CHAPTER I
INTRODUCTORY CHAPTER

It is scarcely a hyperbole to assert that the war of 1939–1945 (World War II) is one of the greatest calamities that ever befall the human race. It had further the striking characteristic that it was deliberately created by a number of very evil men, including Hitler and his clique and the corresponding figures in the Far East, in order to acquire further material advantages. The war was purely acquisitive and aggressive. Their motives were naked, blatant and unashamed. In that, as in other respects, it was peculiar in the history of the world. In the course of the war there sprang a vast world wide accumulation of human misery unparalleled in the history of mankind however widely in space and time the survey is extended. War is in itself always a wicked and evil thing; it necessarily involves a systematic infringement of the ordinary human rights of individual men and women over the whole vast theatre in which it operates.

In World War II not only were there these terrible consequences, but there were what would have seemed an incredible multiplication of cruelties and atrocities, all of which were crimes not only under the ordinary criminal laws of all civilised countries, but also were crimes under the law of war, which is an ancient part of the law of nations. In particular the leaders and organisers of the actual war or wars were guilty of the crime of planning and initiating war as an instrument of policy, the crime against peace forbidden by the Kellogg-Briand Pact of 1928 against aggressive war, and also condemned by the Nuremberg judgment. Such detestation of these deliberately planned aggregations of atrocious wickedness was felt by the civilised nations, that the Allied powers made various declarations to ensure that the guilty should not escape. Of these it is enough to mention here only one, the Declaration of Moscow, made in November 1943 on behalf of the Allied powers by President Stalin, President Roosevelt and Mr. Winston Churchill. That Declaration proclaimed the determination of the Allied powers that justice should be done on the evil doers, that the "major" criminals should be dealt with as the Powers should decide, and that the "minor" criminals should be sent back to the countries in which they had done their atrocious deeds, to be dealt with by the laws of those countries. Those described as the "major" criminals were Hitler and his immediate entourage; the "minor" criminals were the vast number of those who carried out their scheme in varying grades of power and responsibility.

War crimes are multiple in character. Hitler, the arch-criminal in the Western theatre of war, headed the major criminals. Because his evil deeds were ubiquitous, not confined to any particular location, he was the architect of the whole hellish programme; along with the associates who worked in his immediate circle, he might be pictured as being as it were, the apex of a vast pyramid of criminals, which went on spreading outward and downward to its base, so as to include the myriads of subordinate
instruments and coadjutors without whom his purposes could not have
their atrocious fulfilment. I cannot better describe this insipid mass
of wickedness, or the unimaginable misery and ruin which it entailed
to the world than by quoting the impressive summary of the whole delivered
by the International Military Tribunal at Nuremberg at the close of the
trial in 1946:—

“The evidence relating to war crimes has been overwhelming, in its volume
and its detail. It is impossible for this Judgment adequately to review it, or
to record the mass of documentary and oral evidence that has been presented.
The truth remains that war crimes were committed on a vast scale, never before
seen in the history of war. They were perpetrated in all the countries
occupied by Germany, and on the High Seas, and were attended by every
conceivable circumstance of cruelty and horror. There can be no doubt
that the majority of them arose from the Nazi conception of “total war,” with
which the aggressive wars were waged. For in this conception of “total war,”
the moral ideas underlying the conventions which seek to make war more
humane are no longer regarded as having force or validity. Everything is made
subordinate to the overmastering dictates of war. Rules, regulations,
assurances and treaties all alike are of no moment; and so, freed from the
restraining influence of international law, the aggressive war is conducted
by the Nazi leaders in the most barbaric way. Accordingly, war crimes were
committed when and wherever the Fuehrer and his close associates thought
them to be advantageous. They were for the most part the result of cold
and criminal calculation.

“On some occasions, war crimes were deliberately planned long in advance.
In the case of the Soviet Union, the plunder of the territories to be occupied,
and the ill-treatment of the civilian population, were settled in minute detail
before the attack was begun. As early as the Autumn of 1940, the invasion
of the territories of the Soviet Union was being considered. From that date
onwards, the methods to be employed in destroying all possible opposition
were continuously under discussion.

“Similarly, when planning to exploit the inhabitants of the occupied
countries for slave labour on the very greatest scale, the German Government
conceived it as an integral part of the war economy, and planned and organised
this particular war crime down to the last elaborate detail.

“Other war crimes, such as the murder of prisoners of war who had escaped
and been recaptured, or the murder of Commandos or captured airmen, or
the destruction of the Soviet Commissars, were the result of direct orders circu-
lated through the highest official channels.

“Prisoners of war were ill-treated and tortured and murdered, not only in
defiance of the well-established rules of international law, but in complete
disregard of the elementary dictates of humanity. Civilian populations in
occupied territories suffered the same fate. Whole populations were deported
to Germany for the purposes of slave labour upon defence works, armament
production and similar tasks connected with the war effort. Hostages were
taken in very large numbers from the civilian populations in all the occupied
countries, and were shot as suited the German purposes. Public and private
property was systematically plundered and pillaged in order to enlarge the
resources of Germany at the expense of the rest of Europe. Cities and towns
and villages were wantonly destroyed without military justification or
necessity.”

Beating, torture and killing were general. How many millions perished
in this way cannot be computed.

Almost at the same moment as the Moscow Declaration the Allied
nations, 17 in all, constituted the United Nations War Crimes Commission
at a meeting held at the British Foreign Office in London on 20th October,
1943. Its objects and powers were conferred though in very limited terms, as follows:

"1. It should investigate and record the evidence of war crimes, identifying where possible the individuals responsible."

"2. It should report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming."

But however limited its powers, its creation was a landmark in the history of human justice in the field of international law, i.e. that body of international law which embraces the law of war. The functions then expressly given were, at the outset, what I have stated, but they soon were extended to include advisory duties which entitled it to make recommendations to member Governments on questions of law and procedure in order to carry out the objects of the Allied nations. It was in date thus closely associated with the Moscow Declaration. It was an international corporation pledged to fulfill its purpose by a definite practical scheme. Its establishment put an end to the days of mere talk or moralizing. It stood as an objective symbol or testimony that the splendid declarations of the Allied nations, that war criminals would be pursued and punished, were to be carried out. It had, it is true, no effective power either executive or detective, except in so far as it could record war crimes reported to it, which was a positive act with certain consequences. When it was constituted in 1943, the war had gone on for more than four years and the end seemed if no longer uncertain, still remote. But the Commission could and did begin the preparatory work on the exercise of the advisory capacity conferred upon it. What it did in that way in 1944 and the early part of 1945 was of prime importance. The idea and plans which it elaborated were not indeed published in the Press, but they were communicated to the member nations by their respective representatives and being in that way available to those interested, were thus known to the American lawyers whose labours eventually helped to achieve the London Agreement of 8th August 1945.

