] included an interpretation of Article 53 quoted above :

" Neither the text nor the history of Art. 53, para. 2, gives ground for the proposition that the concept ' munitions de guerre ' should be extended far beyond its normal bounds to materials and apparatus such as drilling-machines, turning-lathes, bulbs (lamps), valves and gold and even to other objects which—however important they may be for the technical scientific investigator—certainly do not

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(1) See Vol. X, pp. 136–7. see also p.134 . In the *I.G. Farben* Judgment it was simply said that Arts. 46, 47, 52, 53 and 55 of the Regulations " admit of exceptions of expropriation, use, and requisition, all of which are subject to well-definited limitations set forth in the Articles." (Vol. X, pp. 44).

(2) Not previously treated in these Volumes.

stand in such close connection with warfare that they must be considered as being among the limitative articles enumerated in Article 531, para. 2, and thus to be excepted from the inviolability of private property in a war on land."

The *Krupp Trial* Judgment, moreover, laid down that the laws and usages of war do not authorise " the taking away by a military occupant of live stock for the maintenance of his own industries at home or for the support of the civil population of his country(1) ; moreover the requisitions and services contemplated by Article 52 " must refer to the needs of the Army of Occupation ", whereas " It has never been contended that the Krupp firm belonged to the Army of Occupation."

The rules of international law regarding illegal requisitioning of private property, which were crystallised in Article 52 of the Hague Regulations, were applied by a French Military Tribunal in the Trial of Philippe Rust ; the accused was found guilty of having requisitioned vehicles (and men) without paying or delivering receipts in lieu of immediate payment.(2)

(*c*) Property offences recognised by modern international law are not, however, limited to offences against physical tangible possessions or to open robbery in the old sense of pillage, but include the acquisition of intangible property and the securing of ownership, use or control of all kinds of property by many ways other than by open violence.(3)

(*d*) It has been said that proof that consent was " obtained by threats, intimidation, pressure or by exploiting the position and power of the military occupant under circumstances indicating that the owner is being induced to part with his property against his will " would make a transfer illegal under international law.(4) The possible means of coercion were further elaborated in the *I.G. Farben* Judgment when it was said that in the many instances " in which Farben dealt directly with the private owners, there was the ever present threat of forceful seizure of the property by the Reich or other similar measures, such, for example, as withholding licences, raw materials, the threat of uncertain drastic treatment in peace-treaty negotiations or other effective means of bending the will of the owners. The power of the military occupant was the ever present threat in these transactions, and was clearly an important, if not a decisive factor ".(5)

(*e*) If property has been acquired without the consent of the owner, the proof of having paid consideration is no defence.(6)

Neither will the fact that the reality of a transaction was hidden behind a pseudo legal façade afford a defence.(7)

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(1) See Vol. X, pp. 135–6.
(2) See Vol. IX, pp. 71–4. The question dealt with in Section (ii) above is set out rather more fully in Vol. X, pp. 163–4.
(3) See Vol. X, pp. 164–165 for details on this point. The question to what extent is it necessary that an accused be shown to have intended to acquire the property in question *permanently* is also discussed in Vol. X, p. 165.
(4) See Vol. X, p. 47.
(5) See Vol. X, p. 50.
(6) See Vol. X, pp. 44 and 51.
(7) This point is illustrated in Vol. X, p. 165–6, and by the French cases dealing with " abuse of confidence " treated in Vol. IX, p. 43.

(*f*) One French trial reported in Vol. VIII and two in Vol. IX dealt with wanton destruction of inhabited buildings and the theft of personal property, offences which are war crimes of the more traditional type.[1]

(*g*) If wrongful interference with property rights has been shown, it is not necessary to prove that the alleged wrongdoer was involved in the original wrongful appropriation.[2]

(*h*) In dealing with *public property*, the United States Military Tribunals have relied upon Article 55 of the Hague Regulations according to which the occupying power has only a right of usufruct over such property, and that only for the duration of the occupation:[3]

> "*Article 55* : The occupying State shall be regarded only as administrator and usufructuary of public buildings, landed property, forests and agricultural undertakings belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of such properties, and administer them in accordance with the rules of usufruct."

In a French trial already reported upon in Vol. IX[4] application was made of the rule of international law forbidding the destruction of public monuments which received expression in Article 56 (and through it, Article 46) of the Hague Regulations. Article 56 provides as follows :

> "*Article 56* : The property of local authorities, as well as that of institutions dedicated to public worship, charity, education and to science and art, even when State property, shall be treated as private property.
>
> "Any seizure or destruction of, or wilful damage to, institutions of this character, historic monuments and works of science and art, is forbidden, and should be made the subject of legal proceedings."

(*i*) Two provisions are relevant here which make it a war crime to debase the currency of an occupied territory.[5] Article III of the Chinese Law of 24th October, 1946, declares to be war crimes, not only "confiscation of property", "indiscriminate destruction of property", "robbing" and "unlawful extortion or demanding contributions or requisitions", but also "depreciating the value of currency or issuing unlawful currency notes."[6] So also "debasement of the currency and issue of spurious currency" is declared a war crime in the Australian Instrument of Appointment of the Board of Inquiry appointed on 3rd September, 1945.[7] Similar provisions are made in the French and Netherlands East Indies War Crimes laws.[8]

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(1) See Vol. VIII, pp. 29–31 and Vol. IX, p. 43.

(2) Statements or findings of the Tribunals which conducted the *Flick*, *I. G. Farben* and *Krupp Trials* are set out in Vol. X, p. 166, as the basis for arriving at this conclusion.

(3) See Vol. IX, pp. 22, 24 and 41–2, and Vol. X, p. 50.

(4) See Vol. IX, pp. 42–3 and 67–8.

(5) Such debasement is an attack on the economy of the occupied country, but, as the property of no particular individual is involved, these two provisions are not relevant to the issue set out in section (i) above.

(6) See Vol. XIV, p. 154.

(7) See Vol. V, p. . "Economic exploitation of the Polish population and of economic resources" was proved in the *Greiser Trial* but the Polish Supreme National Tribunal did not analyse at any length the law on this point. (See Vol. XIII, p. 112).

(8) See Vol. III, p. 96 and Vol. XI, p. 94.

(xvii) *Other offences.* An examination of the French,[1] Australian,[2] Polish,[3] Netherlands[4] and Chinese[5] Laws on war crimes will reveal that they not only provide against a number of offences whose punishment has been illustrated by trials reported in these volumes, but also define certain crimes which have not been charged before the courts in trials so reported, including some not mentioned elsewhere in this present volume. It has not been thought necessary to quote here all of the provisions relating to offences of the latter type, since the texts may be examined in full in the earlier volumes, but it may be added that they include usurpation of sovereignty during military occupation, which is declared a crime by the Australian, Netherlands and Chinese laws.[6]

7. SOME EXCEPTIONAL CATEGORIES OF WAR CRIMES

All or nearly all of the categories of crimes so far enumerated may be regarded as offences committed in violation of the rights of various types of persons. There are, however, also some war crimes which in essence do not necessarily so violate human rights. These may be grouped as follows :

(i) *Offences committed in breach of surrender terms*

An example of the punishment of such offences is provided by the *Scuttled U-Boat Case*, where an accused was found guilty of sinking U-Boats in violation of a German Instrument of Surrender, signed on 4th May, 1945.[7]

A parallel trial was that of Kapitanleutnant Ehrenrich Stever by a British Military Court at Hamburg, 17th–18th July, 1946.[8] Here the accused was found guilty of " Committing a war crime in that he in the Atlantic Ocean off Portugal on or about 2nd June, 1945, when commander of U-Boat U.1277 after the German Command had surrendered all naval ships to the Allied Forces, in violation of the laws and usages of war, scuttled U-Boat U.1277." The sentence of five years' imprisonment was confirmed.

A trial related to this in some respects was that of Eisentraeger and others, by a United States Military Commission at Shanghai,[9] in which a number of German accused were found guilty of knowingly, wilfully and unlawfully violating the unconditional German surrender " by engaging in and continuing military activity against the United States and its allies, to wit by furnishing, ordering, authorising, permitting and failing to stop the furnishing of and assistance, information, advice, intelligence, propaganda and material to the Japanese armed forces and agencies, thereby by such acts of treachery assisting Japan in waging war against the United States of America in violation of the laws and customs of war ".

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(1) See Vol. III, p. 95–96.
(2) See Vol. V, pp. 95–96.
(3) See Vol. VII, pp. 84–86.
(4) See Vol. XI, pp. 92–97.
(5) See Vol. XIV, pp. 153–154.
(6) Compare a reference to Article 45 of the Hague Regulations in Vol. VI, p. 93.
(7) See Vol. I, pp. 67–70.
(8) Not previously treated in these volumes.
(9) See Vol. XIV, pp. 8–22, especially pp. 16–22.

Two Netherlands trials of Japanese accused are also of interest in this connection. On 7th May, 1947, Mizuo Katsuno was sentenced to eighteen years' imprisonment by a Temporary Court Martial in Medan, Netherlands East Indies,(1) having found him guilty of the war crime : " Commission of hostilities contrary to the terms of an armistice ". The Court found, *inter alia*, that :

" It is a matter of general knowledge that an armistice was concluded in 1945 between the Allied and Japanese armies in accordance with which all hostilities by the Japanese army had to be stopped, which is further confirmed by the copy of the agreement concluded at Singapore on 12th September, 1945, between the Supreme Allied Commander, South East Asia and the authorised representative of the Supreme Commander, Japanese Expeditionary Forces, Southern Regions, which has been read out at the sitting . . .

" Helping, in contravention of the terms of an armistice, with the construction of fortifications and joining an organisation fighting the lawful Netherlands East Indies Government, thereby committing hostilities, is named by the legislator in Article 1, sub-section 39, of the ' Definition of War Crimes Decree ' as an example of acts which constitute a violation of the laws or customs of war, so that it is not necessary to go separately into which laws or customs of war have been violated . . .

" The war which broke out in 1941 between the Kingdom of the Netherlands and the Japanese Empire is not yet at an end, so that that which has been charged was committed in time of war by a subject of an enemy power thereby constituting a war crime . . .

" The continuation of hostilities after an armistice has been concluded between the belligerents is so contrary to good faith and so hinders the restoration of normal conditions that a sharp punishment is rightly called for, but the strengthening of the armed bands roaming the interior by adding to them a specialist trained soldier has particularly serious consequences in the circumstances reigning at the present time so that a very heavy sentence ought to be imposed."

Minoru Hatada and two others were sentenced to death by a Temporary Court Martial at Macassar(1) having been found guilty of " commission of hostilities contrary to the terms of the surrender of Kokio dated 2nd September, 1945 ". They were shown to have participated in the operations of Indonesian rebels after the Japanese surrender. The Court held, *inter alia*, that " by the above actions the accused have violated Article 35 of the Rules of Land Warfare 1907, seeing that they frustrated the surrender of Kokio, dated 2nd September, 1945, whereby the defeated enemy power Japan—whose subjects the accused are—surrendered unconditionally to the Allied forces ". The Article referred to provides that :

" Article 35. Capitulations agreed upon between the contracting parties must take into account the rules of military honour.

" Once settled, they must be scrupulously observed by both parties."

(1) Trial not previously treated in these Reports.

(ii) *The Giving of Unexecuted Orders*

A study of relevant parts of the Judgments delivered in the *High Command Trial*, the *Hostages Trial* and the trial held by the International Military Tribunal in Nuremberg, and of the trials of August Schmidt, Moehle and Falkenhorst before British Military Courts, has revealed that an accused may be found guilty of having made or transmitted an illegal order which was not carried out, if he knew that it was illegal or if it was obviously illegal.(1)

The illegality of the mere giving of an unlawful order would appear to have been recognised even under conventional international law, since Article 23 (d) of the Hague Convention lays down that : " It is particularly forbidden . . . to declare that no quarter will be given ". It will be recalled that Brigadeführer Kurt Meyer was found guilty on charges including one which said that he " in violation of the laws and usages of war, incited and counselled troops under his command to deny quarter to Allied troops."(2) Charges 1 and 7 of the charges on which Falkenhorst was found guilty was similar.(3)

Again, in a trial before a British Military Court at Hamburg, 29th November, 1946,(4) Hans Wickman was found guilty of " committing a war crime . . . in that he . . . in violation of the laws and usages of war gave orders to [his] platoon that no prisoners were to be taken and that any prisoners taken were to be shot ". Directions to give no quarter are declared illegal by the Australian and Netherlands War Crimes laws.(5)

(iii) *The Abuse of Red Cross Protection*

In the trial by a United States Intermediate Military Government Court, Heinz Hagendorf was sentenced to six months' imprisonment on a charge of having " wrongfully used the Red Cross emblem in a combat zone by firing a weapon at American soldiers from an enemy ambulance displaying such emblem."(6)

Liability for the improper use of Red Cross insignia is covered by an express provision of the Hague Regulations respecting the Laws and Customs of War on Land, appended to the IVth Hague Convention of 1907. Article 23 (*f*) of the Hague Regulations provides that " it is particularly forbidden " to " make improper use of a flag of truce, of the national flag, or of the military insignia, and uniform of the enemy, as well as of the *distinctive signs of the Geneva Convention* ".(7) The latter is a reference to the Convention for the Amelioration of the Conditions of Soldiers wounded in Armies in the Field of 1864, revised in 1906 and more recently in 1929.

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(1) See Vol. XII, pp. 118–23 where these authorities are reviewed.
(2) See Vol. IV, pp. 98 and 108.
(3) See Vol. XI, pp. 18, 23 and 29–30.
(4) Not previously treated in these volumes.
(5) See Vol. V, p. 96 and Vol. XI, p. 94.
(6) See Vol. XIII, pp. 146–148.
(7) Italics inserted.

(iv) *Offences Committed against Dead Bodies*

Cannibalism and other offences committed against dead bodies have been punished as war crimes. Examples of their prosecution are provided by the trial of Max Schmid by a United States Military Government Court at Dachau, and by other trials mentioned in the notes to the report on that case which has appeared in Volume XIII. Also in the notes to the report are quoted relevant Articles contained in the Geneva Convention of 1929 for the Amelioration of the Conditions of the Wounded and Sick of Armies in the Field.(1)

C. CRIMES AGAINST HUMANITY

The commission of crimes against humanity has been charged in a number of trials reported upon in these volumes and in this sphere the United States Military Tribunals have applied Article II, paragraph 1, of Control Council Law No. 10 which provides that :

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

Of the trials referred to above the most important from the point of view of the definition of the scope of the concept of crimes against humanity have been the *Justice Trial*(2) and the *Flick Trial*(3). The law laid down in these trials and in some others reported upon may be summarised as follows :

(i) In the first place it is clear that war crimes may also constitute crimes against humanity ; the same offences may amount to both types of crime. If war crimes are shown to have been committed in a widespread, systematic manner, on political, racial or religious grounds, they may amount also to crimes against humanity.(4)

(ii) On the other hand, not all types of acts which could constitute war crimes could also constitute crimes against humanity, and the dividing line between the acts which could constitute both and acts which, in their nature, could only be war crimes is not always easy to draw, in the absence of relevant judicial pronouncements covering certain types of offences. That crimes against humanity are not limited to offences against inhabitants of occupied territories is shown by a pronouncement made in the Judgment delivered in the *High Command Trial*, that the plan of the German Government " to inspire the German population to murder Allied fliers by lynch law or mob justice " was a crime against humanity.(5) In the *Flick Trial*, however, it was laid

(1) See Vol. XIII, pp. 151–152.
(2) See Vol. VI, pp. 78–83.
(3) See Vol. IX, pp. 44–52.
(4) See Vol. VI, p. 79.
(5) See Vol. XII, p. 71 note 2. Contrast however the fact that in the *Justice Trial*, whereas the indictment charged the taking part in Hitler's programme of inciting the German civilian population to murder Allied airmen forced down within the Reich as both a war crime and a crime against humanity, the Judgment, in dealing with Klemm's responsibility in this connection, spoke only of such participation as being in violation of the laws of war (Vol. VI, p. 81).

down that offences against industrial property could not constitute crimes against humanity.(1) This ruling was adopted by the Tribunal acting in the *I.G. Farben Trial*,(2) while a quotation from the Judgment delivered in the *Einsatzgruppen Trial* which has been quoted in Volume IX of this series(3) indicates that the Tribunal acting in that trial regarded crimes against humanity as being offences such as " murder, torture, enslavement " and infringements of " freedom of opinion . . . the moral or physical integrity of the family . . . or the dignity of the human being ".

The Judgment in the *Flick Trial* declared that " a distinction could be made between industrial property and the dwellings, household furnishings, and food supplies of a persecuted people ",(4) and thus left open the question whether such offences against personal property as would amount to an assault upon the *health and life* of a human being (such as the burning of his house or depriving him of his food supply or his paid employment) would not constitute a crime against humanity. Certain passages from the Judgment of the Nuremberg International Military Tribunal treating certain offences against property as crimes against humanity(5) could refer to acts of economic deprivation of this more personal type.

It may readily be doubted whether certain other categories of war crimes could ever constitute crimes against humanity, even if the other attributes of crimes against humanity (reviewed below) are displayed. Thus, it does not seem possible that war crimes in which there is no violation of human rights(6) could possibly be regarded as crimes against humanity.(7) In the absence of relevant judicial pronouncements, then, it is not possible to state in every instance whether a type of act which could constitute a war crime could also amount to a crime against humanity.

(iii) In the second place, it is established that the possible victims of crimes against humanity form a wider group than the possible victims of war crimes. The latter category comprises broadly speaking the nationals of armed forces of belligerent countries or inhabitants of territories occupied after conquest (other than enemy nationals) against whom offences are committed by enemy nationals as long as peace has not been declared. Crimes against humanity on the other hand could have included also offences committed by German nationals against other German nationals or any stateless person, and apparently also against nationals of Hungary and Rumania.(8)

(iv) Isolated offences do not constitute crimes against humanity.(9)

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(1) See Vol. IX, pp. 48–51.
(2) See Vol. X, pp. 41–42 and 64.
(3) See Vol. IX, pp. 49–50.
(4) See Vol. IX, p. 26.
(5) Quoted in Vol. IX, pp. 50–1.
(6) See pp. 131–4.
(7) This remark assumes crimes against humanity to be restricted to offences against human rights. If on the other hand they are taken to include all offences that grossly offend the human conscience it may be that atrocities against dead bodies could be regarded as crimes against humanity.
(8) See pp. 87–8, Vol. IX, pp. 51–2 and Vol. XIII, pp. 133–135.
(9) See Vol. VI, pp. 79–80 and Vol. IX, p. 51, and compare Vol. XIII, pp. 135–136.

(v) Apparently, the proof of systematic governmental organisation of the acts alleged is a necessary element of crimes against humanity.(1)

(vi) According to the judgment delivered in the *Justice Trial*, if the offences are not " Atrocities and offences ", as defined in Law No. 10, and committed against civilian populations, but amount to persecutions, they must be persecutions *on political, racial or religious grounds.*(2)

(vii) According to the judgment delivered in the *Flick Trial*, the omission from Law No. 10 of the Allied Control Council of the words " in execution of or in connection with any crime within the jurisdiction of the Tribunal ",(3) did not serve to extend the scope of that law to cover crimes against humanity occurring before 1st September, 1939 ; the Tribunal's main argument was that the Charter of the International Military Tribunal, which had been made an integral part of Law No. 10(4), had been interpreted by the latter tribunal in such a way that crimes against humanity committed before the above-mentioned date were excluded from the scope of the Charter.(5)

The principle laid down in the *Flick Trial*, had been left undecided by the Tribunal conducting the *Justice Trial* (Tribunal III) which, in its exposition on the question of crimes against humanity, on this point did not go beyond saying :

> " The evidence to be later reviewed established that certain inhuman acts charged in Count 3 of the Indictment were committed in execution of, or in connection with, agressive war and were, therefore, crimes against humanity even under the provisions of the IMT Charter, but it must be noted that C.C. Law 10 differs materially from the Charter. The latter defines crimes against humanity as

(1) See Vol. VI, pp. 79–80 and Vol. IX, p. 51.

(2) See Vol. VI, pp. 79–80 and 80–83.

(3) Article 6(c) of the Charter of the International Military Tribunal makes the following definition : " *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." (Italics inserted.)

(4) Article I of Law No. 10 provides : " The Moscow Declaration of 30th October, 1943, ' Concerning Responsibility of Hitlerites for Committed Atrocities ' and the London Agreement of 8th August, 1945, ' Concerning Prosecution and Punishment of Major War Criminals of the European Axis ' are made integral parts of this Law."

(5) The statement of the International Military Tribunal on this point runs as follows : " 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. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity ; and in so far as the inhumane act charged in the Indictment and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity." (British Command Paper, Cmd. 6964, p. 65.) (See Vol. IX, pp. 44–5.)

inhumane acts, etc., committed '. . . in execution of, or in connection with, any crime within the jurisdiction of the tribunal . . .', whereas in C.C. Law 10 the words last quoted are deliberately omitted from the definition."(1)

On the other hand, the Judgment in the *Einsatzgruppen Trial* conducted by Tribunal II, included the following explicit declaration :

" The International Military Tribunal, operating under the London Charter, declared that the Charter's provisions limited the Tribunal to consider only those crimes against humanity which were committed in the execution of or in connection with crimes against peace and war crimes. The Allied Control Council, in its Law No. 10, removed this limitation so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law.

" As this law is not limited to offences committed during war, it is also not restricted as to nationality of the accused or of the victim, or to the place where committed."

