CHAPTER VIII

ACTIVITIES ON QUESTIONS OF SUBSTANTIVE LAW

INTRODUCTORY NOTES

As has already been explained, the activities of the Commission developed in three main spheres: investigation of facts and evidence regarding war crimes; enforcement of the law respecting the punishment of war criminals; and legal opinions relating to war crimes and penal liability of perpetrators.(1)

Activities in this latter sphere were performed by a Legal Committee, otherwise designated as Committee III, and occasionally by other Committees or ad hoc Sub-Committees in co-operation with the Legal Committee. The story of how the Legal Committee came into being and how it was eventually formed as an organ of the Commission, and not as an independent body, has been related in the preceding pages.(2)

The Legal Committee carried out a very important part of the advisory function of the Commission. It was called upon to give advice on many cases presented by member Governments to the Commission against war criminals, in which the criminal nature of the acts charged or the liability of the persons accused were at stake. It was also entrusted with giving legal advice on the scope of the retributive action of the United Nations in connection with the developments which were taking place in the body of the laws and customs of war. In this manner it took an active part in the clarification of legal issues, the gradual elimination of uncertainties in the sphere of the laws of war, and in the promotion of rules, many of which were to become part of contemporary international penal law. In most instances, where advice on cases dealing with specific war criminals was required, such advice could only be given after legal opinion on the principles of substantive law had been formed and given to the Commission and member Governments. In other cases such opinions were given with a view to recommending action on the part of the Governments in relation to the further development of the laws of war as a whole.

Questions of substantive law studied on all these occasions covered a very wide field. They concerned, on the one hand, specific questions considered in order to make possible decisions upon cases brought before the Committee on Facts and Evidence. These included: the extent to which black market practices, as evidenced by the Nazis in European occupied territories, amounted to war crimes; the criminal nature of acts committed by enemy agents in execution of their duties and assignments; denationalisation as a war crime; the effect of violations committed out of military necessity; the criminal nature of confiscation of property or appropriations by enemy estate administrators; the criminality of acts resulting in discrimination regarding food rationing; penal liability for

(1) See Chapter VII, B., (i), I, p. 139.
(2) See Chapter VI, C., (iv), p. 124 et seq.
crimes committed in concentration camps; the criminality of scuttling vessels after the armistice; the improper wearing of uniform as a means of deception; the use of civilians in military works; the taking of hostages; the deliberate bombardment of undefended places; denunciation as a war crime; destruction of forests as a war crime. An account of legal opinions given on these questions will be found elsewhere.\(^{(1)}\)

On the other hand, there were questions of principle which affected the scope of the Commission's activities and, more generally speaking, the development of the main body of the laws of war. These questions were the most important of all and concerned issues such as the concept of war crimes; the criminal nature of aggressive war; and the criminal nature of acts analogous to but technically not falling within the notion of war crimes, which subsequently became known as "crimes against humanity". A detailed account of the developments which took place in this field outside the Commission is described in another Chapter,\(^{(2)}\) whereas those concerning opinions devised by the Commission and its Legal Committee are embodied here. They passed through several phases and occupied the whole of the Commission on many occasions, particularly in the beginning and towards the end of its functions.

A. THE CONCEPT OF WAR CRIMES

(i) LIST OF WAR CRIMES

The question of defining the concept of war crimes \textit{stricto sensu} arose in the earliest stages of the Commission's activities. It arose in direct connection with its terms of reference and the scope of its competence.

After the decision had been reached in October, 1943, to form the Commission, several informal meetings of members-designate were held before the official constitution of the body. Many questions as to ways and means of carrying out the assignment were discussed, and, among them, the question of what should be considered a war crime. The question was raised by the British member, later the first Chairman of the Commission, Sir Cecil Hurst. He pointed out that there was a choice between two courses. One was to draw up a list of war crimes, as had previously been done by several bodies, and in particular by the 1919 Commission on Responsibilities.\(^{(3)}\) The alternative was to attempt a general definition of the concept, for example, that it consisted in violations of the laws of war. Opinions in favour of the first course prevailed. It was further observed that many criminal acts had been perpetrated by the enemy which were of a novel nature and did not clearly fall within the hitherto accepted notion of war crimes. To base the Commission's work on narrow and already obsolescent legalisms would defeat the whole object of bringing the criminals to book.