Thus, through the work of the Commission and other agencies, the United Nations had ready to their hands when the time came, a more or less practical scheme for the prosecution and punishment of war criminals, which was capable of being completed and put into effect when the Nazi resistance collapsed. The Commission met much public criticism in 1944 on the ground that it was doing nothing. But its records show how valuable was the work done in 1944, though it was of a preparatory character, as was inevitable at that time. In that year Sir Cecil Hurst was Chairman. The object of the United Nations in this connection was in President Roosevelt's memorable words to put teeth into this branch of international law. It was important for it to be ready to begin work at the earliest possible moment. At the end of the 1914-1918 war (World War I) the Allies were found without a practical plan for prosecuting war criminals and, partly for that reason, the edge of their purpose was blunted.

In any case, 1944 was necessarily a year in which the activities of the Commission, other than those in its advisory capacity, could not be fully
exerted. Its work of recording war crimes was delayed and almost stopped for the time because it depended on the submission of reports of the crimes which were being committed in the occupied countries; but terrible as the crimes were they could not be fully reported in England or America, because of the difficulty of communicating with the occupied countries. However, a certain amount of information began to come through. The general picture a little later is indicated in an article contributed by me to the New York Times (Sunday Magazine) of 13th May, 1945. This article, I understand, had a circulation of many millions in both Northern and Southern America, and had some effect there on public opinion. The information contained in it is clearly defective when compared with subsequent disclosures, but it shows how even then reports were reaching London and how a practical scheme was forming. The article was necessarily silent as to what would be done in regard to the arch criminals. The Governments had not by then decided whether they should be tried by a Court of Law or dealt with by executive action of the Powers. That was to remain uncertain for some little time yet, indeed until the London Agreement of 1945. There was also the fear of reprisals until the occupied countries were liberated.

But the scheme for the prosecution of the “minor” criminals was outlined and came into effect early in 1945 in the Hadamar, Pelesus and Belsen trials; in the first the crime was murder by drugs on the scale of hundreds of “useless” persons, physically infirm, in a medical institution. In the second the charges were for the murder of survivors from a torpedoed ship who were clinging to rafts, the third was for the murders and cruelties; perpetrated in a concentration camp, including the slaughter by poison gas of thousands of unoffending Allied civilians brought from central Europe for the very purpose. The Nazis, who were found guilty in these trials, were sentenced either to execution or long terms of imprisonment. The prosecuting authorities were in two cases the British, and in the third the American military.

These three cases were the earliest of a long series running into many hundreds and involving many thousand accused. Indeed from about the autumn of 1945 until the end of March 1948 there were in the European theatre approximately 1,000 cases tried, involving sentences of death or long imprisonment for atrocious war crimes on some 2,700 persons. These were the “minor” criminals; to be distinguished from those “major” criminals who were eventually tried at Nuremberg. There were in the same period a comparable number of war criminals tried in the Far Eastern theatre. All these numbers also appear in the summary which is included in the later pages of this volume. The enormous number of prosecutions, the conduct of which extended over the large part of the world must (like everything connected with World War II) be almost or entirely unprecedented not only in aggregate numbers and in their complexity variety and geographical area, but also in the comparatively short space of time in which the programme was carried out. It was wisely felt that justice must not be delayed. As I have already observed, the plan of this great machinery for the enforcement of law was sufficiently ready when the time came. To a definite extent and in large part that was due to the

(1) See Appendix IV.
recommendations of the Commission acting in its advisory capacity. The essential elements to be planned and provided for in the administrative organisation of the prosecution were the detection and apprehension of the war criminals, the establishment of the appropriate courts and the examination of the principles of law and procedure relative to war crimes and their trial. All this was preparatory but essential to the actual trials. The whole scheme of prosecuting and punishing war criminals involved the labour of many persons and of co-ordinated effort on their part, aided by the whole-hearted support of the public.

It might seem that it would have been wisest to have had a single great war crimes prosecution agency, created by the concerted action of the Allies, with two great divisions, one for the European theatre, one for the Far East. Some such scheme was examined by the Commission but the objections were insuperable; for instance it must necessarily have involved interference with the independence of national sovereignty. What was recommended and adopted was a dispersion of effort and responsibility. Each Allied nation was, according to the scheme adopted, to be responsible for the prosecution of its own criminals. This was what was envisaged as a general principle in the Moscow Declaration as regards all but the "major" criminals. With this object the scheme adopted was to establish in each country a National Office, charged with the duty of investigating the crimes which fell within its sphere, apprehending the accused, reporting the charges with appropriate prima facie evidence to the Commission, and conducting the trials in its own courts. These courts might require, and generally did require, some amendment to their law and procedure to adapt them to fulfil the function of courts enforcing international law.

To assist the National Offices, the Commission, in May 1945, called together and organised a Conference of the National Offices, which was generally recognised to have been a both useful and helpful course. It was indeed only one instance of the services of the Commission as a liaison and consultative agency, not only for the National Offices but also for the military authorities, the importance of which in this connection I shall now seek to explain. For various reasons a large number of prosecutions were conducted by the military authorities in occupation of the enemy countries, instead of by the National Offices in the different countries. That was so in the three particular trials already referred to, where, in one case, the offence had been committed against Allies on the High Seas; in another against Allies in Germany and in the third case of a concentration camp there were a great many defendants involving great procedural difficulties—a problem which arose in many other concentration camp trials. The camps in which the crimes were committed were both in Germany and in occupied countries. Each of these cases involved a great number of victims of so many nationalities that it would have been impossible to apply the test of the nationality of the victims. Hence, in these cases (as in a very large number of others) the appropriate military department, generally the Judge Advocate General's staff, of one of the Allied countries, mostly Britain or the United States, assumed the burden of the trial. This was also the plan adopted in the very numerous class of offences against the military, such as the slaughter of prisoners of war, in particular captured airmen or commandos, and many others. In
this way a great many prosecutions were carried out by military authorities and tried by military courts instead of national courts.

This division of work functioned extremely well. There was a similar co-operation between the different workers engaged in the most important and difficult task of tracing and detecting criminals. Each nation had its investigation team and so, after the occupation, had each headquarters staff. The various teams, some of which belonged to a British operation called for obvious reasons “Operation Haystack,” were located at the zonal or other headquarters, though they necessarily travelled about and they were thus able to pool information.

I may now advert briefly to the internal or domestic machinery by which the Commission discharged its functions. What has been described as its primary function, which was certainly important, was to record war crimes and report them to the Governments concerned. But as the Commission had no detective or executive powers it was obliged to wait until the charges were submitted to it by the proper authorities, i.e. generally the National Office concerned. To deal with such cases it formed Committee I which examined the evidence submitted to it in order to decide if a prima facie case was shown. If the Committee held that it was, the name of the accused and other particulars of the charge were entered on a List which was kept by the Committee, copies of the List were circulated among the member Governments and later also among other interested bodies. This operation was in no sense a trial. The proceeding was ex parte: the man charged was not called to attend; the evidence tendered by the National Office was not under oath but consisted of written statements. It may, however, be noted as a proof of how careful the National Offices generally were that in very few cases, perhaps less than 10, has objection been afterwards taken to the entry of a name on the List. The National Offices clearly felt the responsibility which attaches to those who bring an ex parte charge.