In estimating the relative authoritativeness of the decision on this question reached in the *Flick Trial* and in the *Einsatzgruppen Trial*, it should be remembered that since the Indictment in the latter charged crimes against humanity committed " between May, 1941 and July, 1943 " the dictum quoted from the judgment delivered therein was not necessary to the decisions reached.(2) In the *Flick Trial*, on the other hand, Count 3 charged the commission of crimes against humanity between January, 1936 and April, 1945.(3) and the Tribunal had to come to a decision as to the criminality of four actual transactions which were completed before 1st September, 1939.(4)

The Tribunal which conducted the *Flick Trial* appears to have been on sounder ground when it said that " crimes committed before the war *and* having no connection therewith were not in contemplation "(5) than when it declared that " In the I.M.T. trial the tribunal declined to take jurisdiction of crimes against humanity occurring before 1st September, 1939 ". This latter phrase does not seem to represent the complete picture, as may be gathered from an examination of the relevant passage from the Judgment of the International Military Tribunal quoted above.(6) Indeed the International Military Tribunal

(1) Vol. VI, pp. 40–41 and 83. The attitude to this point of the Tribunal which conducted the *Justice Trial* is further set out in Vol. IX, p. 46. The Tribunal left open the question whether it would have considered evidence of offences committed before 1939 had they been charged in Counts 2, 3 and 4.

(2) Similarly in the *Justice Trial* the crimes against humanity charged in Count Three were said to have been committed " between September, 1939 and April, 1945 " ; See Vol. VI, p. 4.

(3) See Vol. IX, p. 4.

(4) See Vol. IX, p. 25.

(5) See Vol. IX, p. 26. (Italics inserted).

(6) See p. 136 note 5. It has been pointed out that the International Military Tribunal " recognised some crimes committed prior to 1st September, 1939 as crimes against humanity in cases where their connection with the crime against peace was established. Although in theory it remains irrelevant whether a crime against humanity was committed before or during the war, in practice it is difficult to establish a connection between what is alleged to be a crime against humanity and a crime within the jurisdiction of the Tribunal, if the act was committed before the war. . . ." (Egon Schwelb, in *British Year Book of International Law*, 1946, pp. 204–205). (Italics inserted). For a further elaboration of the learned writer's views on this point, see Vol. IX, p. 47–8.

could hardly have decided that no crime against humanity could possibly have been committed before the war, because Article 6 (c) of the Charter includes the words " before or during the war " which govern at least the first part of that provision.(1)

The Tribunal which conducted the *High Command Trial* may be thought to have agreed with the attitude taken to this point by the Tribunal acting in the *Flick Trial* ; the former pointed out that : " All the acts relied upon as constituting crimes against humanity in this case occurred during and in connection with the war ".(2)

(viii) The crime of *genocide*, which received recognition by the Tribunal which conducted the *Justice Trial*,(3) bears similarity to certain types of crimes against humanity but also certain dissimilarities ; these have been discussed in previous volumes of this series, and the outcome seems to be that, while the two concepts may overlap, genocide is different from crimes against humanity in that, to prove it, no connection with war need be shown,(4) and, on the other hand, genocide is aimed against groups, whereas crimes against humanity do not necessarily involve offences against or persecutions of groups. The inference may be justified that deeds are crimes against humanity within the meaning of Law No. 10 if the political, racial or religious background of the wronged person is the main reason for the wrong done to him, and if the wrong done to him as an individual is done as part of a policy or trend directed against persons of his political, racial or religious background ; but that it is not necessary that the wronged person belong to an organised or well-defined group.(5)

D. CRIMES AGAINST PEACE

Apart from the Judgments delivered in the two trials held before the International Military Tribunals at Nuremberg and Tokyo, the judicial authorities concerning crimes against peace are the Judgments in the *I.G. Farben*,(6) *Krupp*,(7) *High Command*,(8) *Greiser*(9) and *Takashi Sakai*(10) *Trials*, together with the trial of Weizsaeker and others before a United States Military Tribunal, 1st November, 1947–15th April, 1949, in which the Judgment was delivered too late to enable a report on that trial to be included in this series.(11)

(1) See p. 136, note 3.
(2) For certain relevant Chinese provisions relating to what may possibly be regarded as crimes against humanity, see Vol. XIV, p. 156.
(3) See p. 122.
(4) See Vol. XIII, p. 41.
(5) See Vol. VI, p. 83, note 3.
(6) See Vol. X, pp. 30–40.
(7) See Vol. X, pp. 102–130.
(8) See Vol. XII, pp. 65–71.
(9) See Vol. XIII, pp. 108–10.
(10) See Vol. XIV, pp. 1–7.
(11) Occasionally the judgment delivered in a trial in which aggressive war is not charged contains a reference to the waging of such a war, but it is not always clear whether the Tribunal is seeking to show that there is a legal conclusion to be drawn from the fact that the war referred to was aggressive in nature. This is true of the judgment in the *Justice Trial*. " For the accomplishment of the ends of aggressive war, the elimination of political opposition and the extermination of Jews in all of Europe," says the judgment, " it was deemed necessary to harness the Ministry of Justice and the entire court system for the enforcement of the penal laws in accordance with National Socialist ideology." Similar reference in the judgment to aggressive war are contained in passages quoted in Vol. VI, pp. 62 and 73.

The enactments relevant to the trials mentioned have already been quoted or mentioned in these pages : Article II 1 (a) of Law No. 10,(1) and the relevant provisions of Polish(2) and Chinese(3) Law. It should be added that, while no trials before Danish or Greek Courts or before United States Military Commissions in the Pacific Theatre of Operations in which crimes against peace have been alleged have been reported to the United Nations War Crimes Commission, such courts are in fact empowered to try such crimes.(4)

The following paragraphs numbered (i)–(ix) attempt to analyse the law relating to crimes against peace (including in the meaning of that term " planning, preparation, initiation or waging a war of aggression " and " participating in a common plan or conspiracy for the accomplishment of any of the foregoing ", to use the language of Article II 1 (a) of Law No. 10) as that law has been developed in the trials by United States Military Tribunals in Nuremberg which were bound by Law No. 10. The Polish and Chinese decisions are next referred to, and finally some remarks regarding the legal effects of the fact that a crime against peace has been committed are set out.

(i) Deeming it necessary " to give a brief consideration to the nature and characteristics of war ", the Tribunal which conducted the *High Command Trial* said :

> " We need not attempt a definition that is all inclusive and all exclusive. It is sufficient to say that war is the exerting of violence by one state or politically organised body against another. In other words, it is the implementation of a political policy by means of violence. Wars are contests by force between political units but the policy that brings about their initiation is made and the actual waging of them is done by individuals. What we have said thus far is equally as applicable to a just as to an unjust war, to the initiation of an aggressive and, therefore, criminal war as to the waging of defensive and, therefore, legitimate war against criminal aggression. The point we stress is that war activity is the implementation of a predetermined national policy.
>
> " Likewise, an invasion of one state by another is the implementation of the national policy of the invading state by force even though the invaded state, due to fear or a sense of the futility of resistance in the face of superior force, adopts a policy of non-resistance and thus prevents the occurrence of any actual combat. . . .
>
> " The initiation of war or an invasion is a unilateral operation. When war is formally declared or the first shot is fired the initiation of the war has ended and from then on there is a waging of war between the two adversaries."(5)

(ii) Not all wars are illegal ; nor is rearmament *per se* illegal :

> " Furthermore, we must not confuse idealistic objectives with realities. The world has not arrived at a state of civilisation such that it can dispense with fleets, armies, and air forces, nor has it arrived at a point where it can safely outlaw war under any and all circumstances and

(1) See p. 42.
(2) See p. 35 ; and Vol. VII, pp. 90–91.
(3) See p. 36 ; and Vol. XIV, p. 153.
(4) See pp. 33 and 36 of the present Volume and Vol. III, p. 106.
(5) Vol. XII, pp. 66 and 67.

situations. Inasmuch as all war cannot be considered outlawed then armed forces are lawful instrumentalities of state, which have internationally legitimate functions. An unlawful war of aggression connotes of necessity a lawful war of defence against aggression. There is no general criterion under International Common Law for determining the extent to which a nation may arm and prepare for war. As long as there is no aggressive intent, there is no evil inherent in a nation making itself militarily strong. An example is Switzerland which for her geographical extent, her population and resources is proportionally stronger militarily than many nations of the world. She uses her military strength to implement a national policy that seeks peace and to maintain her borders against aggression.''(1)

As was remarked in the *I.G. Farben* and *Krupp Trials* :

'' The I.M.T. stated that, ' Rearmament of itself is not criminal under the Charter.' ''(2)

(iii) The characteristics of illegal warfare are left rather undefined :

'' Whether a war be lawful or aggressive and therefore unlawful under International Law, is and can be determined only from a consideration of the factors that entered into its initiation. In the intent and purpose for which it is planned, prepared, initiated and waged is to be found its lawfulness or unlawfulness. . . .

'' By the Kellog–Briand Pact the sixth-three signatory nations including Germany, renounced war as an instrument of *National Policy*. If this, as we believe it is, is evidence of a sufficient crystallisation of world opinion to authorise a judicial finding that there exist Crimes against Peace under International Common Law, we cannot find that law to extend further than such evidence indicates. The nations that entered into the Kellog-Briand Pact considered it imperative that existing international relationships should not be changed by force. In the preamble they state that they are :

'. . . persuaded that the time has come when . . . all changes in their relationships with one another should be sought only by pacific means.'

'' This is a declaration that from that time forward each of the signatory nations should be deemed to possess and to have the right to exercise all the privileges and powers of a sovereign nation within the limitations of International Law, free from all interference by force on the part of any other nation. As a corollary to this, the changing or attempting to change the international relationships by force of arms is an act of aggression and if the aggression results in war, the war is an aggressive war. It is, therefore, aggressive war that is renounced by the pact. It is aggressive war that is criminal under International Law.

'' The crime denounced by the law is the use of war as an instrument of national policy.''(3)

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(1) Vol. XII, p. 68.
(2) Vol. X, pp. 36, 106 and 122. The Tribunals were careful to make clear, furthermore, that they were not called upon or empowered to make new law on the question of crimes against peace ; see Vol. X, pp. 31 and 121 and Vol. XII, p. 67.
(3) Vol. XII, pp. 67 and 70.

Elsewhere the Tribunal acting in the *High Command Trial* quoted the section of the Judgment of the Nuremberg International Military Tribunal which is headed " Violations of International Treaties ".(1) Here the latter court, having pointed out that " The Charter defines as a crime the planning or waging of war that is a war of aggression *or a war in violation of international treaties*,"(2) refers to violations by Germany of the most important of these treaties that were in fact broken by that State.(3)

Comparatively little judicial attention has, however, been paid to that part of Article II 1 (a) of Law No. 10 which, like Article 6 (a) of the Charter of the Nuremberg International Military Tribunal, declares criminal, " planning, preparation, initiation or waging of . . . a war in violation of international treaties, agreements or assurances."(4) although the Supreme National Tribunal of Poland may be taken to have regarded conspiracy to commit breaches of Article 104 of the Treaty of Versailles and of the Polish Danzig Agreement of 9th November, 1920, and other agreements, and breach of the non-aggression pact signed in Berlin on 26th January, 1934, between Poland and Germany, as constituting part of ex-Gauleiter Greiser's guilt under the charge of crimes against peace(5).

The Judgment of the Tokyo International Military Tribunal recognises five separate crimes as crimes against peace :

> " Under the heading of ' Crimes against Peace ' the Charter names five separate crimes. These are planning, preparation, initiation and waging aggressive war or a war in violation of international law, treaties, agreements, or assurances ; to these four is added the further crime of participation in a common plan or conspiracy for the accomplishment of any of the foregoing. The indictment was based upon the Charter and all the above crimes were charged in addition to further charges founded upon other provisions of the Charter."

The Tribunal added, however :

> " A conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime. Thereafter, in furtherance of the conspiracy, follows planning and preparing for such war. Those who participate at this stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plan and prepare for its fulfilment they become conspirators. For this reason, as all the accused are charged with the conspiracies, we do not consider it necessary in respect of those we may find guilty of conspiracy to enter convictions also for planning and preparing. In other words, although we do not question the validity of the charges we do not think it necessary in respect of any defendants who may be found guilty of conspiracy to take into consideration nor to enter convictions upon counts 6 to 17 inclusive.

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(1) See British Command Paper, Cmd. 6964, pp. 36–38.
(2) Italics inserted.
(3) Vol. XII, p. 62.
(4) See p. 42. The Nuremberg International Military Tribunal found it unnecessary to discuss at any length whether the aggressive wars found to have been proved were also wars in violation of international treaties, agreements or assurances (British Command Paper, Cmd. 6469, p. 36).
(5) See Vol. XIII, pp. 70–71, 74–77 and 108–110.

> " A similar position arises in connection with the counts of initiating and waging aggressive war. Although initiating aggressive war in some circumstances may have another meaning, in the Indictment before us it is given the meaning of commencing the hostilities. In this sense it involves the actual waging of the aggressive war. After such a war has been initiated or has been commenced by some offenders others may participate in such circumstances as to become guilty of waging the war. This consideration, however, affords no reason for registering convictions on the counts of initiating as well as of waging aggressive war. We propose, therefore, to abstain from consideration of Counts 18 to 26 inclusive."(1)

Finally it should be added that in the Chinese trial mentioned on page 138, the Tribunal, in finding the accused guilty of a crime against peace, stressed that he had taken part in a war in violation of certain specified international agreements.(2)

(iv) The essentials of criminality in this sphere are knowledge and participation. After reviewing the findings of the International Military Tribunal as to Kaltenbrunner, Frank, Frick, Streicher, Funk, Schacht, Doenitz, von Schirach, Sauckel, von Papen, Speer, Fritzsche and Bormann, the Tribunal which conducted the *I.G. Farben Trial* said :

> " From the foregoing it appears that the I.M.T. approached a finding of guilty of any defendant under the charges of participation in a common plan or conspiracy or planning and waging aggressive war with great caution. It made findings of guilty under Counts I and II only where the evidence of both knowledge and active participation was conclusive. No defendant was convicted under the charge of participating in the common plan or conspiracy unless he was, as was the defendant Hess, in such close relationship with Hitler that he must have been informed of Hitler's aggressive plans and took action to carry them out or attended at least one of the four secret meetings at which Hitler disclosed his plans for aggressive war. The I.M.T. Judgment lists these meetings as having taken place on 5th November, 1937, 23rd May, 1939, 22nd August, 1939, and 23rd November, 1939."(3)

The necessity for knowledge and participation was repeated elsewhere,(4) but it is added in the *Krupp Trial* Judgment that :

> " In finding Hess guilty on the aggressive war Count and on the conspiracy Count, the International Military Tribunal clearly indicated that in its opinion a defendant could be found guilty even if he had not attended one of the four meetings referred to above. Likewise, we do not hold that a defendant cannot be found guilty unless he attended one of the meetings."(5)

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(1) Official transcript of the Judgment, pp. 32–33.
(2) See Vol. XIV, pp. 6–7.
(3) See Vol. X, pp. 31–34. The finding as to Speer was given particular attention, the importance of the precedent seeming to be that : " He was the official head of the whole industrial programme for the production of armaments. It would be unprecedented to hold that the activities of private citizens in the production of armament constituted waging of war when those of the official supervising those activities did not constitute that offence." (See Vol. X, p. 106–107 and 125–127).
(4) See Vol. X, pp. 35, 36, 106, 123, 125 and 128–129.
(5) Vol. X, p. 106 ; and see pp. 122–123 of that Volume.

The requisite knowledge must be of plans for specific invasions or wars of aggression :

> " The International Military Tribunal required proof that each defendant had actual knowledge of the plans for at least one of the invasions or wars of aggression, in order to find him guilty."(1)

Judge Anderson emphasised that :

> " The requisite knowledge, I think, can be shown either by direct or circumstantial evidence but in any case it must be knowledge of facts and circumstances which would enable the particular individual to determine not only that there was a concrete plan to initiate and wage war, but that the contemplated conflict would be a war of aggression and hence criminal. Such knowledge being shown, it must be further established that the accused participated in the plan with the felonious intent to aid in the accomplishment of the criminal objective. In the individual crime of aggressive war or conspiracy to that end as contra-distinguished to the international delinquency of a state in resorting to hostilities, the individual intention is of major importance."(2)

Judge Wilkins also stressed that the requisite knowledge must include knowledge that the envisaged warfare would be criminal in character :

> " To establish the requisite criminal intent, it seems necessary to show knowledge that the military power would be used in a manner which, in the words of the Kellogg Pact, includes war as an ' instrument of policy '."(3)

The judgment delivered in the *High Command Trial* ruled that, in certain circumstances, *inaction* could make an accused liable, as well as " active participation " :

> " We are of the opinion that as in ordinary criminal cases, so in the crime denominated aggressive war, the same elements must all be present to constitute criminality. There first must be actual knowledge that an aggressive war is intended and that if launched it will be an aggressive war. But mere knowledge is not sufficient to make participation even by high-ranking military officers in the war criminal. It requires in addition that the possessor of such knowledge, after he acquires it shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it. If he then does the former, he becomes criminally responsible ; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy.
>
> " If a defendant did not know that the planning and preparation for invasions and wars in which he was involved were concrete plans and preparations for aggressive wars and for wars otherwise in violation of international laws and treaties, then he cannot be guilty of an offence. If, however, after the policy to initiate and wage aggressive wars was formulated, a defendant came into possession of knowledge that the

(1) Vol. X, p. 106.
(2) Vol. X, p. 123.
(3) See Vol. X, pp. 128–129.

invasions and wars to be waged were aggressive and unlawful, then *he will be criminally responsible if he, being on the policy level, could have influenced such policy and failed to do so.*"[1]

(v) It was stressed that no rule of law excluded either business men or military men from liability for crimes against peace if the essentials of criminality are present :

"We do not hold that industrialists as such, could not under any circumstances be found guilty upon such charges."[2]

"The prosecution does contend, and we think the contention sound, that the defendants are not relieved of responsibility for action which would be criminal in one who held no military position, simply by reason of their military positions. This is the clear holding of the Judgment of the I.M.T., and is so provided in Control Council Law No. 10, Article II, Sec. 4a."[3]

Military men appeared among those found guilty of crimes against peace by the International Military Tribunal for the Far East.

Further, of the accused Oshima who was found guilty of conspiracy to wage aggressive war, that Tribunal said :

"Oshima was one of the principal conspirators and consistently supported and promoted the aims of the main conspiracy.

"He took no part in the direction of the war in China or the Pacific War and at no time held any post involving duties or responsibility in respect of prisoners.

"Oshima's special defence is that in connection with his activities in Germany he is protected by diplomatic immunity and is exempt from prosecution. Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the Courts of the State to which an Ambassador is accredited. In any event, this immunity has no relation to Crimes against international law charged before a tribunal having jurisdiction. The tribunal rejects this special defence."[4]

(vi) Of the types of person who could be held guilty of crimes against peace, the *I.G. Farben* Judgment said :

"The London Agreement is entitled an agreement 'for the prosecution and punishment of the major war criminals of the European Axis.' There is nothing in that agreement or in the attached Charter to indicate that the words 'waging a war of aggression', as used in Article II (a) of the latter, were intended to apply to any and all persons who aided, supported, or contributed to the carrying on of an aggressive war ; and it may be added that the persons indicted and tried before the I.M.T. may fairly be classified as 'major war criminals' in so far as their activities were concerned. Consistent with the express purpose of the London Agreement to reach the 'major war criminals', the Judgment of the I.M.T. declared that 'mass punishments should be avoided.'

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(1) Vol. XII, pp. 68–69. (Italics inserted).
(2) See Vol. X, p. 105.
(3) Vol. XII, p. 66.
(4) Official transcript of the judgment, p. 1189.

"To depart from the concept that only *major war criminals*—that is, those persons in the political, military, and industrial fields, for example, who were *responsible for the formulation and execution of policies*—may be held liable for waging wars of aggression would lead far afield. Under such circumstances there could be no practical limitation on criminal responsibility that would not include, on principle, the private soldier on the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces, or the housewife who conserved fats for the making of munitions. Under such a construction the entire manpower of Germany could, at the uncontrolled discretion of the indicting authorities, be held to answer for waging wars of aggression. That would, indeed, result in the possibility of mass punishments. . . .

"The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. It is, of course, unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilt to which the corollary of mass punishment is the logical result, for which there is no precedent in international law and no justification in human relations. We cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or, if it starts right, when it turns wrong. We would not require the citizen, at the risk of becoming a criminal under the rules of international justice, to decide that his country has become an aggressor and that he must lay aside his patriotism, the loyalty to his homeland, and the defence of his own fireside at the risk of being adjudged guilty of crimes against peace on the one hand, or of becoming a traitor to his country on the other, if he makes an erroneous decision based upon facts of which he had but vague knowledge. To require this of him would be to assign to him a task of decision which the leading statemen of the world and the learned men of international law have been unable to perform in their search for a precise definition of aggression."(1)

The Krupp Trial Judgment stated :

"Whatever may be the view of experts in the field of criminology, in the eyes of law-makers and laymen the object of punishment is to deter others from crime. In this particular instance, I apprehend, the object sought to be accomplished by making aggressive war a crime was to deter those *capable of initiating that type of war* from doing so. The language used in the Pact is to the effect that the signatories renounced war *as a matter of national policy*. Considered in the light of the complexity of the whole problem, the usage and custom which led to the Treaty and the object sought to be accomplished, it seems to me to be a reasonable view that the language used necessarily implies that only those *responsible for a policy* leading to initiation and waging

(1) See Vol. X, pp. 37–39. (Italics inserted).

of aggressive war *and those privy to such a policy together with those who, with a criminal intent actively conduct the hostilities or collaborate therein,* are criminally liable in the event of war in violation of the Pact ; for, if the threat of punishment deters these, there will be no war and the object of the law will have been accomplished. Upon the other hand, if the threat to the policy-makers, leaders and their collaborators proves of no avail, is it reasonable to conclude that the law contemplates that the threat of post-war punishment by a court exercising criminal jurisdiction held out to the mass of the people will prove effective ? To answer this in the affirmative, it seems to me, would be to ignore everyday experience and indulge in purely theoretical rather than practical thought.