The subject was referred to a Sub-Committee appointed on 26th

\(^{(1)}\) See Chapter XV.
\(^{(2)}\) See Chapter IX.
\(^{(3)}\) \textit{Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties}. 
October, 1943. Considering the drawing up of a list of war crimes, the Sub-Committee deprecated the compiling of an extensive and binding list, and suggested that this be done as a general guide only, leaving freedom to effect further developments in the light of facts and evidence. It proposed the adoption of the list prepared by the 1919 Commission on Responsibilities, and suggested that the advantage of doing so consisted in the fact that Italy and Japan had been parties to its preparation, and that Germany had never questioned the inclusion of any particular item in it. At the same time it introduced a very general definition by recommending that "the Commission should proceed upon the footing that international law recognises the principle that a war crime is a violation of the laws and customs of war, and that no question can be raised as to the right of the United Nations to put on trial as a war criminal in respect of such violations any hostile offender who may fall into their hands."

This course has subsequently been adopted and consistently followed up. From 2nd December, 1943, the list of the 1919 Commission on Responsibilities was implemented as a working instrument, and the fact recognised that it had not the effect of preventing acts lying outside its scope to be treated as war crimes, or of binding Governments to regard as a war crime every act contained therein. In other words, it was recognised that there were or at least might be war crimes not included in the body of the violations of the laws and customs of war as envisaged at the time of the elaboration of the 1919 Commission's list.

Soon after the list was adopted, proposals were submitted to the Legal Committee for its extension to cover other violations.

In April, 1944, the Polish representative suggested that the practice of taking hostages, as exercised by the Nazi authorities, as well as other acts committed with the result of humiliating and degrading inhabitants of occupied territories, should be recognised as separate war crimes. As to the first question, it was observed that, whereas the killing of hostages was clearly regarded as a war crime, this was not the case with the taking of hostages. Hostages, however, had been taken by tens of thousands as a means of systematic terrorism. This practice was resorted to in all possible circumstances, including cases where there could be no justification whatever under the accepted terms of international law. It was also pointed out that this was not restricted to selecting individuals, but that in fact whole populations were treated as hostages.

As to the second point, examples were cited to the effect that inhabitants of occupied territories were forbidden to use their native language in public places; that Jews were compelled to wear special marks on their clothes; that in all governmental and other offices Germans were given

(1) The Sub-Committee was composed of the British, Belgian, Czechoslovak, Netherlands and Polish representatives.
(2) C.I., Report of the Sub-Committee as adopted on 2nd December, 1943 (regarding the task of the Commission).
(4) See Chapter III, Part I, B.I., pp. 34 and 35.
(5) III (3) 14.4.44, Addition of items to the List of War Crimes, proposed by the Polish representative.
preference over the local population; that, in other words, the populations of the invaded countries were being persecuted on racial, political or religious grounds. It was therefore suggested that any such act, "especially the infringement of the fundamental rights of individuals by discriminating decrees, orders and regulations," should be treated as war crimes.

The Legal Committee submitted its opinion to the Commission on 9th May, 1944. In its report it recommended that the following acts should be regarded as a war crime:

(a) Indiscriminate mass arrests for the purpose of terrorising the population, whether described as taking of hostages or not;
(b) Acts violating family honour and rights, the lives of individuals, religious convictions and liberty of worship, as provided for in Art. 46 of the Hague Regulations.

It suggested further that this extension be effected on the basis of the Preamble to the 4th Hague Convention of 1907, which reads as follows:

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

This statement was taken as evidence that the field of war crimes was not limited to the violations of the laws of war as embodied in the Hague Conventions, and that extensions had consequently a legal basis whenever required in the light of new facts and circumstances. The Commission accepted the above recommendation of the Legal Committee and added indiscriminate mass arrests to the list of the 1919 Commission on Responsibilities. As regards the second type of offences, it declared that the above quoted Preamble would at any time be taken into account and make possible the extensions suggested. As a consequence, the principle was adopted that the Commission was not bound by the said list of war crimes and that it was to proceed in all cases on the basis of general sources of international law and general principles of penal law.

