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WAR CRIMES

WAR CRIMES

An Attempt to Define the Issues

BY

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LONDON - 1945

STEVENS & SONS, LIMITED

119 & 120 CHANCERY LANE

Law Publishers

PRINTED IN GREAT BRITAIN BY
C. F. ROWORTH LTD., 88 FETTER LANE, LONDON, E.C.4.

PREFACE

THE phenomenon of war confronts humanity with many complicated and difficult issues; the more so a totalitarian war which aims at the complete destruction and annihilation of the other belligerent. So we stand to-day facing problems great and small, grim and confused. One of them is the problem of war crimes.

The present volume is an attempt to deal with the problem. It is not more than a handbook. Written under the strain of war conditions, while the author was on active military service, it is bound to have many shortcomings. But if it throws light on this confused problem and helps in its practical solution its aim will be achieved. It is one more plea for justice and law to be restored to its rightful place in this world while lawlessness and tyranny are still claiming their scores of victims.

The author is indebted to the Publishers of the *Juridical Review* for permission to reprint the article, "War Crimes—Political Offences," which appeared in their April, 1944, issue.

M. L.

June, 1945.

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BLACKSTONE defines crime as an act committed or omitted in violation of a public law either forbidding or commanding it. The essential reaction of the community against crime is punishment. In its social aspect crime is an attack against peace, morality and the social order under which we live. Whether the attack is directed against the life of an individual or against other values and goods, our social order affords protection.

In time of peace and normal life the community acts in self-defence against any attack on its safety by sanctions of its law, by judgment of its Courts and through its executive authorities. Whether it is murder, theft or injury to the person of an individual, the law of the society considers the loss which the State sustains and the pernicious example set to others. The legal qualification of an "attack on the society" depends on the act or omission itself.

There are, however, some additional criteria which qualify the weight of the crime in its effects on the community.

From the point of view of the culprit the motive for crimes has its roots in his emotions, which, as we know, are various. The culprit may be prompted by the lowest instincts, namely, greed and the desire to become rich. The crime he commits may have behind it the emotions of love, jealousy or hatred. It may also be mere carelessness which does injury to the society. It depends very much—(and this is a well-established fact)—on the social and political order of the community concerned what values and goods are protected by its legal order. Democratic States extend protection to all those values which correspond to the democratic outlook of the society and to the aims of a democratic State.

Totalitarian States have a different approach; they protect goods of different value. Nazi Germany considered race, soil, the Reich, and

honour the highest values; and provided the highest punishment for any violation of those values.[1]

Apart from all these qualifications there remains the distinction between political and common crimes. In order to be a crime of political character the act or omission must fulfil certain conditions. These conditions qualify the culprit for different treatment.

As to the time when a crime is committed, there are crimes committed in time of peace and others committed in time of war.

Crimes committed in time of war may be sub-divided into crimes committed in connection with the war and crimes committed during war in general.

The subject for our consideration will be crimes committed during a war and in connection with the war.

[1] Dr. W. Stuckart: Partei und Staat (Vienna, 1938); Schmitt Carl: Nationalsozialismus und Voelkerrecht (Berlin, 1934). For German law in this war, see National Zeitung, March 17th, 1940, "Deutsches Kriegsrecht"; Die Zeitung, German weekly published in London, February 20th, 1942; Das Reich ohne Recht, June 5th, 1942, Der Todesweg der Deutschen Justiz, and Justiz nach Befehl der SS, August 28th, 1942.

I

INTER ARMA SILENT LEGES?

1. THE ESSENCE OF WAR

THERE have been many definitions of what war is. None of them has actually hit the very essence of war. Turning the pages of history we ponder over the essential difference between war and peace, their mutual relation, the abnormal and normal phenomena of communal life, the life of States, nations and groups.

We cry out for peace, but do so little to make life free from wars.

Sociologically, war means " a violent contact of distinct but similar entities."[1] It manifests itself in a conflict of arms.

Its relation to peace has found a very varied reflection in human minds. Many an abortive idea—Clausewitz, Marinetti—has been translated into deeds leading communities into the frenzy of war.

It would lead us too far to go into a detailed analysis of the subject. All we want is to state, that law takes wars into its sphere of operation.

2. CRIMINAL LAWS OF PEACE AND WAR

That is why the whole complex of legal rules and regulations which frames the life of a community in time of peace is no less valid in time of war. Order, the working of the machinery of law, justice, executive and administration remain in force. Many a great authority has protested against the application of the rule " *inter arma silent leges.*"

The life of the community must go on, and it does. For behind the battlefronts the necessities of everyday life call for attention, care and watchfulness. The State engaged in war is bound to keep order at home, to preserve discipline and keep up the morale of its population. Law remains the dominating factor of life in the community. It defines the relations between citizens, between soldier and soldier of the same army, and even between soldiers of the two enemy armies.

[1] See Quincy Wright: " A Study of War " (University of Chicago Press, 1942, 2 volumes, Chicago), p. 8.

As has been already mentioned, however, war is a special phenomenon. It sanctions by its very existence the use of force, the application of deadly weapons, the destruction of life and property.

War creates a conflict between the continuous application of the laws of peace and the necessities of war. The application of force is a challenge to law.

Manslaughter, destruction of values, of property and goods, wounding, if they remain unpunished, are immoral and become a danger to the community. Yet war, in fact, approves of them.

The basic conflict which was bound to arise out of this, fills the pages of mankind's history: it is the struggle between law and lawlessness, between brute force which knows no boundaries and force controlled by rules.

3. THE GREAT COMPROMISE

For centuries the struggle between law and force has gone on, and it has not yet come to an end. Our generation has the unfortunate privilege of witnessing events which are perhaps the most cruel example of what brute force can achieve. But mankind climbing the ladder of culture and what we call civilization tried to reach a compromise, a compromise between the two opposing forces. Civilized States reached an agreement by which they decided to introduce order into that "symbol of disorder" which means war. It is called the *laws of warfare.*

By way of exceptions, exceptional rules and regulations, the operation of the "laws of peace" has been to a certain degree restricted. It did not and could not affect the value of law as such, for were we to confess this, law would not stand the test of life. What it did was to substitute for certain rules of law operating in peace some other rules, which ought to be applied by way of exception.

The practical result of this state of affairs, if we want to define it from the point of view of the law in force is, therefore, as follows: the laws of peace remain in force despite the state of war. They are, however, subject to exceptions which operate in certain circumstances and under certain conditions.

2

THE WRITTEN INTERNATIONAL LAWS OF WARFARE

THE idea of making war as humane as possible has been growing in human society. Custom and certain humanitarian principles were before this war becoming more and more the common property of civilized nations.

Since our modern International Law began to govern the relations between the States of the Western civilization, the need for rules in international relations, even while States are engaged in a war, has been steadily growing.

We have few, if any, written documents containing rules of warfare before the nineteenth century. But even without them certain rules were obeyed as the result of custom and human study. It was only in the nineteenth and twentieth centuries that the principles of the laws of warfare (or *jus in bello*) were laid down in international agreements.

Here is a list of the main written laws of warfare, Conventions, Declarations, Regulations or Protocols. They form the body of the *International Written Laws of Warfare* :—

1. *Declaration of Paris*, 1856, concerning the maritime law in time of war. Signed by seven Powers, acceded to later by all the maritime Powers.
2. *The Geneva Convention*, 1864, for the amelioration of wounded soldiers in armies in the field. Signed by nine Powers. Acceded to by almost all civilised States.
3. *Geneva Convention of* 1906, signed in 1906, by thirty-five States. Its principles incorporated into the Hague Convention.
4. *Declaration of St. Petersburg*, 1868, prohibiting the use in war of certain projectiles. Signed by seventeen States.
5. *The Convention of the Hague*, respecting the laws and customs of war on land. Signed in 1899, revised in 1907 at the Second Hague Conference.
6. *The Third Hague Convention*, concerning opening of hostilities, 1907.
7. *The Fourth Hague Convention*, respecting the laws and customs of war on land, 1907. (See 5.)
8. *The Fifth Hague Convention*, respecting the rights and duties of neutral Powers and persons in case of war on land, 1907.
9. *The Sixth Hague Convention*, relative to the status of enemy merchant ships at the outbreak of hostilities, 1907.
10. *The Seventh Hague Convention*, relative to the conversion of merchant ships into warships, 1907.
11. *The Eighth Hague Convention*, relative to the laying of automatic submarine contact mines, 1907.

12. *The Ninth Hague Convention,* respecting bombardment by naval forces in time of war, 1907.
13. *The Tenth Hague Convention,* for the adaptation of the principles of the Geneva Convention to Maritime War, 1907.
14. *The Eleventh Hague Convention,* relative to certain restrictions on the exercise of the right of capture in maritime war, 1907.
15. *The Thirteenth Hague Convention,* respecting the rights and duties of neutral Powers in maritime war, 1907.
16. *The First Hague Declaration,* prohibiting the discharge of projectiles and explosives from balloons, 1899—1907.
17. *The Hague Declaration,* concerning projectiles diffusing asphyxiating or deleterious gases, 1899.
18. *The Hague Declaration,* prohibiting the use of expanding bullets, 1899.
19. *The London Declaration,* of 1909, concerning the laws of naval warfare, signed by ten States.
20. *Protocol of* 1925, concerning the use in war of asphyxiating, poisonous and other gases.
21. *The Geneva Conventions of* 1929, concerning the treatment of sick and wounded and of prisoners of war.
22. *The London Protocol of* 1936, relating to the use of submarines against merchant vessels.
23. *Hague Air Warfare Rules,* 1923. Not ratified, but on several occasions States declared that they would abide by their stipulations.

3

THE UNWRITTEN INTERNATIONAL LAWS OF WARFARE

It has often been stated that written conventions and international agreements are not the only source of the international rules of warfare. It has been said that the written law is " declaratory of the unwritten law."[1]

The preamble to the Fourth Hague Convention gives guidance on the subject:—

" Until a more complete code of the laws of war can be issued the High Contracting Parties think it expedient to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the Law of Nations, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

The Hague Conventions, the main body of the rules of warfare, could not cope with the whole problem. One chapter of the rules of warfare was left almost untouched by them: air-warfare. Aerial navigation was at that time in its very beginnings. Like the Hague Conventions many other Conventions are silent on very many points. This silence is covered by the statement, that: " It could not be intended by the High Contracting Parties that the cases not provided for should, for want of written provision, be left to the arbitrary judgment of military Commanders."[2]

And, therefore, it is clear that the laws of warfare, in International Law, are complemented by the unwritten law. This lack of written law is only a formal deficiency.[3] The Hague Conventions quote explicitly what is to be regarded as an additional source of the Laws of Warfare; and there they say what Art. 38 of the Statute of the Permanent Court of International Justice at the Hague accepted as a general principle altogether, *i.e.*, with regard to all sources of the Law of Nations.[4]

[1] Lord Cave, in his speech before the Grotius Society, Transactions of the Grotius Society, vol. 3, 1923, p. xxi.

[2] Preamble to the Sixth Hague Convention, 1907.

[3] This view can be accepted irrespective of that we regard as the ultimate source of law. For further analysis on the subject, see Spiropoulos: Théorie générale du droit International (Paris, 1930); Le Fur: " Précis du droit international public " (Paris, 1931), and Kelsen: Das Problem der Souveraenitaet und die Theorie des Voelkerrechts (Tuebingen, 1928, 2nd ed.).

[4] Art. 38 lays down as sources of International Law: International conventions, general and special, " la coutume internationale comme preuve du pratique générale acceptée comme etant droit " and general principles recognized by civilized nations.

A reply to the question how to view cases " not included in the regulations " of international arrangements concerning laws of warfare, is to be found in the preamble to the Fourth Hague Convention (see above). The preamble indicates also that there are bound to be many points on which the written law is silent.

Why the written laws are silent has been explained in various ways. Prof. Holland pointed out in another connection that those who drafted the rules " declined to seem to add to the authority of repulsive practice."[5] Another writer asserts that the Hague Conventions " mistakenly assumed a permanent progress, that is why they have not developed rules to this effect."[6] At the time when the Hague rules were drafted, it is maintained, at the end of the last and the beginning of the present century, mankind was in the high swing of technical, industrial and also cultural development. It was not anticipated that all the new inventions and developments would be used one day as mortal weapons of destruction, that the greater the achievements of science the deeper may be the abyss of brutality, cruelty and vandalism. That is probably why, whilst prohibiting some minor offences and crimes, the written laws of warfare did not deal with the very great crimes—a fact of which there is shocking evidence at the present time.

But, as has been already stated, the lack of rules " does not mean " that those crimes are being approved of.[7]

It is again the Fourth Hague Convention which covers the silence by saying that the Powers " were inspired by the desire to diminish the evils of war " and, in Art. 22, " that the right of belligerents to adopt means of injuring the enemy is not unlimited."

That is why a general, administrator of occupied lands, commander of a prisoners-of-war camp, soldier, policeman, or any other person taking part in the war, cannot claim immunity, invoking silence of the written law, if he used special methods of cruelty, hardships, caused " unnecessary suffering "—as all these methods are prohibited by the unwritten, if not by the written, rules of war.

[5] Holland: The Laws of War on Land (Oxford, 1908), p. 61, where reference is made to reprisals in connection with the Brussels Convention.
[6] Feilchenfeld: The International Economic Law of Belligerent Occupation (Washington, 1942), p. 14.
[7] Merignhac: De la responsibilité pénale des actes criminels commis au cours de la guerre de 1914—1918 (R.D.I. 3 ser. vol. I, 1920), p. 59.

4

MUNICIPAL LAWS OF WARFARE

We have arrived at the conclusion that the laws of warfare altogether are a great compromise resulting from the conflict between the command of law and the necessities of war. The International Rules of Warfare are an attempt to lay down these principles, based on compromise, in the form of international agreements between civilized States. This leads us one step further, to the application of the rules of warfare, to the ultimate object of law, *i.e.*, the individual.

War does not mean an end of law. Laws, acts and decrees remain in force unless special arrangements are made to terminate their binding force definitely or for the duration only. As pointed out, necessities of war call for extending law on one side and providing exceptions on the other. Municipal law remains the foundation on which is based the treatment of the individual who violates the law.

In times of war criminal acts are governed by:—

1. PENAL CODES

The main field of crimes committed during a war is covered by penal codes. All of them contain stipulations concerning crimes committed both in time of peace and time of war. Usually, no provisions are made limiting the time when the crime can be committed, whether it is in peace or in war.

2. SPECIAL PENAL LEGISLATION

(a) Besides the criminal codes in force in various countries, there are also laws concerning special crimes. Amongst them the most recent legislation contains special stipulations "concerning the Security of the State." We find such laws in Belgium,[1] Brazil, France,[2] Germany, Greece, Hungary, Italy, the Netherlands, Norway, Poland,[3] and many other countries.[4] Many of them provide for the prosecution of both nationals and foreigners, as the crime is so seriously viewed.

[1] Loi du 4.8.1914, et arrêtés-lois des 11.10.1916 and 8.4.1917 modifiant les articles 113—123 de Code Pénal.

[2] Loi du 27.6.1866.

[3] Decree of 24.10.1934.

[4] See Pella: La Repression des Crimes contre la Personnalité de l'Etat (Recueil des Cours, The Hague, vol. III, 1930), p. 775.

(b) The State is bound to protect its safety, in particular in times of war. The United States have their Articles of War, by which Congress introduced legislation concerning the Armed Forces, and the trial and punishment of those who violate the stipulations.

On that basis and being the " executive Power " the President of the United States issued, after the outbreak of this War, in July, 1942, a proclamation by which he provided for the trial and punishment of acts of " sabotage, espionage, hostile or warlike acts or violations of the laws of war." [5]

The same can also be said of the Emergency Powers (Defence) Act, 1939, and the Defence (Trading with the Enemy) Regulations, 1940. Similar legislation abounds in other States.

3. MILITARY CODES AND INSTRUCTIONS TO ARMIES

Issued by almost all States, military Codes contain provisions adapted to the necessities of war and military life and directed against those who violate law. Most of them were issued at the end of the last and the beginning of this century. The first important document in this direction was Order No. 100 issued for the American Army. It was the Civil War which was the occasion for these regulations. A Committee was set up headed by General Hitchcock and the draft proposals were prepared by Dr. Francis Lieber. They were issued with the consent of President Lincoln under the title : " Instructions for the Government of Armies of the U.S.A. in the field." This Order No. 100 is even now the outstanding document in this respect. It was followed by many others. [6]

1871:	*Netherlands :*	A Practical Manual of the Laws of War, prepared by General den Beer Portugael.
1874:	*Belgium :*	Code prepared by Prof. Bluntschli, of the rules and usages of war is mainly based on Dr. Lieber's principles.
1877:	*France :*	Manuel de Droit International à l'usage des officiers de l'Armee de terre.
1878:	*Serbia :*	Manual of Military Instructions for Officers.
1878:	*Switzerland :*	Militaerstrafgesetz, prepared by Prof. Hilty.
1881:	*Argentine :*	The Spanish edition of the French Manuel.
1883:	*Great Britain :*	Manual of Military Law.

[5] Art. II, § 1, cl. 1, U.S. Const. See also the decision of the U.S. Supreme Court in the case of German Saboteurs, July 31st, 1942, A.J.I.L. January, 1943, v. 37, p. 156.

[6] See Hugh H. L. Bellot: War Crimes, Their Prevention and Punishment (Transactions of the Grotius Society, 1917, vol. II), pp. 38—40).

1893: *Spain :*	Text-book of the Laws of War used later as lectures in military schools.
1902: *Prussia :*	Prussian General Staff: Kriegsbrauch im Landkrieg.
1904: *Great Britain :*	The British Government issued the book by Prof. Holland on " Laws and Customs of War on Land " for the Army. It was followed by several editions of the British Manual of Military Law.
1904: *Russia and Japan* ·	Issued for their armies' instructions in the field.

Among the many documents issued on the subject there are two which confront each other from the extreme points of view. One is " Order No. 100," the Instructions for the American Armies, which was a great achievement, rising above all other documents of this kind by its great ideas and deep feeling of responsibility. Its author may be rightly proud of it.

The other is the German " Kriegsbrauch im Landkrieg."[7] These German principles are a challenge to law and a parody of it. It has been rightly said that " the peculiar logic of this book " consists for the most part in ostentatiously laying down unimpeachable rules and then quietly destroying them by debilitating exceptions.[8] The book as a whole is a reflection of Moltke and Clausewitz and their ideas about warfare. It has been a well-established practice of the German General Staff to agree with certain principles of law, but to destroy them by different instructions in practice. They completely misrepresent the idea of military law and the laws of warfare which are only exceptional rules, raising them to the level of laws superseding all rules binding otherwise.[9]

A step further in this work of destroying law by " rules of warfare " we find in other publications of the German General Staff. They are dictionaries issued for the armies in occupied countries.[10] These

[7] J. H. Morgan: The German War Book (London, 1915).

[8] Morgan, *ut supra*, p. 1. In the Introduction it says: " By steeping himself in military history an officer will be able to guard himself against excessive humanitarian notions; it will teach him that certain severities are indispensable to war " (p. 55). It goes on to say that military history will teach the officer " whether the governing usages of war are justified or not, whether they are to be modified or whether they are to be observed." Thus, it makes the officer free to decide whether to obey the rules of warfare or not at his own discretion.

[9] An example from the recent practice will also supplement the picture: General von Brauchnitsch issued on September 1st, 1939, in his capacity as C.-in-C. of the German forces in the war against Poland, a proclamation in which he says: " The Army does not regard the population as its enemy. All the provisions of law will be respected " (VBl, B.G. No. 1, p. 1). All following orders and decrees have *via facti* invalidated this order. (See German Occupation of Poland (London, 1941).)

[10] The dictionaries for soldiers, issued by Lt. F. Sulzberger, German-Polish, contains on p. 10 the following sentence: " If you lie you will be shot." The German-

dictionaries suggest questions, sentences and wordings which are in contradiction to law and are not permitted by the international laws of warfare in times of war.

4. MARTIAL LAW

This is a body of special legal stipulations which are introduced in fighting areas, cases of special emergency, and war situations.

Provisions for martial law and martial courts are as a rule contained in military Codes. In view of the fact, however, that martial law is so distinct an institution, we put it under a separate heading here. Martial law is understood to include all measures introduced by a Commander-in-Chief in the field " supplementing or wholly or partially superseding the laws ordinarily enforced in a given district."[11] It has been stated with authority that these measures should " be guided by the laws and customs of war as generally accepted."[12] It is very often the case that martial law is very arbitrary, going beyond these limits. But it is generally agreed that a minimum standard of justice is imperative and must be prescrved even in areas where martial law has been introduced.[13]

In these four bodies of legal stipulations we find the principles of warfare laid down for soldier and civilian. They are the municipal laws of peace adapted, adjusted and extended to the conditions war brings about.

Altogether the rules of warfare have, therefore, to be sought for in:—

(1) The written international rules of warfare embodied in international agreements.

(2) The unwritten International Law, as defined in the Hague Conventions and Art. 38 of the Statute of the Permanent Court of International Justice.

(3) Municipal legislation.

Russian Dictionary for German soldiers contains the sentence, " Should food be hidden, the village will pay a fine of "; the same is in the Polish-German Dictionary, p. 31.

In the German-French Dictionary, von Weltzien, Berlin, Mentor Verlag, we find " The village will be burnt down " (p. 169).

There is no doubt that these questions and sentences suggested to soldiers in occupied countries are enticements to crimes.

[11] Prof. Holland: The Laws of War on Land (Oxford, 1908), p. 14.

[12] Holland: as above, p. 15.

[13] G. Schwarzenberger: War Crimes and the Problem of an International Criminal Court (Czechoslovak Year-book of International Law, London, 1942), p. 70.

5

CRIMES IN WARTIME

CRIMES and violations of penal law are in time of war governed by much the same laws as in time of peace. This refers to offences which have the same features as they would have if committed in peace. A Frenchman who, in time of war, shoots his wife because he suspects her of having committed adultery will come before the same Court as if he had done so in time of peace. A Japanese who resided in Singapore in 1942 and stole some goods from a local shop was liable to the same punishment as if he had committed the theft before 1942, while Singapore was under British rule. Both at home and in occupied countries the laws remain with regard to criminal offences as they were before the war.[1]

War does, however, increase the catalogue of crimes; it opens "new possibilities" for their commission. Belligerent armies facing each other are bound to comply with the rules of warfare. Should their members fail to do so, they are liable to punishment provided by law. A belligerent army may occupy the country of the enemy and after having done so is under the obligation to obey law. Should members of this army fail to do so, they are liable to punishment. These new conditions and circumstances create types of offences which are different from those which can be committed in time of peace; their characteristic feature is the fact that they are connected with war as such, with the conduct of war, and with the rights and duties imposed upon belligerents in war.