" Moreover, to extend criminal liability beyond the leaders and policy-makers and their privies to private citizens called upon to aid the war effort necessarily embodies the concept of mass punishment . . ."[1]

The Tribunal which conducted the *High Command Trial* found that no accused could be held guilty of crimes against peace unless he was in a position to influence state policy ; no other type of " major war criminal " could apparently fall within the Tribunal's ruling :

" As we have pointed out, war whether it be lawful or unlawful is the implementation of a national policy. If the policy under which it is initiated is criminal in its intent and purpose it is so because the individuals at the policy-making level had a criminal intent and purpose in determining the policy. If war is the means by which the criminal objective is to be attained then the waging of the war is but an implementation of the policy, and the criminality which attaches to the waging of an aggressive war should be confined to those who participate in it at the policy level.

" This does not mean that the Tribunal subscribes to the contention made in this trial that since Hitler was the Dictator of the Third Reich and that he was supreme in both the civil and military fields he alone must bear criminal responsibility for political and military policies. No matter how absolute his authority, Hitler alone could not formulate a policy of aggressive war and alone implement that policy by preparing, planning, and waging such a war. Somewhere between the Dictator and Supreme Commander of the Military Forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it. Control Council Law No. 10 does not definitely draw such a line. It points out in Sec. 2 of Article II certain fact situations and established relations that are or may be sufficient to constitute guilt and sets forth certain categories of activity that do not establish immunity from criminality. Since there has been no other prosecution under Control Council Law No. 10 with defendants in the same category as those in this case, no such definite line has been judicially drawn. This Tribunal is not required to fix a general rule but only to determine the guilt or innocence of the present defendants . . .

" If and as long as a member of the armed forces does not participate in the preparation, planning, initiating or waging of aggressive war on

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[1] See Vol. X, pp. 127–128. (Italics, apart from the second set thereof, are inserted.)

a policy level, his war activities do not fall under the definition of Crimes against Peace. It is not a person's rank or status, but his power to shape or influence the policy of his State, which is the relevant issue for determining his criminality under the charge of Crimes against Peace.

" International Law condemns those who, due to their actual power to shape and influence the policy of their nation, prepare for, or lead their country into or in an aggressive war. But we do not find that, at the present stage of development, International Law declares as criminals those below that level who, in the execution of this war policy, act as the instruments of the policy-makers. . . .

" Those who commit the crime are those who participate at the policy-making level in planning, preparing, or in initiating war. After war is initiated, and is being waged, the policy question then involved becomes one of extending, continuing or discontinuing the war. The crime at this stage likewise must be committed at the policy-making level.

" The making of a national policy is essentially political, though it may require, and of necessity does require, if war is to be one element of that policy, a consideration of matters military as well as matters political. . . .

" The acts of Commanders and Staff Officers below the policy level, in planning campaigns, preparing means for carrying them out, moving against a country on orders and fighting a war after it has been instituted, do not constitute the planning, preparation, initiation and waging of war or the initiation of invasion that International Law denounces as criminal."(1)

The International Military Tribunal for the Far East may be thought to have followed the same line of thought. Two passages from its judgment should be quoted in this connection :

" [Muto, Akira] was a soldier and prior to holding the important post of Chief of the Military Affairs Bureau of the Ministry of War he held no appointment which involved the *making of high policy*. Further, there is no evidence that in this earlier period he, alone or with others, tried to affect the making of high policy.

" When he became Chief of the Military Affairs Bureau he joined the conspiracy. Concurrently with this post he held a multiplicity of other posts from September, 1939 to April, 1942. During this period planning, preparing and waging wars of aggression on the part of the conspirators was at its height. He played the part of a principal in all these activities."

[Of Sato, Kenryo :] " It was thus not until 1941 that Sato attained a position which by itself enabled him to influence the making of policy, and no evidence has been adduced that prior to that date he had indulged in plotting to influence the *making of policy*. The crucial question is whether by that date he had become aware that Japan's designs were criminal, for thereafter he furthered the development and execution of these designs so far as he was able."(2)

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(1) Vol. XII, pp. 67, 69 and 70.
(2) Official transcript of the Judgment, pp. 1185 and 1190–1. (Italics inserted.)

(vii) The specific crime of *conspiracy* to plan, prepare, initiate or wage a war of aggression has been discussed above as part of the crime against peace. In particular, it should be noted that the *dicta* concerning knowledge and participation refer to conspiracy as well as the offence of planning, preparing, initiating and waging aggressive war. The Tribunal in the *I.G. Farben Trial* repeated that : " In order to be participants in a common plan or conspiracy, it is elementary that the accused must know of the plan or conspiracy." The Tribunal also stated :

> " It is appropriate here to quote from the I.M.T. Judgment :
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> ' The Prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.' (Vol. I, p. 225, I.M.T. Judgment.) "[1]

After quoting the same passage from the Judgment of the International Military Tribunal, the Tribunal acting in the *Krupp Trial* pointed out that : " Applying this rule, the I.M.T. held proof of actual knowledge of the concrete plans of the Nazi government to wage aggressive war to be essential to a conviction under the conspiracy Count. . . . Whether it be called the ' Nazi conspiracy ', the ' Krupp conspiracy ', or by some other name, to be a crime under Control Council Law No. 10 or the London Charter, a conspiracy must meet at least three requirements : (1) There must be a concrete plan participated in by two or more persons ; (2) the plan must not only have a criminal purpose but that purpose must be clearly outlined ; and (3) the plan must not be too far removed from the time of decision and of action."[2]

A relevant paragraph from the Judgment of the Tokyo International Military Tribunal dealing with conspiracy to wage wars of aggression runs as follows :

> " The conspiracy existed for and its execution occupied a period of many years. Not all of the conspirators were parties to it at the beginning, and some of those who were parties to it had ceased to be active in its execution before the end. All of those who at any time were parties to the criminal conspiracy or who at any time with guilty knowledge played a part in its execution are guilty of the charge contained in Count I."[3]

(viii) In view of the language of Law No. 10, Article II 1 (a)—" planning, preparation, initiation or waging ", the question presents itself whether the mere planning of a war of aggression would itself be criminal. It seems[4]

(1) Vol. X, p. 40, and also 31.
(2) Vol. X, pp. 110 and 113.
(3) Official Transcript, pp. 1142–3.
(4) See Vol. X, pp. 119, 121 and 125.

that such an act would not be criminal unless it amounted to the crime of conspiracy discussed above, and that this would necessitate proof of action, in common with others, which involved conspiring to initiate or wage specific wars of aggression. It was on this ground, among others, that the Prosecution's theory of a separate "Krupp conspiracy" was dismissed.(1)

(ix) On the facts before them, the Military Tribunals held all accused charged of crimes against peace to be not guilty of such offences, on the grounds either of lack of knowledge or lack of ability to influence policy.(2)

(x) In the Trial of Takashi Sakai by a Chinese War Crimes Military Tribunal at Nanking, the accused was found guilty of, *inter alia*, a crime against peace in that he participated in a war of aggression,(3) and Artur Greiser was also found guilty of, *inter alia*, crimes against peace, in his trial before the Supreme National Tribunal of Poland.(4) Neither the Chinese nor the Polish Courts, however, examined in their judgments the question of how closely an accused must be shown to have been to the planning and waging of aggressive war before he can be held responsible for crimes against peace. The Supreme National Tribunal made it clear, however, that Greiser had acted as an instrument of Hitler and not as one who had any part in the laying down of policy, and its judgment indicates why he was chosen to be such an instrument of Hitler's will.(5)

(xi) Some other important aspects of crimes against peace have been noted in these volumes. Each shows whether the fact that such crimes have been committed alters a certain legal situation :

(*a*) In the *Milch Trial* the Tribunal expressed certain conclusions regarding what amounted to a plea of superior orders.(6) It seems fair to summarize the decision of the Tribunal by saying that it rejected the plea on the grounds that the superior orders relied upon related to the waging of a war of aggression and involved the commission of "ruthless acts of persecution and terrorism", and that the defendant *must have known* that the orders were in these ways illegal. This finding is interesting in that it represents the only instance reported in these volumes in which the illegal nature of aggressive war has been related to the principle that the plea of superior orders can only be effective if the orders were legal or if the accused was not aware, and could not reasonably be expected to be aware, of their illegality.(7)

(*b*) On the other hand, it was laid down in the *Hostages Trial* that "International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of

(1) See Vol. X, pp. 107–109 and 110–120.
(2) See Vol. X, pp. 34–35, 36–37, 38–39, 40, 123–124, 127 and 129 and Vol. XII, p. 70.
(3) See Vol. XIV, pp. 4–7.
(4) See Vol. XIII, pp. 104–5 and 108–9.
(5) See Vol. XIII, pp. 104–5.
(6) See Vol. VII, pp. 40–2.
(7) See pp. 157–158.

this subject."[1] The Supreme National Tribunal of Poland, in the *Greiser Trial* declared that the occupation of Poland by the Reich was a " criminal invasion " and was not, therefore an occupation in the true sense of the word. The Tribunal did not, however, elaborate upon the legal consequences of this finding.[2]

(*c*) The Tribunal acting in the *High Command Trial* rejected a Prosecution argument that an accused could never plead military necessity in the course of a criminal war.[3]

(*d*) In the *Trial of Willy Zuehlke*, the Netherlands Special Court of Cassation dissented from the opinion of the Court of first instance that all acts committed by the Germans against the Netherlands civilian population were criminal because of the war of aggression launched and waged by Germany against Holland. It was agreed that the said war was an international crime and added that on account of this fact the Netherlands " would have been authorized to answer " the aggression " with reprisals, even with regard to the normal operation of the laws of war on land, sea and in the air." The Court stated, however, that : " it is going too far to regard as war crimes all acts committed against the Netherlands or Netherlanders by the German forces and other organs during the war, solely on the grounds of the illegal nature of the war launched by the then German Reich."[4]

E. MEMBERSHIP OF CRIMINAL ORGANIZATIONS

(i) The question of membership of criminal organizations has received treatment at several points in these Volumes[5]. Three aspects of the problem are discussed elsewhere in this present volume : the relation of membership to the crime of conspiracy,[6] the fact that, in respect of the question whether any organization must be deemed to have been criminal, the findings of the Nuremberg International Military Tribunal are binding upon the United States Military Tribunals which function under Ordinance No 7, and have also been followed in trials before United States Military Government Courts,[7] and the question of the punishment to be meted out to those found guilty of membership.[8]

(ii) The Charter of the International Military Tribunal did not define a " group " or " organization." The matter is left to the appreciation of the Tribunal as a question of fact.

(iii) The criminal acts for which a group or organization may be declared criminal are apparently those covered by the Charter in its Article 6, i.e. crimes against peace, war crimes and crimes against humanity. The

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[1] See Vol. VIII, pp. 59–60. Compare Vol. VI, p. 52 and Vol. XIV, pp. 127–129, where similar opinions on the part of the Tribunal acting in the *Rauter Trial*, and of certain other Netherlands Courts are set out.
[2] See Vol. XIII, p. 110. Compare a similar statement in Vol. XIV, p. 46.
[3] See Vol. XII, pp. 124–125.
[4] Vol. XIV, pp. 143–145.
[5] See Vol. VI, pp. 65–72 and 77 ; Vol. VII, pp. 5–7, 18–24 and 86–7, Vol. IX, pp. 28–9 ; Vol. X, pp. 57–61 ; and (especially) Vol. XIII, pp. 42–67.
[6] See pp. 3 and 98–99.
[7] See p. 17–18.
[8] See p. 201–202.

International Military Tribunal would appear to have made this clear in the statement in which it stated that mere membership of criminal organizations was not *per se* criminal in nature :

> " Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of *acts declared criminal by Article 6 of the Charter* as members of the organization. Membership alone is not enough to come within the scope of these declarations."(1)

(iv) Various of the judgments delivered by the United States Military Tribunals have included rulings as to whether the groups to which various accused belonged were to be regarded as being part of organizations declared criminal by the International Military Tribunal and as to whether " sponsoring " membership was sufficient for criminality(2), but as stated in the Introduction to the present volume, it is felt that such findings as to individual groups and organizations are of less importance to the development of international law than the underlying basic legal principle.(3)

(v) The International Military Tribunal did not specify who was to bear the onus of proof regarding the test of personal guilt, when an alleged member is brought to trial, but the wording used by the Tribunal in respect of each of the organizations it declared criminal tends to indicate that it regarded the burden as resting on the prosecution. It would appear that two alternative courses were open to the competent courts. The first would be to hold the view that the declaration made by the Nuremberg Tribunal creates a presumption of guilt against every member, and that consequently all the prosecution is required to do is to establish that the accused was a member of the organization. In this case it was to be presumed, until proof to the contrary was established by the defendant, that he knew of the criminal purposes or acts of the organization or that, if he did not join the organization on a voluntary basis, he was personally implicated in the commission of crimes. The second course would be to hold the view that no presumption of individual guilt derives from the declaration of the Nuremberg Tribunal, and that consequently, the prosecution is called to prove not only that the accused was a member of the organization declared criminal, but also that he knew the relevant facts or (if an involuntary member) that he was personally implicated in the commission of crimes. It would appear that, by omitting to give an explicit answer on the issue of the burden of proof, the Nuremberg Tribunal in fact delegated this task to the competent courts and shunned interfering with their jurisdiction beyond the point mentioned in the Judgment.(4) In the event the courts have in many cases explicitly ruled that the burden of proof remains on the prosecution.(5) At times, however, they have on first sight appeared to take a

(1) British Command Paper, Cmd. 6964, p. 67. (Italics inserted).
(2) See Vol. VI, p. 77 and Vol. X, pp. 59–61.
(3) See pp. 3 and 98–99.
(4) See Vol. XIII, pp. 51–2.
(5) See Vol. X, p. 59 and Vol. XIII, pp. 58–60 and 62.

different view, as when the Tribunal which conducted the *Justice Trial* held that no man with Joel's intimate contacts with the Reich Security Main Office, the S.S. and the S.D. and the Gestapo " *could possibly have retained membership* of the second and third mentioned organizations *without knowledge* of their criminal character."(1) The crimes of the Leadership Corps of the Nazi Party, ruled the Tribunal at another point in its Judgment, were of such wide scope and were so intimately connected with the activities of the Gauleitung that " it *would be impossible* for a man of the defendant's [Oeschey's] intelligence *not to have known of* the commission of these crimes, at least in part if not entirely ".(2) Finally, of Altstötter's guilt under Count Four, the Tribunal said, *inter alia* : " that the activities of the S.S. and the crimes which it committed as pointed out by the Judgment of the International Military Tribunal above quoted are of so wide a scope that no person of the defendant's intelligence, and one who had achieved the rank of Oberführer in the S.S., could have been unaware of its illegal activities, particularly a member of the organization from 1937 until the surrender. According to his own statement, he joined the S.S. with misgivings, not only on religious grounds but also because of practices of the police as to protective custody in concentration camps. . . He was a member of the S.S. at the time of the pogroms in November, 1938, ' Crystal Week ', in which the International Military Tribunal found the S.S. to have had an important part. Surely whether or not he took a part in such activities or approved of them, he *must have known* of that part which was played by an organization of which he was an officer."(3) These extracts from its Judgment are sufficient to show that the Tribunal was willing, in suitable instances, to assume knowledge on the part of defendants of the criminal purposes of the organizations referred to, though it should be added that Altstötter for instance was not found guilty on the basis of presumed knowledge alone.(4)

Speaking in rather a similar vein, the Tribunal which conducted the *Flick Trial* said :

> " Relying upon the I.M.T. findings above quoted the Prosecution took the position that it devolved upon Steinbrinck to show that he remained a member without knowledge of such criminal activities. As we have stated in the beginning, the burden was all the time upon the Prosecution. *But in the face of the declaration of I.M.T. that such knowledge was widespread we cannot believe that a man of Steinbrinck's intelligence and means of acquiring information could have remained wholly ignorant of the character of the S.S. under the administration of Himmler.*"(5)

It is clear however that the Tribunals are here not reversing the burden of proof in the sense described above, but are treating *other facts than the mere fact of membership*, such as the accused's rank and duties, as creating a

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(1) See Vol. VI, p. 76 (Italics inserted).
(2) See Vol. VI, p. 68 (Italics inserted).
(3) See Vol. VI, pp. 71 and 72 (Italics inserted).
(4) See Vol. VI, pp. 71–72.
(5) Vol. IX, p. 29. (Italics inserted).

presumption of knowledge. As was said by the Tribunal which conducted the *I.G. Farben Trial*, " Proof of the requisite knowledge need not, of course be direct, but may be inferred from circumstances duly established."(1)

(vi) In Volume VII of these Reports, it has been submitted(2) that since the ratification of the London Agreement by Poland, whenever a person is tried on a charge of membership in a group or organization the criminal character of which was under the examination of the Nuremberg Tribunal, the Polish Courts are in law bound by the findings of the Tribunal and cannot re-examine the question of the criminal character of the organization dealt with in the Judgment.

On the other hand, it is clear from the law as laid down in paragraph 2 of Article 4 of the Polish War Crimes Decree of 1944 that Polish Courts are not bound by the fact that certain other groups or organizations have not been indicted and adjudicated as criminal within the meaning of the Charter of the International Military Tribunal. In these cases the Polish Court may declare such groups or organizations to be criminal within the Polish jurisdiction. Accordingly, in practice the Polish courts have declared to be criminal some other Nazi groups or organizations which displayed particular zeal in occupied Poland, such as the leadership of the German civil administration in the so-called General Government, members of the concentration camp staff at Auschwitz, and officials of the administration of the Lodz ghetto.(3)

The fact that the Polish legislation on membership of criminal organizations is based upon the principle of joint responsibility for acts done in pursuance of a criminal common design (as, it has been submitted,(4) is the approach taken by the Judgment of the International Military Tribunal), seems to be proved by the wording of paragraph 2 of Article 4 of the above-mentioned Decree :

> " *Paragraph* 2. A Criminal organization in the meaning of paragraph 1 is a group or organization :
>
> (*a*) which has as its aims the commission of crimes against peace, war crimes or crimes against humanity ; or
>
> (*b*) which while having a different aim, tries to attain it through the commission of crimes mentioned under (*a*)."(5)

It is also significant that in a Polish trial referred to in the notes to the *Hoess Trial* it was held that the inmates of Auschwitz concentration camp could only be held responsible for their personal deeds *as they were not members of the criminal organization as it is understood by the Nuremberg Judgment, namely, they were not bound together by a common aim which was the commission of crimes against humanity*.(6)

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(1) Vol. X, p. 59.
(2) See Vol. VII, pp. 86-7 and pp. 20-1 of that Volume, paragraphs (1), (2), (5) and (7).
(3) See Vol. VII, pp. 20-4 and Vol. XIV, pp. 40–8. The requirement of knowledge of the criminal aims and methods of the organization question will be found to have been repeatedly stressed.
(4) See pp. 98–9.
(5) Vol. VII, pp. 86–7.
(6) Vol. VII, p. 21. Compare Vol. XIV, p. 45. Regarding the attitude of the Polish Supreme National Tribunal to membership of criminal organizations, see also Vol. XIII, pp. 107–8.

(vii) Finally it should be remarked that Article 10 of the Netherlands East Indies Statute Book Decree No. 45 of 1946 contains a special rule regarding responsibility of a group of individuals involved in the commission of war crimes. It reads as follows :

> " 1. If a war crime is committed within the framework of the activities of a group of persons in such a way that the crime can be ascribed to that group as a whole, the crime shall be considered to have been committed by that group, and criminal proceedings taken against and sentences passed on all members of that group.
>
> " 2. No penalty shall be imposed on the member for whom it is proved that he had taken no part in the commission of the war crime."

This provision may have been applied in the trial of Shigeki Motomura and others at Macassar ; the court did not, however, discuss the legal implications thereof.(1) The Netherlands Metropolitan laws contain no provisions applicable to membership of criminal organisations.(2)

(1) See Vol. XIII, pp. 138–42. The provision is further discussed in Vol. XI, pp. 101–2.
(2) See Vol. XIV, pp. 141 and 142–3.

VII

DEFENCE PLEAS

(i) The pages which follow deal with those pleas on which courts, or Judge Advocates acting with British or Commonwealth Courts, have expressed opinions in trials reported in these volumes, and which are of the most importance from the point of view of international law. Pleas and arguments either explicitly or implicitly based solely upon provisions of municipal law have not been included here, but examples may be found from time to time in the series,[1] particularly pleas to the jurisdiction of the court.[2]

(ii) As already indicated, the pleas treated here have all been decided or passed upon by courts or Judge Advocates in actual trials, but not all have been recognised by the courts as valid. Further, not all of those which have been recognised as valid have been regarded as constituting a complete defence in the sense that they take away completely an accused's guilt ; in particular the plea of superior orders has generally been regarded as constituting, if anything, a mitigating circumstance which may be considered in assessing sentence. The way in which each plea is to be classified along the above-mentioned lines will become clear from the treatment which follows.

(iii) Before proceeding, one matter of definition should be dealt with. It is necessary to describe at the outset what is usually regarded as first the plea of superior orders, second the plea of duress (sometimes called the plea of coercion) and thirdly the plea of military necessity. This process of definition is made necessary by the fact that the same names are not always given to the same alleged sets of facts, and the term " necessity " has from time to time been applied to one or other of all three.[3]

A study of war crime trials reveals that, among others, three pleas of a related character have been put forward by the Defence in such trials :

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[1] See for instance Vol. I, pp. 23–4, 73, 74, 75, 76–8 and 78–9 ; Vol. III, pp. 2, 36, 38, 42–5 and 45–9 ; Vol. IV, pp. 7–11, 13–15, 15–16, 38–41, 44–6, 49–50, 63–9, 73–4, 75 ; Vol. XI, pp. 8, 9, 53–4 and 132–3 ; and Vol. XIII, pp. 110, 117 and 132.