The Lists, which now contain over 36,800 names, will be a valuable record for future historians. But they were and still are, so long as prosecutions continue, of present-day practical importance. The listing of a man entitled the proper authority to apprehend him and place him on trial before the proper court. He might also be surrendered by the Allied power which held him prisoner to another Allied power which claimed him for trial. But under Article IV of Control Council Law No. 10, which regulated procedure in war crimes in Germany after the surrender of the German forces, the ultimate decision whether a man should be “extradited,” as it was called in this way rested with the Commander-in-Chief of the zone in Germany in which he was held. The mere fact that a man was listed was not necessarily enough to decide the matter. But the List was of great assistance to the investigating teams because it often enabled them to trace a man who was wanted for trial on a charge of war crimes. In the History will be found a description of the more complicated machinery by which the Commission’s Lists were used by the investigating teams to establish the whereabouts of a wanted man.

All this, however, was preliminary to the trial. The question of the courts in which war criminals could be tried was a vital inquiry which
early occupied the attention of the Commission, in its Committee II and later, when that Committee was dissolved, in Committee III. The law of war was, of course, a section of international law, and as I shall later explain, involved questions different from and outside the ordinary municipal law of any particular nation. It was thus necessary to have international courts, just as it is necessary to have Prize Courts in belligerent countries. The Commission in the first months of its activity prepared elaborate plans for the constitution of a special court or courts by agreement of Treaty between the Allied nations—such a court was referred to as a Treaty Court. But these plans, admirable as they were, had to be laid aside because they were likely to involve delay before they could be brought into operation and also because of other obvious difficulties.

I shall put the matter very broadly but sufficiently for this very summary survey of the general layout of the system of war crimes prosecution, so far as concerned the "minor" criminals. There were two principal alternatives, the national courts with such additional powers and rules of law and procedure, as were necessary to enable them to function as international courts, and the military courts, such as those that sat in the three trials I have mentioned. These military courts are different from courts martial which deal with the discipline of an army. The business of the military courts is to try offences against the law of war. They are, in practice, convened by the Commander-in-Chief of the zone or area. They act under a Commission or Warrant. The judges generally are military men. Such courts have tried a very large number, probably the larger proportion, of the war crimes adjudicated upon in connection with World War II. They generally have a member with legal qualifications, or, as in the British practice, are assisted and advised as to the law by a member of the staff of the Judge Advocate General who is always a lawyer. The facts are in most cases peculiarly suited to adjudication by experienced soldiers. The use of such courts for the trial of offences against the law of war has long been recognised by international law. I have attended many of these courts as an observer and can speak for the high qualities of care, ability and impartiality which these judges, officers of standing and experience, have shown. There is no appeal, but the Commander-in-Chief has a revising power.

There was a different type of court developed for the trial of the "major" criminals. That was the famous Nuremberg Tribunal. It had some affinity with the type of Treaty Court envisaged by the Commission in the tentative but abortive scheme to which I have referred above; it had also some affinity with the military court. It was called the International Military Tribunal, but only the Russian members were military men. That, however, does not affect its right to be called a military court. Its judges were taken from the four great Allies, one judge and one associate judge from each.

A military court might, in ordinary practice, be composed of members from more than one Allied nation, as for instance was done in the Peleus case. This was a precedent for the International Military Tribunal which was indeed a great and famous Court sui generis. It and its Judgment
were a landmark in the history of international law. Its constituent
document, the London Agreement of August 1945, is one of the most
momentous of international documents. Besides the four Allied Govern-
ments which were parties to it, it was acceded to by all the members of the
Commission except two. As it deals with the "major" criminals it was
to that extent outside the scope of the Commission, though it is well recog-
nised that the deliberations of the Commission on the legal questions were
not without influence on the law adopted in the London Agreement. I
am not here concerned with controverted issues as to its precise status.
As international law is created *inter alia* by the decision of courts of
competent authority, what the Nuremberg Tribunal decided will be a
landmark in international law, whether it was an international or
municipal court or both. It was certainly established to administer inter-
national law, even or especially in respect of those principles which are
often regarded as novel, such as offences against peace or crimes against
humanity. I shall later revert to this matter.

International law is a product of natural law, that is, it has grown
and developed from the workings of the moral impulses and needs of
mankind by a sort of instinctive growth, as well as by edicts or decrees or
authoritative pronouncements. In this it resembles all customary law.
Indeed it is itself a body of customary law. Its dictates take shape and
definition particularly when they are acted upon and are recognised by the
common consensus of mankind and are administered and enforced by
competent courts. A great English legal historian similarly described
commercial law as an example of natural law. Incidentally the same is
true of Prize Law. Later, after a certain stage of development has been
reached, such customary law finds a definite form and substance, the moral
ideas from which it originates become crystallised and are enforced by
competent courts, by various sections of customary law, and the process
results in the creation of codes. Thus for instance in the case of com-
mercial law we have Codes, such as the Bills of Exchange Act, which
again generally are based on rules laid down by decisions of the national
courts. But international law is not the law of any single nation. Any
nation may act upon it and adopt it and in that sense it may be said to
be the law of that nation, but it is still international law, which is the
law of the community of nations. Hence the source of that law is to
be found in international documents or conventions and the like, not in the
specific laws or legislation of any particular country. That there is such
a law of war as part of the law of the community of nations is expressly
stated by the Nuremberg Tribunal in its judgment, in the following passage:

"The very essence of the Charter (i.e. the Agreement of 1945) is that
individuals have international duties which transcend the national obligations
of obedience imposed by the individual state. He who violates the laws of
war cannot obtain immunity while acting in pursuance of the authority of the
state if the state in authorising action moves outside its competence under
international law."

The Commission, in order to fulfil its duty to advise the Governments
on questions of law, had to deliberate on fundamental issues of inter-
national law, issues which were of practical importance in regard to war
crimes. The idea of laws of war is not at all novel. Shakespeare in a
familiar passage (Henry V, Act 4, Sc.?) makes the Welsh Captain Fluellen exclaim “Kill the poys and the luggage! ’tis expressly against the law of arms.” A little lower down it is apparent that Fluellen could distinguish martial law from the law of war or arms. No doubt the law of war has developed since those days. The name of Grotius is not to be forgotten. There were other great lawyers who advocated more humane rules of war, until a sort of partial codification was attempted by the Hague and Geneva Conventions. But these did not close the tale. Since then there have been two world wars. In both of which, and especially in that recently ended and indeed somewhat earlier, the aggressors set up a theory of totalitarian war, totalitarian not merely because all the nations resources of men and material were swept into the war, but also because the war was waged with a total disregard of all humane and moral or legal restraints.