Here are some examples:—

Commander Helmuth Patzig, of the German Navy, sank without warning the British Hospital Ship "Llandovery Castle," and subsequently fired upon and sank boats containing the survivors with the consequent loss of 234 lives. This happened during the last World War.[2]

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[1] Art. 43 of the Hague Regulations stipulates: "The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all measures in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

[2] Patzig was one of the men to be tried after the last war. He was supposed to appear in Leipzig. He was not tried, however, as the German authorities stated that he could not be "traced."

The deed of Commander Patzig was connected with the war in which he was engaged. It was a typical case of mass murder, qualified as such by every Penal Code in all civilized countries. The International Laws of Warfare did not provide any exception for his deed, as it was contrary to the stipulation of Art. 1 of the Tenth Hague Convention for the adaptation of the principles of the Geneva Convention to Maritime War.

And here is another example:—

The German General Stenger, Commander of the 58th Brigade, issued on August 28th, 1914, two orders containing the following:—

(a) As from to-day no prisoners will be taken. All prisoners, wounded or not, must be killed.

(b) All prisoners should be massacred, whether they are with arms or without; even those taken in greater units ought to be massacred. Not one enemy must be left alive behind us.

Those charged with putting this order into operation were Lt. Leule, Capt. Schroeder, Commdr. Mueller, Capt. Curtius and Meier.[3]

The order of General Stenger was a typical incitement to crime—to murder. His deed comes under the rules of Penal Codes. He could not justify his act by the International Laws of Warfare, as it was contrary to Art. 4, Art. 7, Art. 13, Chapter II, and Arts. 22 and 23, Chapter III of the Fourth Hague Convention, and Art. 21 of the Convention applying the Geneva Convention of August 22nd, 1864.

And during the present war:—

The following happened in December, 1939, in the borough of Wawer, near Warsaw, under German occupation:

"shots were exchanged between some German policemen and a delinquent whom they were pursuing. One of the policemen was killed. The place was surrounded by a detachment of German 'Landesschuetzen' and the following night 107 males aged from 15 to 60 years were dragged from their homes and killed with machine guns."[4]

". . . In the centre of Orel the Germans set up a gallows and hanged old men who protested against the robberies. Alongside them they hanged several citizens who refused to help the Hitlerites in their plundering of the population's clothing and provisions."[5]

While being violations of the Hague Rules (Art. 46, etc.), these deeds are definite crimes in the eyes of the municipal legislator. So also is the following order of the Chief of Staff of the 14th Rumanian

[3] General Stenger's name was submitted by the French Government for trial, *ut supra*. See R.D.I. vol. I, 1920, p. 62.

[4] See The German Occupation of Poland, Extract of a note, issued by the Polish Government (London, 1941).

[5] Revealed in the Molotov Notes, sent by V. M. Molotov, People's Commissar for Foreign Affairs, to all Governments with which the U.S.S.R. has diplomatic relations, on January 6th, 1942 (published by H.M. Stationery Office, 1942, p. 5).

Division, No. 24220, issued by Colonel Nikolaescu, which says: " Grain, large-horned cattle, small-horned cattle, poultry, all this must be taken away from the population for the army. In every home it is essential to make a careful search and to seize all clothing and whatever else is to be found; for the slightest resistance shoot down on the spot and burn the houses."[6]

Mass murder: The International rules of warfare do not provide any exceptions, on the contrary, Arts. 46 and 50 of the Hague Regulations forbid acts of this kind.

These examples show that during war there are crimes which can be distinguished from crimes in peace by some accessory features.

They have something in common, and that is why they have been labelled as a special type of crime called: " war crimes."

It was in fact due to the events in the last and the present war that both lawyers and laymen began to use the term " war crimes." The term has been accepted into the " war dictionary." No strict definition has been attached to it; it has usually been used in a very loose way. The result is the lack of clear and precise differentiation of these crimes.

On the pages which follow we suggest a new approach to the problem as such, and all its elements. It will enable us to draw the line of demarcation between " crimes in wartime " and " war crimes."

[6] Molotov Notes, as above, p. 6.

6

ELEMENTS OF WAR CRIMES

WORKING from examples we shall be able to establish the common elements in those crimes which we should be entitled to call "war crimes."

One day after the outbreak of war between Great Britain and Germany, *i.e.*, on September 4th, 1939, a German U-boat sank after torpedoing without warning the passenger vessel "Athenia." 400 lives were lost.[1]

"In January, 1940, the German authorities at Plock in Poland, conducted a group of Jews to the building of the Catholic religious seminary . . . , the Jew wearing the finest vestments was picked out and ordered to smash a bust of Christ, and was given a hammer to work with. When the Jew hesitated, and when threatened fearfully aimed a blow at the head of the figure, one of the Germans swore at him, and told the others that he, the German, would show him how to smash heads. Using the butt-end of his rifle he smashed the Jew's head in."[2]

On August 22nd, 1914, General Buelow, the Commander of the 2nd Army at Liége, issued the following proclamation:—

> "It was with my consent that the General C.O. burnt down the whole village and a hundred persons were shot."[3]

Wilhelm Hohenzollern ordered pillage in the areas of Mezières Charleville, the deportation of inhabitants, devastation, etc.[4]

During the last War Karl Heynen "was in charge of a working camp established at the Friedrich der Grosse mine at Herne in Westphalia." It was proved that "he consistently ill-treated British prisoners-of-war under his charge by knocking them about with the butt-end of his rifle and with his fists."[5]

Dr. Frank, the General Governor of the occupied areas of Poland ordered the deportation of Poles for forced labour to Germany, the detention of Polish citizens in concentration camps in which they were killed by ill-treatment, the mass shooting of hostages, massacres of Jews, mass confiscation of property, destruction of works of art, etc.[6]

The Order of the Day of December 24th, 1941, issued by the Commander of the 98th German Infantry Division, contains the following passage:—

> "Stocks of hay, straw, foodstuffs, etc. must be burned. Ovens in dwelling-houses must be put out of commission by placing hand-grenades therein, thus rendering their further use impossible . . ."[7]

Lt.-General Beyer signed the following instruction of the Command of the Northern German Army Group No. 1.422—41, on November 6th, 1941:—

> "All felt boots in the possession of the Russian civilian population, including children's, are subject to immediate requisition. The possession of felt boots is prohibited and should be punished just as unauthorised possession of arms."[8]

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[1] See A.L. Goodhart: "What Acts of War are Justifiable?" (Oxford Pamphlet, 1940).
[2] See The German New Order in Poland (London, 1941, Hutchinson).
[3] Buelow was one of those claimed by the French Government after the last War (see R.D.I. 1920, p. 63).
[4] *Ut supra.*
[5] See A.J.I.L. vol. 16, 1922, p. 633.
[6] See German New Order in Poland, as above.
[7] See The Molotov Notes on German atrocities (Supplement to Soviet War News Weekly, May 7th, 1942, p. 1).
[8] See as above.

On April 21st, 1943, the President of the United States made it public that the Japanese Government executed "some members of this country's armed forces who fell into Japanese hands." This concerned the crews of two American aeroplanes who fell into the hands of the Japanese after having raided Japan on April 18th, 1942.

The claim put forward by the Japanese was that they had intentionally bombed non-military objectives, had shot at civilians, and had confessed to having done so.[9] It turned out, however, that six of the American airmen were "tortured unmercifully before being executed."[10]

Such examples could be continued indefinitely. The above, however, suffice in our view to present a clear picture of the "type."

They have the following features in common:—

I. *They are acts of violence*, whether it be the sinking of the "Athenia" or "the smashing of the Jew's head," whether it concerns the orders of General Buelow, Frederick Wilhelm Hohenzollern, Frank, Lieut.-General Beyer or the deeds of Karl Heynen or maltreatment of United States airmen. As such they are punishable according to municipal penal laws of warfare.

II. *They are committed under specially favourable circumstances created by the war.*—All those responsible for the deeds enumerated above acted without any scruples and without exposing themselves to special dangers; their situation was favourable. (Commanding Officers, Administrative Authorities.)

III. *They are committed by a special group of persons in connection with the war.*—This also is a common feature of all these acts of violence. It concerns Commanders of armies, administrators of occupied territories, members of the police in occupied countries, persons in charge of prisoners-of-war camps, and many other persons falling into the same group.

IV. *They are committed during war.*—In all these cases the factor of time is identical. They took place during a war, while the belligerent States were engaged in fighting.

[9] Press Release Dept. of State, No. 148, April, 1943; for the reaction of the American Government to it and comment on the subject, see Charles Ch. Hyde. Editorial Comment, A.J.I.L. July, 1943, pp. 480—482.

[10] Reported by a former prisoner-of-war in Japanese hands, Mr. J. B. Powell, former editor of the "China Weekly Review of Shanghai" ("Observer" Newspaper, January 30th, 1944).

V. *They are committed on the battlefield, behind it,* in the State of which the culprit is citizen, in occupied countries, or on the high sea. They can, however, *mutatis mutandis,* also be committed in other areas.

VI. *They are committed against* soldiers and other members of the armed forces of the other belligerents, against the civilian population in the occupied country, against the property of both, or property of the other belligerent State. But they can also be committed on other subjects and goods.

VII. *They are not covered by the exceptions provided by the International Laws of Warfare.*—The sinking of the "Athenia" was contrary to the stipulations of the London Naval Treaty of 1930, which says:—

"A warship whether surface vessel or submarine may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety."

Germany declared accession to the London Protocol in 1936.

The scene which took place in Plock and the acts committed there were contrary to the stipulations of the Hague Regulations, namely, Art. 46:—

"Family honour and rights, the lives of individuals and private property, as well as religious convictions and liberty of worship, must be respected . . ."

Art. 56 of the Regulations says:—

"The property of the communes, that of institutions dedicated to religious worship, charity, education, art and science, even when belonging to the State, shall be treated as private property."

(And Art. 46 protects private property.)

"All seizure of, and destruction, or intentional damage done to such institutions, historical monuments, works of art or science, is forbidden . . ."

General Buelow's, Frederick Hohenzollern's and General Beyer's orders and the order of December 24th, 1941 issued to the German Army on the Eastern Front, were contrary to Arts. 46, 47, 50 and probably also 56, of the Hague Regulations. So was the mass shooting of civilians in Wawer.

The orders issued by Dr. Frank were violations of all the rules of belligerent occupation as laid down in the Hague Regulations.

Karl Heynen or the Japanese authorities responsible for the torturing of American airmen, cannot claim exemption either. They acted contrary to Art. 2, Geneva Convention (1929): "They shall at all times be humanely treated and protected, particularly against acts of violence."

The seven elements given above are the essentials for qualifying war crimes. Their analysis will lead us to a clear definition of what a war crime is.

7

WAR CRIMES—ACTS OF VIOLENCE

ALL " war crimes " are characterized by violence. They are acts of violence in both the positive and negative sense. In their positive meaning they are the application of brute force, attacks against life, health, property and honour. They do, however, include also acts of violence in their " negative " sense, *e.g.*, the refusal to fulfil a fundamental duty and obligation, which results in death, grievous bodily harm, loss of property or pillage, committed by others. The present war provides us with abundant examples of types. A typical case of " negative violence " is the refusal to supply even the minimum of food to the population of occupied countries or prisoners-of-war, such refusal sometimes involving violence.

The right definition in this, their aspect, was given in the Declaration of St. James's Palace of January 13th, 1942, where the term " violence " is expressly used. Violence is an *essential* of the concept " war crime."

The roads which lead to violence, both as an aim and as a means to an end, are very varied. They may include murder, pillage, torture as isolated cases or in the mass, though the written law itself remains correct. It may, therefore, occur that the belligerent party complies with international obligations in issuing Instructions to Armies, local legislation, etc. while every day these rules are being violated by those very authorities who are responsible for them. General Brauchnitsch's order, issued on September 1st, 1939, quoted above, and the practice which followed it, are typical examples of this.

Violence may take the form of law in disguise. It may be commanded, permitted, or sanctioned by law. It does not cease to be violence, however.

It may often take the shape of enticement to violence and crime either as an instruction, order of the legitimate Commander-in-Chief, legislative act or as judgment of Court, carrying out a criminal act.

Many incidents of this kind have been recorded during this War.[1]

[1] Many instances quoted in Molotov's Note, referred to above, German Rule in Poland; also Justice Outlawed: Administration of Law in German-occupied Territories (London, 1943).

They result from illegal legislation and Courts administering judgments in compliance with them. Both bear all the marks of violence. It would hardly be agreeable with principles of elementary justice were we to accept these rulings as law.[2]

Negative violence, the refusal to grant essential rights has also frequently occurred during the War, 1914—1918, and the present conflict.

On January 31st, 1940, Mr. Ley, the German Minister for Labour, declared:—

"A lower race needs less room, less clothing, less food, and less culture, than a higher race. The German cannot live in the same fashion as the Poles and the Jew."[3]

As a result of this and other similar authority the food allotted to people in German-occupied lands was reduced to starvation rations. Men, women and children were not allowed to draw larger quantities of food; they were forcibly deprived of all those things which are required for the maintenance of bodily health. The German authorities reduced the amount of food in countries under German war occupation to 400 and even 250 calories a day. There is no doubt that these measures carry all the qualifications of "violence" in its negative meaning.

A typical list of war crimes has been set up by the "Commission on Responsibilities," which was charged with the task of going into the matter of atrocities committed by the Central Powers during the 1914—1918 War.[4]

The list comprises thirty-two types:—

1. Murders, massacres, systematic terrorism.
2. Putting hostages to death.
3. Torture of civilians.
4. Deliberate starvation of civilians.
5. Rape.
6. Abduction of girls and women for the purpose of enforced labour.
7. Deportation of girls and women for the purpose of enforced prostitution.
8. Internment of civilians under inhuman conditions.
9. Forced labour of civilians in connection with military operation of the enemy.
10. Usurpation of sovereignty during military occupation.

[2] See Sir Henry Slesser, in "Justice Outlawed," quoted above, p. 2.
[3] Rationing under Axis Rule, Report 2 of the Inter-Allied Information Committee, London, 1942.
[4] See A.J.I.L. vol. xiv, 1920, p. 144.

11. Compulsory enlistment of soldiers among the inhabitants of occupied territory.
12. Attempts to denationalize the inhabitants of occupied territory.
13. Pillage.
14. Confiscation of property.
15. Exaction of illegitimate or of exorbitant contributions and requisitions.
16. Debasement of the currency and issue of spurious currency.
17. Imposition of collective penalties.
18. Wanton devastation and destruction of property.
19. Deliberate bombardment of undefended places.
20. Wanton destruction of religious, charitable, educational and historic buildings and monuments.
21. Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew.
22. Destruction of fishing boats and of relief ships.
23. Deliberate bombardment of hospitals.
24. Attacks on and destruction of hospital ships.
25. Breach of other rules relating to the Red Cross.
26. Use of deleterious and asphyxiating gases.
27. Use of explosive or expanding bullets, and other inhuman appliances.
28. Directions to give no quarter.
29. Ill-treatment of wounded and prisoners-of-war.
30. Employment of prisoners-of-war on unauthorised works.
31. Misuses of flags of truce.
32. Poisoning of wells.

Although very exhaustive, the list will have to be supplemented by the many new crimes which science has made possible, and which have been continuously committed by some of the belligerents during the war which started in 1939.

Each of the deeds enumerated finds its equivalent in municipal criminal law. It can therefore be qualified as crime, according to the principle—*nullum crimen sine lege;* it can also be punished because of its compliance with the rule—*nulla pœna sine lege.*

8

CIRCUMSTANCES IN WHICH A WAR CRIME IS COMMITTED

THE circumstances in which a war crime is committed are very important in its qualification. It is the circumstances in which the culprit acts or refuses to act, that raise his deed or omission to the grave category.

When an act of violence is committed by an officer commanding his battalion or regiment, a warden in a prisoners-of-war camp, an administrator in occupied country, an airman, or a captain of a ship, each of them acts in circumstances which facilitate the commission of the crime. The gravity is not affected by the dangers and risks of his deed (consider, for example, the case of an airman diving to a very low level, exposing himself to anti-aircraft fire, in order to machine-gun a market place or school). The risks he runs while committing the act of violence are not relevant, but his expectations are. He may act under favourable circumstances, which result from the express or tacit consent of his superior, his commanding officer or Government. The consent is expressed either in the authority given to him, in suggestions made, or honours or decorations which await him after he has acted successfully in the particular case.

Recent examples are provided by men like Seyss-Inquart or Heydrich. Both of them acted with deliberate brutality. Both of them expected promotion and praise from their superiors for the acts of violence for which they were responsible. Examples of this tacit approval can also be found in the last War—when the German Emperor decorated and promoted commanders of U-boats for their "heroic" action in sinking undefended ships.

A characteristic feature of every war crime is, therefore, the hope or reasonable expectation, very often also the approval and help given to the culprit beforehand. War criminals usually have the blessing of their superiors. As a rule they can be assured of impunity. In other cases war criminals act without support of their superiors, abusing the rights given to them while they have power on the

battlefield, in occupied lands or in prisoners-of-war camps, or any other power over citizens of the other belligerent or neutral.

This is the dishonourable aspect of war crimes. This is what deprives them of certain privileges granted to some types of offenders.[1] These circumstances also exclude from the qualification of war criminals those who, living under war occupation, under the yoke of the lawless belligerent, defy his orders, and commit acts of desperate bravery trying to rid their people of the invader. Neither those who killed Heydrich, the German-Governor of occupied Czechoslovakia, nor those who shot the German Police Inspector Krueger in Warsaw could be classified as war criminals. They fought their way through tremendous odds, risking their own lives and the lives of their families. They deserve all the privileges which law grants to political offenders.

Let us take the case of Governor Frank, in charge of German-occupied Poland in this war, who, abusing his power, ordered mass murders, deportations, reduced food rations, ordered confiscation of property, and pillage.[2] The deeds of those Czech or Polish patriots who carried on underground resistance are not to be compared with his. The Czechs or Poles have committed crimes (it would be unjust to pass judgment on them otherwise), but they have done so as martyrs, as political offenders.

By reason of the favourable complex of circumstances a war-criminal is guilty of a most dishonourable crime. He uses the favourable conditions and circumstances of war in order to commit acts of violence under the cloak of law by abuse of his power, very often with the approval or consent of his superiors.

This is his personal qualification.

[1] See below, Chapter on political crimes.

[2] See German New Order in Poland. See also Reports of the Czechoslovak Government on Nazi Terror in the Protectorate.

9

THE CULPRIT

A WAR crime is connected with war. Consequently in the main it can be committed by persons who take an active part in war.

In qualifying the culprits we have two groups:—

I. War criminals *sensu stricto.*

II. War criminal *sensu largo.*

I

A. MEMBERS OF THE ARMED FORCES

Members of the armed forces are all those who are in the Army, Navy and Air Forces.[1] Amongst them there are first of all members of the regular Army, but Militia and Volunteers are also included, in view of the fact that, as we know, there are States which have no permanent Army, Militia or Volunteers being their only military force. Art. 1 of the Fourth Hague Convention, laying down some principles which concern Militia and Corps of Volunteers, says:—

"the laws, rights and duties of war apply not only to the Army, but also to Militia and Corps of Volunteers, fulfilling the following conditions: (1) that of being commanded by a person responsible for his subordinates; (2) that of having a distinctive emblem fixed and recognisable at a distance; (3) that of carrying arms openly, and (4) that of conducting their operations in accordance with the laws and customs of war."

As to the personal composition of the armed forces it is irrelevant whether "it is based on conscription or not, whether foreigners as well as subjects are enrolled and the like."[2]

Art. 3 of the Hague Regulations extends the connotation of the phrase "armed forces," stipulating that they may consist of "combatants and non-combatants." The latter are, however, not members of the armed forces *sensu stricto.* They include doctors, nurses, chaplains, contractors, newspaper correspondents, etc. Formerly it was questionable whether women could be regarded as members of

[1] Art. 62 of the Hague Air Warfare Rules, 1923. not ratified, provides that "aircraft personnel engaged in hostilities come under the laws of war and neutrality applicable to land troops."

[2] See Oppenheim-Lauterpacht: International Law, v. 2, 1940, p. 203.

the armed forces. To-day it is no longer so. To-day women are equal with men as far as the armed forces are concerned. The Geneva Convention of 1929 provides that women may become prisoners-of-war, thus putting them on the same footing as men.[3]

Art. 2 of the Hague Regulations contains a further extension of the notion "armed forces." It says:—

"The population of the territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organise themselves in accordance with Art 1, shall be regarded as belligerent if they respect the laws and customs of war."

These are the so-called levée *en masse*. It concerns territories which have not yet been occupied.

The employment of coloured races.—The question of special qualifications which may be necessary for the enrolling of persons into the armed forces has been frequently discussed. It was at one time a subject of controversy whether coloured people and barbarous forces could be employed in armies. To-day the question no longer admits of discussion. The colour of the skin is of no importance, should the general conditions provided by law be fulfilled.

The nationality of members of the armed forces.—The law of nations makes no reservation on the subject of the nationality of members of the armed forces. The States are free to select persons they would like to employ in their armies. It is, however, obvious that a national who enrols with the Army of a State which is at war with his own country runs the risk of being prosecuted in his national Court. Many of the contemporary penal codes contain stipulations to this effect.[4]

It must be understood that the crime a man is committing by joining the Army fighting his own country is a purely internal matter of the State concerned.[5]

Privateers.—Up to the Declaration of Paris, privateers were members of armed forces when commissioned with letters of marque. The Declaration of Paris laid down in Art 1: "Privateering is and remains abolished."

[3] Art. 3 of the Geneva Convention, 1929, reads: ". . . Women shall be treated with all consideration due to their sex . . ." See also Oppenheim-Lauterpacht, p. 203.

[4] Art. 101 of the Polish Penal Code; Code penal belge, Art. 117; Swedish, Chap. VIII, 1; Chinese, Art. 109. The problem of *sujets mixtes* is interesting. See Pella: *op. cit.* 723—724.

[5] The case of a man who, after having joined the Army of the enemy of his country, is taken prisoner by his national Army, provides an interesting problem.

Merchantmen.—In naval warfare the problem of converted merchant ships has been a subject of controversy, the point being whether they can be regarded as members of the armed forces.[6] The Seventh Hague Convention of 1907 regulates the question by laying down that " no merchant ship converted into a warship shall have the rights and duties appertaining to vessels possessing that status unless it is placed under the direct authority, immediate control and responsibility of the Power whose flag it flies " (Art. 1). It goes on to say: " merchant ships converted into warships must bear the external marks which distinguish the warships of their nationality." Arts. 3, 4 and 6 contain further conditions on the subject, while Art. 5 stipulates that a converted merchant ship " is bound to observe in its operations the laws and customs of war."[7]

The question still remains open where the conversion of a merchant ship has to take place. The Hague Convention deliberately avoids the issue, stating in the preamble:—

" that the question of the place where such conversion is effected remains outside the scope of this agreement and is in no way affected by . . . " the rules contained therein.

