CHAPTER X

DEVELOPMENTS IN THE DOCTRINES OF INDIVIDUAL RESPONSIBILITY OF MEMBERS OF GOVERNMENTS AND ADMINISTRATORS, OF ACTS OF STATE, OF IMMUNITY OF HEADS OF STATE, AND OF SUPERIOR ORDERS

INTRODUCTORY NOTES

Developments which took place in respect of the concept of crimes against peace and crimes against humanity, as well as within the sphere of penal liability for war crimes proper, brought about profound alterations in the doctrines of immunity of heads of State, of individual responsibility of members of Governments and high ranking administrators, and of acts of State. If the proposition that aggressive wars or persecutions on racial, political or religious grounds in time of war were criminal acts, was not to be confined to the sphere of moral principles, advocated by learned jurists or philosophers or to that of the wishful thinking of politicians, the only way to deal with it was to recognise that individuals upon whose decisions such acts depended, were to be held penal responsibility. This could be done only by dismissing the doctrine of immunity of heads of state, on the one hand, and that of the acts of State legalising deeds of members of Governments and administrators on the other. As a corollary to the theory of national sovereignty, these two denominators served for centuries the purpose of providing a legal cover for a series of acts undertaken by one State against another, or by a Government against its own citizens within the boundaries of a State. There was no international liability for acts such as the launching of a war, but only the bearing of the natural consequences of a military defeat. Constitutional sanctions recognised for mishandling national or international affairs of a State were of a political nature only. A head of State could resign, abdicate or be dismissed, and members of a Government or administrators could similarly be forced into retirement or deprived of political power by other methods—but none could be held penal responsibility for acts undertaken in the exercise of their State functions. In this manner the whole system was one of utter official irresponsibility.

The grave consequences of modern warfare for all the nations of the world, and particularly the impact of the last War with its unparalleled human suffering and economic, political and social upheavals, made these doctrines inconsistent with the vital requirements of international peace and the stability and prosperity of nations. By consent of the great majority of nations these doctrines were eventually discarded and replaced by the rule that individuals could no longer shelter behind acts of State, and that the former were consequently to be held answerable for acts amounting to international crimes, in the same manner as any other individual was answerable for common crimes under municipal law.
Another doctrine was closely connected with those affecting heads of State and members of Governments. It is that concerning acts committed upon superior orders. The question requiring answer was to what extent persons pledged by law to obey orders of their superiors, in particular those issued by heads of State and Governments, were to be held personally responsible for acts committed by them in subordinate positions. Was liability to be confined only to those persons who issued the orders, or were the executants to share responsibility with them? If so, what were the limits for holding a subordinate guilty of committing acts upon superior orders?

Developments in all these various fields took a sinuous line of progression. There were hesitations and hindrances, and there were also complete reversals of attitude on the part of Governments within a given period of time. The ultimate result was the elaboration of rules embodied in contemporary international law which provide clear answers to all the main issues at stake, and which will be the law until a further development takes place in the future. Such as it is, this law meets the requirements of the present world in a manner which is designed to act as a deterrent to breaches of peace and to crimes incidental to such breaches, and even to acts committed by Governments and heads of State within their national territory in connection with aggressive wars.\(^1\) One of its principal effects is that it introduces international penal liability for such individuals and makes some of their acts the concern of the community of nations as a whole. In this way, it subjects the real actors in national and international affairs to the rule of law in all matters affecting the maintenance of international peace and of the fundamental human rights of mankind.

A. INDIVIDUAL RESPONSIBILITY OF HEADS OF STATE, MEMBERS OF GOVERNMENTS AND STATE ADMINISTRATORS

The problem of personal responsibility of heads of State, members of Governments and similar high State administrators, and the relevance of the doctrine of acts of State affecting their liability, were the subject of thorough investigation and discussion at several international conferences. After the First World War they were analysed by the 1919 Commission on Responsibilities; during the Second World War they were dealt with by bodies such as the Interallied Commission on the Punishment of War Crimes, the London International Assembly, and the International Commission for Penal Reconstruction and Development; they were also carefully studied by the United Nations War Crimes Commission. These phases ended in the trial of German and Japanese Major War Criminals at Nuremberg and Tokyo after the end of the Second World War, and the adjudications made in their respect by the International Military Tribunal at Nuremberg.\(^2\)

(i) THE 1919 COMMISSION ON RESPONSIBILITIES

In the report submitted to the Allied Powers sitting at Versailles,

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\(^{1}\) See Chapter IX, Section A, (ii) (f) (c) p. 195 et seq.

\(^{2}\) The Judgment of the Tokyo Tribunal had not been given at the time of going to press.
members of the 1919 Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties(1) were divided on the main issue.

The majority dismissed the doctrines of immunity of heads of State and of acts of State in the following terms:

"The Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of States. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a State. But this privilege, where it is recognised, is one of practical expediency in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different ".

The majority therefore recommended the setting up of a High Tribunal which would try the German Kaiser, and in this connection expressed the following opinion:

"If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him (a Sovereign) could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind ".

On these grounds the majority came to the following formal conclusion:

"All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution ".

The above views and conclusions were dissented from by the United States and Japanese delegations.

In a Memorandum of Reservations the American delegation drew a distinction between "two classes of responsibilities". They set on the one side "responsibilities of a legal nature, justiciable and liable for trial and punishment by appropriate tribunals", and on the other side "responsibilities of a moral nature" and "moral offences" which "however iniquitous and infamous, and however terrible in their results, were beyond the reach of judicial procedure, and subject only to moral sanctions ". They applied the latter to heads of State, members of Governments and other persons in high authority and advocated that they could, consequently, not be brought to trial. Making special reference to heads of State, the American delegation said that they "were not hitherto legally responsible for the atrocious acts committed by subordinate authorities" and that to hold them now responsible was an "inconsistency" to which "the American members of the Commission were unwilling to assent ". As a consequence they dissented to that extent from the formal conclusion reached by the majority, and reiterated the traditional rule that a head of State could be held responsible only to

(1) See Chapter III.
the "political authority of his country" and not to the judicial authority"(1).

For similar reasons the Japanese delegation made reservations excluding penal liabilities of heads of State.(2)

The Allied Powers adopted the view of the majority and provided for the trial of the Kaiser in the Versailles Treaty (Art. 227). The Kaiser was held responsible "for a supreme offence against international morality and the sanctity of treaties", and was to be tried by a special interallied tribunal of five powers (U.S.A., Great Britain, France, Italy and Japan).

It will be noted that in its conclusion as to the individual penal responsibility of high State administrators, the majority of the 1919 Commission had declared their liability for violations of the laws and customs of war or of the laws of humanity. It is generally agreed that the former cover the field of war crimes *stricto sensu* and that—in the light of the Nuremberg Trial—the latter comprise what are now called crimes against humanity.

As to the launching and waging of an aggressive war, the 1919 Commission was of the opinion that "by reason of the purely optional character of the institutions at the Hague for the maintenance of peace (International Commissions of Inquiry, Mediation and Arbitration), a war of aggression may not be considered as an act directly contrary to positive law". Consequently, at this stage, penal liability of State administrators, including heads of State, was contemplated primarily for war crimes proper.