The Nazi statesmen and soldiers claimed to be “legibus soluti.” They acted on that principle. That was the new ideology of which Keitel boasted when he approved Hitler’s order to kill the captured British airmen or commandos. The conscience of humanity has recoiled from such a doctrine. As always when there have been murderous and destructive wars, there has been since 1919 a great world movement to abolish war or, if that is impossible, to diminish its possibility and to humanise war. That had two main consequences apart from the important factor that a practical and effective system of prosecuting and punishing war crimes had been brought into existence. One was a determination to reform and redefine the law of war, the other was to make aggressive war an international crime. Coupled with these main ideas, was the idea that war crimes involved individual responsibility.

It has often in the past been said that international law was only concerned with affairs between nations. The discussions after World War I left the matter a little vague though the idea of individual responsibility was sufficiently explicit. The Commission, however, in compiling its Lists of persons charged as war criminals and in its debates consistently accepted that idea of individual responsibility. Since then the Nuremberg Tribunal has clinched the matter in its judgment. I quote only a few words “crimes against international law are committed by men not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” Indeed it has always been involved in the idea of war crimes in the conventional sense, e.g. under the Hague and Geneva Conventions. It may now be taken as settled that there is an international criminal law for breach of which, since World War II ended, thousands of individuals have been tried and punished by competent courts all over the world.

That there was a crime of aggressive war has been hotly contested in certain quarters, but on this issue the Nuremberg Tribunal has spoken with no uncertain voice. “The charges” it said, “in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone but affect the whole world. To incite a war of aggression therefore, is not only an international crime, it is the
supreme international crime differing only from other crimes in that it contains within itself the accumulated evil of the whole.” The arguments of counsel before the Tribunal advanced the same proposition with singular logic and force. I may refer in particular to those of Mr. Justice Robert Jackson, the United States Chief Prosecutor and of the British Attorney General, Sir Hartley Shawcross. These arguments will become classical.

In the debates in the Commission this vital topic had been fully discussed. I have been told that these discussions were not without influence in determining the scope of the prosecution and in putting “crimes against peace” in the fore-front of the Charter of the Tribunal.

The concept was not novel either in 1945, or in 1939 when the war was initiated by Hitler and his associates. It was at least implicit in those articles of the Versailles Treaty which provided for the prosecution of the Kaiser. It had been frequently approved by weighty arguments of distinguished lawyers and statesmen in the years between the two wars. In 1928 it was explicitly embodied in a fundamental international document, the Kellogg-Briand Pact, which was based on the distinction between a just and an unjust war, which was certainly an ancient, or at least a mediaeval, Christian principle. It was unpalatable in certain quarters, because it was directly contrary to the theory of totalitarian war. It was, however, just that evil conception which the highest moral forces of the world were bent on eradicating. It was indeed a moral and a political principle which had acquired the status and definiteness of a principle of international law and was by 1939 ripe for enforcement. Finally it was expressly enforced by the Nuremberg Tribunal, an international court of the highest competence and authority. I am quite satisfied that in the future, even though other forces may temporarily and on occasion prevail, the nations of the world will not let the principle go.

Apart from the Kellogg-Briand Pact there were the manifold weighty declarations by the League of Nations and other authoritative international councils and bodies, and the opinions of the most eminent international lawyers. Above all there were the dictates of the moral sense and conscience of mankind. If anything had been wanting, the whole was consummated in the explicit and deliberate judgment on the issue by the Nuremberg Tribunal. It is impossible to suggest that Hitler or any of the criminals did not know they were committing a crime in starting the war. It is not merely that they could not deny what was widely known, especially to the Fuehrer, and his circle; their documents and evidence show consciousness of criminality. Hence it cannot relevantly be contended that a man cannot be punished for what he did not know was a crime. Indeed if it were necessary (as it is not) to go further and say that the law of the Charter under which the Nuremberg Tribunal sat was valid retrospectively, it would fall within the principle stated by a great English judge that there may be offences for which the earlier law for want of prevision failed to meet, and in which the execution of the law as it stood, would involve the injustice that the axiom 

summun jus summa injuria would apply. As the Tribunal said, the objection to retrospective enactment is one of justice not of jurisdiction.

Among other fundamental doctrines debated by the Commission was
what has been called the defence of superior orders. I think it can now
be taken as settled that that plea is not a sufficient defence but that it may
have effect by way of extenuation. I shall merely mention in passing one
important doctrine debated by the Commission; crimes against humanity.
I shall be content here to refer to an article on that type of war crime by
Dr. Egon Schelbul, until last year one of the Commission's legal advisers,
published in the British Year Book of International Law, 1946. I am in
full agreement with his exposition. The same learned jurist contributed a
note on the Commission in the same publication (p. 363), from which I shall
take the liberty of quoting a list of detailed rulings on specific legal
problems which occurred in connection with the listing of criminals by
Committee I. It is a list of examples of "questions of substantive law
which the Commission had to decide over and over again when dealing
with particular charges brought before it by the National Offices." The
list proceeds:

"The defence of military necessity, particularly in connection with charges
of the destruction of property, dykes, port installations, a library, works of
art; the legality of pecuniary reprisals imposed on the civilian population
by an occupant; the question whether and to what extent judges, including
military judges, can be called upon to account for crimes committed in the
exercise of their functions, particularly in connection with the different types
of special courts and courts martial instituted by the German authorities
and the Italian "Tribunale Speciale per la Difesa dello Stato"; the definition
of crimes against humanity under the basic documents of 1945 in general;
the question as to whether perpetrators of crimes committed on Czechoslovakian
territory at the beginning of 1939 can be prosecuted under the heading of
crimes against humanity, and the legal character of acts of persecution commit-
ded during the war by Italian authorities against Italian nationals of Yugoslav
race; the question of what extent attempts to denationalise the inhabitants
of occupied territory are war crimes; the legal status of guerrilla fighters and
partisans: particularly as applied respectively to the Yugoslav Army of
National Liberation and the F.F.I. and to the Italian Fascist Republican
formations—after September 1943; the criminal responsibility for adminis-
trators of seized property in occupied territory, particularly of Jewish
property; individual responsibility for violations of conventional and customary
rules of international law; the relation between international and municipal
law, particularly the question whether and to what extent the lex loci is
relevant to a charge of a war crime or a crime against humanity; the committing
of a war crime or a crime against humanity by enacting legislation which
orders or permits such crimes; the responsibility of commanders for offences
committed by their subordinates and of administrators of occupied territory;
the responsibility of persons holding key positions in the political, military,
and economic life of Germany and of Japan; racial discrimination in food
allocation by the occupation authorities; compelling the inhabitants of occupied
territory to work at places where military operations, as distinguished from
military preparations, were being conducted; forced labour of civilians in
general; the interpretation of the detailed provisions of the 1929 Prisoners
of War Convention; the compulsory enlistment of the inhabitants of occupied
territory in the armed forces of the occupant, particularly in connection with
Alsace-Lorraine, and the question of the responsibility of judges who sentenced
to death, as deserters from the German army, Alsation soldiers who had been drafted
into the German army; the question whether voluntary recruitment of inhabit-
ants of occupied territory for the armies of the occupant is permitted; the
confiscation of property as a war crime; the seizure of means of transport by
an occupying force; crimes committed in concentration camps; the responsi-
bility of concentration camp personnel; membership in criminal organizations;
responsibility for unjustified imprisonment, the taking of hostages, the killing
of hostages; the responsibility of the commander of an Italian submarine who
torpedoed a French merchant vessel on sight after the conclusion of the French-Italian armistice in 1940; the question whether a German officer who scuttled a German submarine after the German surrender committed a war crime; the criminality of the use of Dutch uniforms, on 10th May 1940, by members of the German army; the implications of the war crime of ‘usurpation of sovereignty’.