Thus, it has been left to the free discretion of individual States to decide whether the conversion is to take place on the high seas or in the harbours of the States whose flag the merchant ship flies.[8]

Crews of merchant vessels.—The crews of merchant vessels enjoy the status of armed forces if they defend themselves against an attack. They do not do so if they attack without being provoked, except in special circumstances.

Air warfare.—It has already been said above that members of the air force enjoy the same status as members of the land forces. This was not laid down by the Hague Conventions, as at the time of the Hague Conferences air warfare played a very small part in warfare altogether. The rules were the result of the subsequent development of aerial navigation and were laid down by a Commission of jurists in 1923.

[6] See Oppenheim-Lauterpacht, *op. cit.* p. 208, on the historical development of the problem, and for literature.

[7] Many converted merchant ships have taken part in operations during the last and present War, *e.g.*, the famous case of " Graf Spee " and the auxiliary vessel " Tacome," in 1939.

[8] Great Britain holds the view that merchant vessels cannot be converted on the high seas. See Lauterpacht, *op. cit.* p. 211.

B. MEMBERS OF THE ADMINISTRATION OF PRISONERS-OF-WAR CAMPS

" Prisoners of war may be interned in a town, fortress, camp or any other locality and are bound not to go beyond certain fixed limits, but they can only be confined as an indispensable measure of safety "

says Art. 5 of the Hague Regulations. Arts. 4—20 contain detailed stipulations concerning the treatment of prisoners-of-war. The Geneva Convention of 1929, signed by forty-seven States, incorporates all these rules except 10—12 relating to release on parole.

As to the camps themselves, it is said that the prisoners ought to be removed from the fighting zone as soon as possible, and an exception is provided for those who cannot be removed on account of their wounds or for other reasons of health. (Art. 7 and Art. 25.)

The belligerents, in whose power the prisoners-of-war are, are bound to obey certain rules. They have to treat humanely all prisoners-of-war and protect them against acts of violence, " from insults and from public curiosity " (Art. 2). " Measures of reprisal against them are forbidden " (Art. 2).

They have to provide them with food " equivalent in quantity and quality to that of the depôt troops." " All collective disciplinary measures affecting food are prohibited " (Art. 11). Prisoners have to be supplied with " clothing, underwear and footwear " (Art. 12). Infirmaries have to be established in each camp (Art. 14), and " medical inspection of prisoners-of-war shall be arranged at least once a month " (Art. 15).

While being entitled to employ prisoners-of-war, with the exception of officers and persons of equivalent status, the detaining Power may not employ them on work for which they are physically unsuited (Arts. 28, 29). " The duration of daily work . . . shall in no case exceed that permitted for civil workers of the locality employed on the same work " (Art. 30).

Prisoners-of-war may not be employed in work which has " direct connection with the operations of the war," " manufacture or transport of arms or munitions of any kind " (Art. 31), or is " unhealthy or dangerous " (Art. 32).

The status of prisoners-of-war is also to be accorded to " persons who follow the armed forces without directly belonging thereto, such as correspondents, newspaper reporters, sutlers or contractors " . . . " provided they are in possession of an authorization from the military authorities of the armed forces which they were following " (Art. 81).

In order to carry out these regulations, the belligerent is bound to employ a staff of administrative personnel, commanders, wardens, doctors, nurses, etc. All of them while carrying out their duties or refusing to do so—if committing acts of violence—may be guilty of war crimes. They are, therefore, potential culprits.

Besides them there are also:—

C. MEMBERS OF CIVIL ADMINISTRATION, MILITARY AND POLICE IN OCCUPIED TERRITORIES

The laws of war envisage the possibility of a territory being occupied by the enemy. The occupying power is vested with certain rights (acts of occupation are laid down in Art. 42 of the Hague Regulations). The rights and duties of the occupying power are, *inter alia* :—

(a) to re-establish and ensure as far as possible, public order and safety (Art. 43);
(b) to collect taxes, dues and tolls imposed for the benefit of the State (Art. 48);
(c) to levy other money contributions (Art. 49);
(d) to collect contributions (Art. 51) and requisitions (Art. 52).

" The occupying State shall be regarded only as administrator and usufructuary of public buildings . . ." (Art. 55).

In order to carry out these obligations and make use of these rights, the occupying power installs in the occupied territory military, civil and police administration. Members of this administration also belong to the group of potential war criminals *sensu stricto.*

D. PERSONS CHARGED WITH SPECIAL FUNCTIONS, POLITICAL, LEGAL OR ECONOMIC, IN CONNECTION WITH WARFARE

The belligerent power may entrust various persons with functions which concern the occupied territory, its economic and political life and legal order. They carry out their functions *ad hoc,* without becoming members of the armed forces or administration. By the mere fact of being entrusted with and carrying out certain functions, they come within the definition of persons engaged in warfare. We have, for instance, trustees appointed by the German authorities in some of the occupied countries in order to administer properties sequestrated—or rather confiscated—by the German authorities in occupied countries.[9]

[9] See Decree concerning the establishment of a trustee office for the General Government of Poland, November 15th, 1939, VBl.GG.BG.I. p. 36, and also note issued by the Polish Ministry for Foreign Affairs (London, 1941).

E. MEMBERS OF PARTY ORGANIZATIONS AND PARA-MILITARY ORGANIZATIONS

The totalitarian States of the twentieth century have to their "credit" the creation of certain organizations which, although not bodies forming part of the administration, have the character of institutions of public law. Hitlerite Germany had the National Socialist Party, which was the "bearer" of the idea of the German State and was inseparably linked with the State. The Party was an institution of public law.[10] Its task was to secure "the closest possible collaboration between the Party and the S.S. (Storm Detachments) on the one hand and the State and the municipal authorities on the other." The Fuehrer's Deputy and the Chief of the Storm Detachments Staff were *ex officio* members of the Reich Government.[11]

In 1937 was set up the National Socialist Air Service (National Sozialistischer Fliegerkorps) the so-called N.S.F.K., as a public corporation. The Defence Detachments (S.S.) were also an autonomous formation of the National Socialist Party (decree of 1934). There were also the National Socialist Mechanised Corps (N.S.K.K.), the Foreign Organization of the Party and the Hitler Youth, whose leader was directly subordinate to the Fuehrer.

Similar is, or rather was, the structure of the Facist Party in Italy and the organization of Fascist Youth (Balilla, Pre-Militari, Giovanni Fascisti).

In view of these special functions of State Parties within the totalitarian States, members of those parties had a special responsibility and qualification as semi-officials or full officials of the State.[12]

The groups enumerated above and persons belonging to them form the restricted class of those who may become war criminals *sensu stricto*. Upon each of them, be he a soldier, general, warden, governor or policeman, there rests in time of war a certain responsibility and

[10] Das Recht, December 1st, 1939, RGBl.I. p. 1006.

[11] In his instruction to the Party Congress in 1935, Hitler stated that they "are to be regarded as the volunteer army, guaranteeing the stability of the National Socialist revolution." See Cesare Santoro: Hitler Germany, 1938, p. 138.

[12] The relation between State and Party in Nazi Germany is also explained in an article by Dr. W. Stuckart: Partei und Staat (Schriften des NS Reichs-Wahrerbundes in Oesterreich) (Vienna, 1938). In the same volume, Dr. G. Neesse writes: "For the outside the State creates the laws, but it does so under the influence of the party and within the outlines and principles established by the party. . . . The Party has the primate while the State is behind it."

duty to obey the law and to comply with its regulations. Privileges attached to each of the functions or offices result from compliance with law. He who does not raise himself to the high standard of chivalrous warfare cannot claim any rights resulting from his being in uniform.

II

PERSONS WHO MAY BECOME GUILTY OF WAR CRIMES SENSU LARGO

The long list of persons who, according to existing law, may be guilty of war crimes, can, however, be extended. Not only those officially engaged in war may be indicted.

The group of potential war criminals *sensu largo* includes:—

1. *Marauders.*—Marauders are persons who commit pillage, theft, etc., following armies or acting under their cover.

2. *Guerrilla bands.*—Dr. Lieber, the author of the famous Instructions to the Government's Armies in the field (Order No. 100), defines them as " self-constituted sets of armed men, in time of war, who form no integral part of the organized army, do not stand on the regular pay-roll of the army or are not paid at all, take up arms and lay them down at intervals, and carry on petty war (guerrilla),[13] chiefly by raids, extortion, destruction and massacre, and who cannot encumber themselves with many prisoners, and will, therefore, generally give no quarter. They are particularly dangerous, because they easily evade pursuit, and by laying down their arms become insidious enemies, because they cannot otherwise subsist than by rapine and almost always degenerate into simple robbers or brigands."[14] This definition may have been correct at the time Dr. Lieber wrote it, but it certainly does not hold for this war.

Although guerrilla warfare was known in the past, it has acquired special importance during the war which started in 1939, not only in the East, where natural conditions facilitate this type of fighting, but also in European countries occupied by Germany. In view of

[13] The word " guerrilla " is said to derive from the Spanish " guerra " as its diminutive.

[14] Order No. 100. See above, History of the International Laws of Warfare; for text, see Hyde: International Law, chiefly as interpreted and applied by the United States, 1922, vol. II, p. 296. See also Wheaton: Elements of International Law, vol. II, pp. 719—720.

the fact that Germany was forced to fight on many fronts, guerrillas fighting against German forces in occupied countries made continuous attempts to destroy the German war machine. Although irregular in their inception, they have at least in two instances reached the status of regular armies during the present War: the Army of the Yugoslav General Tito[15] and the Army in occupied Poland. They have also been used as special detachments and special troops by the Soviet High Command in the years 1941—1944 on the Eastern Front. By wearing uniforms and complying with the requirements of the Hague Regulations (Art. 1), they have risen above the status ascribed to them by Dr. Lieber. They enjoy the same status as any other army. Where these conditions are not complied with the case may be doubtful. In general, guerrillas should " be treated as regular partisans until special crimes such as murder, or the killing of prisoners, or the sacking of open places are proved against them—leaving the question of self-constitution unexamined."[16]

3. *Armed prowlers.*—Generally known as " persons of the enemy's territory who steal within the lines of the hostile Army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires."[17] Their status is obviously different from that of guerrillas, as they can in no case claim the status of a regular army. They have been rightly defined as " highway robbers or pirates."[17]

4. *Merchantmen* who attack an enemy vessel without having been previously attacked (see above). In this case a merchantman is regarded as a pirate and has to be treated as an ordinary criminal. The characteristic feature of this case is the fact that merchantmen are only in special conditions privileged, and should these conditions occur they can be regarded as members of the armed forces. The condition is an attack by an enemy vessel when the merchantman is forced to self-defence. He enjoys, therefore, a kind of a *qualificatio conditionalis.* It has been authoritatively stated that the right to attack is to be extended to cases when a " merchantman must expect to be attacked without warning by a lawless enemy."[18]

[15] See Mr. Churchill's speech in the House of Commons, February 17th, 1944.
[16] Hyde, *op. cit.* p. 296, vol. II.
[17] Art. 82 of Order No. 100, in Hyde, *op. cit.* vol. II, p. 297.
[18] See Lauterpacht, *op. cit.*, p. 351.

In this connection it is worth recalling an incident which took place in 1915:—

The captain of a British merchant ship, Fryatt, was caught by the Germans, indicted for a crime, court-martialled and executed. This happened on July 27th, 1916. The official German communique stated that Fryatt attempted on March 28th, 1915, to ram a German submarine, when signalled to stop. The German Court added that the British Admiralty, convinced that Fryatt was successful in his action, presented him with a watch bearing an appropriate inscription.

The case of Capt. Fryatt called forth a keen discussion, in which two opposing schools of thought were engaged. One group asserted that a merchant ship is entitled to attack and that the right to attack is unrestricted,[19] while others maintained that there is no unrestricted right to attack. The latter view prevailed and is now a generally established rule—a merchantman is entitled to attack if in danger, either when facing an attack or expecting to be attacked. The execution of Capt. Fryatt was a judicial murder, if only because of the deliberate and unrestricted U-boat warfare conducted by the Germans, as a result of which all merchantmen were in danger of being torpedoed. Capt. Fryatt could expect to be torpedoed, and there was no justification for his execution, as he acted in self-defence.[20]

5. *Any individual.*—Any individual may become guilty of war crimes—*sensu largo*. Modern war reaches the entire population of countries engaged in it and unfortunately provides considerable opportunities for criminals and for criminal actions. In view of this, any individual may be guilty of a war crime.

THE DISTINCTION BETWEEN A WAR-CRIMINAL SENSU STRICTO AND SENSU LARGO

The international rules of warfare grant to those engaged in war, whether as combatants or as fulfilling other functions, certain rights and privileges. These rights result from their status as subjects of warfare. These rights and privileges can be claimed by them when indicted for having committed a war crime. If evidence is produced they are bound to be acquitted. Accordingly, war-criminals *sensu stricto* are those who, having the status of subjects of warfare, commit

[19] H. Bellot: "The right of a belligerent merchantman to attack" (Grotius Society, vol. vii, 1922, p. 43); also Garner: International Law and the World War, vol. I, p. 412, and James Brown Scott, 10 A.J.I.L. 877, both quoted by Bellot.

[20] See Lauterpacht, *op. cit.* p. 362.

acts which are not covered by the privileges based on the International Law of Warfare.

Entirely different is the situation with war-criminals *sensu largo*. They cannot invoke the International Law of Warfare in their defence. They are guilty of ordinary crimes to which *no exceptional rule of warfare can be applied.* Consequently they may become guilty of two types of crimes:—

(a) Crimes which go beyond the exceptions granted to subjects of warfare.
(b) Crimes which if committed by subjects of warfare, may be successfully defended by them, as being within the privileges of warfare, but have no application to non-subjects of warfare (war criminals *sensu stricto*) because of lack of war status with them.

War-criminals *sensu largo* are deprived of the defence of privilege based on the International Laws of Warfare.

A detachment of soldiers, who succeed in stealing behind the enemy's lines of defence and destroy bridges and railway trucks, in order to cut his way of retreat, cannot be treated otherwise than as prisoners-of-war. The same being done by a group of soldiers working in disguise as civilians, would entitle the other belligerent to prosecute them as war criminals. Art. 23 (f) of the Hague Regulations, 1907, forbids the improper use of a flag of truce, of the national flag, or of military insignia and uniform of the enemy, as also the distinctive signs of the Geneva Convention.

Detachments of soldiers fighting in the uniforms of their own army are free to carry out all orders aimed at destroying the enemy's forces within the limits of legitimate warfare. But if they wear uniforms of the enemy's army, they are treated as war criminals, being deprived of the right to carry out orders and to perform military operations which they would possess while in their own uniforms. This form of treacherous warfare was practised by the Germans in France and by the Austrians in their offensive against Italy in 1917. It has also been not infrequently used during the recent conflict. Those so acting are employing illegitimate methods of warfare; having lost their status as subjects of warfare, they are unable to claim its attendant privileges, but had they preserved that status their deeds might not be qualified as offences at all.

10

PARTIES TO WAR CRIMES

MUNICIPAL penal law in all its varieties provides for the punishment of persons who in various degrees are connected with the particular offence (crime).

The Penal Codes of civilized States divide those involved into three groups:—

1. *Principal.*—The principal is the individual committing the crime and the main acting personality. However, he may not take any part in the commission of the crime itself: his part may be confined to the preparation of plans, or to the giving of orders or instructions to those who carry them out, yet as the *spiritus movens* he remains the chief responsible person.

The chief of the German U-boat campaign, through which hundreds of defenceless ships have been sunk, Admiral Doenitz, although he himself remained safely in his office, is one of the principals to the beastly crimes carried out on the High Seas. So are the Commanders-in-Chief of the German, Japanese or Italian Armies who ordered the slaughter of the civilian population on the Eastern Front, pillage, murder of hostages, etc.

2. *Accessory before the fact.*—In general the person who inspires, encourages, helps, or abets the principal in his criminal action.

3. *Accessory after the fact.*—The person who helps the criminal by sheltering him, by helping him to escape, destroying evidence against him and thus preventing justice from being meted out to him.

The degree of responsibility and penal liability of both principal and accessories is in every case to be decided by the stipulations of Municipal Law. International Law makes no special provisions as to those groups of accomplices to crime.

The same applies also to the question of competence. "Le compétence se detérmine vis-à-vis des complices en appliquant les règles posées pour les auteurs principaux."[1]

Mutatis mutandis the same rules and principles apply to everybody connected with the particular war crime.

[1] See Travers: Le Droit Penal International, 1922, V, p. 2739, Art. 4.

II

DENOTATION OF TIME

(When can a war crime be committed ?)

WAR is a fact recognized by International Law. It may have the character of an act of self-defence, or of an unprovoked attack, which aims at the realization of certain political or economic objects. Finally, war may have the character of a legal sanction.

When it is an act of self-defence it becomes a measure of the legal system not provided with organs putting law into force. As a sanction it gives the legal system the mark of effectiveness which is so essential. Such a sanction was laid down in Art. 16 of the Statute of the League of Nations.

In recent times many writers have confined the term " war " to criminal wars, while defining other wars as " sanctions " or " police measures." However, that clear-cut distinction is so far impossible.

The formal characteristics of all wars are the same. We hold the view that irrespective of whether the war is legal or illegal a war crime can be committed; the legality of war has no effect on the crime as such. The only difference is that during illegal wars the presumption that law has been violated may be stronger. War crimes can, however, be committed during wars which are sanctions, wars of self defence and wars which are, as such, crimes in International Law.[1]

A war crime can be committed only *during a war.*

In view of this, a reply ought to be given to the following two questions:—

(a) When can a state of war be regarded as having commenced ?
(b) When can a state of war be regarded as having ended ?

(a) The Romans used to begin wars in a very solemn way. The same applied to the Middle Ages which paid very great attention to the formalities connected with the beginning of hostilities.[2]

[1] Compare Sir Robert Young, in Contemporary Review, August, 1942, on the " unsoundness " of the notion war crimes.

[2] Pillet: Les Lois Actuelles de la Guerre (Paris, 1901), p. 61 *et seq.*

The seventeenth and eighteenth centuries show less and less formality in beginning wars and commencing hostilities.

The Seven Years War began by the seizure of two French vessels and 250 French merchant vessels, taken by the English, a year before a formal declaration of war was announced (seizure took place on June 8th, 1755, and the formal declaration of war was announced on May 18th, 1756). Neither the practice nor theory of International Law has compelled States to make formal declarations of war before opening hostilities.

But there has been evident both in theory and in practice an increasing conviction that the principle of making a formal declaration of war before opening hostilities, should be adhered to.[3]

Art. 1 of the Third Hague Convention laid down that—

" the contracting Powers recognized that hostilities between them must not commence without a previous and unequivocal warning which shall take the form either of a Declaration of War, giving reasons, or of an ultimatum with a conditional Declaration of War."

Thus the principle of modern warfare has found its expression in codified law. The statute of the League of Nations went a step further by restricting the rights of States to wage war (Arts. 11, 12, 13, 15 and 16 of the Covenant of the League of Nations).

The Briand-Kellogg Pact and the Non-Aggression Pacts have banned altogether certain types of war. The practical results of all this, however, were, as could have been anticipated, that States used to open hostilities, labelling them " penal expeditions " or " military expeditions," or even " incidents " without making formal declarations of war, in order to evade the possibility of being classed as violator of treaties they themselves had signed. It was obvious that this " labelling " meant evading the issue as in fact their hostilities meant nothing less than war.

In view of the above, we have to conclude that a state of war can be said to have begun *either with a formal Declaration of War or by the actual opening of hostilities.*

The actual date of the beginning of the war depends upon which of these two events comes first. *And this is actually the starting point from which a war crime can be committed.*

[3] The Institute of International Law passed at its session at Ghent in 1906 a resolution that a formal declaration of war or an ultimatum is essential before hostilities may begin.

(b) A war can be regarded as having ended either by a mere cessation of hostilities, by the belligerent parties without a formal sanction, or by the conclusion of a formal Peace Treaty. A third possibility is the complete subjugation of one of the belligerents or unconditional surrender, and a fourth is a declaration by one of the belligerents that the war is over.[4]

ARMISTICE

Armistice does not mean the end of a war, being only a cessation of hostilities—that is why the right to search merchantmen, to seize contraband remains in force.

However, a generally binding definition of the term "armistice" is impossible. There are many and various kinds of armistices. The question which confronts us here is whether the conclusion of such an armistice—an armistice in the widest sense—means the termination of the period during which a war crime can be committed. In accordance with Art. 39 of the Fourth Hague Convention the parties at war are at liberty to stipulate the conditions of an Armistice. They are free to decide that all hostilities cease, that their armed forces cease to enjoy the privileges which are vested in them while hostilities last. They may stipulate that the administration of occupied territories comes to an end and the occupying armies have to be withdrawn. *In this case the conclusion of an armistice means the end of the period during which a war crime can be committed. Hence flow certain consequences.* Should a soldier on the front shoot at his enemy and afterwards be caught, he will not be treated as a prisoner-of-war, but dealt with as an ordinary criminal, because he has lost his status as a member of the armed forces. A member of the Administration of an occupied country who, after the conclusion of such an armistice, acted even within the rights granted to him by International Law, will also be responsible as an ordinary criminal because his rights have ceased to exist.[5]

The signing of a Peace Treaty means a definite end of a war and of the period during which war crimes can be committed.

[4] See Hyde: International Law, chiefly as Interpreted and Applied by the United States, 1922, vol. 2, par. 905.

[5] Art. 41 of the Fourth Hague Convention stipulates: "A violation of the terms of the Armistice by individuals acting on their own initiative only confers the right of demanding the punishment of the offenders, and, if necessary, an indemnity for the losses sustained."

There are, however, other possibilities of ending wars.

One of the belligerent parties may issue a declaration to the effect that she ceases hostilities. This is a unilateral act. The war between China and Germany came to an end by a declaration made by the Chinese Parliament on September 3rd, 1919, that the state of war had ceased to exist. But even in these cases a Peace Treaty is the usual conclusion of a war as it was in the case of China and Germany, when on May 2nd, 1921, a treaty was signed.

DEBELLATIO OR CONQUEST

A war can also come to an end by the annihilation of the enemy, by what is commonly known as conquest.

Conquest means the end of a war and the conversion of belligerent occupation into the sovereign status of the occupying state on occupied lands.[6] It follows the complete breakdown of one of the belligerents; it may also mean formal surrender, without a treaty.