(ii) INTERNATIONAL BODIES PRECEDING THE ESTABLISHMENT OF THE UNITED NATIONS WAR CRIMES COMMISSION

(1) Inter-Allied Commission on the Punishment of War Crimes

The Nine Powers, signatories to the St. James's Declaration of 13th January, 1942,(3) had set up a Commission on the Punishment of War Crimes.

The Commission drafted a questionnaire which was referred to member Governments for answer. One of the questions asked was how were individuals responsible for planning, inciting or ordering violations of international law to be punished. The question was framed in general terms so as to include the responsibility of high State administrators. The collection of governmental views on this subject could not be completed in time, for the Commission ceased its activities on 23rd October, 1943, the date of the establishment of the United Nations War Crimes Commission. A questionnaire, however, of the International Commission for Penal Reconstruction and Development brought answers from many Governments, as will be seen later.

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(1) The U.S. delegation made, however, one practical concession. They agreed that the above rule of judicial immunity did not apply to a head of State who had abdicated, as was precisely the case with the ex-Kaiser. Therefore they apparently did object to his trial, but did so on the grounds that in such case the head of State was "an individual out of office".

(2) It can be noted that in Japan the Emperor was considered to be of divine origin, and that the Japanese delegation had of necessity to be in line with this principle.

(3) See Chapter V, Section A, (iv), p. 89 et seq.
(2) London International Assembly

The London International Assembly, which was created in 1941 under the auspices of the League of Nations Union, studied post-war problems and the framing of the future world organisation. Most of its members were designated by the Allied Governments, so that it indirectly reflected their views.

The problem of retribution for war crimes committed during the Second World War held a prominent place on its agenda and gave rise to thorough discussions. Analysing the position of a head of State the Assembly made a distinction, and held the view that heads of State, who constitutionally had not power to order or prevent the framing of a specific policy, could not be held personally responsible for acts of other State administrators or of the Government, as the case might be. As to the principle, they followed the majority of the 1919 Commission and agreed that, with the above exception, rank or position, however high, conferred no immunity in respect of war crimes.

(3) International Commission for Penal Reconstruction and Development

A second semi-official body established by the same Nine Powers who signed the St. James's Declaration of 13th January, 1942, was the Cambridge "International Commission for Penal Reconstruction and Development". It started functioning on 14th November, 1941, and studied, among other things, rules and procedure to govern the case of crimes committed against international public order, with particular reference to events of the Second World War. It performed brilliant work and in July, 1943, submitted to the Governments a learned and comprehensive report on this matter.

In a questionnaire submitted to its members, the Commission requested their opinion as to the "immunity of a head of State and of other State officials". Answers were received from eight members of different nationalities. The majority declared that in the field of war crimes no such immunity could be accepted. With particular reference to the Axis powers, the argument was used that in such regimes the head of State had concentrated all powers in his own hands, and that consequently the doctrine of immunity had no justification. Another argument was that immunity was an accepted principle in time of peace, for reasons of expediency and courtesy vital to peaceful intercourse between nations, but that it ceased to exist in time of war and could not be maintained for the benefit of the aggressor. The practice of making and detaining heads of State and other State administrators prisoners, such as in the case of Napoleon I, Napoleon III, King Leopold of Belgium and Rufolf Hess, were also invoked as evidence that immunity did not exist in war time.

The question was also touched upon, though only in a general manner, in the part of the report dealing with superior orders, and prepared by Professor H. Lauterpacht:

"The rules of warfare", said Professor Lauterpacht, "like any other rules of international law, are binding not upon impersonal entities, but...

(1) See Chapter V, Section B, (ii), p. 99 et seq.
upon human beings... In no other sphere does the view that international law is binding only upon States but not upon individuals lead to more absurd consequences and nowhere has it in practice been rejected more emphatically than in the domain of the laws of war. The direct subjection of individuals to the rules of warfare entails, in the very nature of things, a responsibility of a criminal nature".

(ii) THE UNITED NATIONS WAR CRIMES COMMISSION

In the United Nations War Crimes Commission the problem of individual penal responsibility of State administrators was treated for a considerable period of time in conjunction with two other allied questions: with the preparation of Lists of "major war criminals", "arch criminals", or "key men", as they were alternatively called, and with the question of collective criminality of Governments. (1) Both questions were considered in connection with Axis leaders, and particularly with concrete cases implicating Hitler and members of the Nazi Government.

From March to May, 1944, the Belgian delegate, acting at the same time as Chairman of the Committee on Facts and Evidence, raised several questions in this respect. He pointed out the desirability of supplying the Committee not only with evidence against ordinary war criminals but also against the Axis leaders, and of placing their names on war criminals lists prepared by the Commission. He complained of the fact that member Governments were not communicating such evidence, with the result that "persons in whom the crimes really originated" were not prosecuted. (2) Therefore, he suggested that such evidence be obtained from the Governments or else that it be collected by the Commission on its own initiative. As to the alternative method of bringing major war criminals to book, he considered that the proper course was to try them before a court of law, and not to impose penalty by political decision. However, should the latter course be taken, he suggested that it be applied only in respect of the Axis top leaders, such as Hitler, Mussolini and Hirohito, and not in respect of the other Axis high State administrators. The Commission agreed in principle. (3)

In May of the same year the Czechoslovak Government presented a charge against eight Nazi administrators, including members of the Nazi Government, for the destruction of two Czech villages, Lidice and Lezaky, and the deliberate killing of most of their inhabitants. The accused persons were placed on the Commission's Lists of war criminals wanted for trial.

A few months later, in August and September, 1944, the Netherlands representative stressed that charges brought by member Governments were still very limited in number, and that the Commission should not wait for the Governments to act, but should collect the evidence and place arch-criminals on its Lists without further delay. The Commission agreed. (4) At this stage, however, the decision of the Commission, as

(1) On this last subject see Chapter XI. Section A, (ii) p. 292.
(2) See Doc. C.14, 25.4.1944.
(3) M.16, 2.5.1944.
(4) M.29, 29.8.1944; M.33, 26.9.1944.
well as the proposals of the Netherlands and Belgian representatives, were
admittedly made without prejudice as to whether the Nazi and other
high State administrators would be punished as a result of a trial or of a
political decision of the Allied Governments. Nevertheless, the principle
that such administrators, including heads of States and members of
Governments, could not shelter under the cloak of immunity, was clearly
established by the majority of the Commission's members.

This principle was confirmed and still further developed in the course
of the following months and years, though not without certain difficul-
ties. In November, 1944, the Czechoslovak Government brought a charge
for crimes committed by Nazi special courts, and placed primary respon-
sibility on Hitler and members of his Government. The Commission
admitted the charges, and placed the accused on its lists of war criminals.
On the ground of this decision the Czechoslovak Government extended
its previous charge concerning crimes perpetrated in Lidice and Lezaky
so as to include Hitler and individual members of his Government. At
this juncture some members objected to the procedure. Thus, for
instance, the British member thought that, prior to deciding whether the
Nazi Government could be held responsible, the German constitution
should be consulted and the decision reached according to German con-
stitutional rules for liability of members of the Government. This was
inacceptable to other members, including the Czechoslovak representative,
who argued that the decision would thus depend entirely on the will of
Hitler himself, who had framed the constitution of the Third Reich so
that his subordinates should bear no responsibility.