To these I may myself add just one more instance.

The Nazi forces while in occupation of France found an active ‘black market’ in operation. With Teutonic ingenuity, they devised a simple method of profiting by it. They formed a department in the occupational system for the purpose. There was a purchasing section, which went into the illegal market and bought large quantities of valuable articles at the prices there demanded and paid for them by means of paper money which they issued as the government of the country, at no cost to themselves except the cost of paper and printing. They then despatched the goods to Germany. This ingenious transaction certainly involved the pillage, plunder and spoliation of France, even though the particular sellers were content to get the currency and could use it in France. The case also fell within other articles of the Hague Convention. As to the Nazi criminality it would of course be necessary if an individual was to be held guilty to show that he was privy to the whole complex (though in one sense simple) scheme.

The Commission did not give a definition of ‘war crime’. Definition involves limitation and exclusion. Hence the Commission did not think it necessary or desirable to formulate a precise definition nor did it give more than a working list. With modern scientific development in the war machinery and in the modern concept of total war and its methods of barbarism, a final list could not be drawn up, but the working list drawn up from various authoritative sources provided a sufficient guide to Committee I in dealing with war crimes that were submitted to it. Some gaps, if they existed in the Hague and Geneva Conventions, could be filled up according to the liberal scientific method of interpretation provided for by the Code itself.

I turn to another matter. As the Commission was from the first charged with the duty of recording and reporting cases, it has seriously occupied itself with the preparation of a series of Law Reports of Trials of War Criminals. This is a duty of the highest importance, because without such reports future generations would not be able to ascertain the law developed by the various courts nor would future authors engaged in producing works on the laws of war be able to garner the fruits of these few but very busy years of legal elucidation. It has often been said that every great war which has shocked the moral sense of mankind has resulted, at least in modern times, in humanitarian reforms or at least declarations, in the hope of checking at least in some degree the atrocities and murderous practices of war. Such were the Hague and Geneva Conventions and the Kellogg-Briand Pact and the corresponding treaties in regard to war at sea, all intended to be legislative enactments and to go to constitute a code of this part of the law of nations. One main purpose of this great campaign which I have outlined of justice in war, for the protection of human rights in war conditions, or at least some human
rights, was to provide a body of legal doctrines, elaborated in many ramifications of fact, which would enlighten future generations and perhaps help to avert war in future, or if that is impossible, limit its atrociousness.

It is hoped that the publication of these Law Reports will facilitate the elaboration of a jurisprudence in connection with this branch of international law.

I have so far limited this Introduction to the circumstances of the Western theatres including the European, African, Italian and Mediterranean spheres. But in the Far East, including Asia, Malaya, China, the Pacific Islands and Japan, there was a similar activity in the prosecution of war crimes by the Allies. Over these vast spaces of the world, atrocities of the same kind and heinousness were perpetrated. Japan fought hard and fought with a barbarism and ruthlessness comparable at least with their Nazi allies. When the Tokyo Tribunal was set up on the model of the Nuremberg Tribunal even the layout of the court room followed the same arrangements as its prototype; it was constructed and arranged by the United States as was that at Nuremberg. The vast area with which it had to deal was indicated by the number of judges, who were eleven, one for each country which had suffered. Sir William Webb, at first Chief Justice in Queensland and before the case ended promoted to be a Justice of the High Court of the Australian Commonwealth, presided. An explanation of the great length of the hearing may perhaps be found in the language; translation was a grave difficulty and source of delay. Japanese was in any case a difficult language and particularly hard to use to express the complexities of modern Western ideas. When I went to Tokyo in April 1946 the trial was about to begin, though it did not actually get into full operation until the following June. It had not finished when I write.

The Tokyo trial was the trial for the Far East of the "major" criminals. For the "minor" criminals (to adopt the same classification as I have used before) Military Courts were formed by the United States, the British, the Australian, the Dutch and other countries interested, at a number of places, the Phillipines, Shanghai, Hong Kong, Singapore and the various Pacific Islands such as Guam.

All these manifold and widely spaced activities fell within the province of the Commission, but with differences. The Commission was vested with power to appoint sub-commissions or panels, and has established one such at Chungking, which, when the Japanese were defeated and surrendered, eventually removed to Nanking. That body did make some reports to the Commission, but the great part of the very important Far Eastern prosecutions of war criminals, were conducted from a number of central offices, dotted over the whole area, for instance at Yokohama, Singapore, Hong Kong and elsewhere. The constitution and procedure and law of these military courts followed the corresponding European model. The various authorities sent reports and information to the Commission with the total of cases tried and prisoners dealt with, some with figures com-
parable to those in the Western area. At the early stage a question was raised whether it was necessary or convenient to have a system for the Far East of listing war criminals and suspects similar to that adopted by the Commission on this side of the globe. That would have involved the submission of cases to a body similar to Committee I, but it was decided that such a system, when applied to the vast spaces of the East, would involve a complication and delay disproportionate to any possible advantage. Some important cases from the Far East have been and will be included in the Law Reports of War Crimes Trials which the Commission are publishing. What has been said above in reference to the whole question as arising in the Western hemisphere will apply *mutatis mutandis* to its counterpart in the Far East, and need not be repeated here. The Far Eastern system enjoyed the experience acquired by or with the aid of the Commission.

II

I have been dealing so far in this brief Introduction with the bare bones of the scheme and purpose of the Commission and of its Constitution. I may, however, descend to some concrete particulars and take the opportunity of developing some answers to objections—even at the risk of some little repetition.

I quoted a memorable passage from the Nuremberg Judgment on Nazi atrocities, but I venture to supplement it by some appalling figures which I take at random from other parts of it. Thus General Ohlendorf, who led one of the Einsatzgruppen invading Russia, states that, in the course of the year, his army liquidated about 90,000 men, women and children, Jews or Communists; at least 5,000,000 of the inhabitants of the occupied countries were deported to Germany for slave labour; it might be asked how many ever came back. Himmler complained of loss of labour because the deportees or prisoners died in hundreds of thousands, of exhaustion and hunger. The Tribunal heard evidence that at Auschwitz concentration camp at least 2,500,000 died of poison gas in the gas chambers and 500,000 died of disease and starvation. The Tribunal quotes an estimate that the policy of exterminating the Jews resulted in the killing of 6,000,000 Jews. Other figures quoted by the Tribunal for 1942 alone were 72,729 Jews in Warsaw, 17,542 in Lodz, 18,000 in Croatia, 125,000 in Rumania, 14,000 in Latvia, 85,000 in Yugoslavia, 700,000 in all in Poland. Streicher, the Jew baiter, boasted that the Jews had virtually disappeared from Europe.