The subject-matter of many of the pleas described or commented upon on the pages here referred to was procedural ; some aspects of war crimes procedure are dealt with on pp. 918–199. Pleas which claim that the courts of one state which conducted trials on the territory of another state did so without the latter's consent do not challenge the general right of courts under international law to try war criminals, and so appear to form a separate category. The question depends upon whether the latter state can be said to have given its consent. See Vol. I, p. 42 ; Vol. V, pp. 8–10 and Vol. XIV, pp. 15–16.

[2] The possibility of pleas to the jurisdiction of British, Canadian and Australian war crime courts has been ruled out by the enactments under which they operate (Vol. I, p. 106, Vol. IV, p. 126 and Vol. V, p. 99).

[3] For an example of the application of the word " necessity " to a set of facts usually connected with the plea of superior orders, see Vol. X, p. 174.

(*a*) The argument that the accused acted under orders, which he had the duty to obey, when he committed the acts alleged against him. Sometimes this plea is augmented by the claim that certain consequences would ultimately have followed from disobedience, such as the execution of the person refusing to obey and/or the taking of reprisal action against his family. This may be called the *plea of superior orders.*

(*b*) The argument that, in committing the acts complained of, the accused acted under an immediate threat to himself. This may be called the *plea of duress.*

(*c*) The argument that a military action carried out by a group of military personnel was justified by the general circumstances of battle. This may be called the *plea of military necessity.*

It is not always easy to distinguish one plea from another and the same argument put forward in court may contain elements of more than one. Nevertheless, the fact that there is a difference between the first and second for instance may be taken to have been recognised by the Tribunal which conducted the *Einsatzgruppen Trial*, in that it applied one test of the knowledge of the illegality of an order in cases where the plea of superior orders is put forward and a different test when the plea of duress is added. The Tribunal said that : " To plead superior orders one must show an excusable ignorance of their illegality ", yet it went on :

> " But it is stated that in military law *even if the subordinate realises that the act he is called upon to perform is a crime*, he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes duress. Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to put a lethal lever.
>
> " Nor need the peril be that imminent in order to escape punishment."[1]

Further, an examination of the treatment given by the Tribunals which conducted the *Flick*, *I.G. Farben* and *Krupp Trials*, to the " defence of necessity ", suggests that they regarded an argument based on necessity, if substantiated, as constituting a complete defence and not simply a mitigating circumstance. This was particularly clear in the Judgment in the *Flick Trial*, where the Tribunal, referring to Article II (4) (b) of Control Council Law No. 10 (" the fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation "), said : " In our opinion it is not intended that these provisions are to be employed to deprive a defendant of the defence of necessity under such circumstances as obtain in this case with respect to defendants Steinbrinck, Burkart, Kaletsch and Terberger."[2]

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[1] Vol. VIII, p. 91. (Italics inserted).

[2] See Vol. IX, p. 19. The classification of defences attempted in the text above represents a slight condensation of pages 174-5 of Vol. VIII.

The Judgment delivered in the *I.G. Farben Trial* also made clear the distinction between the legal effects of the successful pleading of, respectively, the plea of superior orders and the plea of duress :

> " Thus the I.M.T. recognised that while an order emanating from a superior officer or from the government is not, of itself, a justification for the violation of an international law (though it may be considered in mitigation), nevertheless, such an order is a complete defence where it is given under such circumstances as to afford the one receiving it no other moral choice than to comply therewith."(1)

In the discussion which appears in these present pages of the attitude of the courts to these three pleas, attention has been paid, where necessary to avoid confusion, to the sets of alleged facts to which the courts referred rather than to the names which the courts gave to the pleas ; thus, for instance, remarks which a court made on the " defence of necessity " are quoted in the section on superior orders when the context shows that the court is actually discussing what is usually known as the defence of superior orders.

1. THE PLEA OF SUPERIOR ORDERS(2)

(i) 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. A variation is to be found in the argument of Counsel for Dr. Klein, one of the accused in the *Belsen Trial* ;(3) 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.

Not unnaturally, then, the plea has received treatment or reference on many previous occasions in the pages of these volumes.(4)

(ii) It has often been said that an accused is entitled under international law to obey commands which are lawful or which he could not reasonably be expected to know were unlawful. The question, however, arises whether these commands must be lawful under municipal law or under international law ; as will be seen,(5) the legality under municipal law of the accused's *acts* does not free him from liability to punishment if those acts constitute war crimes, and it seems to follow that the plea of having acted upon *orders* which were legal under municipal law must also fail to constitute a defence. On the other hand, if the order is legal under international law, it is difficult

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(1) Vol. X, p. 54.

(2) See also p. 15b

(3) See Vol. II, p. 79.

(4) See especially Vol. V, pp. 13–22, Vol. VII, p. 65, Vol. VIII, pp. 90–2 and Vol. X, pp. 174–6 ; and see also Vol. XI, pp. 24–5, 46–50, 77–8, and Vol. XIII, pp. 68–9.

(5) See pp. 161–2.

to show how an act committed in obedience to it could be illegal under that system.(1) 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. The true test in practice is whether an order, *illegal* under international law, on which an accused has acted was or must be presumed to have been known to him to be so illegal, or was obviously so illegal (" illegal on its face " to use the term employed by the Tribunal in the *High Command Trial*) or should have been recognised by him as being so illegal. The *general upshot* of a large number of decisions, and of the advice of Judge Advocates to British or Commonwealth courts,(2) is that, if the order comes within one or more of these categories, then the accused cannot rely upon the plea of superior orders.

The Judgment delivered in the *Einsatzgruppen Trial* underlined certain other essentials. It was said that : " If one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionally greater than the harm which would result from not obeying the illegal order. It would not be an adequate excuse, for example, if a subordinate, under orders, killed a person known to be innocent, because by not obeying it he would himself risk a few days of confinement. Nor if one acts under duress, may he without culpability, commit the illegal act once the duress ceases."

Further, " the doer may not plead innocence to a criminal act ordered by his superiors if he is in accord with the principle and intent of the superior . . . In order successfully to plead the defence of Superior Orders the opposition of the doer must be constant. It is not enough that he mentally rebel at the time the order is received. If at any time after receiving the order he acquiesces in its illegal character, the defence of Superior Orders is closed to him."(3)

Before this treatment of the circumstances in which the plea may be effectively put forward is closed, it should be added that, while the plea in its typical form relates to military orders given to military personnel, it may also in suitable circumstances be pleaded by civilians who acted under orders.(4)

(iii) As to the effectiveness of the plea when put forward in circumstances which, in accordance with the rules just laid down, make it permissible to plead superior orders, the general attitude of the courts and the rule expressed in numerous municipal and international law enactments, including the Charter of the International Military Tribunal and Law No. 10, has been that, while obedience to superior orders does not constitute a defence upon

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(1) Unless the act constituted an illegal *means* of fulfilling a legal order. This, however, is not the situation in which the plea is in fact usually put forward.

(2) See Vol. V, pp. 14–19 and the cross-references there set out, Vol. VII, p. 65, Vol. VIII, p. 50 and p. 91, Vol. XI, pp. 98–100 ; Vol. XII, p. 74 ; Vol. XIII, pp. 114–17 and 144–5 and Vol. XIV, pp. 146–151. These rules have not invariably been followed ; compare the acquittal of Luger in the *Wagner Trial* ; this accused knew of the illegality of the orders which he obeyed. (See Vol. V, p. 16).

(3) Vol. VIII, pp. 90–1.

(4) As it was by Luger, a Public Prosecutor who acted on the orders of Gauleiter Wagner. (See Vol. III, pp. 54–5).

For a discussion of the question of superior orders thought to be in pursuance of legitimate reprisals, See Vol. VIII, pp. 7–8 and Vol. XI, pp. 25–7.

which an accused can rely with certainty of being completely protected thereby, it may at the discretion of the court be treated as a factor which justifies mitigation of punishment.(1)

In the trial of Gozawa Sadaichi and others at Singapore, 21st January–4th February, 1946,(2) a British Military Court in passing sentences addressed the following language to two of the accused :

> " Chiba Masami, your participation in the horrible scene which has been described in this Court is undoubted. But it would be unjust to deal with you on the same footing as your superior officers. The sentence of the Court, subject to confirmation, is that you be kept in prison for the term of seven years.
>
> " Tanno Shozo : Yabi Jinichiro, the Court considers that your brutality was carried out under the orders of your superior officers. But you were not unwilling brutes, nor unversed in brutality. The sentence of the Court, therefore, subject to confirmation, is that you be kept in prison for the term of three years."

The Tribunal acting in the *High Command Trial* dealt with, *inter alia*, the position of a commanding officer who knows that men under his command are committing violations of International Law in pursuance of orders from *his superiors* passed down independently of him. While admitting the difficulty of his position, the Tribunal held that " by doing nothing he cannot wash his hands of international responsibility. His only defence lies in the fact that the order was from a superior which Control Council Law No. 10 declares constitutes only a mitigating circumstance."(3) This is

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(1) See Vol. V, pp. 13, 17 and 19–22 ; Vol. VI, p. 117 ; Vol. VII, pp. 10 and 88 ; Vol. VIII, pp. 16, 20–21, 50, 52, 90 and 91–92. For an exceptional case, a type of order which the Tribunal in the *High Command Trial* regarded as being capable of giving rise to a complete defence, see Vol. XII, p. 98.

It is clear that the circumstances of each case will determine the *extent* of mitigation which the court will recognise. In this connection it may be permissible to summarise three of the possible criteria for determining the circumstances in which the plea of superior orders might be effective which were touched upon by counsel in the *Masuda Trial* and which are set out more fully on pages 18–19 of Vol. V :

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

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

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

These suggested criteria demonstrate an awareness of the heavy pressure under which an accused may be acting in obeying an order, and the fact that in some circumstances a subordinate would have less opportunity to consider the legality of an order than in others. It is difficult, however, to say precisely how far such criteria as the three set out above are followed by Courts. The International Military Tribunal at Nuremberg, commenting in its Judgment on Art. 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." (British Command Paper, Cmd. 6964, p. 42).

In the Judgment in the *Milch Trial*, there seems to be a recognition that, whatever the effectiveness of the plea of superior orders, such effectiveness would be greater in conditions of war-time than during time of peace. (See Vol. VII, p. 65).

(2) Not previously considered in these Volumes.

(3) See Vol. XII, pp. 74–5.

interesting as a rare example of the application of this provision to afford some protection to a person other than that to whom the order was addressed.

2. THE PLEA THAT AN ACT WAS LEGAL OR EVEN OBLIGATORY UNDER MUNICIPAL LAW

The general attitude taken by the courts and by the war crimes legislation of various countries[1] to this plea has been much the same as that taken towards the plea of superior orders. The plea does not constitute a complete defence to a charge but may be admitted as a circumstance justifying mitigation of sentence.

The defence that the accused's acts were justified in their own municipal law received consideration in the *Belsen Trial*, but was rejected by the Military Court which tried the case.[2] Again, the Judgment of the Military Tribunal before which the *Justice Trial* was conducted pointed out that : " The defendants contend that they should not be found guilty because they acted within the authority and by the command of the German laws and decrees." After quoting the provisions of Control Council Law No. 10 as to the plea of superior orders,[3] and also the provision therein for the punishment of crimes against humanity whether or not in violation of the domestic laws of the country where perpetrated, however, the Judgment went on to point out that : " The very essence of the prosecution case is that the laws, the Hitler decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defence to the charge."[4]

Defining " crimes against humanity ", Control Council Law No. 10 deems to be criminal :

> " . . . Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, *whether or not in violation of the domestic laws of the country where perpetrated.*"[5]

The importance of the words italicised was stressed by the Tribunal which conducted the *Justice Trial*.[6]

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(1) See Vol. V, pp. 22–4 ; and see Vol. VII, p. 65 ; Vol. XI, p. 50 and Vol. XIV, p. 69.

(2) See Vol. II, pp. 70–5, 107–8 and 148.

(3) Art. II, 4(b) :

> " The fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."

(4) Vol. VI, pp. 48–9.

(5) Italics inserted. The words italicised appeared also in the definition of crimes against humanity in the Charter of the Nuremberg International Military Tribunal.

(6) See Vol. VI, pp. 39–40, 48–49 and 75. Compare a comment on p. 78 of that volume.

It was, however, the view of the Tribunal conducting the *Greifelt Trial* " that euthenasia, when carried out *under state legislation* against citizens of the state only does not constitute a crime against humanity ".(1)

It may be added that the Tribunal acting in the *Justice Trial* was unable to regard as constituting crimes against humanity the enforcement in Germany against Germans and during time of war, of laws providing the death penalty for habitual criminality, looting and undermining military morale.(2)

3. THE PLEA OF HAVING ACTED IN AN OFFICIAL CAPACITY

A defence that an accused was head of a State has not been pleaded in trials such as those reported upon in these volumes, since no such person has been brought before the courts which have conducted these trials. Nevertheless it is worth noting that the similar circumstance that an accused in committing offences was acting in an official or judicial capacity has not been regarded as constituting a defence.(3)

Sometimes it has been expressly laid down in municipal enactments that an accused's official position does not excuse him. Thus, the Chinese Law of 24th October, 1946, governing the Trial of War Criminals provides in its Article VIII that the fact that the crimes were committed as a result of official duty or in pursuance of governmental policy shall not exonerate war criminals.(4) Again, Article 4 of the Law of 2nd August, 1947, of the Grand Duchy of Luxembourg on the Suppression of War Crimes lays down that : " In no instances can the application of the laws mentioned in Article 1 be set aside under the pretext that the authors or co-authors of, or the accomplices in, the offences set out therein acted in the capacity of an official, a soldier, or an agent in the service of the enemy. . . ."

Similarly, Control Council Law No. 10 in its Article II, 4 (a) provides :

> " The official position of any person, whether as Head of State or as responsible official in a Government Department does not free him from responsibility for a crime or entitle him to mitigation of punishment."(5)

4. THE PLEA THAT THE ALLEGED OFFENCE WAS CARRIED OUT AS A JUDICIAL ACT

It has sometimes been pleaded that a victim of an alleged war crime, sometimes a prisoner of war and sometimes an inhabitant of occupied territory, had himself engaged in an act of espionage or a war crime and was punished in accordance with international law for having committed these offences. This plea has been allowed to prevail if it has been shown that the victim was accorded a fair trial. Just as in municipal law systems a hanging or imprisonment following upon a legal sentence pronounced in court does not involve the hangman or prison warder in subsequent criminal proceedings

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(1) See Vol. XIII, pp. 33–34. Regarding the special characteristics of crimes against humanity, see pp. 134–138.

(2) See Vol. VI, pp. 51–52.

(3) See, for instance, Vol. VI, pp. 50 and 60–61, and Vol. XIII, p. 117.

(4) Vol. XIV, p. 157.

(5) Substantially the same provision was made by Art. 7 of the Charter of the International Military Tribunal.

The fact that an accused enjoyed diplomatic immunity at the time of his offence apparently constitutes no defence to a war crime charge ; see p. 22 of XIV and p. 144 of this present Volume.

so under international law the proof that a prisoner of war or a civilian inhabitant of an occupied territory has been executed or otherwise punished only after proceedings possessing the characteristics of a fair trial will constitute a defence to a charge of war criminality brought against persons involved in the inflicting of that punishment, such as a prosecutor, a judge, a prison warder or an executioner.

The type of facts which would tend to show that an accused had violated a victim's right to a fair trial have been analysed in Volumes V and VI of these Reports.(1) which include reports upon twelve relevant United States, British, Australian and Norwegian trials, including the *Justice Trial*, reported in Volume VI. The discussion of this question on pages 73–77 of Volume V includes references to the *Wagner Trial* before a French Permanent Military Tribunal which was reported in Volume III and which is also significant in this connection.

It should be added that, in Volume V, the victims of the crimes proved were captured military personnel or inhabitants of occupied territories, and the crimes therefore all constituted war crimes. The *Justice Trial*, however, involved allegations of crimes against humanity as well as of war crimes, according partly to the nationality of the victims, but the differences between the two types of crimes, as defined by the Tribunal, lay in aspects other than that now under discussion. There is nothing to indicate that the Tribunal, in judging whether proceedings constituted a fair trial so as to be a defence against charges of crimes against humanity, applied different tests from those applied when war crimes were alleged.

It will be recalled that such victims of the offences charged in the trials reported upon in Volume V as were inhabitants of occupied territories had been charged and found guilty by the Japanese occupying forces of war crimes. As had already been stated, however,(2) there can be no doubt that inhabitants of occupied territories are entitled to at least the same degree of protection under international law when accused of committing any other kind of offence. Many of the equivalent victims of offences charged in the *Justice Trial* had certainly not been charged with offences which would have constituted war crimes even if the charges had been well founded ; a charge of " race defilement ", for instance, could in no instance have represented an allegation of the committing of a war crime. Yet the Tribunal made no distinction between the victims according to the offences charged against them, when elaborating the ways in which these persons had been denied their right to a fair trial, and this suggests that the inhabitants of occupied territories have indeed the same rights during proceedings taken against them, whatever the offence charged.

A study of the attitude taken in the Judgment in the *Justice Trial* to the evidence concerning *applications of certain specific German laws* which had been made by certain accused in pronouncing sentences,(3) reveals that the Tribunal, in deciding whether the acts of the accused constituted a participation in war crimes or in racial or political persecutions amounting to crimes against humanity, was willing :

(1) See Vol. V, pp. 73–77 and Vol. VI, pp. 96–104.
(2) See Vol. V, p. 73, note 3.
(3) See Vol. VI, pp. 98–100.

(i) to disregard the question whether or not the acts were legal under German law ;(1)

(ii) to regard the enforcement of certain laws as in fact constituting such participation ;

(iii) to look upon a violation of the principle *non bis in idem* as evidence of guilt ;

(iv) (apparently) to deem it further evidence of guilt that a forced manipulation of German laws was made so as to " legalise " a more severe sentence than would have been allowed otherwise under German Law.

Attention may now be turned to the significant data concerning the departures made *during the actual conduct of trials* from elementary principles of justice.

In the notes to most of the reports in Volume V, an attempt has been made to set out the facts which the Courts *may* have regarded as constituting evidence of the denial of a fair trial, and, where possible, the circumstances which an examination of the judgments of the Courts in relation to the charges made has shown the Courts to have *definitely* regarded as incriminating. These circumstances and facts were recapitulated on pages 74–7 of the Volume, where the relevant cross-references are supplied.

The following circumstances were *definitely* held by a Court to be incriminating :

(i) that captured airmen were tried " on false and fraudulent charges " and " upon false and fraudulent evidence " ;

(ii) that the accused airmen were not afforded the right to a Defence Counsel.

(iii) that the accused airmen were not given the right to have an interpretation into their own language of the trial proceedings ;

(iv) that the accused fliers were not allowed an opportunity to defend themselves.

In this connection it should be noted that the judgment of the Supreme Court in the Yamashita Trial stated that : " Independently of the notice requirements of the Geneva Convention, it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defence."(2)

It may also be remarked that among the principles laid down as the essentials of a fair trial by the Judge Advocate in the trial of Shigeru Ohashi by an Australian Military Court, appeared the following ; " [The accused] should have full opportunity to give his own version of the case and produce evidence to support it."(3)

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(1) Compare pp. 160–1.

(2) See Vol. IV, p. 49.

(3) See Vol. V, p. 30. Claims were put forward, unsuccessfully, by various accused that a discussion between officers as to the merits of a case based upon the result of previous interrogations, would constitute a trial ; see Vol. V, p. 38 and note 3, and p. 57 and note 1.

The following facts, indicating in the view of the Prosecution a denial of a fair trial, have been admitted in evidence in the trial of war criminals and *may* have been taken into account by the Allied Courts in deciding on their verdicts and sentences :

(i) accused prisoners of war were not told that they were being tried.

It will be recalled that the Judge Advocate acting in the Australian trial of Shigeru Ohashi and others, in the course of summarising the essential elements of a fair trial, said that " The accused should know the exact nature of the charge preferred against him."

(ii) accused prisoners of war were not shown the documents which were used as evidence against them.

Here again it is relevant to quote the words of the Judge Advocate referred to above : " The accused should know what is alleged against him by way of evidence."

(iii) the trials of accused prisoners of war and civilians from occupied territories occupied a space of time which may have been thought too brief to allow of an adequate investigation of the facts, particularly in view of the need for proper interpretation of the proceedings.

The Judge Advocate whose words have just been quoted stated, further, that : " The Court should satisfy itself that the accused is guilty before awarding punishment . . .", but there must be " consideration by a tribunal . . . who will endeavour to judge the accused fairly upon the evidence . . . honestly endeavouring to discard any preconceived belief in the guilt of the accused or any prejudice against him."

The Judge Advocate's final rule was that : " The punishment should not be one which outrages the sentiments of humanity ", and this advice should be compared with the decision of the French Permanent Military Tribunal in Strasbourg in finding Ex-Gauleiter Wagner and two others guilty of complicity in the murder of Theodore Witz ; the act which was deemed to constitute murder was the passing on this young Alsatian of the death sentence (which was carried out) for the illegal possession of a gun of a very old type.(1)

When the case of Hauptsturmführer Oscar Hans came before the Supreme Court of Norway in August, 1947.(2) Judge Holmboe stated that it was not correct to say that international law laid down that an occupation power had no right to undertake the execution of citizens of an occupied country except according to sentence by an appropriate court ; international law did not seem to go beyond the requirement that no execution should take place before proper investigation of the case and a decision passed by an authority legally vested with appropriate powers.(3) This point was not expanded upon, however, since the decision of the Supreme Court rested on other grounds.

The notes to the *Justice Trial* in Volume VI also include some tentative conclusions on the attitude of the Tribunal which tried Altstëtter and others regarding the nature of those aspects of purported trial proceedings which may be used as proof of the offence of denial of a fair trial or as evidence in

(1) See Vol. III, pp. 30–31 and 40–42.
(2) See Vol. V, pp. 82–93.
(3) See Vol. V, p. 91.

rebutting the defence that execution or other injury was done in pursuance of a judicial sentence.(1) These aspects, which are in addition to those set out above(2), may be summarised as follows :

(i) the right of accused persons to know the charge against them, and this a reasonable time before the opening of trial, was denied ;

(ii) the right of accused to the full aid of counsel of their own choice was denied, and sometimes no counsel at all was allowed to defend the accused ;

(iii) the right to be tried by an unprejudiced judge was denied to accused persons ;

(iv) the right of accused to give or introduce evidence was wholly or partly denied ;

(v) the right of accused to know the evidence against them was denied ;

(vi) the general right to a hearing adequate for a full investigation of a case was denied.