The importance of the issue as raised above, caused the Commission
to appoint a special Sub-Committee to study the question in all its details.
The Sub-Committee was appointed on 13th December, 1944, under the
chairmanship of Lord Wright. The Czechoslovak delegate submitted
a memorandum on the individual responsibility of members of the Nazi
Government and the Sub-Committee investigated the issue on the basis
of this memorandum and of information which it collected from various
sources. The question was considered simultaneously from the viewpoint
of individual penal liability and from that of responsibility for membership
in a criminal group or organisation. On the first point the Sub-Commit-

(1) Doc. C.88, 13.3.1945, The Criminal and Personal Responsibility of Members of the
Nazi Government, memorandum by Dr. B. Ecer.
(2) On this last point see Chapter XI, Section A, (ii) p.292.
by an inner Cabinet, called Ministerial Council for the Defence of the Reich (Ministerrat für die Reichsverteidigung), and that, in addition, laws which directed or influenced the Nazi criminal policy, were enacted by individual Ministers. It also established that laws and decrees enacted by the inner Cabinet did not need to be countersigned by Hitler.

Consequently the Sub-Committee arrived at the conclusion that, in view of such powers and of the evidence proving the perpetration of numerous crimes upon the inner Cabinet’s orders, its individual members were to be considered prima facie criminally responsible for acts committed by their subordinates. On the other hand, it proclaimed similar responsibility of ministers who individually enacted criminal laws, decrees or orders.

The Sub-Committee considered also the position of Nazi State administrators other than members of the Government. In this respect it found that administrators who had conceived, or assisted to frame, legal or administrative measures violating laws and customs of war, could equally not enjoy immunity under the doctrine of acts of State; the same was true of those who had carried out a criminal policy by giving or issuing orders or by actual action.

As a result of these findings, the Commission and its Committee on Facts and Evidence adopted the rule of placing such persons on war criminals lists, and consequently of rejecting as irrelevant the doctrines of immunity of heads of State and members of Government, and of acts of State. Upon charges presented by various nations, Hitler was placed on the Lists of war criminals on several occasions, and so were other high State administrators, such as Mussolini. The number of such accused persons increased in the course of time, and separate Lists of major or arch criminals were issued to deal exclusively with State administrators and other high officials.1

(iv) Trials of Major War Criminals

The irrelevance of the doctrines of acts of States and of immunity of State administrators, and the principle of individual penal responsibility of the latter in contemporary international law, received its highest judicial sanction at the trials of the Nazi war criminals at Nuremberg.

The most important trial was that of the members of the Nazi government and other Nazi high officials, with Goering and Ribbentrop at the head of those tried and convicted.2 Other trials, held by United States courts, also at Nuremberg, included administrators of various ministries of the Nazi government, such as of the Ministry of Justice and of the Ministry for Foreign Affairs. In all these cases criminal procedure was applied to, and penalties of criminal law imposed upon, individual State administrators for acts which, by virtue of the doctrines under review, would have enjoyed immunity.

A similar development took place in the Far East, in the prosecution of the Japanese Major War Criminals before the International Military

1 See Committee I Minutes No. 3/45, 17.4.45; also M.56, 18.4.45; M.57, 24.4.45; M.62, 23.5.45.
2 See Chapters IX and XI.
Tribe on sitting at Tokyo. The accused were mainly members of the Japanese Government.

The above trials were held under express provisions of international law, which were preceded by authoritative declarations made by the Allied Governments.

(1) The Moscow Declaration

The determination of the United Nations to bring to trial all those responsible for crimes against peace, war crimes and crimes against humanity, irrespective of position and rank, was first formulated in the Moscow Declaration of 1st November, 1943, by the United States, Great Britain and the U.S.S.R. on behalf of all the United Nations. This Declaration drew a distinction between ordinary or lesser war criminals on one hand, and "major" war criminals, on the other. The trial of the latter was to be made in an international procedure, as distinct from the case of lesser war criminals, whose trial devolved to national courts:

"... The major war criminals, whose offences have no particular geographical localization ..., will be punished by the joint decision of the Governments of the Allies..."

This formula left open the choice between an executive and a judicial international procedure, and this was subsequently decided in favour of the latter course.

(2) Surrender Document regarding Germany and Potsdam Declaration

The bringing to trial of the Nazi State administrators, including members of the Nazi Government, was prescribed in two international documents related to Germany.

In the "Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany"—otherwise known as the "Unconditional Surrender of Germany"—issued by Great Britain, the U.S.A., the U.S.S.R. and France on 5th June, 1945, it was declared:

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

The fact that the obligation to hand over Nazi leaders was laid down for the purpose of bringing them to trial, was stressed in the "Protocol of the Proceedings of the Berlin Conference", known as the Potsdam Declaration, of 2nd August, 1945:

"War criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgment. Nazi leaders, influential Nazi supporters and high officials of Nazi organisations and institutions, and any other person dangerous to the occupation or its objectors, shall be arrested and interned".

Statements with the same effect were made in the terms of surrender for Japan, issued at Potsdam on 26th July, 1945, and appropriate obliga-

(1) Paragraph 5. Italics introduced.
tions to hand over Japanese Major War Criminals for trial were undertaken by the Japanese authorities in the instrument of surrender signed at Tokyo Bay on 2nd September, 1945.

(3) The Nuremberg and Tokyo Charters

During the preliminary phases for the establishment of the International Military Tribunal at Nuremberg, the United States Chief of Counsel in the prosecution of European Axis war criminals, Justice Robert H. Jackson, defined the main issues at stake. In a report submitted to the President of the United States in June, 1945, he referred to the intended procedure, and stressed that it was conceived so as to secure fair trial and full rights of defence. He then said:

"Nor should such defence be recognised as the obsolete doctrine that a head of State is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of Kings. It is, in any event, inconsistent with the position we take towards our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still 'under God and the law'.”

Justice Robert H. Jackson then stated that the prosecution was to be directed against "a large number of individuals and officials who were in authority in the government”.

These preparatory steps culminated in the provisions embodied in the two Charters governing the jurisdiction of the International Military Tribunal at Nuremberg and of that at Tokyo.

In Article 7 of the Nuremberg Charter the following principle was declared:

"The official position of defendants, whether as heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment".

Article 6 of the Tokyo Charter provides:

"Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires".

Both provisions thus proclaimed that, within the sphere of crimes covered by the two Charters, the doctrines of acts of State and of immunity of heads of State and State administrators were no longer relevant or operative as a basis for freeing the individuals concerned from penal responsibility.

The principle was repeated in Law No. 10 of the Allied Control Council for Germany, under whose terms the trials were held of State administrators other than those tried by the International Military Tribunal at Nuremberg. Article II of Law No. 10 reads:
"The official position of any person, whether as head of State or as a responsible official in a Government Department, does not free him from responsibility for any crime or entitle him to mitigation of punishment."(9)

It thus appears that, in the main body of what is taking the shape of international penal law, the doctrines under review have clearly and definitely been discarded.

(4) The Trials

At the trial of the German Major War Criminals held before the International Military Tribunal at Nuremberg, 13 of the 21 accused sitting at the bar had been members of the Nazi government. They included Goering, Ribbentrop, Hess, Rosenberg, Frank, Speer, Frick, Schacht, Papen, Neurath, Seyss-Inquart, Keitel and Raeder. They were indicted for crimes against peace, war crimes and crimes against humanity, as leaders, organisers, instigators or accomplices who, under Article 6 of the Nuremberg Charter, bore responsibility "for all acts performed by any persons" in execution of plans and orders issued by them.