All this was no accident: it was part of the settled policy of extermination and terrorism. It was practised deliberately from the outset. Von Hasselt, a very distinguished German diplomatist, in his Diary as early as 11th October 1939, records how young fellows in the Labour Service had witnessed the way villages were surrounded and set on fire because of civilian snipers, while the population inside shrieked frantically. He also quotes the horror felt at the thousands of unburied corpses in Warsaw.
Poor von Hasselt, a scholar, liberal-minded and a gentleman, at one time a German Ambassador, managed to survive until he was charged with complicity in the Generals’ plot against Hitler’s life which nearly succeeded on 20th July, 1944: he was tried by the “People’s Court,” condemned and executed. One cannot help wondering if he escaped, what so many of those accused of that plot suffered, the tortures of the Gestapo. I must not be tempted to multiply instances, but I may perhaps give an illustration of the complete dehumanisation produced in the perpetrators of such cruelties and brutalities. The passage is quoted from the evidence before the Tribunal of Hoess, the commandant of Auschwitz camp; he records in matter of fact terms the ordinary routine operation of gas poisoning, by which millions perished:

“It took from three to fifteen minutes to kill the people in the death chamber, depending upon climatic conditions. We knew when the people were dead because their screaming stopped. We usually waited about one half-hour before we opened the doors and removed the bodies. After the bodies were removed our special commandos took off the rings and extracted the gold from the teeth of the corpses.”

I may note that the poison gas used caused excruciating agony before death.

It is not strange that the leaders of the four great Allies issued the Moscow Declaration and announced that punishment of war criminals would be one of the major objects of the war. Nothing less would have satisfied the moral conscience of the civilised world. From this flowed the procedure which I have outlined. What has been criticised in particular has been the trial and condemnation of the “major” criminals on the charge of crimes against peace under the London Charter. I have just read a vigorous article in the Record of 6th February, 1948, by a distinguished Professor of international law, Dr. J. L. Brierly of Oxford. He states that “the traditional view” of international law has been that “resorting to war is the right of enemy sovereign states and that whether or not the motive is offence or defence or whether or not the act involves a breach of faith are questions legally irrelevant.” He balances pros and cons but considers that the article was not the place for an exhaustive legal argument.

I venture, however, to repeat what I earlier stated, that in my judgment the decision on this momentous issue given by the Nuremberg Tribunal was the right legal decision. I venture to say that it is not good law to put aside the decision which was that of the whole Tribunal, because there was only one judgment, that of the whole Court, though for convenience of deliberating the eight judges took turns in reading it, as merely an obiter dictum when it deals with the crime of war. The doctrine of stare decisis which is so familiar to Anglo-American lawyers does not apply in Military Tribunals, nor is it generally accepted by Continental lawyers. The tremendous decision of the Tribunal on the crime of war is of the same weight, no more and no less, than any other part of the judgment. It does not bind other courts, but all the same it carried great weight as coming from so august a Tribunal, and goes to form a jurisprudence. The same is true of the ruling in the judgment that “the Charter is not an arbitrary exercise of power on the part of the victorious
nations, but is the expression of international law existing at the time of its creation."

It seems to me that a fundamental fallacy of the opponents of the scheme outlined in the London Charter is the attempt to obliterate the distinction between just and unjust war. That distinction was well-established for many generations, from mediaeval times, and was treated as flowing from natural law, which, I think, has never meant more than the innate sense of right and wrong possessed by all decent-minded human beings. It was sometimes supported by the precepts of the universal Church. But, at a later period, there was introduced a concept of the sovereignty of the individual state and that was carried in the 17th and 18th centuries to some lengths. In more recent times, and particularly in the end of the last century and in the beginning of this century, the doctrine of sovereignty was used to nullify this distinction between the justice or injustice of war. It was said that it was part of the sovereignty of every nation to wage war for any purpose, and in any manner, however atrocious, which appeared to it to be desirable to achieve the purpose of overcoming the opposing power. This may well appear to the moralist a diabolical idea, but there may be some who think it proof of the strength and validity of law that it refuses to find sanctions to correct and punish the most atrocious conduct. Such a mental or moral attitude may even perhaps be sometimes discerned in the views and arguments put forward by those who say that there is no distinction between just and unjust war. It would be easy to find very stentorous opposition to that view, for instance, if I may refer to some of the greatest writers on international law of the present generation, I should point to authorities like Professor Kelsen, Professor Lauterpacht, Professor Goodhart, Professor Quincy Wright and many other authorities. One of the troubles of arriving at a definition of international law rules is that writers in their study, often removed from the realities of life, have expressed so many diverse views, which cannot be reconciled at all; but international law does not depend upon the irresponsible views of theoretical writers. It is to be found rather in international declarations, conventions, treaties, and practices of the nations, to say nothing of the moral consensus of human beings in the world, and the decisions of competent courts.

International law becomes, as I have already explained, a definite and positive reality, both in its character and its consequences, when competent courts acting under it try individuals and sentence them to punishments which are executed by competent authorities. It is said, however, although that may be true of particular violations of the rules of war, there are no such instances of the trial or conviction, of people who have offended against the law laid down in the Pact of Paris. But even before the Pact of Paris, punishments were inflicted, or at least intended by the aggressive nations, against those who had inflicted on them the evil of aggressive war. I refer to the banishment of Napoleon, first to Elba and then to St. Helena, for the aggressive wars which he had initiated. In the same way in 1918, at the end of the war, it was intended to take proceedings against the German ex-Kaiser and that intention was embodied in Article 227 of the Treaty of Versailles. It is true that plain language was evaded by the somewhat rhetorical language which was there used. The Treaty
proclaimed that the ex-Kaiser should be arraigned for a supreme offence against international morality and the sanctity of treaties and provided for this trial by an especially appointed tribunal of the allied and associated powers. That trial was never held because the Dutch Government refused to surrender the accused man to the Allies, he having found shelter in Holland. Rather than start a fresh war, the Allies abandoned their intention, just as they abandoned their intention to try the various war criminals themselves and left them to be tried by the Leipzig Court, with the consequences that are so well-known. But the principle that an unjust war, or war of aggression, is unlawful, was clearly recognised by these two instances and indeed was recognised in the various provisions of the Treaty of Versailles, which provided for reparations; liability to make reparation is proper to illegality. I think, therefore, that there are clear precedents for the rule that it is an unlawful act (sicilicet crime) to start and wage an aggressive war. It has indeed been long held by humanity that he who does such a thing is guilty of a supreme offence. In the words of the poet "he shuts the gates of mercy on mankind." The world would indeed be shocked, if those who are chiefly responsible for the evils and atrocities either in the war in the Far East, or in the war in Europe, should escape scot-free, especially in view of the treaties which they were instrumental in breaking and of the general condemnation of humanity.