(ii) WAR CRIMES AGAINST "ENEMY" AND "ALLIED" NATIONALS

On the ground of this ruling, further extensions of the notion of war crimes were proposed and effected. When defining the scope of war crimes, as described in the preceding pages, the Commission had taken the view that the concept applied to victims who were nationals of the United Nations, i.e. to "allied" nationals, and to offences committed since the outbreak of the war in September, 1939.

Doubts as to whether the functions of the Commission should strictly be limited to such a field were expressed as early as 20th October, 1943,

(1) C.15(1), 9.5.44, Proposal by the Polish representative for adding new items to the List of War Crimes, Amended Report of Committee III.
(2) M.17, 9.5.44.
(3) See, for instance, opinion expressed in (III/15), 10.9.45, Notes on the Criminality of Attempts to Denationalise the Inhabitants of Occupied Territory.
at the diplomatic conference instituting the Commission. The Chinese Ambassador to the United Kingdom observed that China had suffered the consequences of enemy invasion long before 1939, and that therefore offences committed in China before the outbreak of the second World War should also be regarded as war crimes. The question was considered by the Sub-Committee appointed on 26th October, 1943. It recognised that the elements of time and nationality were not to be regarded as strict limitations, but recommended that expansions should be considered at a later stage.

In April, 1944, the Belgian representative, Chairman of the Committee on Facts and Evidence, proposed that certain offences committed against individuals who were not "allied" nationals, including persons who were technically "enemy" nationals, should also be treated as war crimes. He referred to the reported killing of many Italian hostages by the Nazis after the Armistice with Italy, as well as to deportations and other offences perpetrated against inhabitants of Denmark, Hungary, Roumania and other neutral, co-belligerent or enemy countries. He proposed that, in view of such offences, the concept of war crimes should be applied irrespective of the nationality of the victim or of the place of the crime.\(^1\)

This proposal was considered by the Commission in May, 1944.\(^2\) It was generally agreed that the inclusion of enemy nationals meant an alteration of the Commission's terms of reference, which required the agreement of the Governments. Many members, however, were in favour of the principle that the nationality of victims and the place of crime should not be regarded as decisive for the concept of war crimes. A draft recommendation to the Governments was submitted by the Chairman of the Commission, which favoured the proposal in so far as Danish and Italian victims were concerned, on account of the express terms of the Moscow Declaration of 1st November, 1943.\(^3\) Since no unanimity could be achieved, consideration of the matter was adjourned.

The question was to be raised once more in respect of stateless persons and the notion of crimes against humanity, an account of which will be found later. No formal resolutions or recommendations were ever adopted by the Commission. It should, however, be noted that the principle was nevertheless observed in many instances by the Committee on Facts and Evidence, as deriving both from the spirit of the Moscow Declaration and from the terms of the Preamble to the 4th Hague Convention. As a result, offences committed before September, 1939, for instance in China or Czechoslovakia, offences perpetrated against stateless persons or enemy nationals, and offences committed by Allied nationals themselves in conjunction with the activities of the enemy, were treated either as war crimes proper or as acts analogous to war crimes *stricto sensu*, and in any event as part of the notion of war crimes in a wider sense. The

\(^1\) C.12, 21.4.44, *Extension of the Commission's competence to war crimes not committed against United Nations nationals*. Proposal by the Chairman of Committee I.

\(^2\) M.16, 25.4.44 and M.17, 9.5.44.

\(^3\) C.16, 4.5.44, *Extension of the Commission's competence to crimes not committed against United Nations Nationals*. Draft prepared by the Chairman of the Commission. The Moscow Declaration ruled that lists of war criminals should be prepared for offences perpetrated in the U.S.S.R., Poland, Czechoslovakia, Yugoslavia, Greece, Norway, Denmark, the Netherlands, Belgium, Luxembourg, France and Italy.
basis and justification for such expansion lay, concurrently or alternatively, in the heinous nature of the offence, irrespective of whether the victim or the perpetrator was or was not an Allied national, or in the belligerent position of the country whose inhabitants were victimised, irrespective of whether the status of war was recognised or recognisable under the traditional terms of international law.