When prosecuting the case against them and the other accused, the United States Chief Prosecutor, Justice Robert H. Jackson, referred to the provision of the Charter discarding the doctrines of acts of State and of immunity of State administrators, and stressed that "the idea that a State commits crimes is a fiction". Crimes, said Justice Jackson, "are always committed only by persons. While it is quite proper to employ the fiction of responsibility of a State for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity".(2) He referred to certain precedents and requested the punishment of the accused members of Government on the basis of the terms of the Charter and of the evidence submitted.

As was to be expected, the defence invoked both the doctrine of acts of State and that of immunity of State administrators. Replying to this plea, the International Military Tribunal declared in its Judgment the following:

"It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, and where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected... The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings... On the other hand the very essence of the Charter 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".

(1) It will be noted that, unlike the Nuremberg Charter and Law No. 10, the Tokyo Charter makes possible the admission of the plea of acts of State or of immunity of State administrators in so far as mitigation of punishment is concerned.

(2) The Trial of German Major War Criminals. Opening Speeches of the Chief Prosecutors
Of the 13 accused members of the Nazi government only two were acquitted (Papen and Schacht); they were, however, not acquitted on account of the plea of their immunity, but for lack of evidence that they had committed crimes for which they had been prosecuted. The remainder were all sentenced to various punishments, including the death penalty.

A remarkable feature in connection with this judgment is that the irrelevance of the doctrines of heads of State and State administrators was pronounced in regard to the whole field of international crimes covered by the Nuremberg Charter. Unlike the position as it developed after the First World War, this now includes crimes against peace as the paramount international offence, for which nobody but heads of State and members of Governments can conceivably be held responsible.

A similar judgment, though not including crimes against peace, was passed by a United States Military Tribunal at Nuremberg in the case of 16 Nazi high officials, comprising 9 administrators of the German ex-Ministry of Justice and 7 judges or prosecutors of Nazi courts. The trial was held under the terms of Law No. 10 of the Allied Control Council for Germany. The accused were prosecuted for criminal offences committed by misusing legislative or judicial power as part of the criminal policy of the Nazi regime. The evidence submitted was to the effect that the whole of the Nazi legal machinery at governmental level and that of the courts of law was used "for terroristic functions in support of the Nazi regime". Severe punishments, including the death penalty, were prescribed by the Nazis and systematically implemented upon acts which did not represent criminal offences under standards of modern justice or which did not warrant such heavy penalties.

State administrators prosecuted included chiefs of departments of the Reich Ministry of Justice, ministerial counsellors, state secretaries and legal advisers. Judicial officers included senior magistrates and prosecutors. Eleven were found individually responsible for and guilty of war crimes or crimes against humanity under the terms of Law No. 10, and were sentenced to various penalties, including imprisonment for life.

At the time of writing another trial is still in progress which also involves high Nazi State administrators. It is the important trial of 9 leading officials of the Nazi ex-Ministry for Foreign Affairs, including a Minister for Foreign Affairs, and 12 administrators of other governmental agencies connected with the planning and operations of Nazi foreign policy. The former include the short-lived Minister, Schwerin von Krosigk, who succeeded von Ribbentrop in May, 1945, in Dönitz's government, and 8 top-ranking officials of the Ministry, who were in function for a number of years as heads of departments. The latter include the chief of the Nazi Party Foreign Affairs Organisation, the Reich Minister for Food and Agriculture, the chief of the Presidential Chancellery, State Secretaries of other ministries, leading directors of German banks, heads of economic planning agencies and others. They are tried for crimes against peace, war crimes or crimes against humanity.

(1) See also Chapter XI, Section D (2) p. 334.
The trial of all these high officials is conducted on the basis of the rule that they do not enjoy immunity and cannot claim impunity on account of having acted in the course of their official functions.

B. SUPERIOR ORDERS

The question of individual responsibility and punishment in cases in which offences were committed upon the orders of a head of State, a government or any other superior authority by a subordinate pledged by law to obey superior orders, is one of great difficulty. It has been given differing legal solutions from one country to another, and until recently there were in the matter no fixed or precise rulings of principle in international law. In legal systems of certain countries there were even reversals of provisions dealing with the issue in the course of a comparatively brief period of time.

Such a state of things did not assist in solving the problem when it arose acutely during the Second World War. As was judiciously observed by one of the best authorities in the field of international penal law, Justice Robert H. Jackson, the combination of the doctrine of immunity of State administrators, issuing orders, and of the theory according to which a subordinate does not or should not personally bear responsibility for acts conceived and ordered by his superiors, means that nobody can be held responsible. Justice Jackson rightly added: "Society as modernly organised cannot tolerate so broad an arch of official irresponsibility".

The scale on which war crimes and other international offences had been perpetrated during the last war, made it, therefore, necessary to reconsider the question as it stood, and find a just solution in view of the circumstances brought to light during the late war. The ultimate answer found was to the effect that, in the same manner as rank or position could not be used as a ground for automatic exoneration from penal liability, the fact of having acted upon superior orders could equally not provide such ground for the instrumental perpetrators of the offences. The solution thus found did not place any onus or preconceived guilt on the individual concerned. Neither did it preclude acquittals or mitigation of punishments in such cases. It only excluded the possibility of a subordinate escaping liability altogether on the sole ground of having acted upon superior orders.

This solution was based on clear precedents and developments which took place after the First World War.

(i) THE 1919 COMMISSION ON RESPONSIBILITIES

Along with its consideration of the doctrines of immunity of heads of State and State administrators and of acts of State, the 1919 Commission on Responsibilities touched also upon the problem of superior orders. In its report to the Allied Powers it stressed the following:

"... The trial of the offenders might be seriously prejudiced if they attempted

(1) Report to the President of the United States by Hon. Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, June, 1945.
and were able to plead the superior orders of a Sovereign against whom no steps had been or were being taken”.

In connection with its recommendation to put on trial heads of State and other high State administrators, and taking into consideration situations arising out of a conviction of such persons, the Commission added:

“We desire to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility”.

Unlike the dissension which took place among members of the Commission in regard to heads of State and acts of State, agreement on this issue was reached unanimously.

(ii) LONDON INTERNATIONAL ASSEMBLY

Similar conclusions were arrived at during the discussions of the London International Assembly. Attempts made by the Germans after the first World War to shield subordinates were stressed, and in particular those made by Hindenburg when he publicly accepted responsibility for all orders issued, and thereby sought to relieve all subordinates from liability.

In 1943 the Assembly voted a resolution by which it expressed the following opinion:

(a) That an order issued by a superior to a subordinate to commit an act violating international law was not in itself a defence, but that the courts were entitled to consider whether the accused was placed in a “state of compulsion” to act as ordered, and acquit him or mitigate the punishment accordingly.

(b) That such exculpating or extenuating circumstances should in all cases be disregarded in two types of cases: when the act was so obviously heinous that it could not be committed without revoltin the conscience of an average human being; and when the accused was, at the time of the offence, a member of an organisation whose membership implied the execution of criminal orders.