The difficulty which has been recently felt in some quarters has referred to the prosecution of the governing authorities of the conquered state for acts such as initiating or waging an unjust war. At the basis, however, of that class of charges is the distinction which, as I have already pointed out, somebody have sought to obliterate, between just and unjust or aggressive war and I cannot but think that many of those who have discussed this problem have gone back to earlier pronouncements antecedent to the Pact of Paris, and have not considered the numerous other Conventions which are familiar to all students of international law, some of which have expressly referred to the initiation or waging of unjust war as a crime, as indeed it is in the strict sense of that word. I regard these international agreements as declaratory of the existing law and as giving it a positive place or status. It is true that the Pact of Paris as a treaty only binds the nations which are parties to it but, if it renders the waging of unjust war a crime, then, on familiar principles, the agents in the particular states who are responsible under the constitutional system prevailing in that state for leading the nation into war, cannot escape personal and individual liability for what they have done. In that respect, this is a liability independent of, and additional to, the liability of the treaty breaking nation. The principle of individual liability has always been recognised in military courts. It is apparent in the ordinary war crimes, that those who do the acts are personally liable and equally there is no logical or moral justification for applying any different rule in the case of the more generalized crimes chargeable against the leaders of the unjust belligerent nation. The Pact is not a scrap of paper. Indeed its effect has been recognised in the sanctions applied under it in the cases of China and Abyssinia. I have already referred to the principle of the sovereignty of nations and I fully accept the importance of maintaining the freedom of independent sovereign states; but that is a freedom which must be
regulated by the like freedom of other independent states who are entitled to resist unlawful aggressions against their own freedom and independence; hence, when the aggressive state goes beyond its own boundary and its own domestic affairs in order to interfere with the freedom and independence of other sovereign states, the latter are entitled to resist and punish the aggressor; in that event it is clear to me, that the doctrine of the independent sovereignty of the wrongdoer no longer applies and equally that the concept of sovereignty cannot be invoked to protect those members of the aggressor state who are personally guilty of leading the nation into the criminal courses which involve the trouble. To my mind, it is immaterial that, from the point of view of the aggressor state, the conduct of these men can be described as being acts of state, whatever that may mean. That concept of acts of states is submerged in and is inconsistent with the concept of international crime and of the individual responsibility of international criminals. Some advocates of the doctrine of sovereignty have gone so far as to say that every act of a military commander, or indeed of a soldier, which involves infringement of the laws of war, is an act of state and cannot be proceeded against even though the delinquent has been captured and has fallen into the hands of the other belligerent state. This is indeed a *reductio ad absurdum* of the doctrine of the act of state. I can find no real authority for any such theory.

I think also that the idea that the belligerent state is not entitled to punish the war criminals, or is not entitled to punish them without the consent of their own people, is fallacious and without authority. It is said to be more plausible to describe the decisions of a monarch, or a prime minister or the members of his cabinet, arriving at a decision to initiate an unjust and aggressive war, as acts of state because of the old superstition that the crime ceases to be a crime because done on a large scale with political motives and as an act of policy. The very language, however, of the Kellogg-Briand Pact uses the phrase "renouncing war as an instrument of policy," which seems to be expressly directed against this superstition which has long since been condemned by moralists or humane writers, (for instance, one finds the phrase "necessity the tyrant's plea") and indeed there is almost no crime, however atrocious or however immense in its operation, which might not be described as an act of policy. It seems to me that the whole aim of international law, in recent times, has been to give a definite and positive shape to the moral concepts, which, in some quarters and in some periods, have been thought too fluid and indefinite to deserve the name of positive law.

The strongest argument against the punishment of the war criminals either "major" or "minor," is that men have not been punished previously for the particular offence.

That argument completely fails as regards the "minor" criminals, those who are accused of war crimes *stricto sensu,* but it needs further consideration in the case of what I call the "major" criminals, such as monarchs, prime ministers, cabinet ministers, or the like, even though there are precedents which I have already referred to. Thus there is the case of Napoleon who was punished for what we call a major crime though
by executive instead of judicial act, and the case of Kaiser Wilhelm II who was marked down for trial though, as I have observed, the trial never took place because the Allies had not, and could not, obtain custody of the accused. These are, in any event, precedents but, as I have attempted to show, the law is clear enough. Responsible statesmen cannot pretend to be ignorant of what the law is, especially since the Kellogg-Briand Pact, which is now nearly twenty years old. I can understand the statesmen and the generals asserting that there had so often been immunity allowed to such conduct that they were entitled to speculate on similar immunity when their time came. No doubt they said to themselves that they were certain to succeed; but they did not succeed and that possibility ought to have presented itself to their minds, and have led them to consider what their position might be if that happened. What is quite clear is that, when they started the war, they were or should have been fully aware that they were committing a crime both at ordinary law and at international law and they were really banking on what they thought was the absence of an efficient machinery to punish the crime. If they had thought at all during the years in which they prepared for war and for the crime, they could not have failed to realize the enormity of their purpose and acts. The form in which the argument is sometimes put is that no man should be punished for an offence as to which he could not know at the time when he committed it that it was a punishable offence. I find it impossible to apply that idea to the question relating to these men. Of the criminality of their conduct there could be no doubt, and equally it must have been apparent to them, beyond a doubt, that they were guilty of such criminality. Even if I were wrong in my view that the positive law announcing the crime and defining the criminality was in existence at all times material, at least the criminality of wholesale murder and the like was apparent and all that was lacking was some precise enunciation of positive law and punishment; that defect could, in my opinion, be made good by subsequent declaration and clarification of the particular breach of law and the punishment. If it were necessary, I could go further and say that the definition of a clear and atrocious moral offence as being also an offence of positive law can be lawfully made by the competent court or legislature. This indeed is the normal method of developing international law which extends its boundaries on the principle of analogy just as the common law has done.

I wish to emphasise my opinion that the difference between a war of aggression and a just war is fundamental and that the attempts to obscure it in comparatively recent times ought to fail, and have failed. I have sought to refute some misleading conclusions, as I regard them, from a fallacious idea of the extent of the doctrine of sovereignty. In particular, I wish to protest against the idea that the doctrine of the sovereignty offers a shield of immunity in the case of acts of unlawful aggression. Sovereignty is not the same as autocratic, arbitrary power. It is a limited or regulated doctrine which cannot be extended beyond its proper limits, which are primarily but not necessarily the limits of the sovereign state's own boundaries. I have wished also to protest against an illegitimate application of the idea of acts of state; that concept I think does not
justify the commission by nations or individuals of crimes or other unlawful acts in the realm of international law.

The objection taken by some that the Nuremberg Tribunal is merely a one-sided pronouncement is, I think, inconsistent with the general principle as to the jurisdiction of Military Courts laid down recently on two occasions by the Supreme Court of the United States. The nation attacked is entitled to defend itself, and it is incidental to that that it should be entitled to punish those individuals who are guilty of the aggression if they fall within its custody and a right or duty to try them first is ancillary. Distinguished writers arguing against the validity of the Nuremberg trial have agreed that the punishment suffered by the accused was well merited. They deserved to die. Is that all changed because the victors preferred a judicial proceeding to an act of arbitrary power? All that the criminals were entitled to by way of protection of their human rights was a fair and impartial trial. That they got.