In addition it is at least possible that the Tribunal regarded the persistent denial of clemency as a further incriminating factor.

A comparison of these points with the similar catalogue taken from Volume V and reproduced previously reveals a striking uniformity in the attitude of different courts to the characteristics of a fair trial under international law or conversely to those characteristics which would brand purported judicial proceedings as a denial of a fair trial.(3) The denial of one of the rights enumerated above would not necessarily amount to the denial of a fair trial, however, and the courts have had to decide in each instance whether a sufficient number of the rights which they have regarded as forming part of the general right to a fair trial were sufficiently violated to warrant the conclusion either that the offence of denial of a fair trial had been committed (if it is to be recognised as a separate offence(4)), or that the defence claim that a killing or other injury was justified by the holding of a previous fair trial had been disproved.

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(1) See Vol. IV, pp. 101–4, where the relevant cross-references are supplied.

(2) See top of p. 163, points ii, iii and iv.

(3) It can fairly be said that a body of rules is emerging or has emerged in this branch of international law. The analyses contained in these pages of the characteristics just mentioned have, it should be noted, been based on one or more of the following :

(i) The actual findings of the United States Military Commissions in trials reported upon in Vol. V ;

(ii) The advice of the Judge Advocate in the Australian trials reported in the same volume. This source is less authoritative than the last ; nevertheless while the Judge Advocate's advice need not have been taken by the court, such advice (as in British and Canadian trials) carries great weight ;

(iii) The evidence which was at any rate admitted by the courts conducting trials reported on in Vol. V, and which may have been taken into account by the courts in deciding on their verdicts and sentences ; and

(iv) Passages from the Judgment in the *Justice Trial.*

Due to the construction of this last Judgment it is not always possible to state with certainty what the Tribunal regarded as criminal and what merely as evidence of knowledge, intent or motive. Again, the other three sources set out above are not all of equal authoritativeness. Nevertheless, it must be recognised that even the first, namely the findings of courts upon certain charges, are not of more than persuasive authority, and it is submitted that the analysis that has been attempted of the nature of the denial of a fair trial, even though based on such differing categories of authority, is not without interest in the building up of a jurisprudence of war crimes law.

(4) See pp. 99 and 113.

The truth of this statement was in effect underlined by the Judgment of the Norwegian Supreme Court in the *Latza Trial*.(1) The Supreme Court, while holding that proof of a fair trial was necessary before killings of Allied victims such as were alleged could be regarded as legal, was content to define the concept of a fair trial in very broad terms. The accused person must be given an opportunity to defend himself and present counter-evidence, and if a death sentence was based on manifestly insufficient evidence it was clearly contrary to the basic principles of justice as expressed in the Preamble to Hague Convention No. IV of 1907. The decisive point was whether trials had fulfilled those minimum demands which were to be regarded as indispensable for a proper trial, primarily whether an independant and impartial tribunal had reached its decisions after a thorough investigation of the guilt of the accused. or whether the outcome had been determined beforehand by directives given to the court. Judge Berger held that, even if taken all together, the following facts did not decisively prove the denial of a fair trial : that the charges made against the accused before the Standgericht had not been put down in writing beforehand, that the accused had not been assisted by a counsel for the defence, that the evidence presented and accepted had been of an indirect nature only, that the proceedings had taken a short time and were of a summary character, and that the confirmation by the " Gerichtsherr " seemed to have been procured and prepared in a very superficial way. Judge Berger stressed that the Lagmannsrett had established that the Standgericht went through each and every charge with the accused and that they were given full opportunity to explain themselves. It also appeared from the judgment of the Lagmannsrett that the accused before the Standgericht had partly admitted charges brought against them. This procedure might have been considered to be sufficient by the judges of the Standgericht, and Judge Berger did not feel entitled to say that the Standgericht had made an illegal use of their discretionary powers.

The Supreme Court may be thought to have taken a view of the denial of a fair trial which was more favourable to persons accused of such denial than the view taken by some other authorities, as described earlier in these pages.

5. THE PLEA OF NULLUM CRIMEN SINE LEGE, NULLA POENA SINE LEGE

(i) The plea has often been put forward in war crime trials that an accused may not be punished if at the time of his acts there was no law describing his acts as crimes and laying down a punishment therefor, but this argument has usually been rejected on the ground that at the time of the alleged offence the acts of the accused did in fact constitute punishable violations of international law. Of particular interest are the statements by the Tribunals which conducted the *Justice*, *Hostages*, *Flick*, *I.G. Farben*, *High Command* and the *Einstazgruppen Trials* that Control Council Law No. 10 did not constitute *ex post facto* legislation and the arguments which they produced in that connection.(2) Similarly the International Military Tribunal declared that the Charter under which it operated was "an expression of international law at the time of its creation ".(3)

(1) See Vol. XIV, pp. 84–85.
(2) See Vol. IX, pp. 32–5, Vol. X, p. 43 and Vol. XII, p. 64.
(3) See British Command Paper Cmd. 6964, p. 38. Compare also Vol. X, p. 131, Vol. XII, pp. 60–2 and Vol. XIII, pp. 109–10.

(ii) The judgment delivered in the *High Command Trial* also stressed that, if a rule of international law had declared a certain act to be illegal, the mere fact that, at the time of an infringement of that rule, there had been no court with jurisdiction over such an offence did not entitle an accused to object to being tried before such a court later :

> " There is no doubt of the criminality of the acts with which the defendants are charged. They are based on violations of International Law well recognised and existing at the time of their commission. True no court had been set up for the trial of violations of International Law. A state having enacted a criminal law may set up one or any number of courts and vest each with jurisdiction to try an offender against its internal laws. Even after the crime is charged to have been committed we know of no principle of justice that would give the defendant a vested right to a trial only in an existing forum. In the exercise of its sovereignty the State has the right to set up a Tribunal at any time it sees fit and confer jurisdiction on it to try violators of its criminal laws. The only obligation a sovereign State owes to the violator of one of its laws is to give him a fair trial in a forum where he may have counsel to represent him—where he may produce witnesses in his behalf and where he may speak in his own defence. Similarly, a defendant charged with a violation of International Law is in no sense done an injustice if he is accorded the same rights and privileges. The defendants in this case have been accorded those rights and privileges."(1)

(iii) Perhaps of wider significance than these findings that specific texts escape the operation of the maxim under discussion is the authoritatively held opinion that the latter does not in any case apply to war crime proceedings since here international law, not municipal law, is applied. In the *Peleus Trial* this was recognised ; there the Judge Advocate advised the court that the maxim *nulla poena sine lege* and the principle that is expressed therein had nothing whatever to do with the case. It referred only to the municipal or domestic law of a particular State and the court should not be embarrassed by it in its considerations.(2)

The Tribunal which conducted the *Justice Trial* stated :

> " Under written constitutions the *ex post facto* rule condemns statutes which define as criminal acts committed before the law was passed, but the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, although the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional States, could be applied to a treaty, a custom, or a common

(1) Vol. XII, pp. 62–3.
(2) Vol. I, p. 12.

law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth."(1)

The extent to which the Tribunal did regard the rule as applicable in international law may be judged from the following words from its judgment :

" As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organised system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught. Whether it be considered codification or substantive legislation, no person who knowingly committed the acts made punishable by C.C. Law 10 can assert that he did not know that he would be brought to account for his acts. Notice of intent to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the governments of the States at war with Germany. Not only were the defendants warned of swift retribution by the express declaration of the Allies at Moscow of 30th October, 1934. Long prior to the Second World War the principle of personal responsibility had been recognised."(2)

The Nuremberg International Military Tribunal also regarded the rule as being a rule of justice on which reliance could not be placed by defendants who did not come to court, so to speak, " with clean hands " :

" In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish these who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances *the attacker must know that he is doing wrong*, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or *at least some of them must have known of the treaties signed by Germany, outlawing recourse to war* for the settlement of international disputes ; they must have known that *they were acting in defiance of all international law* when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts."(3)

This statement, together with several others, was quoted by the Tribunal acting in the *Justice Trial*.(4)

(1) Vol. VI, p. 41.
(2) *Ibid*, pp. 43–44.
(3) British Command Paper, Cmd. 6964, p. 39. (Italics inserted.) The Tokyo International Military Tribunal declared its concurrence with this view (official transcript of Judgment, p. 26).
(4) Vol. VI, pp. 41–43. The weight of authorities could have been further augmented. Other learned authorities writing to the same effect are quoted in Vol. IX, pp. 36–9.

The Judgment in the *Krupp Trial* tacitly recognised that novel situations must necessarily cause the courts to make legal decisions which in effect amount to the creation of new law. In speaking of the "defence of necessity," the Judgment said ;

> "As the prosecution says, most of the cases where this defence has been under consideration involved such situations as two shipwrecked persons endeavouring to support themselves on a floating object large enough to support only one ; the throwing of passengers out of an overloaded lifeboat ; or the participation in crime under the immediate and present threat of death or great bodily harm. So far as we have been able to ascertain with the limited facilities at hand, the application to a factual situation such as that presented in the Nuremberg Trials of industrialists is novel."(1)

The Netherlands Special Court of Cassation, in the *Rauter Trial*, stated its view on the maxim *nulla poena sine lege* in these terms :

> "The principle that no act is punishable except in virtue of a legal penal provision which had preceded it, has as its object the creation of a guarantee of legal security and individual liberty, which legal interests would be endangered if acts about which doubt could exist as to their deserving punishment were to be considered punishable after the event.
>
> "This principle, however, bears no absolute character, in the sense that its operation may be affected by that of other principles with the recognition of which equally important interests of justice are concerned.
>
> "These latter interests do not tolerate that extremely serious violations of the generally accepted principles of international law, the criminal . . . character of which was already established beyond doubt at the time they were committed, should not be considered punishable on the sole ground that a previous threat of punishment was lacking. It is for this reason that neither the London Charter of 1945 nor the Judgment of the International Military Tribunal [at Nuremberg] in the case of the major German War Criminals have accepted this plea which is contrary to the international concept of justice, and which has since been also rejected by the Netherlands legislator, as appears from Article 27 (a) of the Extraordinary Penal Law Decree."(2)

A dissenting note was struck in the Judgment delivered in the *Hostages Trial* :

> "It is a fundamental principle of criminal jurisprudence that one may not be charged with crime for the doing of an act which was not a crime at the time of its commission. We think it could be said with justification that Article 23 (h) of the Hague Regulations of 1907 operates as a bar to retroactive action in criminal matters. In any event, we are of the opinion that a victorious nation may not lawfully enact legislation defining a new crime and make it effective as to acts previously occurring which were not at the time unlawful. It therefore becomes the duty of a Tribunal trying a case charging a crime under the provisions of Control

(1) Vol. X, p. 147.
(2) Vol. XIV, p. 120.

Council Law No. 10 to determine if the acts charged were crimes at the time of their commission and that Control Council Law No. 10 is in fact declaratory of then existing International Law."(1)

The view of the problem most commonly adopted seems, however, to be that since the rule against the enforcement of *ex post facto* law is in essence a principle of justice it cannot be applied in war crime trials where the ends of justice would be violated by its application.

6. THE PLEA OF DURESS

(i) The kind of circumstances generally alleged and relied upon in putting forward the plea of duress have already been defined.(2) Various statements have been made in war crime trials regarding the extent of validity of this plea.

(ii) The Judgment delivered in the *Krupp Trial* included the following words :

> " The defence of necessity in municipal law is variously termed as ' necessity ', ' compulsion ', ' force and compulsion ', and ' coercion and compulsory duress '. Usually, it has arisen out of coercion on the part of an individual or a group of individuals rather than that exercised by a government.
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> " The rule finds recognition in the systems of various nations. The German criminal code, Section 52, states it to be as follows :
>
> > " ' A crime has not been committed if the defendant was coerced to do the act by irresistible force or by a threat which is connected with a present danger for life and limb of the defendant or his relatives, which danger could not be otherwise eliminated.'
>
> " The Anglo-American rule as deduced from modern authorities has been stated in this manner :
>
> > " ' Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable ; that there was no other adequate means of escape ; and that the remedy was not disproportioned to the evil. Homicide through necessity—i.e. when the life of one person can be saved only by the sacrifice of another—will be discussed in a subsequent chapter. The issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The canon law prescribes that a person whose life is dependent on immediate relief may set up such necessity as a defence to a prosecution for illegally seizing such relief. To the same general effect speak high English and American authorities. Life, however, can usually only be taken, under the

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(1) Vol. VIII, p. 52. On p. 54 of that Volume the Tribunal is cited as repeating its view that " one may not be charged with crime for committing an act which was not a crime at the time of its commission." This rule is upheld, however, as a principle of fundamental justice, and the Tribunal conceded that there did exist to a limited extent a possible legality for the retroactive application of new rules.

(2) See p. 156.

plea of necessity, when necessary for the preservation of the life of the party setting up the plea, or the preservation of the lives of relatives in the first degree.' "(1)

The passage from Wharton's *Criminal Law* also appears in part in the Judgment delivered in the *Flick Trial* where it is added that :

" A note under subdivision 384 of Chapter XIII, Wharton's ' Criminal Law ' Volume I, gives the underlying principle of the defence of necessity as follows :

> " ' Necessity forcing man to do an act justifies him, because no man can be guilty of a crime without the will and intent in his mind. When a man is absolutely, by natural necessity, forced, his will does not go along with the act. Lord Mansfield in Stratton's Case, 21, How. St. Tr. (Eng.) 1046–1223 '."(2)

The Judgment delivered in the *Krupp Trial* stated that, when what it called " necessity " is pleaded, " the question is to be determined from the standpoint of the honest belief of the particular accused in question . . . The effect of the alleged compulsion is to be determined not by objective but by subjective standards. Moreover, as in the case of self-defence, the mere fact that such danger was present is not sufficient. There must be an actual bona fide belief in danger by the particular individual."(3)

In the *Flick*, *I.G. Farben* and *Krupp Trials*, the plea put forward was that the accused were obliged to meet the industrial production quotas laid down by the German Government and that in order to do so it was necessary to use forced labour supplied by the State, because no other labour was available, and that had they refused to do so they would have suffered dire consequences. The test applied by the Tribunal in the *Flick Trial* was whether a " clear and present danger " had threatened the accused at the time of their committing the alleged offences.(4) The test applied in the *I.G. Farben Trial* was that laid down by the International Military Tribunal in dealing with the plea of superior orders, namely, whether a moral choice was possible.(5) In the *Krupp Trial* Judgment it was said that : " Necessity is a defence when it is shown that the act charged was done to avoid an evil severe and irreparable ; that there was no other adequate means of escape ; and that the remedy was not disproportioned to the evil."(6)

The Judgment delivered in the *High Command Trial* included the following relevant passage :

> " The defendants in this case who received obviously criminal orders were placed in a difficult position, but servile compliance with *orders clearly criminal* for fear of some disadvantage or punishment not immediately threatened cannot be recognised as a defence. To establish the defence of *coercion or necessity in the face of danger* there must be a

(1) " Wharton's *Criminal Law*, Vol. I, Section 126, p. 177." This quotation is from Vol. X, p. 147.
(2) See Vol. IX, p. 19.
(3) See Vol. X, p. 148.
(4) See Vol. IX, p. 20.
(5) See Vol. X, pp. 54 and 57.
(6) See Vol. X, pp. 147 and 149.

showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong."(1)

(iii) In the *Flick Trial* the plea served to acquit all but two defendants of charges of using slave labour ; these two had been shown to have gone beyond the limits of what they were required by the State to do in the matter of the employment of State-supplied forced labour.(2) The Tribunal which conducted the *Krupp Trial* pointed the moral by saying that " if, in the execution of the illegal act, the will of the accused be not thereby over-powered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct.(3) This principle was accepted by Judge Herbert who, however, dissented as to its application to the facts of the I.G. Farben Case.(4)

In his summing up in the trial of Gustav Alfred Jepsen and others,(5) the Judge Advocate said that :

> " Duress can seldom provide a defence ; it can never do so unless the threat which is offered as a result of which the unlawful act is perpetrated is a threat of immediate harm of a degree far, far greater than that which would be created if the order were obeyed. So far as we know, and Jepsen had an opportunity of telling us but he did not, there might have been many steps which he could have taken to avoid himself being shot rather than submit to the threat and carry out a massacre of this nature. If you are contemplating that possibly this threat of death may provide a defence then let me ask you not to give effect to it unless you think that he really was in danger of imminent death and that the evil threatened him was on balance greater than the evil which he was called upon to perpetrate."

The Judge Advocate then went on to admit that if the plea of duress on the facts of the case failed as a complete defence it might be successful as a plea in mitigation of sentence :

> " These considerations take a different aspect when one is considering not the question of liability but the degree of heinousness ; a man who does things only under threats may well ask for a greater measure of mercy than one who does things *con amore*. That is another matter, it raises considerations which do not find their proper place in your present deliberations when you are deciding the question of guilt or innocence."

After the court had decided on its findings the Judge Advocate addressed the accused Jepsen as follows :

> " Gustav Alfred Jepsen, you have been found guilty of the gravest criminal conduct, conduct for which the normal penalty is death. But for the fact that the court considers that there is an element of doubt as to whether or not you acted under some degree of compulsion, that

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(1) Vol. XII, p. 72. (Italics inserted).
(2) See Vol. IX, pp. 20–1.
(3) See Vol. X, p. 149.
(4) See Vol. X, p. 62.
(5) Regarding this trial see also pp. 20 and 46. This trial has not been previously considered in this series.

is the penalty which would have been imposed upon you. As it is, the least sentence which the Court feels able to pass is that you be imprisoned for life, and that is the sentence of the Court upon you."

It must be assumed therefore that in this trial the plea of necessity was admitted as an argument in mitigation of sentence.

Similarly, the Judge Advocate acting in the trial of Valentin Fuerstein and others, by a British Military Court in Hamburg, 4th–24th August, 1948,[1] offered the court the following advice :

" There is, further, a defence which to some extent is akin to that of superior orders, and that is the defence which I may describe as the defence of ' duress and coercion '. It has been said here that once the order for the execution of these soldiers had been given, it was impossible for any of the accused to ignore it, and that the only way in which they could act was the way in which, in fact, they did act. Now that defence of ' duress and coercion ' is not a defence in law. You are not entitled, even if you wished to save your own life, to take the life of another. There I may remind you of a case which is known as the Mignonette case, and in which a number of shipwrecked sailors, seeing no hope of reaching land, decided to kill one of their companions and to eat him. Lots were drawn, and in the end this object was carried out and one of these companions found his death in that way. Fortunately or unfortunately for these sailors, they were picked up and duly brought to trial at the Central Criminal Court in London, and they raised just this defence, They said : ' If we had not killed our companion, and had not eaten him, all of us would have starved and none of us would have been alive today '. This defence, Gentlemen, was rejected by the court, and it was said that you must not take another's life in order to save your own. Here again, however, if you believe that the degree of pressure was such that only a hero or a martyr would have found the strength to oppose it, then you are entitled to say that there are in this case mitigating circumstances, and the sentence ought to be less severe than it would have been had no such duress or coercion been present."

In his summing up, the Judge Advocate who acted in the trial of Robert Holzer and two others before a Canadian Military Court at Aurich, Germany, 25th March to 6th April, 1946, made this comment : " As to the law applicable upon the question of compulsion by threats, I would advise the court that there can be no doubt that a man is entitled to preserve his own life and limb, and on this ground he may justify much which would otherwise be punishable. The case of a person setting up as a defence that he was compelled to commit a crime is one of every day. There is no doubt on the authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent person can never be justified. . . . Sir J. Stephens expresses the opinion that in most if not all cases the fact of compulsion is a matter of mitigation of punishment and not matter of defence . . ."[2]

The Judge Advocate acting in the *Stalag Luft III* trial advised the Court that " The same principle which excuses those who have no mental will in the perpetration of offences protects from the punishment of the law those who

(1) Not previously considered in this series.
(2) See Vol. V, pp. 16 and 21.

commit crimes in subjection to the power of others and not as a result of an uncontrolled free action proceeding from themselves. But if a merely moral force is used as threats, duress of imprisonment, or even an assault to the peril of his life in order to compel the accused to kill, this is no excuse in law."[1]

Similarly Article 5 of the Polish Law, promulgated on 11th December, 1946, concerning the punishment of war criminals and traitors, provides that :

> " The fact than an act or omission was caused by a *threat*, order or command does not exempt from criminal responsibility.
>
> " In such a case the Court may mitigate the sentence taking into consideration the circumstances of the perpetrator and the deed "[2]

The Norwegian Law of 13th December, 1946, on the punishment of foreign war criminals, makes the following provision :

> " *Article* 5 :
>
> " Necessity and superior order cannot be pleaded in exculpation of any crime referred to in Article 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."[3]

The Tribunal acting in the *Einsatzgruppen Trial* expressed the following view : " Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.

" Nor need the peril be that imminent in order to escape punishment,"[4]

Under Article 40 of the Netherlands Penal Code, which is applicable to war crime trials, an act is not punishable if " forced by necessity ". A similar provision is made by Article 48 of the Netherlands East Indies Penal Code.[5]

(iv) The general view seems therefore to be that duress may prove a defence if (a) the act charged was done to avoid an immediate danger both serious and irreparable ; (b) there was no other adequate means of escape ; (c) the remedy was not disproportionate to the evil. According to the decision in the *Krupp Trial*, these tests are to be applied according to the facts as they were honestly believed to exist by the accused. Finally, if the facts do not warrant the successful pleading of duress as a defence, they may constitute an argument in mitigation of punishment.