(iii) THE INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

A very thorough and detailed study of the question was pursued by the International Commission for Penal Reconstruction and Development. Its findings were summed up in a memorandum prepared by Professor H. Lauterpacht and embodied in the report which the Commission submitted to the Governments.

In this memorandum(1) Professor Lauterpacht underlined in the first instance the necessity of rejecting the rule that superior orders were a sufficient justification for relieving the subordinate from penal liability:

“A rule of this nature”, he said, “unless reduced to legitimate proportions, would in most cases result in almost automatic impunity in consequence of

(1) The memorandum was subsequently published by Professor H. Lauterpacht as an article in the British Year Book of International Law, 1944, under the title The Law of Nations and the Punishment of War Crimes.
responsibility being shifted from one organ to another in the hierarchy of the State or its allied forces. If the rule... actually represented the existing position in international law, the prospect of bringing to justice any substantial portion of offenders would indeed be slender... It is clear that in many cases no one but the head of State, especially in a regime of absolutism or dictatorships, could be held responsible for decisions of major importance involving a breach of the law—a solution the futility of which is enhanced by the international irresponsibility, asserted by many, of the head of State”.

Whilst recommending the rejection of such a rule, Professor Lauterpacht referred to the complexity of the issue both in international and municipal law, particularly in so far as clear and just solution was concerned of all individual cases:

“...How intricate it is may be gauged from the fact that the solution adopted in recent British and American military manuals with regard to war crimes is at variance with that in force in both countries in the domain of constitutional and criminal. Moreover, the law on the subject in these and in other countries in the field of municipal law is not free of ambiguities and apparent inconsistencies. In Great Britain and in the United States a soldier cannot validly adduce superior orders as a circumstance relieving him of liability for an illegal act. This is a rule established by a long series of decisions in both countries.1 The difficulties resulting from the possible conflict between the duty of the soldier to obey orders and his subjection to the general law of the land are appreciated by judges and writers, and expressed by judges and writers, and expressed variously... enjoining upon him obedience to orders; it adds the substantial qualification to the effect that obedience is due only to lawful orders... The result is that in addition to the natural risks of his calling the soldier has, in theory, to face the dangers of a conflict between his duty of obedience to orders and his duty to obey the law. We say “in theory”; for in fact the law does not ignore altogether the resulting difficulty. Numerous decisions of courts in the United States recognise that, while, in principle, superior orders are not a valid defence, obedience to an order which is not on the face of it illegal, relieves the soldier of liability. Some State laws go even further in that direction. In England, where the courts have been loth to depart from the logical rigour of the established rule, it is generally recognised that the exercise of the right of pardon by the Executive is in such cases a proper remedy... Conversely, countries which, in the interest of the efficiency of their armed forces, have adopted the rule that obedience to superior orders excludes liability, make an exception in cases in which the orders are illegal. They, in turn, differ as to the necessary degree of the obviousness of the illegality. The German Code of Military Criminal Law provided that the soldier must execute all orders without fear of legal consequences, but added that this does not apply to orders of which the soldier knew with certainty that they aimed at the commission of a crime. According to the law of other States, the immunity of the soldier obeying orders ceases if he knows or ought to have known of the unlawful nature of the order. There are indeed some States, in particular France, in which there is, apparently, no qualification to the rule that superior orders are in all circumstances a valid excuse... But it has not been asserted that its effect is to relieve French nationals of responsibility when tried before foreign tribunals for the violation of the municipal law of these countries or of international law even if that foreign country

1) As will be seen later, after Professor Lauterpacht’s memorandum was written and considered, changes took place in both the British and American military manuals, which reversed the rule referred to and fell into line with the course recommended in the memorandum.
itself has adopted an identical rule. For it is, by necessary implication, a rule applicable only to the State’s own nationals and only in respect of its own municipal law. In fact, no country has more emphatically than France rejected the plea of superior orders when put forward by enemy soldiers and officers accused of war crimes. It is an interesting gloss on the complexity of the problem that in Great Britain and in the United States the plea of superior orders is, on the whole, without decisive effect in internal criminal or constitutional law, although it is apparently treated as a full justification in relation to war crimes, while in France, where the plea of superior orders is an absolute defence in the municipal sphere, it is disregarded in the matter of war crimes. There is no international judicial authority on the subject, but writers on international law have almost universally rejected the doctrine of superior orders as an absolute justification of war crimes.”

In view of this complexity and diversity in the judicial and legislative practice of States, Professor Lauterpacht recommended that every case, as it would arise in war crimes trials, be solved on the basis of general principles of penal law, and that individual responsibility be determined in ascertaining the existence of mens rea of the accused. The rules suggested by him are the following:

There can be no liability, or there must be only diminished liability, if the accused had acted in the legitimate belief of having behaved in accordance with law, both municipal and international. In this connection, the fact that he had received orders should be regarded as creating in the accused the conviction of the lawfulness of the action as ordered. By the same criterion, the clearly illegal nature of the orders as intelligible to any person of ordinary understanding by reference to generally acknowledged principles of international law, should render the fact of superior orders irrelevant. On the other hand, such a degree of compulsion as must be deemed to exist in the case of a soldier or officer exposing himself to danger of death as the result of a refusal to obey an order, should exclude pro tanto the accused’s responsibility. “The result of the combination of those two principles”, concluded Professor Lauterpacht, “will be, at the one end, that a person obeying an obviously unlawful order the refusal to obey which would not put him in immediate jeopardy, will not be able to shield himself behind the excuse of superior orders. At the other end, a person obeying an illegal order which is not on the face of it unlawful and disobedience to which would expose him to the full rigours of military discipline, may fully rely on the plea of superior orders. There will be a variety of intermediate situations between those two extremes.”

The above considerations met with the general approval of the Commission and of various Governments.(1)

(iv) THE UNITED NATIONS WAR CRIMES COMMISSION

It is at this stage of the development regarding the effect of superior orders that the United Nations War Crimes Commission undertook consideration of the subject.

(1) The report of the Commission contains a survey of the position of the defence of superior orders under the municipal law of Belgium, United States of America, Norway, Luxembourg, Czechoslovakia, Great Britain, France, Greece, Holland—as it stood at the time and as was communicated to the Commission by the members concerned.
The issue was raised during the first meetings of the Commission, at the time when members were defining the main problems requiring study and solutions. In January, 1944, the Czechoslovak representative submitted suggestions as to the working machinery of the Commission and legal questions deserving early attention. He laid stress on the issue of superior orders.(1) When the study of legal questions was referred to the newly formed Legal Committee, the latter appointed a special Sub-Committee to deal with the problem of superior orders.(2) The United States representative proposed that a solution of the problem be found with a view to insuring the application of the same rule by all courts charged with the trial of war criminals.

At about the same time the issue also arose in the Committee on Enforcement, which had undertaken consideration of a Draft Convention on the Trial and Punishment of War Criminals. It was contemplated that, in addition to national courts, war crime trials would also be held by an Inter-Allied Court competent to function in specific cases. A draft was submitted by the United States representative and the insertion of the following provisions was recommended (Article 30):

"1. The plea of superior orders shall not constitute a defence . . . if the order was so manifestly contrary to the laws of war that a person of ordinary sense and understanding would know or should know, given his rank or position and the circumstances of the case, that such an order was illegal.