When a State's territory is occupied, even if the whole of the administration is in hands of the other belligerent, the fight may still go on. The legitimate Government may be removed, but the fight continues from abroad: either alone or on the side of allies, continuing the war. In this case there can be no question of conquest or subjugation.

The distinction is essential, for when the period of belligerent occupation comes to an end and the period of annexation or subjugation begins, all rights of a belligerent cease to exist and the occupied or formerly occupied territory becomes part of the territory of the annexing power.

No war crime can be committed then, as war has come to an end.

We touch here upon a very essential problem, namely, whether conquest or subjugation is altogether a title to sovereignty, in other words how long can belligerent occupation be regarded as continuing, until the sovereignty is established by a legal title ?

Conquest can take place only if certain conditions are fulfilled. In fact, conquest cannot be regarded as a complete title to power. It shares always the fate of the war it follows, being its result.

But if a State exercises sovereign rights on occupied lands for a

[6] The rights of the occupying Power in occupied territory are defined in the Fourth Hague Convention.

long time, with the consent of the populations concerned, and if other members of the International community recognize the occupation, this fact creates the legal title. The mere lapse of time does not suffice, as the psychological factor is essential. This was also the view of the international judicature in particular of the Supreme Court of the United States.[7]

There are legal and illegal wars. In all cases where the war is illegal the conquest which follows it is illegal, and the occupation of the territory of the other belligerent cannot be changed into sovereignty.

Until then the occupation is as such to be regarded as being a belligerent occupation, with the consequence that war crimes can be committed. The Hague Regulations remain in force. Compare the case of Abyssinia until the recovery of her territory after several years. It is the typical case to which these principles ought to be applied.

All crimes and violations of the laws of warfare committed during this period of usurpation of sovereignty have to be qualified as war crimes.

Only with the termination of that period does the situation change. In all cases where there is a formal instrument of surrender—the war is to be regarded as terminated with the date of the document of surrender coming into force. Legitimate warfare comes to an end, and all military privileges cease to have effect. Every deed committed after that date is to be judged on its merits in accordance with penal laws of peace.

The explanations above give six temporal limitations of those periods during which a war crime can be committed.

[7] Compare *The Case of British Guiana and the Treaty concluded between Holland and Great Britain in* 1897; *The Case of Grisbadarna*; *The Case of Rhode Island* v. *Massachusetts*, in J. Brown-Scott: Judicial Settlements of Controversies between the States of the American Union (London, 1918), pp. 1070, 1619.

12

DENOTATION OF PLACE

(Where can a war crime be committed ?)

THERE are many duties and obligations imposed on the belligerents by both the written and unwritten laws of warfare; there are the many stipulations of municipal Penal Law which draw the demarcation line between "legal" and "illegal" acts and omissions. They concern the behaviour of the Armed Forces in the field; in battle, wherever it takes place; on land, on sea and in the air. They bind the soldier in occupied land,[1] the civil administration and everybody concerned with the war.[2] Out of these rules and duties there arises as a logical consequence the legal sanction for violating them.

Accordingly wherever the Laws of Warfare are in force there any act or omission contrary to their rules is punishable.

On land.—A war crime may take place on the belligerent's own territory, on which a battle is raging, where a prisoners-of-war camp is situated, or members of the armed forces of the other belligerent find themselves or where civilian citizens of the other belligerent or a neutral State live.[3]

It can also be on the territory of the other belligerent or of a neutral State.

On sea.—The crime can be committed on the ocean, in territorial waters, closed seas, in straits. This concerns both belligerents and neutral States. It extends to the surface of the water, and the area above and beneath the surface.

In the air.—The same rules apply to the aerial space above an occupied country, above the belligerent's own territory or the territory

[1] Instructions for the Government of Armies of the United States in the field (Order No. 100) lays down, in Art. 47: "Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred."

[2] See Articles of the Hague Regulations (Fourth Hague Convention, 1907), as above.

[3] See Fifth Hague Convention, 1907, as far as land warfare is concerned, and maritime warfare in Thirteenth Hague Convention, 1907.

of the other belligerent, or of a neutral State—above the ocean, seas, territorial waters, etc.[4]

There are therefore no territorial limits as to where a war crime can take place—it can be committed anywhere: on land, on sea and in the air. The legal status of the spaces enumerated above is very varied. Different rules apply to the belligerents when in battle, between armed forces and to the belligerent as regards the cities, towns and villages which are "fortified" (to use the phrase of the Declaration of Brussels, 1874,[5] or "defended" the term used in the Hague Regulations) and "undefended" places.

Special rules apply to neutral States and neutral citizens. The paramount rule in land warfare reads: "The territory of neutral Powers is inviolable" (Art. 1, Fifth Hague Convention). In regard to maritime warfare, Art. 1 of the Thirteenth Hague Convention (1907) says:—

"Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality."

It is clear however that *mutatis mutandis* the principle remains unshaken; there are no geographical limitations as to the place where a war crime can be committed.

[4] See above about air warfare.

[5] See Chapter IV, Art. 15: "Fortified places are alone liable to be besieged. Towns, agglomerations of houses or villages, which are open and undefended, cannot be attacked or bombarded." The Oxford Manual of the Laws of War on Land, adopted in 1880, reads in Art. 34: "In cases of bombardment, all necessary measures ought to be taken to spare, so far as possible, buildings devoted to religion, the arts, sciences, and charity, hospitals, and places in which sick and wounded are kept, provided always that such buildings are not at the same time utilised, directly or indirectly, for defence. It is the duty of the besieged to indicate these buildings by visible signs, notified to the besieger beforehand."

13

DENOTATION OF THE SUBJECT-MATTER OF WAR CRIMES

ALL persons, goods and values for which International and municipal laws of warfare afford protection may become subjects of war crimes.

Human life, body and health are protected by the Penal Codes of all civilized States. The degree of protection provided for them by the International Laws of Warfare depends on their status in war.

(a) *Members of the armed forces (land, sea and air)* while in battle are protected by prohibitions against the use of certain types and kinds of weapons. If taken by the enemy they are entitled to the privileged status of "prisoners-of-war." "They must be humanely treated" (Art. 4, Fourth Hague Convention, 1907).[1]

Sick and wounded.—"Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong" (Art. 6, Geneva Convention, 1864).[2]

Dead.—"After each engagement the commander in possession of the field shall take measures . . . to ensure protection against pillage and maltreatment, both for the wounded and the dead."

"He shall arrange that a careful examination of the bodies is made before the dead are buried or cremated" (Art. 3, Geneva Convention, 1906).

(b) *Civilians* (population of the other belligerent).—Special protection is afforded by the Hague Regulations to the civilian population of the other belligerent, while under military occupation. The paramount rule is contained in Art. 46. Life, property, religious convictions and practice, family honour and rights must not be violated.

(c) *Neutral civilians.*—The laws of neutrality put the neutral person on a special level, according to him a privileged status. However,

[1] The Fourth Hague Convention laid down in Art. 21: "The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention (1864—1906). The status of prisoners-of-war was finally described by the Geneva Convention, 1929."

[2] See the status of wounded prisoners-of-war as defined in Art. 7 of the Geneva Convention, 1929.

"a neutral cannot claim the benefit of his neutrality: (a) if he commits hostile acts against a belligerent; (b) if he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties." In such a case the neutral becomes assimilated to "belligerent subjects"—but he cannot be treated more severely "than a national of the other belligerent State could be for the same act."[3]

(d) *Stateless civilians.*

(a) *Property of members of the armed forces* (land, sea and air forces).

"All personal effects and articles in personal use—except arms, horses, military equipment and military papers—shall remain in the possession of prisoners-of-war, as well as their metal helmets and gas masks. Sums of money carried by prisoners may only be taken from them on the order of an officer and after the amount has been recorded. A receipt shall be given for them. Sums thus impounded shall be placed to the account of each prisoner" (Art. 6, Geneva Convention, 1929).

"Wounded and dead should be protected 'against pillage'" (Art. 3, Geneva Convention).

(b) *Property of the civilian population* of the other belligerent is protected by the Hague Regulations in various ways; (*ut supra*).

(c) *Property of the other belligerent State* and its public bodies.

The rights of the belligerent occupying the territory of his adversary are limited. Special protection is afforded to—

"buildings devoted to religion, art, science and charity, historic monuments, hospitals and places where the sick and wounded are collected . . ." (Art 27 of the Hague Regulations, 1907);

in siege and bombardments. "Pillage is formally forbidden" in occupied lands (Art. 47, Hague Regulations, 1907); special rules apply to public and municipal property (Art. 53, Hague Regulations), to submarine cables (Art. 54), and the status of the occupant as regards "public buildings, real estate, forests, and agricultural undertakings belonging to the hostile State and situated in the occupied country" is defined in Art. 55 of the Hague Regulations.

(d) *Property of a neutral State and its citizens.*—"The territory of neutral Powers is inviolable" (Art. 1, Fifth Hague Convention, 1907). Any property, whether public or private, on neutral soil is protected. However, a limitation is provided with regard to neutral subjects "resident in the territory of a belligerent" as they are "equally with the other inhabitants of the country, liable to suffer in person and property through the events of the war. . . ."[4] Their

[3] Art. 17, Fifth Hague Convention, 1907.

[4] See Holland, *op. cit.* § 136.

status is equal to those of subjects of the other belligerent and they enjoy protection within the limits provided for the latter. Special rules are also set up with regard to naval warfare (Thirteenth Hague Convention, 1907).

(e) *Property of stateless civilians.*

Life and body, personal integrity and honour, property and the rights enumerated above are protected by the Penal Laws of civilized States. The Laws of Warfare, both International and Municipal, modify the laws of peace by adapting them to the conditions of war. As they enjoy the protection of the law, anyone who attacks, violates or destroys them is liable to be indicted on the charge of a war crime. Thus they are potential subject-matters of war crimes.

14

THE RIGHT OF ASYLUM

WAR CRIMES—POLITICAL OFFENCES

THE right of asylum has so far been the privilege of political offenders. Can it be applied to war criminals, or are war criminals political offenders? An analysis of the political offence as such and its comparison with war crimes will give us the solution of the problem.

THE POLITICAL OFFENCE

The constant social changes, political revolutions, and economic adjustments which we have witnessed during the last and present century were bound to produce changing and dynamic ideas with regard to political offenders. However, it is part and parcel of our modern political outlook that we treat the political offender as a martyr to his cause. We regard him as a man who by his actions, his courage, his daring attempts tries to bring about the realization of an idea he sincerely believes in. Unselfishness of aim and absence of the motive of personal gain are essential elements of any political offence.

1. *Historical prolegomena.*—The historical development of the idea of political offence makes most interesting reading. In fact it was the political offence which was the first punishable crime. In remote times political offenders were most severely punished, while crimes committed on individuals, in the interest of individuals and against them, were regarded as private matters with which law did not interfere. That is how the idea of *crimen majestatis* was born in the days of Rome and passed throughout history up to our days. The Germans accepted it as *crimen laesae majestatis* in the Middle Ages, and it had also become a part of the legal system of other countries. The King and ruler, being symbols of the State, were subject to special protection, hence any crime committed on them was treason, an act hostile to the State.[1] Penalties provided for these crimes were very high, as the values protected were considered the highest.

[1] Pella, La Représsion des Crimes contre la Personalité de l'Etat, Recueil des Cours, The Hague, Vol. III, 1930, p. 677 *et seq.*

The Middle Ages shaped their penal law under the influence of these and similar ideas; treason was one of the main chapters in their Penal Codes. England's Statute of 1351, France's Ordonnance d'Is-sur-Tille of 1553, the German Bambergensis—all of them contained this element as an essential part of legislation.[2]

Three points formed the essential feature of the political offence as seen by the legislator of those days:—

1. A special procedure was adopted in all political trials.
2. No political crime could come under the rule of prescription.
3. Severe penalties were administered to every political criminal.

The turning-point in history was the French Revolution.

The power passed from the hands of the individual ruler to the nation, which became the Sovereign. And although the various régimes which were at the wheel of the " French State in being " applied the severest penalties to political offenders, yet it was the French Revolution which gave the political crime a new meaning. Political offences became offences of a higher degree.

Then comes the liberal era. The political offender is given certain privileges as opposed to the hardships he was subjected to in the past:—

1. His deed is not regarded as dishonourable.
2. Consequently, the penalty provided for him is not dishonourable.
3. He does not come under the rules of extradition and enjoys the privilege of asylum in foreign countries.

One of the first documents which laid down these principles was the extradition treaty between France and Switzerland of 1832. It stipulated that political offenders would not be handed over. One of the first diplomatic documents where the right of asylum was invoked was Lord Palmerston's letter to his ambassadors in Vienna and St. Petersburg of October, 1849. He stated, with emphasis, that political offenders should not be handed over to States claiming them.

This special treatment of political offenders was gradually accepted into the Penal Codes of civilised States.

The end of the last and the beginning of this century witnessed a further revolution of the notion of political offence. States began to look with growing suspicion on the activities of political parties and their members. New rather brutal methods were being applied in

[2] Pella, *op. cit.* p. 693.

political fights in the struggle for power. Terrorism was introduced into the political dictionary. Severe penalties were introduced again and privileges granted in the past partly abolished. This new attitude towards the political offender was mainly due to the creation and growth of power of totalitarian States. Fascism and totalitarianism, seeing in the State the highest symbol of human existence, were determined to crush everybody who dared to attack them. The new Italian Penal Code of 1930 rejects the idea of asylum as an anachronism incompatible with the situation of a strong State.

The last years preceding this war have witnessed a further increase of demoralisation in political life—the application of most odious methods in the fight for power.

2. *New legislative methods.*—Recent legislation introduced a new legislative notion of offences "against the security of the State."[3] Thus a new element has been added to the notion of political offence. It was Pella who made a thorough analysis of these new legislations. They can be summarised as follows:—

1. Crimes against the moral existence of the State;
2. Crimes against the international personality of the State;
3. Crimes against the internal personality of the State;
4. Certain mixed offences;
5. Crimes against the International Community; and
6. Crimes against the honour of the State.[4]

Among crimes directed against the international personality of the State the various legislators enumerate the total or partial destruction of the State, attacks against its territorial integrity, attempts at causing the loss of parts of its territory, or reduction of its sovereignty.

This "néologisme juridique"—as Hammerich calls it—was undoubtedly due to social and political developments. It has become a new subdivision in contemporary Penal Codes, as part of political offences.

3. "*Militant democracies*" versus *political offence.*—The state of affairs described above has also had as its consequence the extension of the ideas held in the past. European democracies eager to maintain their status in a hostile world, and terrorist methods applied from all

[3] Hammerich, Rapport, Comité pour la Définition du Délit Politique, VI. Conférence Internationale pour l'Unification de Droit Pénal (Copenhagen, 1935), p. 82.

[4] Pella, *op. cit.*

sides, made continuous attempts to reduce the danger of revolutions and *coups d'état.* Political systems ranging from the very right to the very left had driven democratic governments to the defensive. Within the new notions of crimes against the security of the State—or without, new legislative acts against treason, new conceptions of treason, aiming at stopping subversive propaganda, the spreading of false news and infiltration of totalitarian propaganda—have constantly been on the agenda of legislative bodies.[5]

This brings us to the end of the historical survey.

4. *Attempts at defining political offences.*—These frequent and numerous changes in legislation concerning political offences have shaped the definition of the political offence itself.

When may a crime be regarded as being political ? There are three alternative views. *One* tries to define it from the point of view of the culprit and his inspirations, *another* qualifies the deed as such. Between them stands the *theory of predominance :* according to this we should weigh up and decide whether the criminal or the political element was in the particular case decisive.

The culprit.—The strictly personal principle defines the crime by the personality of the offender. " La fin justifie les moyens." If the culprit is prompted by political motives, whatever his deed may be, it has to be regarded as political.

This principle finds its expression in the French Draft of 1927. It says: " Sont des criminels ou delinquants politiques ceux, que l'ardeur de la passion politique a seule poussés jusqu à la violation de la loi."

The deed.—Opposed to the personal principle is the objective theory, which disregards the motives of the culprit and the aim he is striving for. The criterion by which the crime is to be judged is the deed alone and its qualification.[6]

The culprit and the deed.—The theory of predominance considers both elements. It analyzes the personality of the offender and the deed of which he is guilty. If the political element is predominant and the crime is fully subordinate to it, the offence is political. The opposite is the case should the relation be reversed (Swiss Law, 1892).

[5] Loewenstein: Legislative Control of Political Extremism in European Democracies, Columbia Law Review, Vol. 38, Nos. 7 and 8, 1938.

[6] Ferdinand De Martitz: Internationale Rechtshilfe in Strafsachen, 1888.

However, all three theories agree to a certain extent which crimes must not be regarded as political. In spite of the many changes there is a continuity; in spite of the lack of a generally accepted definition, we are able to draw the demarcation line.

A very important contribution to the practical approach to this problem is furnished by two rulings of British Courts: the well-known cases of *Castioni* and *Meunier*.

The *Castioni* case was connected with a *coup d'état* carried out in one of the Swiss cantons, where a number of citizens rose against the Government, imprisoned several of its members, seized the arsenal, occupied municipal buildings, disarmed the gendarmes, and established a provisional Government. One of those who took part in that action (he killed a member of the Government) sought refuge in this country. A case for extradition was brought before the Court. It was held that the offence had a political character, the action he undertook being only incidental. Therefore there was no case for extradition (theory of predominance).[7]

The *Meunier* case was of a different type. An anarchist was causing explosions at a certain café and barracks in France. The Court, ruling in favour of extradition, held that his offence was not a political one—the prisoner being an enemy of all Governments (an anarchist).[8] A political offence implies a fight for a certain type of Government between political parties.[9]

Castioni and *Meunier* are very good guides, indicating where the demarcation line between a political and a common crime lies.

WAR CRIMES

As shown above, three theories confront one another in the definition of political offences. Can *any* war crime satisfy *any* of them as to the requirements necessary to grant the culprit the privileges due to a political offender. We propose to analyze each of them in turn.

1. *The culprit and his aims.*—The war criminal is in principle a person committing a crime under the cloak of law, under the protection of his office or his superiors. He does not run the risks, as all political

[7] *Re Castioni*, (1890) 1 Q. B. 149.
[8] Compare above, Pella's Summary, also *Pavan* case in the Swiss Court below.
[9] *Re Meunier*, (1894) 2 Q. B. 415.

offenders do, of being shot, court-martialled, or hanged. The whole idea of putting the political offender on a higher level than the common criminal is based on the different nature of his personality. We have made an attempt to show this in the historical survey of the preceding pages. Once severely punished as being guilty of treason, the political offender in his present status was born on the barricades of the French Revolution. History shows him as the man fighting against tremendous odds; for his people, for his class, for his idea. Whether right or wrong, he is a martyr to his cause. None of these qualities can be ascribed to a war criminal. He commits his deed against innocent, helpless, and defenceless people. He expects promotion, he expects praise from his superiors.

And his aims? Even the strictly personal principle does not admit every person fighting for his ideas into the group of political offenders. Very much depends also on the aim he is striving after.

What are the aims a war criminal has in his mind? Reports from the last and the present war give us abundant examples of these aims:—

(a) Extermination of a people whose territory is occupied.
(b) Extermination of individuals without reasonable justification, very often children, women, and the sick.
(c) Destruction of monuments, works of art and culture.
(d) Destruction of the whole organisation of the State.
(e) "Unnecessary hardships and suffering" inflicted on the other belligerent.

None of these aims comes under the generally recognized political aims which qualify the culprit to enjoy the privileges of political offenders.

Extermination, it is needless to say, contains negative elements only. The very idea behind the protection given to a political offender is that he fights for certain ideas and ideologies concerning the organization of the State, the community, or the régime. It has often been asserted "that the political criminal of to-day may be the Government of tomorrow." This, of course, can never be the case with criminals aiming purely at destruction, at negative objects. And here this aim comes near to the type of war crimes quoted at (d)—the destruction of the total organization of the State and community. Such a crime can never be regarded as political; it is anti-social, anti-human.

This view has many authorities to back it. It was in 1880 that the Institut du Droit International expressed it in its principles. (These principles were modified at Geneva in 1892.)

They read: "Ne sont pas réputés délits politiques . . . les faits délictueux qui sont dirigés contre les bases de toute organization sociale et non pas seulement contre tel Etat déterminé ou telle forme de gouvernment."

The resolution adopted in Munich in 1883 by the Institute of International Law goes much further and gives the State the right to punish crimes committed even beyond its territory if they are directed against its "existence sociale" or "compromettent sa securité."

In this same spirit we have to understand sect. 4 of the definition adopted at Copenhagen: "Ne seront pas considérées comme politique infractions ceux dont l'auteur n'aurait été determiné que par un motif égoiste ou vil." And the motives of war criminals are nothing but selfish and vile. They are the very denial of the self-sacrificing spirit which leads the political offender to his deed.

This refers to all the aims the war criminal strives for. Let us take another example. The extermination of individuals so ruthlessly carried out by Germany and her partners can never be regarded as a political offence. The relation between the death, suffering, and hardship inflicted on individuals and the change of a political system is too distant to be regarded as "political." This was rightly pointed out by the Swiss Federal Court in the case of an Italian anti-Fascist, Pavan (June 15th, 1928), who killed his Fascist compatriot in Paris and fled to Switzerland, where he invoked the right of asylum as political refugee. The Court added that this was not "an appropriate means of attaining this end," "it was a single act of terrorism"—"the relation between the murder . . . and the reversal of the political system in Italy is a distant one."[10] Cannot the same principle be fittingly applied to the murder of Jewish, Polish, Czech men, women, and children? And when murder becomes a method applied *en masse* it becomes an anti-human crime, defined in the Oxford Rules, 1880, and is all the more excluded from the privileges of political offenders (compare the *Castioni* case).

[10] Mannheim: Some Recent Problems in the Law of Extradition, Transactions of the Grotius Society, vol. xxi, pp. 115, 116.

2. *The deed.*—It is in most cases the deed itself which deprives war crimes of their political character. Much as legislations conflict on the question of what to regard as a political offence, they agree when outlawing acts of violence and acts causing public danger. Following an attempt on the life of Napoleon III, the culprit sought refuge in Belgium. When France asked for his extradition it was refused, according to the law of 1838. This incident led to the alteration of the law and the introduction of the famous "Belgian clause," which provides for the handing over of every criminal who is claimed for murder, attempt on the life, or assassination of a head of the State or Government, or members of his family. The "Belgian clause" has been generally accepted by almost all civilized States.