In its activities connected with other subjects, such as with the Draft Convention for an International Criminal Court or a United Nations Joint Court, or with the Draft Convention on the Trial and Punishment of War Criminals, the Commission maintained its general attitude of avoiding strict and binding definitions of the concept of war crimes. Definitions envisaged usually referred to the "violations of the laws of war", and some were constructed so as to cite exempli causa a number of typical offences, as was done by the 1919 Commission on Responsibilities.

B. CRIMES AGAINST HUMANITY

(i) EXTENSION OF COMMISSION'S COMPETENCE

In addition to the development of the concept of war crimes in the narrower sense, the Commission contributed to the elaboration of the notion of crimes against humanity.

This notion was formally recognised in contemporary international law by its insertion in the Charter of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis, commonly known as the Nuremberg Charter. Information on this point, as well as on other developments outside the Commission, will be found elsewhere.\(^1\)

The notion of crimes against humanity, as it evolved in the Commission, was based upon the opinion that many offences committed by the enemy could not technically be regarded as war crimes stricto sensu on account of one or several elements, which were of a different nature. In this respect the victims' nationality played a prominent role, as was exemplified in the case of German and Austrian Jews, as well as of Jews of other Axis satellite countries, such as Hungary and Roumania. The victims were subjected to the same treatment as Allied nationals in occupied territories; they were deported and interned under inhuman conditions in concentration camps, systematically ill-treated or exterminated. It was felt that, but for the fact that the victims were technically enemy nationals, such persecutions were otherwise in every respect similar to war crimes.

As a consequence, the rule stressed during the first days of the Commission's activities, that narrow legalisms were to be disregarded and the field of the violations of the laws of war extended so as to meet the requirements of justice, was applied in respect of this class of crimes.

The development of the subject in the Commission took, technically speaking, the course of extending the concept of war crimes to a wider notion than that hitherto restricting it to the laws and customs of war.

\(^{1}\) See Chapter IX.
Accordingly, along with the notion of war crimes *stricto sensu*, there evolved the concept of war crimes in a wider, non-technical sense, as a common denominator devised so as to include crimes against humanity, and, as will be seen later, also that of crimes against peace.

At one of the first meetings of the Legal Committee, the United States representative drew attention to the atrocities which were committed by the Nazis against German Jews and Catholics, as well as to other offences perpetrated on religious or racial grounds in pursuance of Nazi ideology.\(^1\) He said that such crimes demanded the application of the "laws of humanity", and moved that "crimes committed against stateless persons or against any persons because of their race or religion" represented "crimes against humanity" which were "justiciable by the United Nations or their agencies as war crimes".\(^2\) He explained that the reason for which he had designated such offences as "crimes against humanity" did not lie in the fact that they were unknown to criminal codes under other names, but in that they were crimes against the foundations of civilisation, irrespective of place and time, and irrespective of the question as to whether they did or did not represent violations of the laws and customs of war.

The proposal met with objections, the most important of which were raised with regard to the jurisdiction of the Commission. Thus, the British, Greek and Norwegian representatives were of the opinion that crimes committed by Germans against Germans could in no case be construed so as to be included in the concept of war crimes, however compelling the need for their punishment might be. The British delegate accordingly stressed that the question lay outside the Commission's competence until such time as its terms of reference were altered by the Governments. The American motion was, however, strongly supported by the Czechoslovak and Netherland representatives.\(^3\)

A report on the matter was prepared by the Czechoslovak delegate.\(^4\) The report raised the issue of the total range of offences committed by the Axis Powers, with particular regard to persecutions carried out by the Fascists in Italy and the Nazis in Germany against their own nationals. The opinion was expressed that such persecutions should no longer be regarded as the internal affairs of those countries, and that this had been made abundantly clear in the declarations of the responsible Statesmen calling for the punishment of the Axis criminals. The argument was used that the "extermination of whole classes of their (the enemy's) own citizens because of race, religion or political beliefs" had been instrumental in bringing about the gravest international crime, the second World War, and was therefore a matter of international concern.\(^5\)

After further study and debate, the Legal Committee submitted a draft resolution to the Commission.\(^6\) The draft stressed that the Commission

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\(^1\) Notes of 4th Meeting of Committee III, 16.3.44.