As to the "minor" criminals some, we have seen, were tried by Military Courts of the victors in whose custody they were. The other course contemplated by the Moscow Declaration viz, trial by the National Courts of the countries in which the crimes were committed, involves the same principle of individual criminal responsibility, but bases that on the national law, and recognises the principle of sovereignty. In general the crimes were committed while the country was occupied by the enemy and the normal course of the law was in abeyance. But the law revived when the occupation ended. In effect, however, though the national law had to be enforced then, it was with such qualifications as the law of war required. War is organised murder, devastation and destruction. But the law of war draws a line between legitimate acts done in war and those which are illegitimate. The National Courts must recognise the distinction and in some cases it has been necessary to amend the national law and procedure, to give effect to the requirements of international law. Indeed the National Court is pro tanto a Court enforcing international law. That is generally for the benefit of the accused, who, as soldiers, can claim the benefit of the law of war.

Law is the servant, not the master of the human mind which has created it. Its functions are derivative, not overriding. Though it aims at a standard certain of responsibility or of immunity, the standards can only be fixed with due regard to the demands of justice. A wrongdoer who overpasses the normal limits of human conduct, cannot complain if he is tried by a standard comparable to what he has done. Otherwise, (to adopt the words I have already quoted of Mr. Justice Willes), sumnum jus is nothing but summa injuria: ordinary national law cannot provide for or forsee all that may be done in totalitarian war. That must be settled by international law, if need be retrospectively, if the existing law of the nation is insufficient.

I may again repeat that these problems cannot be solved unless it is clearly realised that international law not only has its own particular principles, but its own rules and methods for answering them. An attempt to settle them by introducing vi et armis principles and procedure
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drawn from national law, is responsible for much of the confusion that has invaded this branch of international law. It is hoped that the series of War Crimes Law Reports which the Commission has begun to publish will help to encourage and facilitate the study of these questions from the correct point of view. It is hoped that these reports will include the judgments in the important trials described as the Subsequent Proceedings at Nuremberg which are being conducted by the United States under the supervision of General Telford Taylor.

III

There could be no higher object of human endeavour than the abolition of war, or if that were found to be impossible, the abolition of terrorism in war. No one would now talk complacently of the pride, pomp and circumstance of glorious war. It is seen for what it is, an unmitigated and unrelieved evil. If there is any offset to its vileness, it is that it calls for noble exhibition of courage, endurance, devotion to duty and the higher aspects of patriotism. But even if it is conducted according to what has been called the old ideology, the ideas of chivalry which inspire the finer military spirits, these things are far outweighed by the vast evils, the destruction of the wealth which, if properly used would solve the problems of social well-being, such as freedom for all from want, poverty and disease, and would promote every form of education, social amelioration and happiness. All this is lost in the destruction of the wealth which might otherwise have been used to produce it and in the spiritual degradation due to war.

What then is to be said of the terrible wickedness of totalitarian war. I should like to quote a passage from the abridgment of Professor Toynbee's Study of History which was prepared by D. C. Somerville after the end of World War II, but with the approval and authority of the learned author of the Study:

"Just as the intensification of slavery through the impact of Industrialism led to the launching of the anti-slavery movement, so the intensification of war through the impact of Democracy, and subsequently of course through the impact of Industrialism as well, has led to an anti-war movement. Its first embodiment in the League of Nations after the end of the General War of 1914-1918 failed to save the World from having to go through the General War of 1939-45. At the price of this further affliction, we have now bought a fresh opportunity to attempt the difficult enterprise of abolishing war through a co-operative system of world government, instead of letting the cycle of wars run its course until it ends—too badly and too late—in the forcible establishment of a universal state by some single surviving power. Whether we in our world will succeed in achieving what no other civilization has ever yet achieved is a question that lies on the knees of the Gods."

It would indeed be an act of sanguine faith to hope to achieve the abolition of war and many people would resent the idea of a single universal state in place of the richly variegated pattern of what Professor Toynbee calls parochial sovereignties. Even to abolish or mitigate the atrocious-
ness of war as exhibited in World War II would seem to be too good to hope or pray for in dreams. But the great campaign against war crimes, which I have been attempting to describe, is better than a mere acquiescence in what has happened as being a necessary evil like an earthquake or a tornado. War involves the deliberate choice of human agencies; in the last war it was long premeditated and prepared. It still may be hoped that the enforcement, in some small degree, of the principle of the individual responsibility of the human agencies and the exhibition to the world of their complete depravity will tend to weaken the evil impulses. It is at least something that the Nuremberg Trial and judgment has brought home the idea that statesmen and high military officers and administrators can be brought to trial. That is something new. It is that novelty which is responsible for much of the hostility and extreme criticism which have been evoked. If (di meliora) the same tragedy should be acted afresh, the idea of punishing the criminals, will be strengthened by precedent and example. When I look round the world horizon, I seem to find on every side the seeds of future wars, but I must not allow myself to yield to pessimism or defeatism.

But apart from the unfamiliarity of the idea of punishing war criminals, especially the most highly placed, the retributive zeal and sense of justice on the part of mankind are slow in developing and in coming to practical activity, and their effective life is short. When I write this only 3 years have elapsed since the Axis powers collapsed and surrendered. The remarkable activities which I have adverted to seem to be losing their initial impetus, except perhaps in some countries which have suffered most terribly from the invaders' terrorism. Where these natural feelings prevail, the series of prosecutions will no doubt continue by means of the activity of the National Offices and with the aid of the system and machinery now evolved. Russia has always held itself aloof from the Commission and did not become a member. But countries like the United States, Britain and the members of the British Commonwealth are now so overwhelmed by the crowd of problems consequent on the war, that they seem involuntarily to turn aside and forget war crimes. It is natural enough. War crimes are horrible to contemplate, indeed no human mind can realise what is meant in terms of human misery and suffering by the massacres of millions, and the death of millions by every form of cruelty and deprivation. No one can bear to visualise what went on in the torture chambers of the Gestapo—the mind recoils and faints. But once the fiend war has been for the time exorcised, the world goes on and mankind seems to resume as far as possible its former course of life. Once it is felt that the idea of an international rule of law and its suitable enforcement have been established with the support of sufficient precedents, humanity is glad to be relieved of the nightmare of the past. It seems to me that this is what is happening now. The waves of war crime prosecutions are beginning to settle down and will soon subside. The majority of the war criminals will find safety in their numbers. It is physically impossible to punish more than a fraction. All that can be done is to make examples.

So it comes about that the member Governments, or the majority, have decided that the Commission should be wound up. I hope it will
be agreed that its life has not been in vain and that, within its narrow limits, it has helped to establish that the law of war is not only wide and just but can be given practical effect.

[Signature]

Chairman