"2. It shall be for the Tribunal and its Divisions to consider to what extent irresistible compulsion shall be a ground for mitigation of the penalty or for acquittal."(3)

By the time the above draft was under discussion in the Enforcement Committee, the Legal Committee proceeded to the examination of a report prepared by the Chinese representative.(4)

The report stressed the complexity of the problem and the diversity in the practice and laws of various nations. Stress was also laid on the experiences of the past, and the opinion expressed that "it would be futile to attempt to formulate, by means of an agreement among the United Nations, an absolute rule in regard to the plea of superior orders." It was, therefore, thought advisable for the United Nations War Crimes Commission "to recommend that the validity of the plea of superior orders be left to be determined by the national courts of the United Nations according to their own views of the merits and limits of the plea". It was, however, suggested at the same time that the Commission "could recommend some guiding principle which, without trying to reconcile the divergent national practices and to formulate an absolute rule, would represent the consensus of opinion among the United Nations".

The report elaborated on this last point. Reference was made to the German Military Penal Code according to which a subaltern executing

(1) M.6, 25.1.44.
(2) M.12, 7.3.44.
(3) II/11, 14.4.44, Draft Convention on the Trial and Punishment of War Criminals.
(4) II/8, 28.8.44, Report on the plea of obedience to superior orders, submitted by Dr. Yien-li Liang.
a criminal order was punishable as accomplice if he had gone beyond the
order or if he knew that the order was related to a criminal offence.
The rapporteur suggested an alternative course in setting forth a guiding
principle for the courts. The German rules should be applied by the
Inter-Allied Court contemplated by the Enforcement Committee, and a
recommendation that the same rules be applied also by the national
courts should be made to the Governments. Alternatively, one should
adopt the rules suggested in the Draft Convention on the Trial and
Punishment of War Criminals.

The Committee agreed with the latter course and on the motion of the
Chairman of the Commission, submitted a report in which it recommended
the adoption of the rule formulated in the first paragraph of the text
quoted from the above Draft Convention. The recommendation read:

"Some general understanding is desirable between the Governments of
the United Nations as to the principle to be followed in cases where a war
criminal puts in a plea of superior orders. Such understanding is desirable
because it will be useful for the guidance of any Inter-Allied tribunal which
may be set up.

"The Commission is satisfied that the following rule is in accordance with
general international practice and is consistent with international law:

"The defence of obedience to superior orders shall not constitute a justifica-
tion for the commission of an offence against the laws and customs of war,
if the order was so manifestly contrary to those laws or customs that, taking
into account his rank or position and the circumstances surrounding the
commission of the offence, an individual of ordinary understanding should
have known that such an order was illegal."

This recommendation was, however, not unanimous. The Czech
representative argued that, if adopted by the courts, it would place
individuals, such as those who were members of the S.A., S.S. and Gestapo,
in a better position than that prescribed in the law already in existence
in some Allied countries. He suggested the course followed by the London
International Assembly and submitted a draft recommendation which
read:

"1. An order given by a superior to an inferior to commit a crime is not
   in itself a defence;
2. The court may consider in individual cases whether the accused was
   placed in a state of irresistible compulsion and acquit him or mitigate
   the punishment accordingly;
3. The defence that the accused was placed in a state of compulsion is
   excluded:
   (a) if the crime was of a revolting nature,
   (b) if the accused was, at the time when the alleged crime was committed,
   a member of an organisation, the membership of which implied
   the execution of criminal orders ".

Both majority and minority motions were referred to the Commission
and the Enforcement Committee for further consideration.

After much debate in the Enforcement Committee, the view prevailed
that it was more advisable to refrain from recommending a guiding
principle which would go beyond the mere statement that the plea of
superior orders should not of itself exonerate the offender. Accordingly
it suggested that, in connection with its separate Draft Convention for the Establishment of a United Nations War Crimes Court, the following statement should be transmitted to the Governments:

"The Commission has considered the question of 'superior orders'. It finally decided to leave out any provision on the subject... The Commission considers that it is better to leave it to the court itself in each case to decide what weight should be attached to a plea of superior orders. But the Commission wants to make it clear that its members unanimously agree that in principle this plea does not of itself exonerate the offenders".\(^1\)

In February and March, 1945, the Czech and French representatives, respectively, re-opened the question in so far as the majority and minority recommendations of the Legal Committee were concerned, upon whom no formal vote had been taken in the Commission. After discussion which developed at two consecutive meetings in March, 1945, the Commission adopted the course taken by the Committee on Enforcement and, by a majority vote, agreed on a formal report to the Governments. This report, which represents the final attitude of the Commission on the subject, referred to the decision formulated by the Enforcement Committee in the Explanatory Memorandum to its Draft Convention for the Establishment of a United Nations War Crimes Court. It confirmed this decision in the following terms:

"Having regard to the fact that many, if not most, of the member States have legal rules on the subject, some of which have been adopted very recently, and that in most cases these rules differ from one another, and to the further consideration that the question how far obedience to the orders of a superior exonerates an offender or mitigates the punishment must depend on the circumstances of the particular case, the Commission does not consider that it can usefuly propound any principle or rule.

"The Commission unanimously maintains the view which it expressed in connection with the United Nations War Crimes Court that the mere fact of having acted in obedience to the orders of a superior does not of itself relieve a person who has committed a war crime from responsibility."

(\(v\)) PROVISIONS OF MUNICIPAL AND INTERNATIONAL LAW

The effect of superior orders upon the personal liability of subordinates is prescribed in the municipal law of many nations. There are in this respect provisions which regulate the issue with regard to State officials and military personnel in time of peace, and which are, therefore, not specifically related to war crimes and other offences connected with a war. A brief survey of this law and the differing practices of individual nations has been made by Professor Lauterpacht in the memorandum previously quoted. It does not come within the purview of this account.

There are, on the other hand, provisions embodied in the municipal law of some nations which form part of international law as understood and practiced by these nations. Such are the rules of warfare prescribed

\(^1\) C.58, 6.10.44, Explanatory Memorandum to accompany the Draft Convention for the Establishment of a United Nations War Crimes Court.

\(^2\) C.76, 8.2.45, Memorandum on the present position of the United Nations War Crimes Commission, the work already done, and future tasks, presented by Dr. B. Eet, p. 12; also M.52, 14.3.45.

\(^3\) M.53, 21.3.45; and M.54, 28.3.45.

\(^4\) C.56, 29.3.45, Report to the Governments on the plea of superior orders.
in military manuals, codes or other documents of a similar nature. Developments which took place in this domain were followed by the introduction of rules in multilateral international instruments, such as in the Nuremberg and Tokyo Charters, which are, generally speaking, declaratory of international law as understood by the community of nations as a whole, in the present stage of its history.

It is with this second type of rules that we are here more particularly concerned. Important developments of the rules governing the effect of superior orders took place within their sphere. The most striking development was that which occurred within the British and American military rules, where it resulted in the adoption of the principle under review, at the cost of a complete reversal of the provisions hitherto in force. In the law of other countries, where such provisions did not exist or were not deemed to be applicable to war criminals, special provisions to this effect were introduced.

The following account is only illustrative, and is not, consequently, intended to be exhaustive. It embraces, however, the most typical legislation.