It was Jules Favre, the French Foreign Minister, who wrote to French diplomatic agents abroad in 1871: "L'assassinat, le vol, l'incendie, systematiquement ordonnés, préparés, avec une infernale habilité ne doivent pas permettre à leurs auteurs ou à leurs complices d'autre refuge que celui de l'expiation légale." France, it is to be remembered, adhered to the personal principle: in spite of concentrating on the personality of the culprit, limits had to be put to his action. And Jules Favre added: "Aucune nation ne peut les couvrir d'immunité." Five years later Lord Grey stated in the House of Lords (July 24th, 1876), in connection with the attack on Burke and Lord Cavendish in Dublin after which the culprit O'Brien sought refuge in Venezuela, that the right of asylum must not be exaggerated.

We find also a very definite elimination of acts of violence from the group of political crimes in the Oxford Rules (1880) and Geneva Rules (1892). They lay down that the right of asylum should not be granted in cases where "s'agisse des crimes les plus graves au point de la morale et du droit commun, tels que l'assassinat, le meurtre, l'empoisonnement"; the Oxford rules go on to quote arson, explosions, and all acts of violence as being in the same category. They even make special reference to crimes in war time. Acts of barbarity and vandalism prohibited by the laws of warfare are excluded from every privilege granted to political offenders.[11]

[11] "En ce qui concerne les actes commis dans le cours d'une insurrection ou d'une guerre civile, par l'un au l'autre des parties engagés dans la lutte et dans l'intérêt de sa cause, ils ne pouvent donner lieu que s'ils constituent des actes de barbarie odieux et de vandalisme defendu suivant les lois de la guerre . . ." (Art. (3) Oxford Rules).

Let us now turn to contemporary legislation and authorities. The Law of Finland (1922) stipulates the following exemptions from the political privilege of asylum:—

(a) if the deed reveals a " méchantété brutale " of the culprit;
(b) if the political crime is simultaneously a common crime; and
(c) if it results from circumstance that the offence has not a political character.

Even the German law on extradition of 1929 (Art. 3) granted extradition in cases where the offence was a deliberate attack on human life, unless it was made in an open fight.

Finally, three more authorities coming from International Congresses. The Congress of Comparative Law, held at the Hague August 2nd to 6th, 1932, excludes from non-extradition " very grave crimes from the moral point of view and the point of view of common law." The Copenhagen Conference for the Unification of Penal Law produced a draft, section 4 of which says: " Offences creating public danger and a state of terror will not be regarded as political."

The draft of a Convention prepared by the International Law Conference at Warsaw, 1928, contains in Art. 2 a long list of thirty-six types of crimes and offences for which extradition ought to be granted. All these crimes are regarded as non-political (Art. 7, sects. 1 and 2). They include various types of acts of terror and violence.[12]

The long list of authorities provides sufficient evidence as to how the laws and authorities of the civilized world view acts of violence, crimes of vile and brutal character. They are unanimous in excluding them from the group of privileged political offences. It shows further that throughout the historical development and changes of the notion of political offences all crimes, which we put to-day under one heading of war crimes, have been regarded as common crimes.

One more point on the subject. Above all the attempts to lay down uniform rules concerning the question of the political offence lies *the high moral principle.* A political offence is bound to be moral by its very nature. The great scale of political systems imposes on each of them the duty to grant asylum to those who fight for ideas. It has been said that it is for history to pass judgment on the men who

[12] Report of the International Law Association (Warsaw, 1928), p. 30. See also draft Convention prepared by the Harvard Law School, 1935, A.J.I.L. vol. XXIX, 1935. Suppl. Sect. II.

fight for ideas, for a change in the social, economic, and political system of the country.

Here rests also the very gist of the struggle between the two currents of legislation: the doctrine of " désintéressement " and the doctrine of " solidarity." The world is ripe, we believe, to recognize that the principle of international solidarity must be applied where fundamental rights of human beings—the right to freedom, to unfettered life—are violated. Can, therefore, the principle of *désintéressement* be applied to war criminals ?

The political offence enjoys to-day three privileges. We have stated these at length above. The privilege that the deed is not dishonourable, the punishment is not dishonourable, and that extradition is not granted. They are given to it in view of the personality of the culprit, the aims he is striving for, and the deed itself. They are not accorded to war crimes.

Let us take the case of a typical war criminal. Hans Frank, the former Governor of German occupied Poland. From the position of an obscure lawyer he rose to that office. " Strength to the strong, freedom to the free, not protection of the weak at the expense of the strong," said Frank in a speech in 1934, and this remained his outlook. When Governor of Poland he ordered the imprisonment and torture of tens of thousands in concentration camps. He was responsible for the destruction of churches, works of arts, pillage, and assassination. And yet he dared to say: " We shall stand up as accusers against the historically unique bestiality of that Polish sub-humanity "; how he put this programme, announced in March, 1940, into practice the records of his deeds show. All this he was doing under the protection of his high office, guarded by the S.S. detachments, travelling in armoured cars. He was no doubt confident of finding approval of his actions by his superiors. And he was not wrong.

Another typical case was Himmler. His crimes committed under similar circumstances have even a wider scope, both in space and time. But Himmler did not recognize even the principles and privileges granted to political offenders. The concentration camps were, in his view, necessary. " For these people we shall never again open the gates of the concentration camps," he said in 1937.

It seems to be clear in the light of the considerations above that war crimes are definitely " at variance with accepted ideas concerning

. . . political offences," to use the phrase of the St. James's Palace Declaration of January 13th, 1942.

All war crimes, whether committed by members of the armed forces or civilians, are completely devoid of those elements which entitle the political offender to claim the right of asylum.

The offenders are common criminals and come under the general rules of extradition.[13] Every State on whose territory a war criminal seeks refuge is under the obligation to hand him over to the State who claims him. This concerns all States, belligerent and neutral alike.

THE MOSCOW DECLARATION

The Conference of the Foreign Secretaries of the United States, of the United Kingdom, and of the Soviet Union, held at Moscow from October 19th to 30th, 1943, has re-affirmed the determination of the United Nations to judge and punish all war criminals. The three Foreign Secretaries speaking " in the interests of the thirty-two United Nations " declared:—

(a) That " those German officers and men and members of the Nazi Party who have been responsible for, or have taken a consenting part in, the . . . atrocities, massacres, and executions will be sent back to the countries " where their deeds were done.

(b) That they will be " judged and punished according to the laws " of the countries concerned . . . " by the people whom they have outraged."

(c) That all war criminals will be pursued by the three Allied Powers " to the uttermost ends of the earth," and that they will be delivered " to the accusers in order that justice may be done."

The issue seems to be clear; so are the means and methods to be applied.

In this connection it is worth recalling the appeal issued by Washington and London some time ago and addressed to neutral States to hand over all war criminals should they seek refuge on neutral soil. The replies of the neutral Governments and Press were not very satisfactory. It was pointed out that war crimes partake of the nature of political offences, and that in some circumstances the offender should be granted the right of asylum.

Some neutrals are not yet convinced of their duty to refuse asylum to them.

[13] The idea of a world treaty of extradition has been maintained for a long time. See Kraus: Observations concernant les tendances de l'evolution du droit international de l'extradition, R.D.I.L.C., 1927, v. VIII, p. 162 *et seq.*

Yet the claim on neutral States is legally justified. War criminals cannot be treated as political offenders; they have to be handed over to the accusers.

THE CASE OF THE EX-KAISER AND THE EXTRADITION OF WAR CRIMINALS

By virtue of Art. 227 of the Treaty of Versailles, Wilhelm II was indicted by the Allied and Associated Powers as the first and main war criminal of the last world war. Art. 227 came into force on January 10th, 1920.

On January 16th, 1920, the Secretary-General of the Peace Conference addressed a letter to the Dutch Minister—Wilhelm II having meanwhile sought refuge in Holland—signed by Clemenceau, asking for the handing over of the German ex-Kaiser. The letter enumerates several crimes committed by the Germans during the war, 1914—1918, and adds: " De tous ces actes, la résponsabilité au moins morale, remonte jusqu'au chef suprème que les a ordonnés ou qui a abusé de ses pleins pouvoirs pour enfreindre ou laisser enfreindre les règles les plus sacrées de la conscience humaine." The letter appeals to the respect for law and love of justice of Holland, asking the extradition of the German Ex-Kaiser.

On January 24th, 1920, M. Loudon, Minister of the Dutch Government replied to M. Millerand, the French Prime Minister and Minister for Foreign Affairs in a letter in which he states as follows:—

(a) that Holland is not a party to Art. 227 of the Treaty of Versailles;
(b) that Holland could not accept the international duty " of associating herself with an act of high international politics of the Powers ";
(c) should, however, the League of Nations establish an international body competent to decree in a case of war on facts qualified as crimes and provide sanctions beforehand—Holland will adhere to this;
(d) the letter invokes the fact that Holland has " de tout temps " been " une terre de refuge pour les vaincus des conflits internationaux."

The legal foundations of the refusal contained in the letter of the Dutch Government are as follows:—

(a) Art. 4 of the Dutch Constitution provides for equal protection for both Dutch and foreigners on Dutch soil; this is laid down in the Law of 6.4.1875, revised 15.4.1886, on which extradition treaties with France (1895), England (1898) and the United States (1887) were concluded.

(b) In view of the above, the request for extradition must be formulated in accordance with the laws and treaties of Holland.

(c) The crime for which extradition is sought was qualified: "L'offense suprème contre la morale internationale et l'autorité des traités . . . ne figure pas dans les nomenclatures des infractions pénales inserées dans les lois de Holland ou les traités par elle conclus." The Dutch Government cannot render legal help for the repression of an act which is not punishable even according to foreign law.

(d) The political character of the crimes does not qualify the case for extradition.

On February 15th, 1920, a new note was addressed to the Dutch Government. The note uses the terms "Les droits et les principes de l'humanité"; it stresses the fact that the refusal of the Dutch Government would create an unfortunate precedent which would undermine the procedure of international tribunals against "highly placed" culprits. The note called upon Holland to revise their view expressed in the previous letter.

On March 6th, 1920, the Dutch Government sent another reply referring to reasons explained in their previous letter.[14]

The result was that the Ex-Kaiser was not handed over, and remained in Holland unaffected by the laws and stipulations of the Versailles Treaty.

Was the attitude adopted by the Dutch Government justified?

This is the question which we are at first sight inclined to ask. However, the real question which ought to be put is: Was the request made in a proper way? The Allied and Associated Powers claimed the ex-Kaiser, without qualifying his deeds from a strictly legal point of view. There is no doubt that he was guilty of war crimes, as qualified by the laws of warfare, as understood by us and explained at length. In accordance with Arts. 53, 63 and 64 of the German Constitution he was the Commander-in-Chief of the Armed Forces, he was aware of all the crimes committed by his armies and occupying authorities and was decorating those guilty of them. He was a war criminal in the true sense of the word. However, what he was claimed for was "moral responsibility" which is not a legal term at all, and for "droits et les principes de l'humanité" which

[14] See Text of these letters, in Revue du Droit Intern. 1920, v. I, p. 40 *et seq.*

are not recognized legal terms either. This was a perfect excuse for Holland to refuse his extradition.

What the ex-Kaiser should have been claimed for was, murder, pillage, robbery, violence, he being principal and accessory to all these acts. These acts were not political crimes, they were common crimes, qualified by both laws and treaties.

The decision of the Dutch Government met with strong criticism and was by the majority of writers disapproved of.[15] However, the mistake committed by the Allied and Associated Powers lay in the wrong formula of the request submitted by them.

The idea of war crime arises from the ashes of the burning world and stands up as a warning, to states and nations, big or small; and the legal foundation of this institution calls for just punishment.

It is, therefore, only right that the European Allied Governments in this war declared, on behalf of their peoples that:—

(a) those guilty and responsible, whatever their nationality, are sought for, handed over to justice and judged;

(b) that the sentences pronounced are carried out.

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[15] See Merignhac, *op. cit.* 37 *et seq.*, quoting "De Lapradelle, Lernaude, Barthélemy."

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THE MUTUAL RELATION BETWEEN MUNICIPAL AND INTERNATIONAL LAW

THE whole body of the laws of war consists, as we have pointed out above, of two great entities—international and municipal law. Together they form what we call the laws of war.

The ultimate object of law is always the individual and a reply must be given to the question: How does the command, prohibition or any stipulation reach him ?

The international agreements and conventions concerning the laws of war were concluded between States. They were meant to bind them *quâ* States, *i.e.*, organized human communities. In them we find also guidance on the subject of how to reach the individual soldier or civilian in time of war.

Art. 28 of the Geneva Convention of 1906 lays down:—

"The Signatory Governments also undertake to adopt or to propose to their legislative bodies, should their military laws be insufficient for the purpose, the measures necessary for the repression in time of war of individual acts of pillage and maltreatment of the wounded and sick of armies, as well as for the punishment, as an unlawful employment of military insignia, of the improper use of the Red Cross flag and armlet (brassard) by officers and soldiers or private individuals not protected by the present Convention."

In the Fourth Hague Convention concerning Laws and Customs of War on Land we find the following stipulation:—

"The High Contracting Parties will issue to their armed land forces instructions which shall be in conformity with the 'Regulations respecting the laws and customs of War on Land' annexed to the present Convention."

A similar passage is contained in the Tenth Hague Convention in Art. 21:—

"The Signatory powers likewise undertake to enact or to propose to their legislatures if their criminal laws are inadequate, the measures necessary for checking in time of war individual acts of pillage and ill-treatment in respect to the wounded and sick in the fleet as well as for punishing, as an unjustifiable adoption of naval or military marks, the unauthorised use of the distinctive marks mentioned in Article 5 by vessels not protected by the present Convention."

It seems to be quite obvious from the above quotations that the Signatory Powers undertook to translate the stipulations of the respective agreements into the language of Municipal Law, by their Penal Codes, Military Codes or special legislation, this, of course, being done only if " their military law be insufficient "—as it is said in one of these documents.

So much for the contractual obligations. But the same applies also to all those rules of International Laws of war which result from the " usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." They are the " silent " rules of warfare. Gradually, with the passing of years, States who were becoming members of the family of civilized nations had to adopt into their legislations many stipulations, which meant the elementary protection of human rights. The principle, for instance, that " an alien must be accorded rights such as are guaranteed under the laws of civilized countries generally both to aliens and nationals,"[1] is one of them.

The rule that murder of innocent and helpless people, pillage and robbery of private property are forbidden and liable to punishment must be by now regarded as the common property of all States and nations, having been translated into the stipulations of the Penal Codes of all civilized States.

The same method of transforming international obligations into Penal Codes concerns also the Criminal Laws of Peace.

Art. 307 of the Bustamante Code, 1928, speaks of offences which the " contracting State has bound itself by an international agreement to repress."

In a similar way the penal law of peace dealt with the problems of crimes, which are at present regarded as contemptible offences against the whole of human society. They are: Traffic in women and children for immoral purposes, Convention signed at Geneva (September 30th, 1931, 9, League of Nations Treaty Series, 415); Convention on the Suppression of the Circulation of and Traffic in Obscene Publications, signed at Geneva (September 12th, 1923, 27, League of Nations

[1] See T. J. Lawrence: Principles of Intern. Law (5th ed.), sec. 42; Fred Nielsen: American Turkish Claims Settlement, Opinions and Reports (Washington, 1937), p. 23, and cases there quoted.

Treaty Series, 213); Convention on Traffic in Opium and Drugs, signed at Geneva (February 19th, 1925, 81, League of Nations Treaty Series, 317); Slavery, regulated by a Convention signed at Geneva (September 25th, 1926, League of Nations Treaty Series, 253); Convention on the Suppression of Counterfeiting Currency, signed at Geneva (April 20th, 1929, 112, League of Nations Treaty Series, 371); similarly the Convention concerning the Suppression of Terrorism, 1937, and the question of contraband in liquor and trade in arms (illegal).

Following these international agreements, stipulations were inserted into the Penal Codes of the Contracting Parties. This was necessary even in the case of piracy, as a *delictum sui generis*, performed on the High Sea, not on State territory. This view was confirmed by a decision of the Privy Council.[2]

States have on the whole carried out their obligations resulting from the International Laws of war by " transforming the laws and customs of war into national regulations."[3] However, there have been several exceptions too.

What then are the functions of the International Laws of war with regard to violations of the laws of warfare ?

They embody a whole complex of rules, both written and unwritten, held in very general terms, which:—

(a) permit certain acts prohibited by the municipal laws; or
(b) prohibit certain acts confirming the rules of municipal law or bringing them up to date.

The great compromise out of which the child called " Laws of War " has been born was bound to produce rules contrary to the general laws in force in time of peace. The whole status of the armed forces, the right to fight, and to use physical force and deadly weapons, being a necessary part of war, is a result of these rules. They have been incorporated into the Military Law and Instructions to Armies (*ut*

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[2] Lord Sankey, Lord Chancellor, ruled in *Piracy jure Gentium*, (1934) A. C. 586, 589, and added: " With regard to crimes as defined by International Law, that law has no means of trying or punishing. The recognition of them as constituting crimes and the trial and punishment of the criminals, are left to the minicipal law of each country."

[3] See George Manner: " The Legal Nature and Punishment of Criminal Acts of Violence contrary to the laws of war," A.J.I.L. July, 1943, p. 409.

supra) of many States. They have thus become part of municipal law. Not long ago the United States Supreme Court said in its decision:—

"From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals"[4]

There is another point which is bound to influence our considerations on the subject. No penalty can be imposed on a person found guilty unless it is explicitly provided for by law (*nulla poena sine lege*). And here we find that International written law has very few stipulations to this effect. And in the few cases where provisions are inserted they concern only the immediate reaction in war and do not deal with the penalty to be administered by the Courts of Law.

The unwritten Laws of Warfare authorize the "immediate death penalty" for those guilty of violations of the Laws of Warfare. This has been confirmed by some learned writers.[5]

As to the written law there is, for instance, Art. 21 of the London Protocol of 1909, which lays down: "A vessel found guilty of breach of blockade is condemned."

Similarly Arts. 45 and 46 of the London Protocol.

Art. 3 of the Fourth Hague Convention refers to "a belligerent party which violates the provisions of the said regulations" which ought to "if the case demands, be liable to make compensation." It goes on to say that "it shall be responsible for all acts committed by persons forming part of its armed forces."

It is obvious that this refers to compensation in money or such like, thus being the State's responsibility. It does not refer to criminal proceedings—it concerns the State and not the individual. In this connection it has been stated with authority that it does not cover "acts of soldiers committed in their private capacity, that is when soldiers are not under some form of authority."[6]

References to penal proceedings can also be found in Art. 56 of the

[4] See *The German Saboteurs Case*, *op. cit.* p. 153.

[5] Schwarzenberger: War Crimes and the Problem of an International Criminal Court, *op. cit.* p. 70.

[6] Nielsen, F.: Report on American-Turkish Claims Settlement, p. 23, cited above.

Hague Regulations, corresponding with Art. 8 of the Declaration of Brussels, which reads:—

"All seizure of and destruction, or intentional damage done to such institutions, historical monuments, works of art or science, is forbidden and should be made the subject of legal proceedings."

This contains reference to legal proceedings but again no specification is made as to the character of the proceedings.

By accepting this rule the Hague Regulations seem to have followed the example of the Manual of the Institute of International Law of 1880 which states:—

"Si des infractions aux règles qui précèdent ont été commises, les coupables doivent . . . être punis, après jugement contradictoire, par celui des belligérants au pouvoir duquel ils se trouvent. . . . Les violateurs des lois de la guerre sont passibles des châtiments spécifiés dans la loi pénale."

The Institute has, however, gone much further by indicating the way of dealing with the guilty, by stating *expressis verbis* that there would be penal proceedings.

The question which we are inclined to put in this connection is: Would these stipulations have been omitted, if there were no body called municipal law, with stipulations in it dealing with all offences in a most detailed and exact manner? The question is very theoretical in the circumstances, but it helps us in the logical approach and solution of the problems which confront us. The reply is clear and definite. Were the Hague Rules the only body of legal stipulations concerning laws of warfare, these seeming *lacunæ* would never have occurred. The contracting parties would have had to work out a very elaborate convention containing classifications of offences and penalties attached to them. It was neither necessary nor practicable to do so, because of the existence of municipal penal law and the stipulations therein. The framework of written International Law, supplemented by other sources of International Law, had and has to be filled in by what municipal law says on the subject.

International Law, both written and unwritten, thus fulfils the function of a legal system at a higher stage. In principle it speaks to the individual *viâ* municipal law.

By its world-embracing power it influences municipal legislation, penal codes and military regulations. It has not done so to an equal degree. Hence the difference between the municipal laws of warfare

in various countries, as for instance between the United States Order No. 100 and the German War Book. This state of affairs creates many practical difficulties, which would be avoided by the existence and operation of a world-wide penal code. There have been attempts to submit such a Code for general acceptance. As far back as in 1874 General Arnadeau suggested it to the Brussels Conference; it was later supported by the Institute of International Law at Oxford, in 1880.

After the first World War, 1914—1918, efforts for the creation of an International Criminal Court were renewed. It was in 1920 that the question was raised, and it was taken up by the International Law Association, where drafts for the Statute of a future Court were laid down. Lord Phillimore and Hugh Bellot made a very great contribution to the cause of organized international criminal justice.

In 1926 the Association Internationale du Droit Pénal resolved at Brussels that a Permanent Court should "hear cases of individual responsibilities which may arise from . . . crimes and accessory crimes and all violations of International Law in time of peace or in time of war."

All those efforts led to the conclusion of a Convention for the creation of an International Criminal Court in 1937, signed by twelve States. However the idea has never materialized and practice did not follow theory. So we stand to-day, where we stood before 1914, though perhaps, it is fair to say, we have made some progress. But we have to face facts, which means seeking for solutions while there is no unified international penal law and no international Court.[7]

It is obvious that the lack of uniformity as it exists now is bound to bring about varying reactions to crimes committed. Some offenders will be punished more severely, others more leniently, in accordance with the rules of municipal law. Some Penal Codes provide for the death penalty, others do not. A constitutional Amendment of October 31st, 1910, to the Constitution of Colombia prohibited the

[7] There is a considerable literature on the subject. Pella: "La criminalité collective des Etats et le droit pénal de l'avenir" (1925); Lewitt, A.: "A proposed Code of International Criminal Law," Reports of the Conférence Intérnationale pour l'unification du droit pénal (Warsaw, 1929); Reports of the International Law Association, Conference, 1922, 1924, 1926. See also E. J. Cohn: The Problem of War Crimes To-day, Grot. Soc. vol. XXIV.

death penalty, substituting for it imprisonment for twenty years or so. Uruguay abolished death penalty in 1907. The Italian (Fascist) Penal Code on the other hand contained a very long list of offences threatened with the death penalty. But this variety of approach to the same type of crime cannot be avoided until a world-embracing Penal Code is brought into being.