\(^2\) III/I, 18.3.44, *Resolution moved by Mr. Pell on 16th March, 1944.*

\(^3\) Notes on 5th Meeting of Committee III, 27.3.44.

\(^4\) III/4, 27.4.44, *Scope of the Retributive Action of the United Nations according to the Official Declarations.*


\(^6\) C/20, 16.5.44, *Scope of the Retributive Action of the United Nations. Resolution proposed by Committee III.*
had come to the conclusion that its "methods and principles must be brought into line with the principles expressed in the Allied declarations" concerning the punishment of war crimes. It was therefore suggested that the Commission should include within its competence crimes other than those technically designated as war crimes *stricto sensu*. These were described as crimes committed "in violation of the criminal laws of the countries invaded or otherwise affected, of the laws and customs of war, of the general principles of criminal law as recognised by civilised nations, or of the laws of humanity and the dictates of the public conscience as provided in the Hague Preamble". This formula was then applied to crimes against humanity, which, as distinct from war crimes proper, were defined as "crimes committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed". It should be noted that this definition was to be adopted in substance in Article 6 of the Nuremberg Charter.

In the discussion which took place on this draft in the Commission, doubts were expressed as to whether the Governments would agree to the course suggested in it. These doubts prevailing, the method of a resolution setting out categories or types of crimes to be added to the concept of war crimes *stricto sensu*, was abandoned. Instead, a letter from the Chairman of the Commission to the British Government was prepared and communicated to the Foreign Secretary.\(^{(1)}\) The letter asked whether it was the desire of the Governments "that the activities of the Commission should be restricted to the investigation of war crimes *stricto sensu* of which the victims have been allied nationals". Stress was laid on "atrocities committed on racial, political or religious grounds in enemy territory", which did not "fall strictly within the definition of war crimes". It was emphasised that the need for the retribution in such cases was as great as in respect of war crimes proper.

A preliminary reply was received from the British Government in August, 1944, and a final answer in November of the same year.\(^{(2)}\) The British Government stated that they did not "desire the Commission to place any unnecessary restriction on the evidence tendered to it" regarding persecution on religious, racial or political grounds in enemy territory. They thought, however, that this could be done only within the limits of the notion of war crimes, and should therefore concern Allied nationals only. They agreed, however, that in so far as crimes against enemy nationals were concerned, the perpetrators "would one day have the punishment which their actions deserve".

A definite stand on this problem was not taken until after the signing of the London Agreement of 8th August, 1945, and of the Nuremberg Charter, which recognised the existence of crimes against humanity as a separate type of international offence.

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\(^{(2)}\) C.78, 13.2.45, Correspondence between the War Crimes Commission and H.M. Government in London regarding the punishment of crimes committed on religious, racial or political grounds. Letters from Mr. Eden of 23rd August and 9th November, 1945.
In the meantime, a few weeks after the Commission's discussions regarding persecutions in enemy territory, it was approached by the World Jewish Congress. This Congress proposed that the Commission should take steps "with a view to a comprehensive investigation of and report on the war crimes perpetrated by Germany, her allies and satellites upon the Jewish community in Europe". After investigation the Commission eventually agreed to entrust outside experts with the preparation of reports on the lines suggested. This, however, did not materialise on account of technical difficulties, and the matter was thus left in abeyance. Much evidence was nevertheless collected by the Commission in the course of time and placed at the disposal of the member Governments.