(1) British and American Rules of Warfare

At the outbreak of the First World War, in 1914, parts of the British Military Manual were revised and amplified. In Chapter XIV, relating to the Laws and Usages of War on Land, the principle was declared that military personnel acting upon superior orders were not penally liable for offences committed under such orders, and that liability lay only on the superior. It was couched in the following terms (para. 443):

"... Members of the armed forces who commit such violations of the recognised rules of warfare as are ordered by their Government, or their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to other means of obtaining redress..."

The same principle was proclaimed at the same time and in similar terms in the United States Rules of Land Warfare (para. 347):

"Indians of the armed forces will not be punished for these offences (i.e., violations of the laws of war) in case they are committed under the orders or sanction of their governments or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall."

During the Second World War opinion developed strongly against these rules, and criticism was repeatedly expressed in the international bodies whose activities have been recorded in the preceding pages. English writers, such as Professor Lauterpacht, observed that the British Military Manual had no statutory force and could, therefore, be amended in the face of new developments. They emphasised that its rule was at variance both with the principle proclaimed by the 1919 Commission on Responsibilities and with the corresponding principles of English Criminal and Constitutional Law.
Radical revisions of the above provisions took place in 1944. Paragraph 443 of the British Military Manual was amended to read:

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

In the United States Rules of Land Warfare, the provision previously quoted was deleted from para. 347 and a new rule added to para. 345:

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

As will be noticed, both rules are similar in that they reject the principle of immunity from penal responsibility, as declared in their previous texts, and both have the effect of holding responsible in principle not only the superior but also the subordinate. Both stress that the subordinate's responsibility is involved when "accepted" or "unchallenged" rules of warfare were violated, thus excluding those rules which do not possess sufficient authority or certainty within the laws and customs of war. The British provision is more explicit than its American counterpart in that it gives guidance to the court as to the general tests under which the subordinate's guilt is to be assessed. Thus, it emphasises the relevance of the latter's mens rea by pointing out that he "cannot be expected to weigh scrupulously the legal merits of the order received", although he is deemed to be bound to obey only "lawful orders". The same subjective element is stressed by the test of acts which "outrage the general sentiment of humanity", and which thus provide a ground for judging the state of the accused's mind. Finally, it can be observed that, while the American provision expressly defines the consequences of the decision of the plea of superior orders by declaring that it can lead to acquittal or to mitigation of punishment, the same consequences are implied in the British provision.

This important development was followed by the appearance of similar rules in other texts of law, thus bringing to light the evidence that the principle involved represented the common consensus of nations.

(2) Rules relating to the Trial of War Criminals

(a) The Nuremberg and Tokyo Charters

Article 8 of the Nuremberg Charter provides as follows:

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

It will be observed that acquittal is not mentioned, but only mitigation of punishment. The same appears in the Tokyo Charter, whose rule, already quoted in connection with the doctrine of immunity of State administrators, reads (Article 6):

“Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of His government or of a superior shall, of itself, be sufficient to free such accused from responsibility from any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires”.

(b) Other provisions

The same principle, with varying consequences as to adjudication, appears in the war crimes legislation of many countries, as well as in that enacted for the ex-enemy occupied territory.

Law No. 10 of the Allied Control Council for Germany contains a provision similar to that of the Nuremberg Charter (Article II, (b)):

“The fact that the person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation”.

A provision identical even in terms to that of the Nuremberg Charter appears in the American Regulations for the Trial of War Crimes, issued on 23rd September, 1945, Circular No. 114, by Headquarters, Mediterranean Theatre of Operations, U.S. Army. With regard to the jurisdiction of U.S. Military Commissions, entrusted with conducting war crimes trials, para. 9 of the said Regulations reads:

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

The American Regulations Governing the Trial of War Criminals in the Pacific Area, issued on 24th September, 1945, by General Headquarters, United States Armed Forces, Pacific, repeats the above rule in the following terms (para. 16):

“... Action pursuant to order of the accused’s superior, or of his Government, shall not constitute a defence, but may be considered in mitigation of punishment if the commission determines that justice so requires”.

The Canadian War Crimes Regulations of 30th August, 1945, which acquired statutory force on 6th August, 1946, provide (para. 15):

“The fact that an accused acted pursuant to the order of a superior or of his Government shall not constitute an absolute defence to any charge under these Regulations; it may, however, be considered either as a defence or in mitigation of punishment if the military court before which the charge is tried determines that justice so requires”.

The French “Ordinance of 28th August, 1944, concerning the Suppression of War Crimes”, provides:
Article 3

"Laws, decrees or regulations issued by the enemy authorities, orders or permits issued by these authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Article 327 of the penal code, but can only, in certain circumstances, be admitted as extenuating or exculpating circumstances.

Article 4

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

The Norwegian "Law on the Punishment of Foreign War Criminals" of 12th December, 1946, contains the following provision:

"Para. 5. Necessity and superior order cannot be pleaded in exculpation of any crime referred to in para. 1 of the present law (i.e., acts which, by reason of their character, come within the scope of Norwegian criminal legislation . . . if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service . . . if the said acts were committed in Norway . . .). The court may, however, take the circumstances into account and may impose a sentence less than the minimum laid down for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted."

Elaborate rules are prescribed in the Czechoslovak "Law concerning the Punishment of Nazi Criminals, Traitors and their Accomplices" of 24th January, 1946:

Article 13

"(1) Actions punishable under this law are not justified by the fact that they were ordered or permitted by the provisions of any law other than Czechoslovak law or by organs set up by any state authority other than the Czechoslovak, even if it is claimed that the guilty person regarded these invalid stipulations as justified.

(2) Nor is the guilty person justified by the fact that he was carrying out his prescribed duty if he behaved with especial zeal, thus notably exceeding the normal limits of his duty, or if he acted with the intention of helping the war effort of the Germans (or their Allies), injuring or thwarting the war effort of Czechoslovakia (or her Allies), or if he acted from other obviously reprehensible motives.

(3) The irresistible compulsion of an order from his superior does not release any person from guilt who voluntarily became a member of an organisation whose members undertook to carry out all, even criminal, orders."

The Polish "Decree concerning the Punishment of Fascist-Hitlerite Criminals guilty of Murder and Ill-treatment of the Civilian Population and of Prisoners of War, and the Punishment of Traitors to the Polish Nation", of 11th December, 1946, provides:

Article 5

"(1) The fact that an act or omission was caused by a threat, order or command does not exempt from criminal responsibility.

(2) In such a case the court may mitigate the sentence taking into consideration the circumstances of the perpetrator and the deed ."

The Austrian "Constitutional Law of 26th June, 1945, concerning
War Crimes and other National Socialist Misdeeds (War Crimes Law)"
contains the following provisions:

**Article 1**

"The fact that the same act (i.e., an act ' repugnant to the natural principles
of humanity or to the generally accepted rules of international law or the laws
of war ') was committed in obedience to an order shall not constitute a
defence ".

**Article 5**

" (1) The fact that the acts mentioned in Articles 3 and 4 (i.e., acts of torture
and ill-treatment, violations of the principles of humanity and offences
against human dignity) were carried out in obedience to orders shall
not constitute a defence. Persons who issued such orders shall be
punished more severely than those who executed them.

(2) Any person who habitually issued such orders shall be punished by
penal servitude for life, except in cases where the death penalty is
applicable under the present law; if, however, he has instigated acts of
the kind mentioned in Articles 3 and 4 on a considerable scale the
death penalty shall be imposed ".