This state of affairs results also in the fact that conflicts are likely to arise. They have already occurred in the past.[8] The penal laws of peace in municipal legislation may contain no stipulations as to the punishment of deeds prohibited by International Law, written and unwritten. The possibility is highly theoretical; the present state of development of municipal penal law guarantees an almost universal punishment of deeds, acts and omissions which we regard as criminal. Murder, pillage, causing bodily harm, are by now universally regarded as crimes (see above). It may, however, happen that a penal code may not include a provision in a particular case. Should this be so, foreign law and its standards of criminal responsibility may be used as a basis for indictment and conviction.[9]

To accept the standard of foreign legislation for punishment was also suggested by the "Commission on Responsibilities" which was dealing with the problem after the first World War, 1914—1918. All delegations, except the Japanese, approved of it.

This solution of the problem arising from the *lacunæ* in municipal law is undoubtedly justified.

Here again its superiority makes International Law the basis for legal approach. No legal principle or rule of International Law exists unless it has previously become part and parcel of the legal system of civilized States, or grown into the conscience at least of those who form the advance guard of international society.

A different approach would mean denial of justice. It would confront the Judge with an insoluble problem—"to refuse judgment" because "of the obscurity, or of the inadequacy of the law."[10] To prevent this in Civil Law, for instance, the Legal Codes of some civilized States stipulate that a Judge who would hide behind the

[8] See Report of the Commission on Responsibilities, *op. cit.*

[9] See George Manner: The Legal Nature and Punishment of Criminal Acts of Violence contrary to the Laws of War, A.J.I.L. July, 1943, p. 419.

[10] Art. 4, French Civil Code.

supposed silence of law " shall be subject to prosecution as guilty of a denial of justice."[11]

If we apply to violations of the laws of warfare the criteria of municipal law and apply " standards of foreign law " we avoid every possibility of a criminal escaping justice.

The other possibility of discrepancy, which is bound to arise out of the lack of uniformity of International and municipal laws of warfare, occurs in cases where municipal penal law provides prohibitions of acts which International Law permits. This state of affairs may result from the fact that, while municipal penal laws remains on the level of peace-time conditions, International Law has adapted its stipulations to war. The " compromise " between law and force has thus been reflected in International Law only. When confronted with a practical issue we may find that a particular case, although provided for by International Law, written or unwritten, has not been translated into municipal legislation.

We have indicated above the cases where international agreements recommended to the signatory powers the issuing of regulations which would conform with their stipulations.[12] In many cases this recommendation may not have been carried out; a concrete case of violence in battle, in occupied territory, in relation to members of the armed forces or civilians, even if approved by International Law as an act of legitimate warfare, still remains a crime or lesser offence in municipal law. It is an obvious conflict.

The Judge called upon to pronounce judgment on a war criminal will have to proceed on the lines indicated above. The indictment is prepared in accordance with the stipulations of municipal law; the case proceeds, the public prosecutor demands conviction and punishment, basing his claim on municipal law. The attitude to be adopted by the Judge is clear—International Law supersedes municipal law. The municipal law of peace is to be regarded as *lex generalis*. The lack of special war-time stipulations (municipal *lex specialis*), causes the immediate and direct intervention of International Law, *vid*

[11] Similar stipulations are laid down in the Belgian Code, Art. 4; Dutch, Art. 4, Law of 1829; Spanish, Art. 6, Codigo Civil, and Art. 368, Codigo Penal, of 1870. For a thorough investigation of the problem of denial of justice in international relations, see Freeman: The International Responsibility of States for Denial of Justice (London, 1938), in particular general theoretical aspects of it, p. 15 *et seq.*

[12] See above, Art. 28 of the Geneva Convention, the Fourth Hague Convention, the Tenth Hague Convention, Art. 21, etc.

exceptionis, quâ *lex specialis*. It follows that, in all these cases where municipal law provides for the punishment of offenders without having regard to the special conditions created by war, the accused is entitled to invoke the International Laws of Warfare in his defence. That is in fact the function to be fulfilled by International Law, intervening in municipal law.

The solutions of the conflicts, suggested above, result from the present inter-relations between State and International Law.

16

MUNICIPAL LAW AS APPLIED TO WAR CRIMES

1. THE CLAIM OF THE STATE CONCERNED

THE existing variety of Penal Codes and their lack of uniformity raise first of all the question, which of the many Municipal Penal Laws is competent for the qualification of the war crime. Competence for qualification implies the right of jurisdiction, which means "the international capacity of the State to prosecute and punish for crime generally."[1] (Jurisdiction in its narrower meaning, denoting problems of procedure only, will be dealt with below.) The practical issue presents itself in the form of conflicts of laws. A German general maltreats American prisoners-of-war detained in a prisoners-of-war camp in France. . . . The Japanese authorities order the shooting of British civilians in Japanese-occupied China. . . . German gauleiters deport Czech hostages to Germany where they are put to death. . . . The commander of a U-boat sinks without warning a hospital ship of the other belligerent, while it is moving along the territorial waters of a neutral State. . . .

The captain of a German bomber drops bombs deliberately on a distinctly marked British hospital ship on the high seas, causing the death of French, Norwegian and Polish soldiers.

Each of the incidents enumerated above represents a type of war crime; each of them involves the question as to which State would have the jurisdiction: the right to prosecute and punish the perpetrator.

Will it be the State on whose territory the crime was committed, the State whose national the culprit is, or the victim is, or whose property was damaged?

No uniform reply can be given to these questions, as there is no generally accepted rule concerning jurisdiction in inter-State relations. Municipal legislations have accepted several criteria on the subject. The usual and most common link between crime and law, according

[1] Jurisdiction with respect to Crimes, Draft Convention, Harvard Law School, Art. 1 (Use of Terms), A.J.I.L. Suppl. vol. 29, 1935, p. 467.

to which it has to be judged, is the place of its commission (*lex loci delicti commissi*).

This is the *territorial principle.*

This principle has its root in the strict application of sovereignty.

The idea of territoriality originated in Italy, based on the principles of Roman law.[2] Since that day the principle of territoriality has been fighting the principle of personal jurisdiction. They are the expression of two different outlooks—one in favour of the full sovereignty of the State, the other in favour of universalism and international solidarity.[3]

The territorial principle, however, stands in the forefront to this day. The State on whose territory the crime was committed does as a rule claim the right of jurisdiction, and always looks with jealousy on those who try to deprive it of what is regarded as a fundamental part of its sovereign rights. Following its universal application the Treaty on International Penal Law, signed at Montevideo, January 23rd, 1889, laid down in Art. 1:—

"Crimes are tried by the Courts and punished by the laws of the nation on whose territory they are perpetrated, whatever may be the nationality of the actor, or of the injured."[4]

Thirty-eight years later, the Conference for the Unification of Penal Law, held in Warsaw, November 5th, 1927, stated in its draft, Art. 1:—

"Les lois pénales de l'Etat . . . s'appliquent à quiconque commet une infraction sur le territoire . . ."[5]

The territorial principle, as illustrated above, contains those exceptions only, which are provided by International Law. This has been perfectly expressed in one of the greatest of legal documents, the Bustamante Code, which was accepted by fifteen States of Central and South America, adopted in Havana, February 20th, 1928, and became law in 1935.[6]

The territorial principle could not wholly suffice. Contemporary

[2] As to the historical development of those principles, see Cybichowski: La compétence des tribunaux à raison d'infraction commises hors du territoire, Recueil des Cours, vol. II, 1926, p. 264 *et seq.*, and Pella: Les Crimes contre la personalité d'Etat et le droit pénal d'avenir, Recueil des Cours, 1930, p. 770 *et seq.*, and literature there quoted.

[3] See Correspondence between U.S.A. and Mexico, *Re Cutting* case, United States Foreign Relations (1887), p. 751 *et seq* .(Washington, 1888).

[4] Text, A.J.I.L. v. 29, 1935, p. 638.

[5] Text, A.J.I.L. above, p. 641, and Actes de Conference.

[6] See Art. 296 *et seq.*, Chapter I of the Code.

legal systems, while jealously defending their claim to territorial jurisdiction, go beyond it by claiming the right of jurisdiction beyond their frontiers.

The principle of personalité active.[7]—This provides for the prosecution of a State's own citizens if they commit crimes abroad. Even the Anglo-Saxon countries who adhere strictly to the principle of territoriality of law make exceptions.

The Explosive Substances Act, 1883 (46 & 47 Vict. c. 3, s. 7), enables British Courts to try British citizens for acts committed abroad, if they had as their aim to cause explosions in England. High treason is punished according to the Official Secrets Act, 1889 (52 & 53 Vict. c. 52), wherever committed; similar provisions are contained in the Merchant Shipping Act, 1854, and the Merchant Shipping Consolidation Act, 1894 (57 & 58 Vict. c. 60, s. 686).

In the United States the 35 U.S. Stat. C. 1088, s. 1, lays down that "Whoever owing allegiance to the United States levies war against them or adheres to their enemies giving them aid and comfort within the U.S. or *elsewhere* (the author's italics), is guilty of treason."

Almost all other civilized States claim jurisdiction over their citizens even if abroad. The claim is usually linked with the condition that the deed is regarded as offence by the *lex loci delicti commissi*:—

(French Law: "si le fait est puni par la legislation du pays où il a été commis"—Code d'Instruction Criminelle, 1808, 1910, Art. 5.)

Other Codes attach conditions concerning the gravity of the offence, as Art. 7 of the Chinese Penal Code, 1938, or the character of the offence itself, Dutch Law, Penal Code, 1881, Art. 5.

The principle of personalité passive.—Many contemporary Penal Codes contain also stipulations for the punishment of crimes committed abroad both by nationals and foreigners, if those crimes are directed against the interest of the State, its citizens, or their interests—the protective principle. The most common bases are reasons of security.[8]

Here again we find British and United States legislation rather reluctant to extend the scope of their jurisdiction (*ut supra*). Yet it is rightly said that "some offences can only be committed within the territorial jurisdiction of the Government, because of the local acts required to constitute them. Others are such that to limit their *locus* (the author's italics) to the strictly territorial jurisdiction would

[7] Cybichowski opposes the definition as a tautology. He tries to base the whole structure of penal law on the principle of territoriality (*op. cit.* p. 282).

[8] The Penal Code of Panama, 1916, extends its competence to "crimes committed abroad against the security, interior or exterior, of the tranquility of the State or against its fiscal interest" (Art. 3, Book I, Title I, Chapter I); the same line is taken by the Polish Penal Code (1932, Art. 8).

be greatly to curtail the scope and usefulness of the statute . . ." This was the dictum of Chief Justice Taft in *United States* v. *Bowman* (1922).[9]

This statement of a prominent American Judge confirms the soundness of ideas which found expression in the resolutions of the Institute of International Law (Oxford, 1880, Munich, 1883), and the Conference for the Unification of Penal Law (Warsaw, 1927).

Quasi delicta juris gentium (Universality).—There are offences which have been so deeply resented by the civilized world that they have been almost universally condemned as crimes. They have been outlawed by municipal law and international conventions. The most typical amongst them is piracy. The practical application of the principle of universality means that wherever the crime is committed, it may be tried and punished by the State in whose custody the culprit finds himself. So far the principle of universality is limited to half a dozen crimes only, as only with regard to them have conventions been concluded.[10]

We have seen that there are at present five principles on which municipal Penal Law bases its competence. Accordingly each particular case may be claimed by a particular State as being within its jurisdiction on the basis of one of the said principles.

This variety of links between "deed" and "law" has been accepted by International Law. All five titles are accepted by it as good and valid. While not interfering with the details of municipal penal stipulations, it only binds the States "not to overstep the limits" which it sets for jurisdiction of the individual State—"within these limits" . . . the title of a State "to exercise jurisdiction rests in its sovereignty."[11] Therefore, within these limits the State has complete freedom of action.

Undoubtedly the strongest link between crime and law exists, if the law reigns over the place where the crime was committed.

[9] See also several judgments quoted by Cybichowski, *op. cit.* p. 275; Pella: *op. cit.* p. 775; Harvard Law School Draft Convention, *op. cit.* p. 544.

[10] Piracy, counterfeiting, slavery, traffic in women and children, traffic in narcotics, use of explosives or poisons to cause common danger, offences against submarine cables, and traffic in obscene publications.

[11] Held by the Permanent Court of International Justice in the case of the *S.S. Lotus* between France and Turkey, Publications P.C.I.J. Series A, Judgment No. 9, p. 19.

However, the growth of international relations was bound to bring about new and wider principles of qualifications. It meant a departure from legal isolationism. The road of progress and international collaboration leads clearly to universality; and, though the present variety of principles creates chaos, yet each of them carries in itself the kernel of what we could call international solidarity and the interdependence of States and their populations—the final solution being universality. It already exists in territories which are not subject to the jurisdiction of any State,[12] and in the *quasi delicta juris gentium*, these being the most odious crimes, condemned by the civilized world.

A deed to be qualified as a war crime by municipal legislation may fall within one of the several categories of jurisdiction dealt with above.

All principles—the territorial, the principles of active personality, of passive personality (the protective principle), and universality, give indications as to which State is " concerned " with the war crime.

Should a conflict arise in a case where more than one State is concerned, the claiming States will have to settle it by mutual agreement. This could be done either *ad casum* or by a convention.

2. DENOTATION OF PLACE AND MUNICIPAL CRIMINAL LAW

The geographical denotation of place, where the criminal act or omission takes place, as described above, does not always correspond with what law regards as " *locus delicti*." Plans for a murder are made in New York, while the victim is murdered in Paris. Or, to quote an American case, *Simpson* v. *State*: the culprit " has stood on the South Carolina bank of the Savannah River and shot at a person in a boat on part of the river within the boundaries of Georgia, the bullet missing the objective and striking the water on the Georgia side . . ."[13] Or where persons are conspiring in Berlin to commit a crime in Paris, where it is in fact committed.

[12] See Cybichowski, *op. cit.* pp. 251, 291. Also Bustamante Code, Art. 308, Chapter III: " Piracy, trade in negroes and slave traffic, white slavery, the destruction or injury of submarine cables, and all other offences of a similar nature against international law committed on the high sea, in the open air, and on territory not yet organized into a State shall be punished by the captor in accordance with the penal laws of the latter."

[13] See 92 Ga. 41, and A.J.I.L. v. 29, 1935, p. 489.

Crime as an event is not a single, detached occurrence, without a "before," a "while" and an "after." It is always an event which has its own history. Born in the criminal's mind it is bound to be preceded by a *mens rea*,[14] the will to commit an offence; the second stage is the preparation, then the commencement of the crime. Some legal systems call it putting a force in motion.[15] The final stage is the commission or consummation of the crime.

All these stages leading up to the criminal act or omission may take place on the same geographically defined place. They may, however, and this occurs quite frequently, be separated, not only locally but also legally, by taking place in areas under different legal systems. In all these cases the question arises: which law is to be applied?[16] Municipal laws give no definite and clear reply to the question and accept various solutions:—

1. The place where the culprit committed his deed, whether it meant the commencement of the crime or its commission.

The Spanish law of 1870 solves the problem by laying it down that: "The cognizance of crimes begun in Spain and consummated or frustrated in foreign countries falls to Spanish Courts and Judges . . . " (Art. 355).

2. The place where the effects of his deed come into force. This qualification is accepted in some cases by the Anglo-Saxon States with regard to crimes committed abroad. We find it in the Explosive Substances Act, 1883; it refers also to crimes commenced abroad and consummated inside the State.[17] The Federal Penal Code of Mexico (1931) stipulates in Art. 2: that the code will be applied to "crimes which are begun, prepared, or committed abroad, when they produce or seek to have effects in the territory of the Republic." The same principle is to be found in the New York Cons. Laws (1923), c. 41, s. 133:

"A person who commits an act without this State which affects persons or property within this State, or the public health, morals, or decency of this State, and which, if committed within this State would be a crime, is punishable as if the act were committed within this State."

3. Mixed theory considering two places where crimes are committed. This is the most modern theory applied in modern Penal Codes. It

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[14] See Kenny : Outlines of Ciminal Law, p. 37 *et seq.*
[15] North Carolina, Const. Stat. 1919, s. 4604, quoted in A.J.I.L. v. 29, p. 486.
[16] Compare considerations above concerning the municipal law to be applied to war crimes.
[17] *Queen* v. *Nillins* (1884), 53 L. J. M. C. 157.

goes so far as to provide for the punishment of the criminal in the place where one of the essential elements in the process of crime takes place. This line has been taken by the German Draft (1927):—

> "An act is committed at each place in which the elements of the punishable action have been realized in whole or in part, or where, in the case of attempt, they were to be realized according to the intention of the actor."[18]

The problem of legal location of crime practically applied to war criminals means under the present circumstances, when international penal law does not provide a clear reply to the question—that a war criminal may be actually liable to punishment and qualified as a war criminal under more than one legislation. In particular will it refer to cases where criminal acts have their effects in more than one State, where the war criminal planned and prepared his criminal action in his own State, while the effects were produced abroad, on the territory of the other belligerent.

It will remain for the judicature of the States concerned to decide in every case on the basis of the laws of conflicts of laws. Here again, as in cases where more than one State claims the culprit (as above) the States concerned will have to reach a mutual agreement.

[18] Sect. 8 ; also Polish Penal Code, 1932, Art. 3; Denmark Penal Code, 1930, Art. 9.

17

THE TRIAL OF WAR CRIMINALS

A WAR criminal to whom justice has to be meted out is bound to appear in Court. His trial can take place while hostilities last or after their cessation.

A. TRIAL OF WAR CRIMINALS DURING THE WAR

A war criminal caught during hostilities can be tried and sentenced. Art. 30 of the Hague Regulations provides for such a possibility with regard to those guilty of spying. The Court competent to try them is either the national Court of the culprit or a Court of any of the States concerned.

1. The national Court of the culprit is competent according to general penal legislation. It is provided for by the British and American Manuals of Military Law and German Military Law. Any war crime committed by members of the armed forces or anybody else may find its epilogue in the national Court. Matters of procedure and punishment are laid down by municipal law and have a purely domestic character as regards the relation between State and citizen. This does not mean, however, that any of the States concerned must regard the solution of the case as satisfactory. A German officer tried by a German Military Court for having committed a war crime, very leniently punished, may still be claimed for the same crime by France if that crime was committed on French soil or against a French citizen. Art. 228 of the Treaty of Versailles provides an important precedent on the subject. Allied Courts had the right to try war criminals even in cases where they were previously tried by their national Courts. This *lex ex contractu* although contrary to the legal principle *non bis in idem* (judgment cannot be passed twice on the same case) was justified by the peculiar character of war crimes and turned out later to be justified by the experience gained during the Leipzig trials.

While the German Army advanced into the Continent during the present conflict some of its members committed pillage, murder and robbery. The German Military Court may have found them guilty in accordance with the stipulations of the German Military Code (Arts. 129, 132 or 134).[1] They may have been convicted, but also may have escaped unpunished. In both cases it may be stipulated that by a *lex ex contractu* (an agreement which creates law) their trial should take place before the Court of the State affected. If they have not been tried at all, no *lex ex contractu* is needed, although even then it is desirable.

2. *The Courts of the State affected.*—The war criminal may also be tried by the Court of the State on whose territory the crime was committed (*forum loci delicti commissi*) or whose citizen was the victim of crime. The same applies to crimes directed against the interests of the State or citizen. The war criminal may get into the hands of the other belligerent as prisoner-of-war. He is then liable for the crimes committed before his captivity. (During the war, 1914—1918, this was the claim on which the German Court tried and sentenced to death Captain Fryatt (see p. 33) for illegitimate naval warfare. He was not in fact guilty of any crime.) During the present war the first trial of this type took place at Kharkov, where German officers and men were tried and sentenced by a Soviet Military Court after having been found guilty of most cruel acts of barbarity committed on Soviet soldiers and civilians in occupied areas.[2]

The legal basis for the trial is the connection between the culprit and the object of crime, as recognized by International Penal Law (*ut supra*).

With regard to prisoners-of-war taken during the hostilities, the competent Court is the Military Court of the other belligerent.

The situation is different with regard to those who are caught in occupied lands. Once an occupation becomes effective three types of Courts are established:—

(a) Military Courts—for members of the occupying army.
(b) Military Courts set up by the Commander-in-Chief of the occupying army, which are called upon to mete out justice and punish crimes committed

[1] German Reichsgesetzblatt, Nr. 181, 1940, Berlin 16.10.1940.

[2] For details of the Kharkov trials, see "The Lessons of the Kharkov Trials," by Dr. B. Ecer, published by the Russia To-day Society.

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against rules, regulations and laws issued by Commander-in-Chief; and, finally,

(c) Local Courts, whose scope of activity is left untouched to the extent provided for by the Commander-in-Chief of the occupying army.

For war crimes local Courts whatever their scope of activity, have no competence whatsoever.

Members of the occupant's Armed Forces are tried by Courts Martial for every offence be it war crime or ordinary common crime.

Members of the civilian population of the occupied country or members of the armed forces of the other belligerent are tried by Military Courts under martial law, which is decreed by the Commander-in-Chief, and aimed at protection of the occupying Army. In accordance with the general principles of law, diplomatic agents and all persons of neutral nationality who have diplomatic immunity are exempt from the jurisdiction of these Military Courts, as are also exempt members of the Armed Forces of the occupant, who come within the jurisdiction of the Courts Martial.

The jurisdiction extends, however, to neutrals who are found guilty of war crimes.[3]

Those who violate the rules set up by the occupant, within the scope of his rights under the Hague Regulations, are war criminals *sensu largo* (*ut supra*), if those crimes fulfil the conditions laid down on the preceding pages.

A different situation arises where territory previously occupied by the other belligerent changes hands and is regained by its lawful sovereign, while the war continues. The lawful sovereign through his army and judicature is entitled to bring to Court those who committed war crimes. This was the case with German prisoners before the Kharkov Military Court. There are no provisions as to whether their trial should take place before a Military Court or Civil Court. The choice is left to the State concerned.

However, the trial of war criminals while a war lasts offers very great difficulties, which cannot be overcome. The difficulties are caused by the war and the consequent impossibility of finding those mainly responsible for the violation of law. The result is that the majority of war criminals can be tried only after hostilities cease.

[3] See *Hardman's* case, American and British Arbitration Claims, 1926.

B. TRIAL OF WAR CRIMINALS AFTER THE CESSATION OF HOSTILITIES

As to the question of trying war criminals after the cessation of hostilities, a still greater variety of possibilities are open for consideration. Let us analyse them:—

1. *National Courts of the culprit.*—It has been already pointed out that existing penal legislation provides for the trial by national Courts in accordance with the principle of active nationality (*ut supra*). Wherever the crime is committed, the culprit can be tried by his national Court. Military laws contain stipulations as to the punishment of soldiers for war crimes by military Courts irrespective of the place where they were committed. Art. 366 of the American Manual lays down certain rules to this effect, and so do other Manuals. The doubt as to whether the trial by a national Court guarantees that justice will be meted out to the accused has already been pointed out above. After the last world war those German officers and other ranks found guilty after a preliminary investigation, were brought before the Court at Leipzig. Out of 896 cases only forty-five appeared in Court. After many difficulties—among them the "impossibility" of finding witnesses to give evidence, and of tracing some of the accused—the trial was opened on May 23rd, 1921. Then it was found that three of the accused had left Germany, and so their trial was rendered impossible. The final result was the conviction of nine accused, who, although found guilty of most dreadful crimes, among them the sinking of the hospital ship "Llandovery Castle," were sentenced to terms of imprisonment ranging from four years to a few months. Some of them never served their sentences.