On 12th November, 1945, the issue was raised once more. In a letter addressed to the Chairman of the Commission, the Norwegian representative referred to the Nuremberg Charter, which had recently been signed, and suggested that the Commission should place on its lists of war criminals not only individuals who had committed "war crimes in the narrower sense", but also those who had perpetrated "crimes against humanity". The matter was carefully considered by the Commission at three consecutive meetings in January, 1946, and the proposal was supported by many members, especially by the Chairman of the Committee on Facts and Evidence. After much debate it was agreed that "crimes against humanity, as referred to in the Four Power Agreement of 8th August, 1945, were war crimes within the jurisdiction of the Commission". The motion was adopted by a majority vote, with several abstentions and no opposing votes.

(ii) SPECIFIC CHARGES

This general ruling was implemented in connection with a number of specific charges brought by member Governments before the Committee on Facts and Evidence. In these cases the charges were referred to the Legal Committee for opinion as to whether or not the acts alleged represented crimes against humanity.

The first case of this kind to be examined by the Legal Committee was presented by the Czechoslovak Government. It concerned offences committed by the Nazis in Czechoslovak territory prior to the invasion of Czechoslovakia in March, 1939, and consequently prior also to the outbreak of war in September, 1939. In view of these circumstances, the Czechoslovak Government based its charge on Article 6 of the Nuremberg Charter, according to which offences analogous to war crimes, and committed before the war, fell or could fall within the notion of crimes against humanity. The principal accused, Sepp Dietz, an S.S.-Standartenführer and commanding officer of an S.S. Unit in Austria, was charged with having, at the beginning of March, 1939, invaded Czechoslovak territory from Austria, with a group of selected men, and with having provoked clashes, in the Moravian town of Jihlava, with members of the Czechoslovak State police and with the local Czechoslovak population. During these clashes, Czech citizens, as well as members of the Czech

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(1) See M.25, 25.7.44.
(2) See M.91, 9.1.46; M.92, 23.1.46; and M.93, 30.1.46.
(3) M.93, 30.1.46, p. 4.
police, were massacred and a number of persons were killed or seriously wounded. The purpose of these armed raids in Czech territory was to stir up conflicts with the Czechoslovak population and authorities in connection with the contemplated invasion of Czechoslovakia.

In its report to the Committee on Facts and Evidence, the Legal Committee came to the conclusion that the acts of which Sepp Dietz was charged fall under crimes against humanity, namely as "inhumane acts committed against any civilian population, before or during the war." In this connection the Committee also made the following ruling:

"Crimes against humanity, as defined in paragraph (c) of Article 6 of the Charter of the International Military Tribunal, should be considered as war crimes in the same way as violations of the laws and customs of war, as defined in paragraph (b) of that Article."

The Committee thus applied the concept of war crimes in the wider, non-technical sense. The findings of the Legal Committee were adopted by the Committee on Facts and Evidence, and the accused placed on the list of war criminals.

(iii) FURTHER DEFINITION

A few weeks later, two more Czechoslovak charges gave rise to a general study of the concept of crimes against humanity and to the formulation of an elaborate definition by the Legal Committee. In one case, the accused, Christoph Manner and others, were charged with having on 22nd September, 1938, abducted a man working with the Czechoslovak police from Czechoslovakia to Germany and then handing him to the Gestapo. The second case was more involved, but there again the offences were alleged to represent crimes against humanity.

When studying these cases the Legal Committee decided that it should, in the first instance, attempt to define more closely the concept of crimes against humanity. As a result a report was submitted on the subject to the Commission. Referring to the definitions of the Nuremberg and Tokyo Charters, as well as to that of Law No. 10 of the Control Council for Germany, the legal Committee came to the following conclusions:

(a) There were two types of crimes against humanity, those of the "murder type" (murder, extermination, enslavement, deportation and the like), and those of the "persecution type" committed on racial, political or religious grounds.

(b) Crimes against humanity of the murder type were offences committed against the civilian population. Offences committed against members of the armed forces were outside the scope of this type, and probably also outside the scope of the persecution type.