It will be noted that, whereas under some of the above laws the plea
of superior orders may lead to mitigation of punishment only, under other
laws it may, in addition, have the effect of acquitting the accused.

Finally, it is worth noting that there are countries in which the effect
of superior orders is regulated within the general system of penal law.
The legislators in some of these countries did not wish to depart from
the existing general rules, holding the view that these were sufficient
to meet the requirements in respect of war criminals.

Such is the case with the Netherlands law. As in the case of the original
texts of the British and American rules of warfare, the Dutch Penal Code
lays down the principle of immunity from punishment of subordinates.
It does so, however, on condition that the orders were given by the
competent authority, within the limits of its competence. In this case
liability for the offence committed is restricted to the superior issuing the
orders. The subordinate's liability is introduced if the order was issued
"without competence ", which refers both to the case of an authority
other than that under whose direct orders the subordinate is bound to
exercise his functions, and to the case of the proper authority acting beyond
the limits set by the law in regard to its competence. In such cases,
however, the subordinate is exonerated from liability if he had acted in
good faith as to the competence of the authority concerned, and if his
obedience to the orders received was within his province as a subordinate.

The relevant provision of the Dutch Penal Code, Article 43, reads:

"Not punishable is he who commits an act in the execution of an official
order given him by the competent authority.

An official order given without competence thereto does not remove the
liability to punishment unless it was regarded by the subordinate in all good
faith as having been given competently and obeying it came within his province
as a subordinate ".

The rule that, in the sphere of war crimes, subordinates are answerable
appears from the context of the following provisions of the Netherlands Extraordinary Penal Law Decree of 22nd December, 1943:

"1. He who (i.e. any person, including subordinates) during the time of the present war and while in the forces or service of the enemy State is guilty of a war crime or any crime against humanity as defined in Article 6 under (b) or (c) of the Charter belonging to the London Agreement of 8th August, 1945, (i.e. the Nuremberg Charter) . . . shall, if such crime contains at the same time the elements of a punishable act according to Netherlands law, receive the punishment laid down for such act.

2. If such crime does not at the same time contain the elements of a punishable act according to the Netherlands law, the perpetrator shall receive the punishment laid down by Netherlands law for the act with which it shows the greatest similarity.

3. Any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment as laid down in paragraph 1 and 2 (above)."(2)

The text of paragraph 3, when read in the context of the two preceding provisions, makes it clear that the superior is held responsible in addition to the actual perpetrator. The latter's guilt and punishment are presumably decided according to the rule of the Penal Code.

(vi) JURISPRUDENCE IN WAR CRIME TRIALS

An important jurisprudence on the effect of superior orders took shape as a result of trials of war criminals held pursuant to the law declared after the last war. Further jurisprudence may be expected from trials still due to be completed. As a matter of course, this jurisprudence confirms the main principle as we saw it. It will not be possible to enter into any detail in this respect, the more so that the most important and illustrative cases are being reported upon by the United Nations War Crimes Commission in a series of Law Reports published as the trials are being completed. Several instances may, however, briefly be mentioned here.

Prior to the jurisprudence which developed as a result of the Second World War, the effect of superior orders was the subject of judicial decisions at the Leipzig Trials, which were the only war crimes trials to be held after the First World War. They will, briefly, be reminded of for the sake of comparison.

(1) First World War

The determination of the Allied Powers in 1919 to punish all Germans responsible for violations of the laws and customs of war ended in their eventually acceding to the German demand that cases be tried by German courts. The trials took place in Leipzig before the German Supreme Court, the Reichsgericht, in 1921.(3)

In one of the trials, which remained known as the "Llandovery Castle" case, two officers of a U-Boat were charged with having sunk a hospital ship and deliberately killed some of the survivors in order to conceal their

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(2) Italics introduced.
(3) See Chapter III, Section B, p. 46 et seq.
criminal act. They pleaded not guilty on the ground of superior orders, received from the German high command, that submarine warfare was to be carried out without restriction. The Court delivered a statement of principle which remained famous and according to which "the order does not free the accused from guilt . . . if such an order is universally known to be against the Law". Applying the test of knowledge, the court found both accused guilty, deciding that, although acting upon specific orders, they were aware of their illegality in international law.

In another trial, the "Dover Castle" case, a ship was sunk by a U-Boat allegedly in reprisals for similar acts of the Allies. When the order was given, the accused were explicitly told that the sinking was to be done as a reprisal. Applying the same ruling and test as in the preceding case, the Court admitted the plea of superior orders by deciding that the accused had no knowledge that the alleged reprisals were illegal.

In the trial of Grand Admiral Tirpitz, who was charged with having originated and issued the orders for unrestricted submarine warfare, the Court decided that responsibility for these orders did not lie with him or other admirals of the German Fleet, but on the head of the Supreme Command of naval operations—presumably the ex-Kaiser himself. All the accused were consequently acquitted.

(2) Second World War

The most authoritative judgment pronounced after the Second World War, was that of the International Military Tribunal at Nuremberg. Most of the accused pleaded not guilty on the ground of superior orders emanating from Hitler himself. Referring to the relevant Article of the Nuremberg Charter, the Tribunal dismissed the plea in the following terms:

"The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."

The plea was introduced and dismissed in many other trials, particularly in those conducted by British and American courts. They include the so-called "Peleus Trial" and "Scuttled U-Boat Case" in which the German submarine fleet was once more involved; the "Dostler Trial", the "Almeio Trial" and the "Jaluit Atoll Case", the first two implicating German offenders and the second Japanese officers in the killing of prisoners of war; and the "Belsen Trial" concerning atrocities committed by Germans in the ill-famed Belsen concentration camp. In all these cases the courts applied the principle that superior orders do not exonerate subordinates from penal responsibility.

The principle was once more confirmed in the "Einsatzgruppen Case", tried by an American Military Tribunal at Nuremberg. The accused were charged with planned, deliberate and systematic extermination of about 1 million inhabitants of occupied territories, in pursuance of Nazi racial political and religious doctrines. In its judgment, delivered on 8th-9th April, 1948, the court declared:

"The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. It is a fallacy of widespread consumption that a soldier is required to do everything his superior officer orders him to do... An officer may not demand of a soldier that he steal for him. The subordinate is bound only to obey lawful orders of his superior ".

Of the 21 defendants, most of whom pleaded not guilty on the ground of superior orders, 14 were sentenced to death, and the rest to severe terms of imprisonment, including life sentences.

It is interesting to note that during the war one of the top-ranking Nazi leaders, Goebbels, who was personally responsible for many crimes, explicitly condemned the plea of superior orders as inadmissible in contemporary international law. He did so, naturally, in regard to the Allies, and with the intention of justifying the Nazi practice of shooting captured Allied airmen. Although his opinion is irrelevant for the body of international law, it is nevertheless a clear recognition coming from the enemy himself, who had thus unwittingly turned the principle against his own crimes. In an article published in the German press on 28th May, 1944, Goebbels said:

"No international law of warfare is in existence which provides that a soldier who has committed a mean crime can escape punishment by pleading as his defence that he followed the commands of his superiors. This holds particularly true if those commands are contrary to all human ethics and opposed to the well-established international usage of warfare."

(1) Deutsche Allgemeine Zeitung, 28th May, 1947.