(v) It would appear that some sort of moral pressure different from superior orders yet not necessarily constituting physical threats may be regarded as a plea in mitigation of sentence. Thus, the Tribunal acting in the *Einsatzgruppen Trial*, in discussing what has been defined here as duress, held that

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(1) Vol. XI, p. 47.
(2) Vol. V, pp. 20–21 and Vol. VII, p. 88. (Italics inserted).
(3) See Vol. III, pp. 14 and 85.
(4) Vol. VIII, p. 91.
(5) Vol. XI, p. 102.

" superior means superior in capacity and power to force a certain act. It does not mean superiority only in rank. It could easily happen in an illegal enterprise that the captain guides the major, in which case the captain could not be heard to plead Superior Orders in defence of his crime."(1) This Tribunal did not state explicitly that the major could possibly have pleaded superior orders, but the British Military Court which tried Gozawa Sadaichi and others,(2) in passing sentence, addressed the following words to Gozawa Sadaichi, *who was commanding officer of a prisoner of war camp* :

> " Gozawa Sadaichi, the Court has taken a merciful view, and grave as was your crime, inasmuch as out of every four helpless men committed to your care, one died ; nevertheless, you were led to acquiescence by your *more powerful adjutant*. But your punishment must be severe. The sentence of the Court is, subject to confirmation, that you be kept in prison for the term of twelve years." (Italics inserted.)

7. MILITARY NECESSITY(3)

In the *High Command Trial*, the Tribunal conceded that the plea of military necessity did, in the circumstance proved, serve to exculpate the accused on certain charges concerning spoliation. It was emphasised that the defendants were " in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature."(4)

The Tribunal which conducted the *Hostages Trial* was also called upon to decide on the validity of pleas based on alleged military necessity put forward by the defendants in that trial.(5) It decided that " Military necessity or expediency do not justify a violation of positive rules . . . The rules of international law must be followed even if it results in the loss of a battle or even a war ". The Tribunal added, however, that the prohibitions contained in the Hague Regulations " are superior to military necessities of the most urgent nature *except where the Regulations themselves specifically provide the contrary* "(6) and pointed out that Article 23 (g) of these Regulations prohibited " the destruction or seizure of enemy property *except in cases where this destruction or seizure is urgently required by the necessities of war*."(7)

Like the Tribunal which conducted the *High Command Trial*, that before which the *Hostages Trial* was held was of the opinion that the plea of necessity might be applicable in the circumstances of an army badly harassed while in retreat : " The destruction of public and private property by retreating military forces which would give aid and comfort to the enemy may constitute a situation coming within the exemptions contained in Article 23 (g)."

(1) Vol. VIII, p. 91.
(2) See p. 159.
(3) See also p. 156.
(4) See Vol. XII, pp. 123–6.
(5) See Vol. VIII, pp. 66–9.
(6) Italics inserted.
(7) Italics inserted.

The Tribunal thus adopted a favourable attitude to the plea as it related to the acts of the accused Rendulic in his retreat before the Russian army in Finmark, Norway.(1)

This may be the appropriate place, however, to mention a separate ruling by the Tribunal acting in the *High Command Trial*, which, while not referring to armies in retreat, may possibly be regarded as an application of a rule as to necessity ; the Tribunal approved the opinion that " A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavour by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence the cutting off of every source of sustenance from without is deemed legitimate. It is said that if the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender."(2)

The plea of military necessity has been more often rejected in war crime trials than accepted, however ; indeed the success of Rendulic and of the accused in the *High Command Trial* in this respect was exceptional.(3) A somewhat similar but more general plea was put forward in the *Milch Trial*, that " Modern war means total war and as such has suspended, in several points, international law as it existed up to now ", was not allowed by the Tribunal which tried the case and Judge Musmanno made some remarks on his own attitude to it.(4) Substantially the same plea was rejected in the *Krupp Trial*.(5)

It should be added that the Tribunal conducting the *High Command Trial* immediately before reading the passage quoted above, stated that the view that military necessity includes the right to do anything that contributes to the winning of a war " would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilised nations. Nor does military necessity justify the compulsory recruitment of labour from an occupied territory either for use in military operations or for transfer to the Reich, nor does it justify the seizure of property or goods beyond that which is necessary for the use of the army of occupation. Looting and spoliation are none the less criminal in that they were conducted, not by individuals, but by the army and the State.

" The devastation prohibited by the Hague Rules and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult."(6)

It may be mentioned here that Article VIII of the Chinese Law of 24th October, 1946, Governing the Trial of War Criminals, provides, *inter alia*, that the circumstance that war crimes were committed out of *political* necessity shall not exonerate the offenders.(7)

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(1) See Vol. VIII, pp. 67–9.
(2) See Vol. XII, p. 84.
(3) Instances of the rejection of the defence have been mentioned in Vol. XII, p. 127. Compare also Vol. V, p. 35, Vol. VI, p. 63, Vol. VII, p. 10 and Vol. X, pp. 138–9.
(4) See Vol. VII, pp. 44 and 64–5.
(5) Vol. X, p. 133.
(6) Vol. XII, pp. 93–4.
(7) Vol. XIV, p. 157.

8. SELF-DEFENCE

A plea of self-defence may be successfully put forward, in suitable circumstances, in war crime trials as in trials held under municipal law. The Tribunal which conducted the *Krupp Trial* compared the defence of " necessity " and that of self-defence in a manner which leaves no doubt that it would have regarded the latter as being applicable in war crime trials had the question arisen to be decided.(1)

The Judge Advocate, acting in the trial of Willi Tessmann and others, by a British Military Court, Hamburg, 1st–24th September, 1947,(2) advised the court : " So far as the defence of self-defence is concerned, I need add but little to that which has been said. The law permits a man to save his own life by despatching that of another, but it must be in the last resort. He is expected to retreat to the uttermost before turning and killing his assailant ; and, of course, such considerations as the nature of the weapon in the hands of the accused, the question whether the assailant had any weapon and so forth, have to be considered. In other words, was it a last resort ? Had he retreated to the uttermost before ending the life of another human being ? "

A successful plea of self-defence would appear to have been entered in the trial of Erich Weiss and Wilhelm Mundo before a United States Military Government Court at Ludwigsburg.(3) On the other hand the plea failed in the trial before a British Military Court at Kuala Lumpur of Yamamoto Chusaburo.(4)

9. THE PLEA OF LEGITIMATE REPRISALS

(i) The plea of legitimate reprisals has two aspects ; it may be used to justify acts between belligerents which would not be legal otherwise, and it may be quoted as justifying measures taken by an occupying power against the population of an occupied territory which would otherwise be illegal. The taking of reprisals against prisoners of war is forbidden by Article 2 of the Geneva Prisoners of War Convention. This rule was illustrated by the *Dostler Trial*.(5)

(ii) No judicial authority dealing directly with the first aspect has come to the notice of the compilers of the present series of volumes, perhaps mainly because of the paucity of trials in which any allegations have been made of the use during the second World War of illegal methods of conducting hostilities.(6)

(iii) The second aspect has arisen in a number of trials, mainly those reported in Volume VIII and the *High Command* and *Rauter Trials* reported in Volumes XII and XIV respectively. In the *Hostages Trial*,(7) the Tribunal

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(1) See Vol. X, p. 148.

(2) This trial was also cited in Vol. V, pp. 73 and 76.

(3) See Vol. XIII, pp. 149–50. Compare Vol. XIV, p. 129.

(4) See Vol. III, pp. 77, 78 and 79–80, where the plea is examined a little further.

(5) See Vol. I, pp. 28–31.

(6) See pp. 109–111. The Tribunal acting in the *Hostages Trial* stated explicitly that this aspect was not before it (Vol. VIII, p. 77). Compare a comment in Vol. XIV, pp. 129–130.

(7) See Vol. VIII, pp. 34–92.

distinguished between " reprisal victims " and " hostages "[1] but it has been seen that the distinction appears to lie in the circumstances under which the victims are taken into captivity and not in the law which should govern their fate.[2]

The plea of legitimate reprisals has usually come before the courts in cases of the killing of inhabitants of occupied territories rather than in cases of their ill-treatment. The Tribunal acting in the *Hostages Trial* held that, subject to a number of conditions, the killing of reprisal victims or hostages in order to guarantee the peaceful conduct in the future of the populations of occupied territories was legal.[3] These conditions were said to be the following :

(*a*) the step should be taken only " as a last resort " and only after regulations such as those elaborated by the Tribunal[4] had first been enforced ;

(*b*) the hostages may not be taken or executed as a matter of military expediency ;

(*c*) " The population generally " must be a party " either actively or passively " to the offences whose cessation is aimed at ;

(The Tribunal did not define the nature of " active " or " passive " participation, but stated that " some connection " must be shown " between the population from whom the hostages are taken and the crime committed "[5].)

(*d*) it must have proved impossible to find the actual perpetrators of the offences complained of ;

(*e*) a proclamation must be made, " giving the names and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason the hostages will be shot " ;

(*f*) " the number of hostages shot must not exceed in severity the offences the shooting is designed to deter " ;

(The Tribunal did not, however, suggest any tests whereby such measures could be related to offences whose perpetration was expected) ; and

(*g*) " unless the necessity for immediate action is affirmatively shown, the execution of hostages or reprisal prisoners without a judicial hearing is unlawful " ;[6]

(It was not stated on what charges hostages would be tried and what would be the nature of proceedings taken against them ; a passage in the judgment, however, suggests that what was meant was not a trial in the usual sense but " a judicial finding that the necessary conditions exist and the essential steps have been taken to give validity to such action."[7]).

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(1) See Vol. VIII, p. 61.
(2) See Vol. VIII, p. 79.
(3) See Vol. VIII, pp. 77–88.
(4) See Vol. VIII, p. 62.
(5) Elsewhere, however, the Tribunal pointed out that there was " nothing to infer that the population of Topola [from whom certain hostages had been taken and shot] supported or shielded the guilty persons." (Vol. VIII, p. 65.) (See also pp. 86–88 of Vol. VIII.)
(6) See Vol. VIII, pp. 64–65.
(7) Vol. VIII, p. 64.

The *Trial of Bruns and two others* by the Norwegian Courts provides evidence that, since the purpose of reprisal action is to coerce an adversary or an inhabitant of occupied territory to observe international law, it is one test of the *bona fides* of such action that its being taken should be publicly announced.(1)

An examination of the Judgment delivered in the *Hostages Trial* shows that the Tribunal's conclusion that the killing of hostages and reprisal prisoners may in certain circumstances be legal has not been the reason for a finding of not guilty regarding any of the accused in the trial with the possible exception of the defendant von Leyser, of whom the Tribunal said : " The evidence concerning the killing of hostages and reprisal prisoners within the corps area is so fragmentary that we cannot say that the evidence is sufficient to support a finding that the measures taken were unlawful. The killing of hostages and reprisal prisoners is entirely lawful under certain circumstances. The evidence does not satisfactorily show in what respect, if any, the law was violated. This is a burden cast upon the prosecution which it has failed to sustain ". This accused was, therefore, found not guilty under Count One of the Indictment, but guilty on other counts.

The Judge Advocate acting in the Trial of Kesselring expressed the opinion that there was " nothing which makes it absolutely clear that in no circumstances—and especially in the circumstances which I think are agreed in this case—that an innocent person properly taken for the purpose of a reprisal cannot be executed ".(2)

On the other hand, the London Charter, in Article 6 (*b*), and Control Council Law No. 10, in paragraph 1 (b) of Article II, both recognise without qualification the " killing of hostages " as a war crime(3) as do also the Australian, Netherlands and Chinese War Crimes laws,(4) while the French War Crimes Ordinance of 28th August, 1944 states that " Premeditated murder . . . shall include killing as a form of reprisal ".(5)

Furthermore, Article 46 of the Hague Convention protects " individual life " in occupied territory and Article 50 provides :

> " No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which it cannot be regarded as collectively responsible ".(6)

The Tribunal which conducted the *Einsatzgruppen Trial* had no hesitation in regarding Article 50 of the Hague Regulations as being applicable to the

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(1) See Vol. III, pp. 21–22. Compare Vol. VI, pp. 115–16 and 119.
(2) Vol. VIII, pp. 12, 83 and 85.
(3) The defence in the *Hostages Trial* claimed that the killing of hostages which was prohibited by the Charter of the International Military Tribunal and Law No. 10, as by paragraph 461 of the British Manual, to which Counsel also made reference, was the execution of hostages in the old sense of prisoners held as a guarantee of the observance of treaties, armistices or other agreements, or of persons taken by an occupying power as security for requisitions and contributions and not the killing of inhabitants of occupied territories with the aim of ensuring the observance of good order in such territories. The prosecution replied that it was inconceivable that, since thousands of hostages were executed in reprisal for hostile acts during the last two wars, this was not precisely the practice which the Charter and Control Council Law condemned. If these statutes were held not to include the execution of all kinds of hostages, they would be completely anchronistic and meaningless. (See Vol. VIII, p. 83).
(4) Vol. V, p. 95, Vol. XI, p. 93 and Vol. XIV, p. 153.
(5) See Vol. III, p. 52, Vol. VIII, pp. 27–29 and Vol. IX, p. 60.
(6) See however, Vol. VIII, p. 78.

taking of reprisals and consequently ruled that reprisals may only be taken against persons who can be regarded as jointly responsible for the acts complained of.(1)

In the *High Command Trial* the Tribunal, faced with facts concerning reprisal killings in occupied territories similar to those proved in the *Hostages Trial*, found it " unnecessary to approve or disapprove the conclusions of the law [announced in the Judgment delivered in the latter trial] as to the permissibility of such killings." It was content to hold that the killings proved to have taken place would not fall within the field of what was permissible according to the Judgment in the *Hostages Trial*.(2)

The British Military Courts which conducted the Trial of von Mackensen and Maelzer,(3) and the Trial of Kesselring,(4) must be taken, in finding the accused guilty, to have rejected the plea of legitimate reprisals on the facts of the two cases, and the confirming officer did not upset the findings of guilty passed on the accused. Nor did the accused in the Trials of Franz Holstein and 23 others and of Hans Szabados(5) which were conducted before French Military Tribunals, benefit from any consideration that their acts might be justifiable as legitimate reprisals, for here again the offences proved to have taken place went beyond what could be considered as legitimate even taking into account the unsettled state of the law on this point.(6)

(iv) The Judge Advocate acting in the Trial of Captain Eikichi Kato, by an Australian Military Court, Rabaul, 7th May, 1946, drew the Court's attention to the following paragraphs in Chapter XIV of the Australian *Manual of Military Law*, thereby seemingly giving his approval to these passages :

> " 386. If, contrary to the duty of the inhabitants to remain peaceful, hostile acts are committed by individual inhabitants, a belligerent is justified in requiring the aid of the population to prevent their recurrence and, in serious and urgent cases, in resorting to reprisals.
>
> " 387. An act of disobedience is not excusable because it is committed in consequence of the orders of the legitimate Government, and any attempt to keep up relations with that Government or to act in understanding with it, to the detriment of the occupant, is punishable as war treason. . . .
>
> " 459. What kinds of acts should be resorted to as reprisals is a matter for the consideration of the injured party. Acts done by way of reprisals must not, however, be excessive and must not exceed the degree of violation committed by the enemy."(7)

These passages however do not deal specifically with the killing of innocent inhabitants in occupied territory.(8)

(v) The Netherlands Courts acting in the Trial of Hans Rauter dealt at some length with the question of reprisals in general(9) and the Court of

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(1) See Vol. VIII, pp. 86–7.
(2) See Vol. XII, pp. 84–5.
(3) See Vol. VIII, pp. 1–8.
(4) See Vol. VIII, pp. 9–14.
(5) See Vol. VIII, pp. 22–23 and Vol. XI, p. 60.
(6) Compare Vol. VIII, pp. 12–13 and 80–1.
(7) Vol, V, p. 38.
(8) In fact the *Manual* does not represent the rules of international law as permitting such killings.
(9) See Vol. XIV, pp. 123–138.

Cassation, on appeal, adopted the view that no right of reprisal can arise except as a result of an illegal act of a State. Consequently, acts on the part of inhabitants of occupied territories, unless they can be regarded as acts of a State, do not give rise to a right to reprisal but only to a right to punish the individual offenders.

In its Judgment the Netherlands Special Court of Cassation distinguished between three separate issues :

(*a*) The legal basis of legitimate reprisals ;

(*b*) The possible objects of such lawful reprisals ;

(*c*) The nature of certain acts allegedly committed in reprisals, in the absence of a proper legal basis.

(*a*) The Court took the view that legitimate reprisals could only arise between States as subjects of international law. The main consequence of this opinion was that the original violation, giving rise to legitimate reprisals, must be in the nature of an act involving the responsibility of a State. The Court stressed the fact that such acts can be committed only through the medium of individuals, but they must be individuals acting *on behalf* of the State and thereby representing it as its *organs*. The Court referred specifically to members of governments and military commanders.

From this it followed that where violations are committed by *irresponsible* individuals, this can never give a legal basis for resorting to lawful reprisals. The Court found that such was the case with the hostile acts of the Dutch population against the Germans. They constituted acts of individuals and not of a State, so that, in the absence of any violation for which the Netherlands State could be held responsible, the Germans could not and did not acquire the right to answer these hostile acts by reprisals.

(*b*) When reprisals are lawful under this rule, they may be taken " against all objects which, in the given circumstances, come into consideration to this end ". This includes, as the Court put it, the " subjects " (citizens) of the State guilty of the criminal violation " wherever they may be ".

The Court of Cassation did not go beyond this point with regard to the possible objects of lawful reprisals, and consequently did not state its views as to whether or in what circumstances it was permissible to kill inhabitants detained as hostages.

(*c*) Acts allegedly committed in reprisals which lacked the legal basis described above, were treated by the Court of Cassation as " so-called " or illegitimate reprisals. All the acts committed by the accused Rauter against the Dutch population were regarded as falling within this concept for the reason that, under international law, the Netherlands State, as represented by its organs during the war, had not been guilty of any violation of international law against the German State. In the absence of such violation the German State, as represented by its organs in occupied Holland, was not entitled to take any reprisals against any possible object, including members of the Dutch population.[1]

[1] It would appear that the Court of Cassation took the view that in any case the German government lost any right of reprisal which it may otherwise have had by waging a war of aggression against the Netherlands and failing to fulfil its duties as an occupant. (See Vol. XIV, pp. 136–137).

While classifying the accused's acts in the above fashion, the Court of Cassation entered into the related question as to the position arising when inhabitants of occupied territory do commit hostile acts against the occupant to which the latter cannot reply by reprisals. The court came to the conclusion that in such cases the occupant was entitled to impose punishment upon the offenders. It stressed two points in this respect :

(*a*) The punishment must affect only the actual offenders.

(*b*) The punishment imposed must not be contrary to the laws and customs of war.

In the court's opinion this derived from Article 50 of the Hague Regulations, which prohibits the imposition of collective penalties of any kind. The only exception allowed is when the population in a given area can be " regarded as collectively *responsible* " for an offence. This, in the Court's opinion, meant that even in this exceptional case the individuals affected were the actual offenders. The general conclusion drawn by the Court was that, when acts of violence are committed by inhabitants, the punishment may never affect *innocent* persons.

The rule that individuals guilty of a violation of the laws and customs of war, including the taking of illegitimate reprisals, are penally responsible, is left unaffected. Under the Court's theory a State official who commits *illegitimate* reprisals and thus affects *innocent* persons, is guilty of a war crime.

(vi) The remark of the Tribunal before which the *Einsatzgruppen Trial* was held that " under International Law, as in domestic law, there can be no reprisal against reprisal " (since a legal reprisal cannot create the grounds for a legal counter-reprisal) suggests that the inhabitant of an occupied territory is not always bound to refrain from hostile acts against the occupying power.(1)

10. IGNORANCE OF THE LAW

In general, under municipal law systems, a mistake of law is not regarded as an excuse. There has, however, been some tendency to recognise that an alleged war criminal can not be expected to have been quite as well aware of the provision of international law as of those of his own municipal law. Among other instances,(2) the advice of the Judge Advocate in the *Scuttled U-Boats Case* may perhaps be relevant. The case turned substantially on what view the Court was to take of the question whether the accused at the material time knew of the surrendering of the German armed forces in the North West region of Germany. Since the act of surrender laid down law binding upon the accused, the question may perhaps be regarded as one of mistake of law (although admittedly of rather a different character from a mistake of the general law) because it is analogous to the position under municipal law when an accused pleads that he was unaware of the promulgation of a law defining crimes.

(1) See Vol. VIII, pp. 87–8. Lord Wright in his Foreword to Vol. VIII has maintained that it is never legitimate deliberately to kill innocent individuals and that to do so is prohibited by the Hague Convention, the London Charter and Law No. 10. The Report of the 1919 law mission on Responsibilities and the opinions of eminent international lawyers were quoted in support of this thesis.

(2) See Vol. I, p. 12, Vol. V, p. 44 and Vol. VII, p. 64.