Some of the trials were most striking and, therefore, worth quoting:

Capt. Mueller, a lawyer, was in charge of the prisoners-of-war camp in Flevy de Martel. He maltreated his prisoners, and tolerated brutal behaviour by his staff. It was proved that he once struck a prisoner's wounded leg with a baton. He forced sick prisoners to do hard work; he used to arrange horse riding over their bodies. The Court found that he was brutal, his actions being sometimes contrary to law. No excuse was given for what he had done, and in spite of all that, the prosecutor asked for a penalty of fifteen months' imprisonment only, and Capt. Mueller served only six months.

General Stenger, who was responsible for the order not to take prisoners but to kill every enemy, was also acquitted. The same happened to General von Schack and General Kruski, who, while in charge of the prisoners-of-war camp in Cassel, were responsible for a daily death rate of 50—100 and later even greater numbers of prisoners-of-war, because of mismanagement.[4]

On the whole the case of the Leipzig trials shows that the national Courts of a defeated State are inclined to be too lenient with the prisoners at the bar.

As shown above, national jurisdiction is one of the alternatives in accordance with existing law. However, when considering the possibilities *de lege ferenda*, it is the least desirable alternative. National Courts dealing with Quislings and traitors are definitely equal to their task. In the case of war crimes, however, where more adequate alternatives are available, those should be adopted.

2. *Courts of the State affected.*—The State affected is entitled to try war criminals before its Courts, both while hostilities last and after their cessation.[5] The strongest link is undoubtedly that between the State and its territory: *forum loci delicti commissi.* It is therefore not without reason that Garner says: "The right of the belligerent in whose territory even if it be at the moment under the military occupation of the enemy, crimes are committed by enemy soldiers, to try and punish the offenders must be admitted in the interest of justice."[6]

Next comes the State whose citizen was the victim of crime, whose interests or whose citizens' interests were violated.[7]

Arts. 228, 229 and 230 of the Treaty of Versailles provided for the trial of war criminals by Courts of the States affected. The Courts had to be Military Courts. In cases where there were crimes committed against nationals of various States a mixed Military Tribunal had to

[4] For details about the Leipzig trials, see A.J.I.L. vol. 15 (1921), p. 440, and A.J.I.L vol. 16 (1922), p. 579.

[5] This view was held by Renault, Pic, Marignhac and many others. See Garner: Punishment of Offenders against the Laws and Customs of War, A.J.I.L. vol. 14, p. 80.

[6] Garner, *op. cit.* 253, p. 80.

[7] This point was rightly stressed by Mr. Dickinson of the State Department of Justice, U.S., during the discussion at the 37th Annual Meeting of the American Society for International Law (see Proceedings, Am. Soc. Intern. Law, April—May, 1943, p. 48).

be established. Similar penal provisions were also laid down in other Peace treaties:—

Art. 173 of the Treaty of St. Germain-en-Laye.
Art. 118 of the Treaty of Neuilly-sur-Seine.
Art. 15 of the Treaty of Trianon.
Art. 226 of the Treaty of Sèvres.

The last of them was not ratified, and the Treaty of Lausanne, which was concluded in its place, provided for an amnesty (July 24, 1923). However, the stipulations of the above-mentioned treaties never came into force. Instead of being brought before Allied Tribunals, German war criminals appeared in Leipzig with the result already described.

This impracticability should be avoided in future, the easiest way being an agreement on the subject. The agreement ought to be concluded between all the belligerents concerned. Where, however, unconditional surrender terminates hostilities no agreement with the defeated enemy can be concluded, this being impossible—the enemy having been left without an authority to deal on his behalf. In this case the settlement must necessarily be unilateral, so far as the opposing belligerents are concerned. But as between the Allied belligerents on the one side, agreements are required in order to avoid conflict of competence.[8]

The question arises now what type of Court is called upon to try war criminals—civil or military. After the last war the decision was in favour of military Courts (Art. 228 of the Treaty of Versailles). There is no definite rule in International Law, excluding either of them from jurisdiction. Conflicting views concern only the problem of advisability and which will be the more appropriate. Speed in action is the asset of the Military Courts, but this is not the only consideration.

Perhaps, in the words of Lord Sankey, it ought to be left "to each country to choose its own type of Court, whether military or civil, and details as to time and place of trial."[9]

[8] The jurisdiction of Courts of the State affected can now be regarded as universally recognized. This view has been expressed by the Lord Chancellor (Viscount Simon), Lord Maugham, Lord Cecil and others. See Discussion in the House of Lords, Parliam. Debates, vol. 124, No. 86, October 7th, 1942, pp. 564, 565, 576 and 579 Also Lord Sankey's article in Fortnightly Review, January, 1943.

[9] Lord Sankey, *op. cit.*

3. *Neutral Courts.*—A third less practicable possibility is open, namely, the trial of war criminals by neutral Courts. Charles Cheney Hyde submitted that proposal and claimed that it would be very advantageous. The decisions of neutral Courts would more easily command respect; they would form a useful expositor of International Law, and would " inspire a widespread and decent respect " for the stand of the Allies.[10]

None of Hyde's arguments is, however, convincing. There are very few neutrals in this war.

Besides there are no legal foundations for such a solution, it could only be an agreement *ad hoc.*

It has been therefore rightly said that the idea of trying war criminals by neutral tribunals is " fantastic, rather than practicable."[11]

4. *International tribunals.*—A further possibility for solving the problem of jurisdiction is offered by the suggestion of bringing war criminals before an International Tribunal. The idea is favoured, as some writers point out, in view of the necessity that the United Nations take a collective stand concerning punishment, for the sake of uniformity and future legal development.[12] It has also been said that in view of the great sufferings endured by many of the occupied countries " it would be too much to expect national judges in a national Court to remain completely impervious to the execration with which the appearance of every incriminated prisoner would be hailed."[13] A " United Nations Court " is therefore advocated.

It cannot be denied that uniformity in jurisdiction is a most desirable object. However, it could not be achieved during the years of peace. All efforts to create an International Criminal Court (as pointed out above) failed. We were left with national jurisdiction and its many varieties. The attempt to create an International Criminal Court cannot, therefore, be directed towards the question of war crimes solely, as it concerns the general organization of penal justice. Justice

[10] Prof. Charles Cheney Hyde's speech at the 37th Annual Meeting of the American Society of International Law, April—May, 1943 (Proceedings, p. 39 *et seq.*).

[11] Wheaton, *op. cit.* 789, vol. II (quoting Woolsey).

[12] See Clyde Eagleton: Punishment of War Criminals by the United Nations, A.J.I.L. July, 1943, p. 496.

[13] See The Spectator, weekly newspaper, October 23rd, 1942, " The War-Criminals."

should prevent revenge. It will prevent revenge only if every community, nation and State is satisfied that the Court is impartial.

The difficulty with an International Court dealing with all cases of war criminals lies, however, in principle, in the fact that it would have to be set up—*ex post facto*—after the crimes and offences have been committed. A further difficulty arises with the procedure of such a Court.[14] It will be slow and cumbersome, while speedy action will be essential in view of the large number of accused.

Everything points to the conclusion that the idea of an international Court for all war criminals is impracticable for the moment at least.

The problem of an International Court is, however, linked with another important legal issue. It is the question of those who are not criminals in the very technical sense, culprits of war crimes, but those whose activities led up to the outbreak of the present conflict as a war of aggression and illegal attack. They could not be punished by national Courts for crimes defined in Penal Codes, but before Courts of natural or substantial justice.[15] This view has also found the support of the Lord Chancellor (Lord Simon), who however claimed their punishment by an act of State.

There are also those criminals "whose offences"—to use the words of the Moscow Declaration of 1943—"have no particular geographical location." They have to be punished "by a joint decision of the Governments of the Allies."

Though the text of the Moscow Declaration implies "punishment by decision" which may be an act of State, yet the setting up *ad hoc* of an International Court cannot be altogether ruled out.

Both propositions are practicable, there are points in favour of both of them. It may be that by the time these lines are read, a decision by the Great Powers one way or the other may have been reached. None the less it has to be pointed out that in the few cases of the

[14] In his speech in the House of Lords (October 7th, 1942) the Lord Chancellor pointed to the difficulties connected with the establishment of an International Court: "When you have created this novel tribunal, you still have to face the question of what is the code of law which it is going to apply. I think myself, as a man who has spent a good deal of his life in the practical business of the law, that one of the greatest difficulties of all . . . would be procedure."

[15] Lord Wright: Letter to *The Times*, January 21st, 1944.

[16] As above.

arch-criminals, who both prepared this war and waged it committing the most atrocious crimes, the setting up of an International Court may be most advisable. Indicted by all the United Nations or by some of them speaking on behalf of all, those arch-criminals would be called to account for the obvious war crimes they had committed.

In any case they would be tried under the Laws of Warfare. Its statute and authority would be based on a *lex ex contractu*, as there is neither International Criminal Law nor Court in existence now.

5. *Minimum standard of proceedings.*—Whatever the choice of the State concerned may be, or be it an International Court, a fair trial must be secured. It is the minimum of justice. This is a principle of International Law. It is referred to in Art. 30 of the Hague Regulations and applies to all war crimes. No war criminal can be punished without a fair trial, as he must be given the opportunity of defending himself.

6. *Pleas of defence.*—The prisoner at the bar is likely to plead in his defence:—

(a) That he acted in pursuance of superior orders.

This is the most common plea. An officer or soldier who was given the order to shoot hostages or to burn a village, will most probably plead in his defence that he acted in pursuance of that order. All pleas of defence have to be dealt with by municipal law.

The plea may under certain circumstances hold good, but if accepted as a general rule it may lead to a *reductio ad absurdum*, to the effect that the only war criminals are those few at the top from whom the orders emanated.

Municipal laws solve the problem of superior orders in various ways. The new German Military Code, for instance, contains the following stipulation:—

"If the Penal Code is violated as the result of the execution of an order given in pursuance of duty then the authorised superior issuing the order is alone responsible. The subordinate executing the order is, however, liable as an accessory: (i) if he exceeds his orders, or (ii) if he is aware that the order of his superior is an act involving a common or military crime or offence. Where the fault of the subordinate is slight, no punishment need be imposed."[17]

[17] German Military Law, German Official Gazette, No. 181/1940, of October 16th, 1940, Art. 47.

(b) That he acted under compulsion.

(c) That it was a mistake in law.

(d) That he rebuts the presumption of having violated law.[18]

All these pleas and general methods of procedure before municipal Courts have to be decided by the municipal Penal Codes. As far as an International Court is concerned this Court would have to consider the pleas of defence on the merits of each case. International Law contains no provisions to this effect, so no general rules can be laid down.[19]

[18] Schwarzenberger adds another plea—namely, that of having acted as a reprisal and also if a head of a State is concerned and thus not responsible, as exempted from the jurisdiction of another State. *Op. cit.* p. 17.

[19] The Commission of Responsibilities stated: "It will be for the Court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility"—this holds good with regard to all pleas of defence.

18

QUISLINGS AND WAR CRIMINALS

WHEN in May, 1933, the Norwegian Major Vidkun Quisling formed an organization, based on totalitarian principles, called " Nasjonal Samling " (National Union), he did not anticipate that his name would become symbolic, the symbol of a special type of treason.

Vidkun Quisling had had a very stormy political career, which reached its peak when Germany invaded Norway in spring, 1940. He installed his collaborationist Government, after the legal Government and the King fled from Norway. Together with and shielding behind the German emissary Terboven he forced upon the people of Norway collaboration with the German occupant. He did so although the laws of Norway and her people were against him. At the time of the invasion of Norway the Nygaardsvold Government appointed as far back as in 1935 was in power. The Government represented the Labour Party, which was the largest party in the Storting, Norway's parliament. After the Germans invaded the country, additional members from other political parties were appointed to the Government. Immediately after the German attack on Norway the Storting gave its sanction to a law (April 9th, 1940) conferring upon the Government full powers to make all necessary provisions in order to safeguard the interests of the Realm until such time as the Storting could meet again.

This Emergency Law, therefore, gave to the King—who according to sect. 3 of the Norwegian Constitution as King-in-Council had the executive power—and Government the right and power to represent the nation and to act on her behalf for the duration of the war.

Yet Quisling challenged these lawful acts and the lawful authority by trying to force the people of Norway into collaboration with the invader. He met with boycott and the organized opposition of the people. However, he continued in his efforts to make Norway yield to German pressure and serve German interests.

Being the first of this type of traitor and using special methods in his treacherous activity he has become a symbol—his name symbolic.

Following Major Quisling's activities all those who collaborated

with the enemy, while he was the " occupant," and did so in defiance of the lawful sovereign and Government, who continued the fight for liberation, have been labelled in common language as " Quislings."

The Press, literature, and every-day talk have thus labelled, among others:—

Pierre Laval, once France's Prime Minister, who was second to Marshal Petain in the Vichy " Government " against the French Committee for National Liberation, headed by General de Gaulle.

Pavelitch, who as the leader of Croatia opposed the King, the Government and the Liberation Movement, headed by Marshal Tito, collaborating with Germany and helping to exploit his country.

These are the most notable among those whom public opinion labelled as Quislings. The common denomination for all of them is " treason," " the atrocious crime of endeavouring to subvert those institutions which have been ordained in order to secure the peace and happiness of society " (Chief Justice Marshall).

Quislingism, however, is a peculiar type of treason. Treason, as a crime has for centuries had its well-established place in national law. It is punishable both in time of peace and war. Out of the bonds which link the citizen with his country, duties arise which the latter must fulfil. The duty of loyalty and faithfulness is of particular importance in time of war, when for security reasons, the danger war brings about casts much heavier burdens on every member of a community. It is, therefore, only right that British law demands from a British citizen continuous allegiance to the Crown, even if he is in enemy-occupied territory.[1]

The methods, ways and means by which the present war was carried on by some of the belligerents have created new possibilities for treason and treacherous activities. Quislingism is the most outstanding among them.

In general, law and penal codes were caught unprepared by these new methods of treason. They were only partly adapted to face them by the new notions of crimes against the security of the State, introduced in several legislations shortly before the year 1939. It was the danger democracies were facing that compelled them to act.

[1] Privy Council in *De Jaeger* v. *Attorney-General for Natal*, (1907) A. C. 326.

Destructive influences from outside, the "fifth column," subversive activities in the years prior to the outbreak of this war put them on guard.[2] The years between the two World Wars were in fact a period of legislative inflation, by which the weak, visionless and inert democratic régimes of Europe attempted to stop the inevitable approach of war. But it was not only war. It was also everything war brought about; the great and deep frictions inside communities which was the product of those years. Once again it became clear that repressive measures of criminal law can be effective only if the society is built on sound foundations, the function of law is to counteract isolated cases only, and not a mass disease which is bound to result in civil war.

The link between the State and the individual, the foundation of the pre-war order proved itself unsound. Europe's communities were affected by a bacillus, which was disintegrating the entity. War has accelerated the process in which those hundreds and thousands of corrupt, dissatisfied and destructive elements could become a real danger to the very existence of the communities they lived in. It was not only those "who were disappointed in life, the frustrated who transferred their feelings to political phantoms," . . . not only people "with serious psychiatric abnormalities," with "homosexual tendencies who had been unable to find any real basis for their lives.[3] The root of the trouble lies much deeper. It is in the very fabric of European communal life, in the political and economic structure of her various societies, in the weakness and inadequacies of her educational systems. Hence the dimensions treachery assumed throughout the occupied countries. Hence also the deep cleavages created in communities, nations and even families.

Belated though it was, law awoke to the realities of life. It was a Belgian legislator who took special notice of these facts. In an introduction to new stipulations he rightly points out:—

"L'evolution de la vie politique tant nationale qu'internationale comme celle des méthodes de guerre et d'occupation, la ménace plus précise ou la réalité d'un conflit armé et de l'envahissement du territoire ont fréquemment amené le législateur à completer ou modifier en cette matière notre code pénal."[4]

[2] See Belgian law of July 17th, 1934, "relative aux crimes et délits contre la surété exterieure de l'Etat"; Czechoslovak law of March 19th, 1923, and other.

[3] Meerloo, A. M.: A Study of Treason, The Lancet, September 2nd, 1944.

[4] Moniteur Belge, 112 année, Londres, No. 28, 29, Dec. 1942, 512, Rapport du Conseil.

New amendments were introduced " par suite des méthodes nouvelles employées par l'ennemi dans les territoires occupés " . . . considering that: " La Patrie liberée . . . demandera compte alors de leur (scil. traitors) conduite, et la protection allemande dont ils se prévalent aujourdhui ne les préservera pas du sort qui les attend." [5]

This is in fact the best justification of the new methods which have been introduced against " Quislings."

They concern mainly those States whose territories were overrun by the enemy, where *via facti* collaboration with the enemy against the interests of the State has been made possible.

Similar provisions are to be found also in other legislation. This is the way in which law fortified itself in the plan to deal with " Quislings." As can be seen from the above, the provisions against Quislings are couched in very general terms. While approaching the problem from the point of every day life it is a very difficult proposition to draw the

[5] Here are some of the enactments passed on the subject:—

Poland (Decree of the President of the Republic, Polish Official Gazette, No. 102, December 2nd, 1939, Art. 8). " A Polish citizen who voluntarily assists the occupying authority in carrying out acts . . . contrary to the Hague Regulations is liable to a penalty of imprisonment up to 10 years and a fine or confiscation of his entire property."

Belgium (Law of 17.12.1942, Moniteur Belge, No. 28, 29.12.1942). " Sera puni de mort, quiconque aura participé à la transformation par l'ennemi d'institutions où organisations légales, ébranle en temps de guerre la fidelité des citoyens envers le Roi et l'Etat, ou qui aura sciemment servi la politique ou les dessiens de l'ennemi."

" Sera de même puni de mort, quiconque aura sciemment dirigé, pratiqué par quelque moyen que ce soit, provoqué aidé ou favorisé une propagande dirigé contre la résistance à l'ennemi ou à ses alliés ou tendant aux faits enumérés à l'alinéa precedend."

Norway (Provisional Order in Council, 22.1.1942, Orders in Council, 12412, U.D. 1942). " (1) Anyone who maintains, seeks or consents to membership of Nasjonal Samling, the Nazi Hird or any other organisation, which aids or abets the enemy shall be punished with loss of public trust for life or for a fixed period of years."

As an additional punishment a fine of up to 1,000,000 Crowns can be imposed.

This provision is to be applied in addition to the provisions of the Chapter 8 of the Penal Code dealing with crimes against the independence and security of the State and the provisions of Chapter 9 of the Penal Code dealing with crimes against the Norwegian Constitution and the Sovereign of the Norwegian State and the War provisions of the Military Penal Code."

(2) " Loss of public trust includes loss of any public office which the guilty person may hold, loss of the right of voting in public matters, loss of the right of serving in the armed forces of the State, loss of the right to carry on any trade, profession or business for which public authorisation or approval is required and loss of the right to hold any position, whether paid or unpaid, as head or leading official in companies, friendly societies, financial institutions, associations or other institutions and organisations and loss of the right to obtain appointment in a position or service as mentioned above."

line of demarcation between those who go on, carrying the cruel burden of occupation in order to survive, and those who help the enemy against the interests, laws and constitution of their own country. A general rule cannot be established, it is difficult to lay down unshakable principles. The only possible approach is casuistic. That is in fact the only method in which the law can at first react to the wrongs which have been committed. It is the only way in which the experience of wrongs themselves may be made to serve the purpose of obtaining redress.

While war lasted and the longer the conflict in Europe continued the more complicated the whole problem of Quislingism—or "helping-the-enemy"—became. Patriots who fought against the illegal measures taken by the occupant appeared before his Courts and were judged according to his laws. In many cases Quislings were executed or shot or condemned to death by the underground organizations in occupied Europe. France gave the world a very sad picture of how that conflict between loyalty and patriotism on the one side, and treachery and Quislingism on the other, affect individual lives and their fate. Under a Quisling Government loyal citizens were sentenced for "treason" which was actually highly patriotic and loyal activity.

The "Government" of Vichy established under Phillipe Pétain issued decrees denationalizing thousands of naturalized Frenchmen and introduced several laws against De-Gaullists and those who continued the fight against Germany.[6]

The outstanding legal case was, however, presented by what is known as the Riom trial.

The men who appeared before the Court were Daladier, Guy la Chambre, Léon Blum, General Gamelin, Georges Mandel, Paul Reynaud and others. They were indicted for:—

"Having committed crimes or offences or betrayed the duties of their office, by acts which have contributed to the passage from the state of peace to the state of war, before September 4th, 1939, and acts which subsequently aggravated the consequences of the situation thus created."

They were also indicted for corruption, embezzlement and betrayal of the duties of their office.[7]

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[6] See Lt.-Col. P. Tissier: The Government of Vichy (London, 1942), pp. 163, 166.
[7] See Léon Blum before his Judges, published by the Labour Party (London, 1943) a report from the trial, p. 5.

The trial at the Supreme Court at Riom which was held in March, 1942, produced no results. The prisoners were in fact condemned before the trial.[8]

Thus the Quislings of France were trying patriots indicted for treason. Léon Blum stated very plainly that the trial was directed not against the men but " against the Republican régime and the Republican principle itself."

Meanwhile the Free French, the Committee for National Liberation, opened a series of trials against those " who collaborated with the enemy," at Algiers. About 250 persons had to be tried for Quislingism. Among them were those in charge of forty concentration camps set up in North Africa, in which anti-Fascists and internees of Spanish and Czechoslovak origin were kept, as well as German and Austrian refugees.

The Court heard evidence of some of the prisoners being tortured to death. Among the indicted was Pierre Pucheu, Vichy's Minister of the Interior, who escaped to North Africa. He was sentenced to death and executed, his crime being " collaboration with the enemy," which brought about the death of many hostages and the killing of thousands of patriots.

The above facts are quoted in order to show the most tragic conflict which was and is bound to arise out of this friction in the communities exploited by the enemy. Léon Blum was charged at Riom with treason; the same indictment was used at Algiers against Pucheu. Blum called the trial at Riom a trial of the Republican régime and principles, while Colonel Joseph Faure, the Public Prosecutor at Algiers, exclaimed: " This trial is not only a trial of brutes and torturers but also a trial of the Gestapo of Vichy and the worst enemies of France."