The Judge Advocate in concluding his summing-up advised the court in the following way :

> " Do you think it is at all reasonably possible that the accused had heard nothing at all which would put him upon his guard as regards the handing over of the submarines, remembering that he was with this security flotilla, and was in a naval port at a time when rumours were presumably going round like wild fire ? Are you satisfied that the man's state of mind at the time in question was this : ' I honestly believed I had an order : I did not know anything about any surrender ; it was not for me to inquire why the higher command should be scuttling submarines ; I honestly, conscientiously and genuinely believed I had been given a lawful command to scuttle these submarines and I have carried out that command and I cannot be held responsible ' ? Gentlemen, that is a matter for you to consider.
>
> " The Defence suggests if you look at the evidence as a whole that that is a reasonable possibility. I am going to tell you that in my view, *if the accused did not have any knowledge of these terms* and that he did believe honestly that he had an order of this kind and that he carried it out ; well, then, gentlemen, you will be entitled to acquit him."(1)

A statement made by the Tribunal which conducted the *Flick Trial* is relevant here, although it may be thought that the passage refers to an occupant's duty to respect, unless absolutely prevented, *the laws in force in the occupied country* :

> " It was stated in the beginning that responsibility of an individual for infractions of international law is not open to question. In dealing with property located outside his own State, he must be expected to ascertain and keep within the applicable law. *Ignorance thereof will not excuse guilt but may mitigate punishment.* The Tribunal will find defendant Flick guilty in respect of the Rombach matter but will take fully into consideration in fixing his punishment all the circumstances under which he acted."(2)

In the Judgment delivered in the *High Command Trial* it was said that : " Military Commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. *He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.*"(3)

The use of the word " error " indicates that the Tribunal had not in mind a situation in which a defendant is to be regarded as innocent because the law relating to his acts is *too vague* to give a definite answer as to the legality

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(1) See Vol. V, pp. 69–70. (Italics inserted.)
(2) Vol. IX, p. 23. (Italics inserted.)
(3) Vol. XII, pp. 73–74. (Italics inserted.)

of those acts. Indeed, the attitude usually taken by the courts to the plea of superior orders(1) seems to involve admitting that a mistake of law may at any rate be pleaded in mitigation ; if an order was not known to an accused to be illegal, *and it was not unreasonable for him to mistake it as legal*, he may plead in mitigation that he acted on that order in carrying out the acts charged.

In the *Latza Trial* a Norwegian Lagmannsrett held that the accused had been under a pardonable misconception in incorrectly believing that a certain German law was consistent with international law, but on appeal the Norwegian Supreme Court stated that it could not find, in view of the uncertainty of international law on the point, that the German provision was in fact illegal.(2)

11. MISTAKE OF FACT

A mistake of fact, however, may constitute a defence in war crime trials just as it may in trials before municipal courts. This is illustrated by the fact that the executioners of allied victims have sometimes been found not guilty on the grounds of their having reasonably believed that the executions which they were carrying out were legal.(3)

The Judge Advocate in the *Almelo Trial* advised the court that, if the court felt that the existing circumstances were such that a reasonable man might have believed that a victim whose killing was charged had been tried according to law and that a proper judicial legal execution had been carried out, then it would be open to the court to acquit the accused. The relevant consideration was whether certain accused had reason to believe that they were carrying out a lawful sentence.(4)

A *bona fide* mistake of fact does not negative the operation of the defences of military necessity,(5) duress(6) or (possibly) the defence that a prisoner of war was shot while trying to escape.(7) In the *Hostages Trial* the Tribunal said that : "In determining the guilt or innocence of any army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvous facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence."(8)

(1) See pp. 157–158.
(2) See Vol. XIV, pp. 60, 69 and 82–83.
(3) See Vol. V, pp. 79–81.
(4) Vol. I, pp. 41 and 45. So also in the trial by a British Military Court at Hamburg of Carl Rath and Richard Thiel, 23rd–29th January, 1948 (not previously treated in these volumes), the Judge Advocate advised the court that it would be a good defence to the charge of having unlawfully executed certain Luxemburg nationals if an accused could show that he *honestly believed* that he was participating in a lawful execution upon someone who was lawfully conscripted into the German army and had been sentenced to death. Compare also Vol. XI, pp. 50–1.
(5) See Vol. VIII, pp. 68 and 69.
(6) See Vol. X, pp. 175–6.
(7) See p. 186, note 5.
(8) Vol. VIII, p. 58.

12. THE MENTAL CAPACITY OF THE ACCUSED

In the trial of Wilhelm Gerbsch, the Special Court in Amsterdam, while passing a sentence of 15 years' imprisonment, recognised as a mitigating circumstance the fact that the accused's " mental faculties were defective and undeveloped " at the time of the crimes as well as at that of the trial.(1)

On the other hand a mere plea of drunkenness was rejected in the trial of Yamamoto Chusaburo by a British Military Court at Kuala Lumpur,(2) while in the *Milch Trial*, the Tribunal rejected a defence claim that the accused made violent statements, due to uncontrollable temper, overwork and head injuries, which were not to be taken seriously.(3)

No exhaustive study of the ages of persons condemned as war criminals has been made in these volumes, but it may be mentioned that sentences recorded in these volumes have on occasions been passed upon persons of 15 years and upwards.(4)

13. THE ALLEGED VAGUENESS, UNCERTAINTY OR OBSOLETENESS OF THE LAW

This plea was put forward in the *Peleus Trial*(5) and in the *Flick*, *I.G. Farben* and *Krupp Trials*, where it was often amalgamated with the argument that the international law relating to economic offences in occupied territories had been rendered obsolete by the coming of " total war " which included a highly developed economic warfare.(6)

The United States Military Tribunal which conducted the *I.G. Farben Trial* showed a willingness to admit that changing international custom may render a rule of law obsolete and so take away its obligatory nature : " As custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilised nations as to alter the substantive content of certain of its principles ".(7) " Technical advancement in weapons and tactics used in the actual waging of war " may have rendered obsolete or inapplicable certain rules relating to " the actual conduct of hostilities and what is considered legitimate warfare."(8) Similarly, the Judgment delivered in the *Flick Trial* stated that certain specified technical developments occurring since 1907 " make plain the necessity of appraising the conduct of defendants with relation to the circumstances and conditions of their environment. Guilt, or the extent thereof, may not be determined theoretically or abstractly. Reasonable and practical standards must be considered."(9)

Such considerations, nevertheless, did not serve to acquit Flick of guilt in connection with the Rombach plant,(10) and the Tribunals acting in the *I.G. Farben Trial* and the *Krupp Trial*, explicitly and tacitly respectively, rejected their application to the protection afforded by the Hague Convention to

(1) See Vol. XIII, pp. 132 and 137.
(2) See Vol. III, pp. 77–8 and 80.
(3) See Vol. VII, p. 47.
(4) See Vol. IX, p. 66 and Vol. XI, p. 74.
(5) See Vol. I, pp. 14–15.
(6) See Vol. X, p. 64–7.
(7) See Vol. X, p. 48.
(8) See Vol. X, p. 49.
(9) See Vol. IX, p. 23.
(10) Ibid, p. 23.

property rights in occupied territories.[1] The plea based on the alleged vagueness of the relevant law was also explicitly rejected by the Tribunal acting in the *I.G. Farben Trial*,[2] and an argument based on its alleged obsolete nature was rejected in the *Milch Trial*.[3]

Similarly, the Judge Advocate acting in the *Peleus Trial* said that if this were a case which involved the careful consideration of the question whether or not the command to fire at helpless survivors struggling in the water was lawful in International Law, the Court might well think it would not be fair to hold any of the subordinates accused in this case responsible for what they were alledge to have done. In the present case, however, it must have been obvious to the most rudimentary intelligence that it was not a lawful command.[4]

14. THE PLEA THAT A SHOT PRISONER OF WAR WAS SHOT WHILE ATTEMPTING TO ESCAPE

(i) The legality of shooting prisoners of war while attempting to escape has been recognised.[5]

The Judge Advocate acting in the *Dreierwalde Trial*, however, said that such shooting would be legal " if it is reasonable in the circumstances ",[6] while, in the Trial of Erwin Wieczorek and two others by a British Military Court at Hamburg, 28th August to 6th November, 1948,[7] the Judge Advocate advised the Court that :

> " Colonel Barratt has drawn your attention to the law . . . which is, of course, that there is no justification for killing a prisoner of war, except to prevent him escaping. Even then, of course, although the volume of Oppenheim, which was referred to, did not, I think, deal with this point—even then I must advise you that the English law on this matter is that you should only in such circumstances use such a degree of violence as is necessary to the circumstances. If a prisoner of war were escaping, the guard in charge of such a prisoner would only be justified in using firearms lethally if there were no other reasonable prospect or recapture of reducing into captivity the prisoner again. If the prisoner could reasonably be re-apprehended without the use of firearms, then such lesser course should be resorted to."

(ii) On the other hand, it is not permissible to shoot a prisoner of war on recapture *on the grounds that he attempted* to escape.[8] Among the provisions of the Hague and Geneva Conventions which the Tribunal acting

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(1) See Vol. X, pp. 48–9 and 133–4.

(2) See Vol. X, p. 49.

(3) See Vol. VII, pp. 44 and 64–5.

(4) Vol. I, p. 15.

(5) See Vol. I, pp. 86–7, Vol. III, p. 22, and Vol. VII, p. 61. Compare Vol. XI, pp. 74–5. The Judge Advocate acting in the *Dreierwalde Case* advised the court that, if the accused Amberger " did see that his prisoners were trying to escape *or had reasonable grounds for thinking that they were attempting to escape*," to shoot at them to prevent their escape would not be a breach of the laws and customs of war. (See Vol. III, pp. 86–7. Italics inserted.)

(6) Vol. I, p. 86.

(7) Not previously referred to in these Reports.

(8) See Vol. VII, p. 61, and Vol. XII, pp. 101–2.

in the *High Command Trial* regarded as being declaratory of customary international law, were part of Article 8 of the former, and Article 50 of the latter, which provide :

" *Article* 8 :

" . . . Escaped prisoners who are retaken before being able to rejoin their own army, or before leaving the territory occupied by the army which captured them, are liable to disciplinary punishment.

" Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of their previous escape."(1)

" *Article* 50 :

" Escaped prisoners of war who are re-captured before they have been able to rejoin their own armed forces or to leave the territory occupied by the armed forces which captured them shall be liable only to disciplinary punishment.

" Prisoners who, after succeeding in rejoining their armed forces or in leaving the territory occupied by the armed forces which captured them, are again taken prisoner shall not be liable to any punishment for their previous escape."(2)

(iii) Nor is it permissible to shoot prisoners of war *to prevent their attempting* to escape, even though their intentions to make the attempt is known.(3)

(iv) Finally, a prisoner of war may not legally be shot if attempting to escape to save his life.(4)

15. PLEAS IN MITIGATION OF SENTENCE

As has already been seen, the courts have recognised that some pleas, while they do not exculpate an accused, are worthy of consideration as reasons for mitigating the sentence to be passed ; such pleas include that of superior orders.

It should be added that on many occasions defence counsel have availed themselves of a right to enter a special plea in mitigation of sentence, based upon facts of a varied nature including the age, experience and family responsibilities of the accused ; such pleas were made, between the announcement of findings and pronouncement of sentence, in, for instance, the *Belsen Trial*.(5)

Furthermore the judgments delivered in war crime trials have themselves often pointed out that, while an accused is guilty of an offence charged, there exist factual circumstances which the court will consider as mitigating the severity of the sentence which ought to be imposed ; such statements have been made for instance by French, United States, and Netherlands

(1) This Article was held to have been infringed in the trial of Flesch by the Norwegian courts. See Vol. VI, p. 114.

(2) See Vol. XII, pp. 90 and 91.

(3) See Vol. VII, p. 61.

(4) See Vol. VII, p. 61.

(5) See Vol. II, pp. 122–5. Compare Vol. I, pp. 87 and 102 and Vol. XI, p. 74.

courts in trials of war criminals.[1] As was stressed in the judgment delivered in the *Hostages Trial*, however, "it must be observed that mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defence. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings of the Court with reference to the degree of magnitude of the crime."[2]

The circumstances which have been thus regarded as being extenuating have been varied in nature ; of more legal interest than most perhaps is the circumstance that an illegal order was not carried out, which the Tribunal in the *Hostages Trial* regarded as being worthy of consideration in deciding upon the punishment of a commander who issued such an order.[3]

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[1] See Vol. VIII, pp. 16, 74–5 and 92 ; Vol. IX, pp. 29–30 and 66 ; Vol. XI, p. 4 ; Vol. XII, pp. 94 and 121–2 and p. 93, note 1 ; Vol. XIII, pp. 121, 132 and 137 ; and Vol. XIV, pp. 141 and 143.

[2] Vol. VIII, p. 74.

[3] See Vol. VIII, p. 90.

VIII

THE PROCEDURE OF THE COURTS

This present section does not purport to be a complete summary of all provisions and decisions on questions of procedure which have been set out in the previous volumes of this series. The purpose of this final Volume is primarily to provide a summary of the rules of *international law* which have been illustrated in the Reports and, on the matter of the procedure to be followed in trials for offences against the international criminal law, customary international law makes no provisions except for requiring that an accused shall be accorded a fair trial. The judgment delivered in the *Justice Trial*, for instance, pointed out that it was essential to recognise that : " The jurisdictional enactments of the Control Council, the form of the indictment, and the judicial procedure prescribed for this Tribunal are not governed by the familiar rules of American criminal law and procedure. This Tribunal, although composed of American judges schooled in the system and rules of common law, is sitting by virtue of international authority and can carry with it only *the broad principles of justice and fair play which underlie all civilised concepts of law and procedure.*"(1)

Some indication of what Allied Courts have regarded as the characteristics of a fair trial, when deciding that such a trial had been denied to Allied victims by enemy accused, has already been given.(2) What can usefully be attempted now is to show what steps have been taken to ensure that the same courts shall accord those rights to enemy accused.(3)

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(1) Vol. VI, p. 49 (Italics inserted). Compare the passage from the Judgment delivered in the *High Command Trial* quoted on p. 167.

(2) See pp. 161–166.

(3) For provisions regarding the composition and procedure of courts, including those provisions about to be examined, see Vol. I, pp. 13 and 106–10 (British courts) ; Vol. III, pp. 85–92 (Norwegian courts), pp. 38–40, 48–50, 53, 94 and 96–100 (French Courts) and 57, 107–113 and 116–120 (United States Courts) ; Vol. IV, pp. 126–30 (Canadian Courts) ; Vol. V, pp. 98–101 (Australian Courts) ; Vol. VII, pp. 91–7 (Polish Courts) ; Vol. XI, pp. 103–10 (Netherlands Courts) ; and Vol. XIV, pp. 159–160 (Chinese Courts). See also Vol. IX, pp. 31–2 (United States Courts).

No particular treatment will be given in this Volume to the presumption of innocence and the rule that conviction is dependent upon proof of the crime charged beyond a reasonable doubt, but these basic elements of a fair trial have also been frequently stressed by Judge Advocates or war crime courts. (See for instance Vol. IX, p. 16 and Vol. X, pp. 109–10).

While the general right to a fair trial is less easy to provide for than certain constituent parts of that right, such as the right to the aid of counsel, it is nevertheless provided by certain of the United States enactments that Military Commissions shall conduct their proceedings as may be deemed necessary for a full and fair trial. (See Vol. III, pp. 108–9).

War Crime trials have sometimes been held before mixed inter-allied courts. The British Royal Warrant and the analogous Canadian and Australian laws make provision for such trials (Vol. I, p. 106, Vol. IV, p. 126 and Vol. V, p. 98), and Art. II of Ordinance No. 7 of the United States Zone of Germany envisages trials by courts appointed jointly by the Military Governor of that Zone and by one or more other zone commanders of the member nations of the Allied Control Authority. (Vol. III, p. 117). The British provision has been applied (see for instance, Vol. I, p. 1 and Vol. V, p. 41), but no use has been made of the United States provision. It may be added that, as far as the writer's knowledge goes, no court trying offences against international criminal law connected with the Second World War has been composed either wholly or partly of members from states which were neutral in that war.

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 guilty shall not escape punishment because of legal technicalities. Certain *typical examples* are examined in the following paragraphs. The survey of information illustrating the protection of certain selected and more important rights (see headings 1–5) makes it clear than an attempt has in fact been made to secure to an alleged war criminal his rights to a fair trial. The later part of the section, however, makes it clear that the aim has also been to ensure that the courts are not so bound by technical rules that the guilty shall benefit from the exceptional circumstances under which war crime trials are necessarily held, and so escape just punishment.

It will have been noted that a marked general similarity exists between the rules laid down in the Charters of the International Military Tribunals and in the various municipal enactments governing all the matters discussed in this section on the rights of the accused. These procedural rules, as much as those quoted elsewhere which lay down provisions of substantive law, represent a further contribution to the development of an international penal law. They will prove of value in the sphere of the codification of international law and will serve as a convenient basis for further developments in this sphere.

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 Charter 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."

A similar provision is made in Article IV (a) of Ordinance No. 7 of the Military Government of the United States Zone of Germany, under which the Nuremberg Subsequent Proceedings were held, and in Article V of Ordinance No. 2 under which Military Government Courts were established.

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."

Article 179 of the French Code de Justice Militaire provides that an alleged war criminal ordered to appear before a Military Tribunal established in a territorial district in a state of war must, 24 hours at least before the meeting thereof, receive notification of the summons containing the order of convocation of the Court as well as the indication of the crime or delict alleged, the text of the law applicable and the names of the witnesses which the prosecution proposed to produce.

Under the laws relating to trials in the Netherlands, the indictment must be made known to an accused at least ten days before trial.

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 applicable 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, Military Government Courts and Military Tribunals. The right is explicitly provided also by, *inter alia*, the relevant Polish laws.

3. RIGHT OF ACCUSED TO HAVE 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. Similar provisions are made by the relevant Canadian and Australian laws.

The relevant United States provisions assure a similar right to the accused. The following provision is contained in Article 5b 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."(1)

The corresponding wording in the China Regulations (Article 14 (b)), 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." (Italics inserted).

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(1) See Vol. I, p. 72 for an application of this provision.

Similarly, Article IV (c) of Ordinance No. 7 of the United States Zone of Germany provides that a Military Tribunal set up thereunder " . . . shall appoint qualified counsel to represent a defendant who is not represented by counsel of his own selection ", and the Polish Decree of 31st October, 1946, on the establishment of a Supreme National Tribunal lays down in its Article 12 (1) that : " At the trial, the defendant must appear with counsel. If he does not appoint one, the President of the Supreme National Tribunal is to appoint a counsel *ex officio* from among the advocates residing in Poland."(1) In trials before French Military Tribunals, if the accused has not chosen a defending Counsel such Counsel will be appointed for him. Again, under Articles 99–101 and 107 of the Norwegian General Law No. 5 of 1st July, 1887, on Criminal Procedure, which is applied in war crime trials before Norwegian Courts, the Court officially appoints a Counsel at the State's expense to defend an alleged war criminal ; this Counsel is usually that already chosen or engaged by the accused. Provision for choice or appointment of Counsel for the Defence is also made in the Netherlands laws.(2)

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). 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 ", while similar provisions are made by Articles IV (a) and (b) of Ordinance No. 7.

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(1) See for instance, Vol. VII, p. 17 and Vol. XIII, p. 102.

(2) Regarding the right to counsel, see also Vol. VI, p. 118 and Vol. IX, p. 16.

An examination of the records of war crime trials indicates that this right of the accused has been well preserved.(1)

5. RULES REGARDING APPEAL AND CONFIRMATION

An accused may be further preserved from any kind of summary treatment by provisions relating to appeal or 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 proceeding 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.(2)

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(1) See for instance Vol. II, p. 145, Vol. III, pp. 74–75 and Vol. XII, p. 5. 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, but the interests of the accused in this case were fully safeguarded by the fact that two, and later, during the evidence for the defence, a further three, officers and soldiers were detailed to act as interpreters. (See Vol. I, pp. 65–66).

The Judgment of the International Military Tribunal for the Far East contains the following passage (on p. 17 of the official transcript thereof) :

> " In addition, the need to have every work spoken in Court translated from English into Japanese, or vice versa, has at least doubled the length of the proceedings. Translations cannot be made from the one language into the other with the speed and certainty which can be attained in translating one Western speech into another. Literal translation from Japanese into English or the reverse is often impossible. To a large extent nothing but a paraphrase can be achieved, and experts in both langugages will often differ as to the correct paraphrase. In the result the interpreters in Court often had difficulty as to the rendering they should announce, and the Tribunal was compelled to set up a Language Arbitration Board to settle matters of disputed interpretation."

(2) Regulation 10 of the Royal Warrant.

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 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) Provision for review by higher military authority is also made in the Australian War Crimes Law and in the Canadian War Crimes Regulations.

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.(2)

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*,

(*a*) confirm or set aside any finding.

(*b*) substitute the finding of guilty by an amended charge,

(*c*) confirm, suspend, reduce, commute or modify any sentence or order, or

(*d*) 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 appears that the error or omission has resulted in injustice to the accused.

Provision is made in Article XVII of Ordinance No. 7 for the review by higher military authority of sentences passed by United States Military Tribunals. Sentences may thereby be altered or reduced but not increased in severity.

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(1) Regulation 11 of the Royal Warrant.

(2) Regarding the degree of control exercised by the Supreme Court of the United States over United States Military Commissions, see Vol. III. pp. 112–13 and Vol. IV, pp. 38 and 48. Contrast the position of the United States Military Tribunals in the United States Zone of Germany as examined in Vol. VII, pp. 47–48 and 66.

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 the sentence, but not on the facts. There is also the possibility of a retrial,(1) or of reprieve or pardon.

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 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.(2)

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

(1) when the Military Tribunal has not been composed in accordance with the provisions of the Code,

(2) when the rules of competence have been violated,

(3) when the penalty laid down by the law has not been applied to the acts declared to be proved by the Military Tribunal or when a penalty has been pronounced which goes beyond the cases stated by the law.

(4) when there has been a violation or omission of the formalities laid down by law as a condition of validity, and

(5) when the Military Tribunal has omitted to decide upon a request of the accused, or an application of the Public Prosecutor, which aims at making use of a power or a right accorded by the law."

According to 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,(3) 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.

(1) As for instance in the *Latza Trial* ; Vol. XIV, pp. 49-85 ; cf. Vol. V, p. 92.
(2) The Permanent Military Appeal Tribunal does not, therefore, enquire into mere questions of fact.
(3) The legal date of the end of war time is, for purposes of French War Crimes Law, 1st June, 1946.

Provision is made for a right of appeal also in Article 16 of the Yugoslav War Crimes Law of 25th August, 1945, and Article 15 of the Polish Law of 31st October, 1946, establishing the Supreme National Tribunal, provides for an appeal for mercy to the President of the National Council. Provision for review by higher authority is made by the second of these provisions and by Article XXXII of the Chinese War Crimes Law of 24th October, 1946. The relevant Netherlands laws provide for either appeal or review by higher authorities, and for the possibility of a pardon.

6. 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. Some relevant provisions and judicial utterances have been quoted in Volume IV, pp. 81–83.

7. RULES OF EVIDENCE

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

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 laws of states.(1)

A study of the various provisions relating to the admissibility of evidence indicates that most of the courts which have actually been entrusted with the trial of criminals under international law have in effect been empowered to admit all evidence which appeared to the Court to have probative value,(2) while 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 concerned then to decide what weight to place on each item.*(3)

Thus the Tribunal which conducted the *Hostages Trial*, in commenting upon Article VII of Ordinance No. 7, which enables the United States Military Tribunals to admit any evidence which they deem to have probative value, said that it was " of the opinion that this rule applies to the competency of evidence only and does not have the effect of giving weight and credibility to such evidence as a matter of law. It is still within the province of the

(1) 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 practicable, 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. (Vol. II, pp. 131–2).

(2) See Vol. I, pp. 46, 84–5 and 107–8 ; Vol. II, pp. 130–1 ; Vol. III, pp. 62–3, 109–11, 117 and 118 ; (especially) Vol. IV, pp. 78–81 and pp. 127–8 ; Vol. V, pp. 92–100 ; and Vol. XI, p. 108.

(3) See Vol. II, pp. 131–8 and 142–3 ; Vol. III, pp. 73–4 ; Vol. IV, pp. 3, 23, 55, 57–8 and 60–2 ; (especially) Vol. IV, pp. 78–81 ; Vol. V, pp. 58–9 ; Vol. XI, pp. 9, 11–12, 51–2 and 84–5 ; and the references in footnote 2 to p. 198.

Tribunal to test it by the usual rules of law governing the evaluation of evidence. Any other interpretation would seriously affect the right of the defendants to a fair and impartial trial."[1]

Much reliance as evidence has been placed during war crime trials on affidavits, that is to say signed statements by a witness made before trial. Defence counsel have more than once protested against such evidence, mainly on the ground that, unlike a witness in the box, affidavits cannot be cross-examined, but there can be no doubt as to their admissibility under the laws governing at least most of the courts which have conducted trials of offences against the international criminal law.[2]

During the trial of Erich Killinger and four others by a British Military Court, Wuppertal, 26th November–3rd December, 1945, before the tendering 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 (i) (a)), and the President of the Court added that " we realise that his 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.[3]

Nevertheless, in his summing up, the Judge Advocate in the trial of Karl

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[1] Vol. VIII, p. 37.

[2] For examples of and discussion of the admission of such documentary evidence, see Vol. I, pp. 14, 42, 82–3, 85 and 96 ; Vol. II, pp. 119, 132–3 and 134–5 ; Vol. III, pp. 35, 39, 70–1 and 88 ; Vol. IV, pp. 23 and 79–81 ; Vol. V, pp. 47–9 ; Vol. VIII, pp. 15, 36–7 and 38 ; Vol. IX, p. 6, Vol. XI, pp. 60–64. Regarding the admission of pre-trial statements by one accused against another, see, for instance, Vol. II, pp. 134–5 and Vol. III, p. 63. Regarding the admission of pre-trial statements of an accused concerning himself, see Vol. II, pp. 135–8 ; Vol. III, pp. 71–2 and Vol. XI, pp. 52, 78 and 83.

[3] See Vol. III, p. 71.

The Judge Advocate acting in the Trial of Oscar Hans by a British Military Court at Hamburg, 18th—25th August, 1948, advised the Court as follows :

" Another matter of general warning that I must draw your attention to relates to the documentary evidence which has been given. It is, as I think you may have heard me say earlier in these proceedings, a rule of English law that the Court must have the best evidence, and of course the best evidence of a person who is alleged to have seen something is the spoken testimony of that person given in court. You have in many cases here not got that particular person before you, but only some document, either an affidavit made by him or some other document, and we will deal with them all as we go through them, which has come into existence at some time outside the confines of this Court, and which, of course, nobody has had any opportunity in this Court of testing. Documents of that kind are subject to the criticism that the defence have been denied the opportunity of cross-examining about them, of investigating them further, of knowing anything of the circumstances in which they were taken, of being in any other way able to probe their reliability, and, therefore, I should tell you this, that in the ordinary procedure of the English Courts, many of these documents would not be admissible as evidence at all for that particular reason, and no doubt you know from your experience of administering Military Law in Courts Martial, such documents would not be admissible. By special regulations made for the conduct of these Courts here for the trial of war criminals, an exception to the main rule of evidence has been made, and these documents are made admissible, but it is my duty to warn you that that is an exception, and that you must not necessarily accept them at their face value. You must have regard to each particular document and consider what weight you ought to attach to it. If you think, in spite of that warning that the contents of the documents are true, then you are entitled to treat them as well as any other evidence. If you feel doubts about them, that may reduce the value which you give to them."

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 . . ."(1)

Further examples of the more elastic rules of evidence permissible before courts trying war criminals are found in the greater frequency with which " hearsay " evidence is admitted, when compared with proceedings before most courts dealing with offences purely under national law. 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 of any matter contained in that statement (see Harris and Wilshere's *Criminal Law*, Seventeenth Edition, p. 482). Such evidence is rendered permissible by Regulation 8 (i) of the Royal Warrant provided it satisfied the conditions laid down therein.(2)

(1) See Vol. V, pp. 47–9.

(2) See, as examples of the admitting of hearsay evidence, Vol. I, p. 85, Vol. II, p. 138, Vol. IV, p. 23, Vol. IX, p. 6.

As an indication of the precise limits of the legal rights of an alleged war criminal it should also be mentioned that such persons are not entitled to the rights laid down to protect prisoners of war in Arts. 60–66 of the Geneva Prisoners of War Convention; see pp. 99–100.

For material on certain other matters of procedure and evidence, reference may be made to the following pages : Vol. II, p. 107, Vol. IV, p. 44, Vol. VI, pp. 49–50 and Vol. XI, pp. 9, 10–11 and 24 (Charges against an accused are, under the British and United States War Crimes legislation, not required to be drafted with the same precision and formality as a charge under common law) ; Vol. II, pp. 146–7 and Vol. X, pp. 158–9 (procedure followed upon an accused falling ill) ; Vol. II, p. 70 and Vol. IV, pp. 7–8 and 11–14 (possibility of defence pleas that charge stated no offence) ; Vol. II, pp. 145–6 (presence of witnesses in the court room after giving evidence) ; Vol. III, pp. 72–3 and Vol. XI, p. 78 (procedure followed when accused produced no evidence other than his own testimony) ; Vol. VII, p. 95 and Vol. XI, pp. 81–2 (procedure followed upon a plea of guilty) ; Vol. II, pp. 5–7 and 143–5, Vol. III, pp. 38 and 66, and Vol. XI, p. 11 (severing of charges and severing of trials) ; Vol. X, pp. 67–8 (rules concerning judicial notice) ; Vol. X, p. 76, note 1 (the taking of evidence on commission) ; and Vol. II, pp. 147–8 (recording of a special finding).

The material here referred to often illustrates further the policy of leaving wide discretionary powers in the hands of the Courts, as does also for instance the rule generally followed as regards the pleas of superior orders and of alleged legality or compulsion under municipal law. This provision of a wide discretion to the courts is an aspect of the attempt to exclude from war crime trial proceedings such unnecessary technicalities as might lead to a miscarriage of justice in favour of the accused ; this tendency has been demonstrated also in certain provisions that a trial cannot be invalidated after its completion merely because of technical faults of procedure which caused no injustice to the accused. (See Vol. I, p. 109–10, Vol. III, p. 120, Vol. IV, p. 130 and Vol. V, p. 101).

It need hardly be added that the courts have often worked upon circumstantial evidence as well as upon direct evidence ; this has been of particular interest in connection with questions turning upon an accused's knowledge of certain activities or of the criminality of certain activities or organisations ; see for instance Vol. VI, pp. 88–9, Vol. XI, p. 4 ; and pp. 151–3 of the present volume, concerning knowledge of the criminality of the aims or activities of certain organisations. Judge Musmanno's judgment in the *Milch Trial* includes the statement that : " Although Milch has here repudiated belief in the master race theory, yet we know that he went through a formal procedure to establish the absence of Jewish blood in his veins. This procedure even took the embarrasing turn of statements concerning his parentage. In doing this, *Milch could not help but know* that the Jews were being persecuted by the political party to which he voluntarily belonged." (Italics inserted). One relevant passage chosen from among several made in the judgment in the *Pohl Trial* is the following : The Tribunal concludes that the knowledge of the defendant concerning the erection and maintenance of the gas chambers and crematoria in the various concentration camps put him upon actual notice of the intended use of these installations. *Owing to the high position he held in the WVHA, we are forced to conclude* that defendant Eirenschmalz had actual knowledge of " Action Reinhardt," and the " Final Solution of the Jewish Problem " and that he knew that numberless thousands of unfortunate Jews and nationals of occupied territories were exterminated in the gas chambers and crematoria erected and maintained under the supervision of his office and other offices of the WVHA." (Italics inserted).

IX

PUNISHMENT OF CRIMINALS

(i) International law lays down that a war criminal may be punished with death whatever crime he may have committed. Some use has been made of the latitude allowed in this matter insofar as certain offences other than killing have, on occasions, been punished with death, for instance cases of torture and/or rape punished by the Norwegian and Australian courts. Illustrative Norwegian trials have been reported upon in these volumes.(1) Among the Australian trials mention should be made of the trial of Tsugiji Matsumoto and others at Rabaul, 6th April, 1946, when three accused were sentenced to death for torturing a civilian inhabitant of occupied territory, and the trial of Hiroe Sakoda and others at Rabaul, 26th–29th April, 1946, when the accused Hiroshi Nakajima and Shigenobu Takahashi were sentenced to death for torturing another civilian. In each case the charge was one of torture; the record contains no mention of any death of the victims having resulted, and the findings and sentences were confirmed and carried out. In a third trial held at Rabaul on 13th December, 1945, an Australian Military Court sentenced to death Yoshio Taki on charges of rape and torture committed against a Chinese civilian of Rabaul, although the victim survived. Again the sentence was confirmed and carried out.

Death sentences have also been awarded by several Australian Courts for cannibalism and mutilation of the dead. These sentences have however usually been either commuted or overruled by the Confirming Authority.(2)

On the other hand, it is open to the courts to award sentences less than the death sentence to accused found guilty of charges of unlawful killing and this has been done in many trials, including some Australian cases where the charges were explicitly charges of murder.(3)

It has also been seen that punishment other than death and imprisonment can be made for war crimes; thus in the *Goeth*, *Hoess*, *Krupp* and *Greiser Trials* confiscation of property appears among other sentences meted out(4) and in certain French trials fines or confiscation of property have also been imposed.(5) It is interesting to note that, as far as the knowledge of the writer goes, corporal punishment has never been the sentence, or part of the

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(1) See Vol. III, pp. 1–22. In considering the plea of the appellants in the *Bruns Trial* to the effect that their acts of torture had in no case resulted in death or permanent disablement, Judge Larssen stated that the acts that had been committed were not casual violations of various paragraphs of Norwegian law but constituted a methodically carried out ill-treatment of Norwegian patriots, conducted throughout several years. (Vol. III, p. 20).

(2) See for example, Vol. XIII, pp. 151–152.

(3) As in the Trial of Jiro Sakata and others and the trial of Kazuyoshi Shimada, held at Rabaul, 29th–30th April and 26th June, 1946, respectively.

(4) See Vol. VII, pp. 4 and 17, Vol. X, pp. 177–181 and Vol. XIII, p. 104. The infrequency of such punishments for offences against international criminal law does not result from the lack of provisions enabling them to be passed. See Vol. X, p. 177, note 2.

(5) See for instance Vol. III, p. 42.

sentence, passed upon anyone found guilty of offences against international criminal law, and has never appeared among the various types of punishment explicitly made permissible by special war crimes legislation.(1)

(ii) It has been seen(2) that among the circumstances which Allied Courts have regarded as constituting some evidence of the denial of a fair trial by ex-enemy accused is the fact that a punishment meted out by such accused on Allied victims was one which was excessive compared with the offence punished. Furthermore the Tribunal which conducted the *Doctors' Trial* was clear and definite in declaring illegal the infliction of punishment by maiming or torture upon spies, war rebels and other resistance workers, who have been, however legally, condemned to death.(3) It seems that, despite the fact that international law has previously permitted the death sentence to be passed for any war crime, some kind of international practice is growing according to which Allied Courts, apart from avoiding inhumane punishments, have themselves attempted to make the punishment fit the crime ; any habitual practice of this kind would tend in time to modify the general rule that any war crime is punishable by death.

It has thus been seen above that the death sentence has been generally reserved for cases of killing unlawfully, torturing and rape. Similarly, a study made in Volume IV of the punishment meted out to certain military commanders and a police chief for *not preventing* crimes, including killings, on the part of their subordinates(4) has shown that, after action by reviewing or appellate authorities, no guilty accused suffered death with the exception of Lt. General Masao Baba(5) and General Yamashita ; and in the case of Yamashita there was some, though not uncontradicted, evidence that he had actually ordered his subordinates to commit atrocities.(6) It is also worthy of note that the International Military Tribunal made recommendations relating to the awarding of sentences for membership of criminal organisations which aimed at securing a certain standardisation of approach on the part of courts set up in the Zones of Germany. Its words included the following recommendation :

> " That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions and penalties be standardised. Uniformity of treatment so far as practical should be a basic principle. This does not, of course, mean that discretion in sentencing should not be vested in the court ; but the discretion should be within fixed limits appropriate to the nature of the crime.
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> " Law No. 10, to which reference has already been made, leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty.

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(1) Regarding this legislation concerning permissible penalties, see Vol. I, p. 109 ; Vol. III, pp. 88–89, 96–97, 112 and 119 ; Vol. IV, pp. 129–130 ; Vol. V, pp. 100–101 ; Vol. VII, pp. 84–86 ; Vol. X, p. 177 ; Vol. XI, pp. 102–103 and Vol. XIV, pp. 158–159.
(2) p. 164.
(3) See Vol. VII, pp. 51–52.
(4) See Vol. IV, pp. 95–96.
(5) See Vol. IV, p. 87 and Vol. XI, pp. 56–57.
(6) This evidence is set out in Vol. IV, pp. 19–20, and the contradictory evidence on pp. 21–23. The Commission which tried Yamashita and the Supreme Court did not speak in terms of his having ordered the committing of any offences ; See Vol. IV, pp. 35 and 42–44.

> " The De-Nazification Law of 5th March, 1946, however, passed for Bavaria, Greater-Hesse and Wurttemberg-Baden, provides definite sentences for punishment in each type of offence. The Tribunal recommends that in no case should punishment imposed under Law No. 10 upon any members of an organisation or group declared by the Tribunal to be criminal exceed the punishment fixed by the De-Nazification Law.(1)

The De-Nazification Law of 5th March, 1946, referred to by the Tribunal, was in force in the United States Zone and, as far as restriction of personal liberty is concerned, its heaviest penalty did not exceed 10 years' imprisonment. There were also provisions for confiscation of property and deprivation of civil rights. As a study of the sentences passed by the United States Military Tribunal in Nuremberg for the crime of membership shows, these Tribunals have in fact followed the recommendation of the International Military Tribunal.(2)

It may be also pointed out that for committing crimes against humanity (a category more recently evolved and recognised as offences than war crimes), the accused Rothaug, who had been found guilty of no other types of crimes, was sentenced by the Military Tribunal which conducted the *Justice Trial* not to death but to life imprisonment, although many of his victims had suffered death.(3) On the other hand the International Military Tribunal sentenced to death Julius Streicher after finding him guilty on the one count of crimes against humanity, which however involved many deaths.(4)

It is thought that an interesting study could be made of the different types and degrees of severity of penalties passed on persons found guilty of different offences under international law by Courts acting within the limits laid down by that law as to the punishment of criminals. It is not possible, however, to attempt such an analysis here.

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(1) See Vol. XIII, pp. 52–53.
(2) See Vol. XIII, pp. 53 and 55–65, and Vol. X, pp. 58–59.
(3) See Vol. VI, p. 83.
(4) See British Command Paper, Cmd. 6964, pp. 102 and 131.

ANNEX I

CERTAIN JURISDICTIONAL PROVISIONS RELATING TO BELGIAN, CZECHOSLAVAK AND YUGOSLAV COURTS EMPOWERED TO TRY WAR CRIMINALS

Due to the fact that no records of trials before Danish, Belgian, Czechoslovak or Yugoslav Courts were forwarded to the United Nations War Crimes Commission,[1] it has not been possible to include reports in the present volumes on war crime trials held before the courts of these countries. The relevant legislation of these countries has however been kindly furnished by the respective governments, and it has already been mentioned,[2] and the jurisdictional provisions made by the Danish law have been quoted[3]. It has been thought that it would be useful for the student of international law and comparative legislation if the jurisdictional provisions of the war crimes laws of Belgium, Czechoslovakia and Yugoslavia were also set out. It will be seen that the articles to be quoted provide for the trial not only of war crimes but also of acts of treasonable nature.

1. THE JURISDICTION OF BELGIAN MILITARY TRIBUNALS OVER WAR CRIMES AND CERTAIN TREASONABLE ACTS

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

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

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

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(1) See pp. xvi–xvii.
(2) See pp. 31 and 36.
(3) See pp. 32–33.

Article 1 of the above-mentioned law states that :

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

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

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

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

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

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

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

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

" *Article* 2. Article 3 of the decree of 5th August, 1943, is replaced by the following :

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

" Except in cases covered by No. 1 and 2 of Articles 6 and 10, the trial of crimes dealt with in the present decree can only be held if the accused is arrested in Belgium.

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

2. JURISDICTION OF THE PEOPLE'S COURTS IN CZECHOSLOVAKIA OVER WAR CRIMINALS AND TRAITORS

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

(i) Section 1 of the Decree provides that :

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

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

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

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

(iii) According to paragraph 1 of Section 3 :

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

(iv) Under Section 3, paragraph 2, a person who, at the time of imminent danger to the Republic, was a functionary or commander in

one of certain organisations, is punishable by hard labour from 5–20 years. The organisations are : The Nazi Party, the Sudetendeutsche Partei (the party led by Henelin), Vlajka (a Czechoslovak Quisling organisation), Hlinkova Garda (a Slovak Militant Quisling organisation). Here it is not membership as such, that establishes the criminal liability, since only functionaries or commanders in these organisations are to be punished.

(v) Section 6 of the Decree makes the ordering of forced labour and the taking part in giving effect to such orders, during the same period of danger, a criminal offence. The punishment is to be more severe if forced labour was connected with deportation abroad.

(vi) Section 7 of the Decree makes it a criminal offence, punishable by death or lesser penalties, to have caused, during the same period, loss of liberty or bodily harm in the interests of Germany or her Allies. Under the express provision of paragraph 3 of Section 7 this applies also to causing such an effect by means of a court decree or an administrative decision. A related provision is that of Section 11, which provides sanctions for denunciations effected in the interests of the enemy. If loss of life was the effect of such denunciation, the death penalty may be imposed ; otherwise such denunciations are punishable by hard labour from 10–20 years, and under aggravating circumstances by life imprisonment.

(vii) Offences against property during the same period and cloaked in the form of judicial or official acts, are also punishable (Sections 8 and 9).

(viii) Section 10 makes it a punishable offence to have exploited, at the time of the imminent danger to the Republic, the distress caused by national, political or racial persecution, in order to enrich oneself, to the detriment of the State, a legal corporation or any person.

(ix) Section 12 provides that :

" Under this law any foreigner who committed the crime mentioned in Section 1, or any of the crimes mentioned in Sections 4–9 while on foreign territory, shall be punished if he committed them against a Czechoslovak citizen or against Czechoslovak public or private property."

(x) The " time of the imminent danger to the Republic " is defined in Section 18 of the Decree as the time between 21st May, 1938, the time of the first Czechoslovak mobilisation against the threat of German invasion, and a day to be appointed by Government decree.

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

" *Any foreign national*(1) who

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

(*b*) has taken part in political, economic or any other kind of oppression of the Slovak nation, especially any person who has

(1) Italics inserted.

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

3. JURISDICTION OF YUGOSLAV COURTS OVER WAR CRIMES AND TREASONABLE ACTIVITIES

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

" *Article* 2

1. As a criminal act against the people and the State is considered an act aimed at the forcible overthrow of or threat to the existing State system of Democratic Federal Yugoslavia, or any menace to its foreign security, or to the basic democratic, political, national and economic achievements of the liberation war, e.g., the Federal structure of the State, the equality and fraternity of the Yugoslav peoples, and the system of the people's authorities.

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

" *Article* 3

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

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

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

" 3. Any person who commits a war crime, i.e., who during the war or the enemy occupation acted as instigator or organiser, or who ordered, assisted or otherwise was the direct executor of murders, of

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

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

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

" 6. Any person who during the war and enemy occupation entered the police service or accepted service in any organ of enemy authority, or assisted these in the execution of requisition orders for the taking of food and other goods, or in the pursuance of any other measures of force against the population of Yugoslavia.

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

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

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

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

" 11. Any person who during the war undertook any action aimed at any defensive objects or positions or any means for waging war or other war needs passing to enemy hands or being destroyed or put out of service, or the use of these being frustrateed, or action resulting in the Yugoslav Army or the armies of any allied lands or any individual soldiers falling into enemy hands, or in any military enterprise or measure being hindered or endangered.

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

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

ANNEX II

INDEX OF CASES REPORTED OR CITED IN THESE VOLUMES

(References given in italics are to reports. References not in italics are to citations. The figures in roman and in arabic figures refer to volumes and pages respectively.)

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