Meanwhile Europe has been liberated. While order is being re-established, the abyss between those who yielded to foreign rule, who helped and assisted the enemy on one side, and those who resisted the powers of darkness on the other, is becoming deeper and more and more dangerous.

From the liberated areas we hear strong voices and demands for the punishment of those guilty. In some of the liberated countries

[8] The Council of Political Justice, created by Pétain on September 29th, 1941, Decree No. 4181, passed sentence of imprisonment for life in a fortress.

Quislings are already being brought to account. In order to curb popular anger and the reaction of the masses the newly established Governments are bound to take stern measures against those who betrayed national interests.

Some trials have already been held. They disclosed the great variety of possibilities for Quisling activities. They faced the judge with a serious issue. It was, whom to regard as a Quisling and whom to condemn morally only. They proved that it is rather difficult to systematize and deduce general rules from the individual sets of facts which have been experienced. This will have to be left for a later period, when the storm calms down and the experience gained by practice and cases becomes available. But it can already be said now that not only those who wilfully helped the enemy should be included. It equally concerns those who by neglect of their duty, by omitting to perform the tasks with which they were entrusted, abandoned the flag to which they owed allegiance, and helped to bring disaster on their country. The man who took office in order to organize help for the occupant, who defied his Government in exile; the official who supplied the enemy with names of prominent resistance leaders, the Superintendent of the Police who showed great zeal in searching for hostages and putting them to death; those who helped the occupying power to carry on economic warfare which brought ruin to their own country—all these are obviously Quislings. However, many a controversy is bound to arise, and has in fact already arisen on the issue of where the line of demarcation between treasonable activity, *i.e.*, punishable behaviour, and morally contemptible work is to be drawn.

These and other dilemmas face those who have to dispense the law. In all the cases, however, the burden of proof will rest with the public prosecutor. It is surely easier to prove that somebody was a Quisling than for him to prove that he was not. Tens of thousands living under occupation in most depressing conditions will be unable to prove that they took part in the underground movement or that they fought the invader. Many were, much against their will, reduced to the level of passive victims of persecution. Many were even forced to serve the occupant "in disguise" in order to render most important service to the underground movement. The task of the prosecution is therefore to prove that of his own free will

the individual concerned chose to help or serve the invader when resistance was possible. Equally it may prove that opportunity to fight against the invader existed, was refused or ignored, and a passive attitude adopted.

In many cases another consideration will be not without importance. A man's record, once tainted, need not be tainted for ever. Active participation in the struggle for freedom may re-qualify a person for the status of a loyal citizen. That is a necessary requirement of justice. Individual consideration will be essential. It will be necessary for the person to prove that his actions on behalf of the State following his defection were sufficiently effective and genuine in intent to qualify him for reinstatement in the eyes of society, and also that this latter activity resulted to a large extent in restoring such damage as he had done.

In the light of the above it seems that we can summarize the legal issue of Quislingism as follows:—

(a) Where special *ad hoc* legislation is provided, as in the cases quoted above, the Quislings will be tried in accordance with the provisions of that *lex specialis*.

(b) Where no such legislation exists, general rules, acts and decrees concerning treason and treacherous activities will form the basis for indictments. The shortcomings of law have to be overcome by bringing Quislingism, wherever possible, under the general formula of treason.

Quislingism, as defined above, does not enter into the scope of what we have defined as war crimes. It is a special type of crime which can be committed in war and during a war only. It concerns, however, the relation of a State to its citizens and *vice versâ*, and this deprives it of the international character which war crimes have. It is a purely domestic issue, which will have to be dealt with by every State within the scope of domestic legislation. No international questions of legislations or treaties are involved. Every State dealt with problems of this type at its own discretion in the past and will have to do so in the future. The question requires, however, new stipulations in extradition treaties, so as to enable the national Courts to bring the culprits to justice.

19

THE CASE OF THE UNITED NATIONS VERSUS WAR CRIMINALS

Some facts.—Soon after the first news of Germany's violation of the rules of warfare came to the notice of statesmen of the United Nations, they took active steps in the matter.

1. On October 25th, 1941, Franklin Delano Roosevelt, President of the United States, and Winston Spencer Churchill, Prime Minister of Great Britain, made, simultaneously, statements on the question of war crimes.

President Roosevelt declared of acts of barbarity, "frightfulness can never bring peace to Europe. It only sows seeds of hatred which will one day bring fearful retribution."

The Prime Minister, Mr. Churchill, stated: "Retribution for these crimes must henceforward take its place among the major purposes of the war."

2. The Soviet Government circulated on November 27th, 1941, and January 6th, 1942, two notes concerning German atrocities committed on Soviet war prisoners and announcing that they kept a detailed register of German crimes.

3. The St. James's Palace Conference was the third Inter-Allied meeting dealing with the subject of war crimes.

The following Governments were represented:

Belgium, Czechoslovakia, Free France, Greece, Yugoslavia, Luxemburg, The Netherlands, Norway and Poland.

Representatives of the following Governments attended as observers:

United Kingdom, Canada, Commonwealth of Australia, New Zealand South Africa, India, United States, U.S.S.R. and China.

The proceedings concluded with the adoption of a Declaration, since known as the Declaration of St. James's Palace. It reads:—

"Whereas Germany, since the beginning of the present conflict which arose out of her policy of aggression, has instituted in the occupied countries a régime of terror characterised in particular by imprisonments, mass expulsions, the execution of hostages and massacres,

"And whereas these acts of violence are being similarly perpetrated by the Allies and Associates of the Reich and, in certain countries, by the accomplices of the occupying Power,

"And whereas international solidarity is necessary in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the civilised world,

"Recalling that international law, and in particular the Convention signed at The Hague in 1907 regarding the laws and customs of land warfare, do not permit belligerents in occupied countries to perpetrate acts of violence against civilians, to bring into disrepute the laws in force, or to overthrow national institutions,

"The undersigned Representatives of: the Government of Belgium, the Government of Czechoslovakia, the Free French National Committee, the Government of Greece, the Government of Luxembourg, the Government of the Netherlands, the Government of Norway, the Government of Poland and the Government of Yugoslavia:

"(1) affirm that acts of violence thus perpetrated against the civilian populations

are at variance with accepted ideas concerning acts of war and political offences, as these are understood by civilised nations,

"(2) take note of the declaration made in this respect on 25th October, 1941, by the President of the United States of America and by the British Prime Minister,

"(3) place amonst their principal war aims the punishment, through the channel of organised justice, of those guilty and responsible for these crimes, whether they have ordered them, perpetrated them or in any way participated in them,

"(4) determine in a spirit of international solidarity to see to it that (a) those guilty and responsible, whatever their nationality, are sought for, handed over to justice and judged, (b) that the sentences pronounced are carried out.

"In faith whereof the signatories duly authorised have signed the present Declaration."

LONDON, *January* 13, 1942.

4. Following the Conference of St. James's Palace the signatory Governments established the "Comité Inter-Aliée pour la répression de crimes de guerre." It was intended that the Committee should investigate war crimes and prepare material for further steps to be taken by the Governments concerned.

The European Allied Governments submitted also a collective note to the Governments of London, Washington, Moscow (at that time at Kuibishev) and to the Holy See. The note was the result of further violations of the laws of warfare committed by Germany in occupied countries.

5. On August 6th, 1942, the Government of the United Kingdom issued an Aide Memoire, explaining their attitude to the suggestions made:

"His Majesty's Government in the United Kingdom have not reached any final conclusions on the policy to be adopted with regard to war criminals, but the following general principles represent their present views:

"(1) Policy and procedure regarding war criminals, including the question of the judicial tribunals to be employed, should be agreed between all the Allied Governments concerned.

"(2) In dealing with war criminals, whatever the Court, it should apply the laws already applicable and no special *ad hoc* law should be enacted.

"(3) The Punishment of war criminals should be disposed of as soon as possible after the end of the war, in order—

(a) to ensure rapid justice,

(b) to prevent so far as possible wronged individuals taking the law into their own hands, and

(c) to prevent trials dragging on for years and so delaying the return to a peaceful atmosphere in Europe.

"It may be desirable ultimately to fix a limited period after the termination of hostilities during which all trials should be instituted.

"(4) Each Allied Government concerned should, so far as possible, at this stage draw up lists of criminals against whom it wishes to proceed and prepare evidence against them.

"(5) Provisions should be included in the armistice terms for the immediate capture or surrender of wanted criminals, and this should not be left over until after the conclusion of a peace treaty. Otherwise it might prove impossible, as after the last war, to obtain custody of the persons required. Lists, if any, included in the armistice terms should not, however, be regarded as exclusive, and authority would be reserved to demand the delivering up of additional persons later. Each peace treaty would subsequently contain any provisions which may be required to enable the action contemplated to be taken.

"(6) All possible steps should be taken to prevent war criminals from obtaining asylum in neutral countries.

"(7) A distinction should be drawn between enemy war criminals and nationals (*e.g.*, Quislings) of the Allied countries concerned. The latter should be dealt with by each Allied Government concerned under its own law, and no inter-Allied agreement is necessary for this purpose, although some special inter-Allied arrangements for surrender to the appropriate Allied authority might be required."

6. Following the collective note submitted to the Government of the United States by the signatories of the St. James's Palace Declaration, President Roosevelt made on August 21st, 1942, a public statement which reads:

"The Secretary of State recently forwarded to me a communication signed by the Ambassador of the Netherlands and the Ministers of Yugoslavia and Luxemburg on behalf of the Government of Belgium, Greece, Luxemburg, Norway, Netherlands, Poland, Czechoslovakia, Yugoslavia and the French National Committee in London, calling attention to the barbaric crimes against civilian populations which are being committed in occupied countries, particularly on the continent of Europe."

In this communication attention was invited to the declaration signed in London on January 13, 1942, by the representatives of nine Governments whose countries are under German occupation. This declaration affirmed that acts of violence thus perpetrated against the civilian populations are at variance with accepted ideas concerning acts of war and political offences as these are understood by civilised nations, stated that the punishment through the channels of organized justice of those guilty and responsible for these crimes is one of the principal war aims of the contracting Governments in a spirit of international solidarity to see to it that those guilty and responsible whatever their nationality, are handed over to justice and tried, and that the sentences pronounced are carried out. The communication which I have just received from the chief of missions of the Netherlands, Yugoslavia and Luxemburg states that these acts of oppression and terror have taken proportions and forms giving rise to the fear that as the defeat of the enemy country approaches, the barbaric and unrelenting character of the occupational régimes will become more marked and may even lead to the extermination of certain populations.

As I stated on October 25th, 1941—

"The practice of executing scores of innocent hostages in reprisal for isolated attacks on Germans in countries temporarily under the Nazi heel revolts a world already inured to suffering and brutality. Civilized people long ago adopted the basic principle that no man should be punished for the deed of another. Unable to apprehend the persons involved in these attacks the Nazis characteristically slaughter fifty of a hundred innocent persons. Those who would 'collaborate' with Hitler or try to appease him cannot ignore this ghastly warning."

"The Nazis might have learned from the last war the impossibility of breaking men's spirit by terrorism. Instead they develop their 'Lebensraum' and 'New Order' by depths of frightfulness which even they have never approached before. These are the acts of desperate men who know in their hearts that they cannot win. Frightfulness can never bring peace to Europe. It only sows the seeds of hatred which will one day bring fearful retribution."

The Government of the United States has been aware for some time of these crimes. Our Government is constantly receiving additional information from dependable sources and it welcomes reports from any trustworthy source which would assist in keeping our growing fund of information and evidence up to date and reliable.

The United Nations are going to win this war. When victory has been achieved it is the purpose of the Government of the United States, as I know it is the purpose of each of the United Nations, to make appropriate use of the information and evidence in respect to these barbaric crimes of the invaders, in Europe and in Asia. It seems only fair that they shall have to stand in courts of law in the very countries which they are oppressing and answer for their acts.

7. Speaking in the House of Commons on September 8th, 1942, the Prime Minister, Mr. Churchill, stated:

"I wish most particularly to identify the British Government and the House of Commons with the solemn words which have been lately used by the President of the United States, namely, that those who are guilty of the Nazi crimes will have to stand up before tribunals in every land where their atrocities have been committed

in order that an indelible warning may be given to future ages and that successive generations of men may say: 'So perish all who do the like again'."

8. On October 14th, 1942, the Government of the U.S.S.R replied to the collective Note of the signatories of the St. James's Declaration, declaring their determination to bring to justice all war criminals and to assist those Governments in carrying out their tasks in this respect.

9. On October 3rd, 1942, the Government of the United Kingdom addressed a Note to the signatories of the Declaration of St. James's Palace suggesting the formation of a "Fact-Finding Commission" to investigate all matters of violation of the laws of warfare and atrocities committed by the enemy.

10. On October 7th, 1942, the Lord Chancellor, Lord Simon, submitted to the House of Lords the proposal to establish the "United Nations Commission for the Investigation of War Crimes." On the same day President Roosevelt made a similar statement in Washington. He said:

". . . With a view to establishing responsibility of the guilty individuals through the collection and assessment of all available evidence, this Government is prepared to co-operate with the British and other Governments in establishing a United Nations Commission for the Investigation of War Crimes.

"The number of persons eventually found guilty will undoubtedly be extremely small compared to the total enemy populations.

"It is not the intention of this Government or of the Governments associated with us to resort to mass reprisals. It is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organized murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith."

11. The functions of the United Nations Commission for the investigation of War Crimes were primarily meant as fact finding:

(1) to investigate all cases referred to the Commission by any of the Governments of the United Nations of atrocities committed by, or by order of, the nationals of any of the countries at war with any of the United Nations against nationals of the United Nations.
(2) to collect, record and assess all available evidence, oral and written upon such atrocities.
(3) to direct their attention in particular, in the first instance to those cases which appear to be atrocities organized and committed in pursuance of a deliberate policy.
(4) to report from time to time, and as early as possible to the Governments of the United Nations, cases in which the Commission is satisfied that an atrocity has been committed, naming where possible, the person or persons whom they consider responsible.
(5) to investigate, consider and report upon any other instances or classes of war crimes referred to them by the general consent of the Governments of the United Nations.
(6) to constitute such panels for the taking and recording of evidence, and to sit whether in panels or as a whole, in such places as the Commission may from time to time decide.
(7) to co-opt such expert technical advisers for the purpose of particular investigations as the Commission may consider necessary.
(8) to make recommendations upon the procedure by which war criminals should be dealt with after the war.

On the basis of the above agenda the Commission commenced its work.

12. On December 17th, 1942, the United Nations issued a special declaration concerning crimes committed against persons of Jewish race. It reads:

"The attention of the Governments of Belgium, Czechoslovakia, Greece, Luxemburg, the Netherlands, Norway, Poland, the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Union of Socialist Soviet Republics, and Yugoslavia, and of the French National Committee, has been drawn to numerous

reports from Europe that the German authorities, not content with denying to persons of Jewish race in all the territories over which their barbarous rule has been extended the most elementary human rights, are now carrying into effect Hitler's oft-repeated intention to exterminate the Jewish people in Europe. From all the occupied countries Jews are being transported, in conditions of appalling horror and brutality, to Eastern Europe. In Poland, which has been made the principal Nazi slaughter-house, the Ghettoes established by the German invaders are being systematically emptied of all Jews, except a few highly-skilled workers required for war industries. None of those taken away are ever heard of again. The able-bodied are slowly worked to death in labour camps. The infirm are left to die of exposure and starvation, or are deliberately massacred in mass executions. The number of victims of these bloody cruelties is reckoned in many hundreds of thousands of entirely innocent men, women and children.

"The above-mentioned Governments and the French National Committee condemn in the strongest possible terms this bestial policy of cold-blooded extermination. They declare that such events can only strengthen the resolve of all freedom-loving peoples to overthrow the barbarous Hitlerite tyranny. They reaffirm their solemn resolution to ensure that those responsible for these crimes shall not escape retribution, and to press on with the necessary practical measures to this end."

13. The most recent document issued on the subject is the Moscow Declaration on war criminals. It reveals:

"The United Kingdom, the United States, and the Soviet Union have received from many quarters evidence of atrocities, massacres, and cold-blooded mass executions, which are being perpetrated by the Hitlerite forces in many of the countries they have overrun, and from which they are now being steadily expelled.

"The brutalities of Hitlerite domination are no new thing, and all peoples or territories in their grip have suffered from the worst form of government by terror. What is new is that many of these territories are now being redeemed by the advancing Armies of the liberating Powers and that, in their desperation, the recoiling Hitlerite Huns are redoubling their ruthless cruelties.

"This is now evidenced with particular clearness by the monstrous crimes of the Hitlerites on the territory of the Soviet Union which is being liberated from the Hitlerites and on French and Italian territory.

"Accordingly the aforesaid three Allied Powers, speaking in the interests of the thirty-two United Nations, hereby solemnly declare, and give full warning of, their declaration as follows:—

"At the time of the granting of any Armistice to any Government which may be set up in Germany, those German officers and men and members of the Nazi Party who have been responsible for, or have taken a consenting part in, the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments which will be erected therein.

"Lists will be compiled in all possible detail from all these countries, having regard especially to the invaded parts of the Soviet Union, to Poland, and Czechoslovakia, to Yugoslavia, and Greece, including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxemburg, France, and Italy.

"Thus, Germans who take part in wholesale shootings of Polish officers or in the execution of French, Dutch, Belgian, or Norwegian hostages, or of Cretan peasants, or who have shared in the slaughters inflicted on the people of Poland or in the territories of the Soviet Union which are now being swept clear of the enemy, will know that they will be brought back to the scene of their crimes and judged on the spot by the people whom they have outraged.

"Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to the accusers in order that justice may be done.

"The above declaration is without prejudice to the case of German criminals whose offences have no particular geographical location, and who will be punished by a joint decision of the Governments of the Allies."

This brings up to date the list of documents and statements made by the United Nations in their case against war criminals. However, many problems are still outstanding and require solution, clarification and settlement. Let us indicate one of them—the question of jurisdiction.

QUESTIONS OF JURISDICTION

1. As pointed out above, a war criminal may be claimed by more than one State for the same deed. This is the result of the present state of penal laws.

The States concerned ought to reach an agreement as to which of them the criminal is to be delivered for trial. The other States may be allowed to appoint *amici curiæ* to assist at the trial.

2. A war criminal may be claimed by more than one State for several deeds he has committed. Here again agreement between the States is the only possible solution. The agreement would settle the question of priority in trials and order of further extradition.

In deciding on those issues the United Nations may act on the merits of each case or conclude on extradition treaty. The gravity of the crime, the number of victims affected, the time of commission may be the criteria for decision.

3. It is also essential that the United Nations decide on the issue of drawing the line of demarcation between arch-criminals, *i.e.*, those whose fate has to be decided by an International Court or an act of State on one side and those who are left to the national jurisdiction on the other side. The criteria for decision should be laid down.

20

AN ATTEMPT TO DEFINE WAR CRIMES

In the light of the foregoing considerations let us attempt to define war crimes.

Art. I.—A war crime is any act of violence, qualified as crime committed during and in connection with a war under specially favourable conditions created by the war and facilitating its commission; the act being directed against the other belligerent State, or its interests; against its citizens or their interests; against a neutral State, its interests, its citizens or their interests, as well as against Stateless individuals or their interests.

Art. II.—The qualification accepted in Art. I ceases should the act not be contrary to the codified International Laws of Warfare or expressly permitted by them if contrary to the customary law or general principles accepted by civilized nations.

Art. III.—The term " specially favourable conditions created by the war " used in Art. I is understood either as tacit or explicit help or encouragement, or approval given to the culprit by his superiors, the hope that his deed will not be punished due to war conditions or any reason which in his belief would make him escape punishment.

Art. IV.—Persons guilty of war crimes may be any member of the Armed Forces, of the Government, Administration, Police, at home or in occupied countries, any member of the administration of prisoners-of-war camps; any person entrusted with political, legal or economic functions connected with the war, members of party organizations or any other person acting on behalf of the belligerent, whether his national or not.

Art. V.—The exemption provided in Art. II ceases, should the deed be committed by a person not enjoying the privileged status of a subject of warfare.

Art VI.—A war crime can be committed on land, on sea and in the air, beneath the surface of the earth, in territorial waters, closed

seas, on the territories of the belligerent himself, the other belligerent or a neutral State.

Art. VII.—A war crime can be committed only during a war and in connection with the war.

Art. VIII.—War crime is a common crime. The culprit does not enjoy any privileges accorded to political offenders, in particular the privilege of asylum, and he ought to be extradited.

Art. IX.—The arch war criminals, or those responsible for the criminal conspiracy of waging and conducting a lawless war, ought to be punished by an act of State or tried and punished by an International Court, according to a common decision of the lawful belligerents.

Art. X.—Until a Permanent International Criminal Court is set up the trial of other war criminals is reserved to the Municipal Courts of the State concerned. Should the State concerned be the lawless enemy the trial is reserved to the Courts of the State affected, *i.e.*, the State against whose interest or whose nationals the act was directed.

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CONCLUSION

We have attempted to approach the problem of war crimes in its historical aspects and present complications.

War crimes, an inseparable companion of every war, are now much more than ever before the subject of an acute controversy between lawyers and politicians. The question is asked: Is it a political or a legal issue ?

Many insist on its political character. It has even been said that—

"it is simply a question of policy and expediency, to be exercised by the victorious belligerent or not accordingly as he may judge whether considerations of retributive justice or its moral effect upon the mind of belligerents in the future may make it desirable."[1]

Its practical solution depends very much on whether the danger of considering it as a purely political problem is appreciated. It touches the very foundations of International Law. Although war crimes are only one of the many chapters of International Law, in particular the Laws of Warfare, their solution is a matter of principle. If we consider their practical solution a matter of political expediency, the whole basis of International Law is shaken and law is made the servant of politics.

For too many years International Law was a flexible instrument in the hands of politicians. Many disasters in international relations resulted. The reversion to this most harmful practice would mean that history has taught us nothing.

War crimes may appear a minor issue in this deadly conflict. Yet the manner in which the problem is resolved might become a great precedent. International Law must be raised to the height it deserves. The principle that crime does not pay must become law, not only in the everyday life of an individual, but also in inter-State relations.

[1] Garner: Recent Developments in International Law, 1925, and Warner, at the 37th Annual Meeting, American Society of International Law, Proceedings, p. 52.

If we fight for a better future, as we do, we look for an international order in which law will be obeyed. It is, therefore, our task, the task of those who are the guardians of law, to make it work.

Its source and foundations were from its very inception international morality and high moral principles. These principles must remain its source in the future. They will be the great inspiration of law.

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PRINTED BY C. F. ROWORTH LTD., 88 FETTER LANE, LONDON, E.C.4.