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(1) C.156, 15.10.45, Crime committed on Czechoslovak territory at the beginning of March, 1939, (Czechoslovak Case No. 26). Report by Committee III.
(2) Committee I Minutes, No. 52, 28.3.46, p. 6.
(3) See III/3, 8.3.46, The Czechoslovak Case No. 253 (Christoph Manner). Refered to Committee III.
(4) See III/3, 29.3.46, The Czechoslovak Case No. 2677 (Breesser and others).
(5) C.201, 30.5.46, General Propositions defining the term "Crimes against Humanity", under the Charters of the International Military Tribunals and the Control Council Law No. 10.
(6) Details on these provisions will be found in Chapter IX, Section A, (ii), (5), p. 212.
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(c) Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.

(d) It was irrelevant whether a crime against humanity had been committed before or during the war.

(e) The nationality of the victims was likewise irrelevant.

(f) Not only the ringleaders, but also the actual perpetrators of crimes against humanity were criminally responsible.

(g) It was irrelevant whether or not a crime against humanity had been committed in violation of the lex loci.

(h) A crime against humanity may be committed by enacting legislation which orders or permits crimes against humanity, e.g. unjustified killing, deportations, racial discrimination, suppression of civil liberties, etc.

This opinion was endorsed by the Commission on the understanding that the final decision on each particular case was to be taken by the Committee on Facts and Evidence, on the merits of each case.(1)

The two Czechoslovak cases which gave rise to the above legal opinion could not be finally decided by the Committee on Facts and Evidence owing to lack of sufficient particulars as to the circumstances of the alleged crimes.

(iv) OTHER CHARGES

Charges alleging the commission of crimes against humanity were also brought by the Yugoslav Government. Altogether ten charges were presented,(2) dealing with offences committed by Italian Fascists during or before the war against individuals of Yugoslav race living in the Julian March, and comprising Istria and the area of Trieste. The cases were extremely complicated since most of the victims were Italian subjects and since there were some doubts as to the criminal nature of certain acts. Such were, for instance, the charges that Italian judges had committed crimes by condemning a number of Italian subjects of Yugoslav race to various punishments for alleged offences against the Italian State. All these cases were referred to the Legal Committee.

After many weeks of study and discussions, the Legal Committee presented a comprehensive report, in which it divided the charges into two parts: (a) those which it recognised as representing crimes against humanity and (b) those which it did not.(3) As to the former, it based its findings upon the elements constructed in its general definition of crimes against humanity.(4) It took into consideration "the number, magnitude

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(1) See M.107, 5.6.46.
(2) Charges Nos. 1323, 1462, 3296, 4031, 4032, 4033, 4034, 4035, 4036, 4037.
(3) C.239, 5.12.1946, Yugoslav-Italian Charges of Crimes against Humanity. Report by Committee III.
(4) C.201, 30.5.46, previously referred to.
and savagery of the inhumane acts” involved, the fact “that a similar pattern emerged at different times and places” and that “the systematic mass action was authoritative”, that is, that it had been carried out upon governmental orders. Accordingly it reached the conclusion that acts it had recognised as representing criminal offences, were “punishable normally under municipal law” and “should be regarded as crimes against humanity, which thus become the concern of international law”.

This report was adopted by the Commission in January, 1947,(1) and the cases accordingly disposed of by the Committee on Facts and Evidence.

C. CRIMES AGAINST PEACE

(i) AGGRESSIVE WAR A CRIME

By far the most important issue of substantive law to be studied by the Commission and its Legal Committee was the question of whether aggressive war amounted to a criminal act.

As in the case of crimes against humanity, those in favour of declaring aggressive war a crime in international law were mainly concerned with including the principle within the Commission’s terms of reference. This would enable presentation to the Commission of charges against the leaders of the Axis Powers and their inclusion in the Commission’s Lists of war criminals. For this reason, here again the development took the course of qualifying aggressive war and its preliminary and contemporaneous acts as war crimes in the wider sense. The term “crimes against peace” was only to be thought of at a later stage.

The question was raised in March, 1944, during the first meetings of the Legal Committee, by the Czechoslovak representative in conjunction with crimes against humanity. It will be remembered that the Czechoslovak delegate had prepared a report on the subject, in which he had reviewed the whole range of what, in his opinion, amounted to criminal acts perpetrated by the Axis Powers.(2) His thesis was that the paramount crime was the launching and waging of the second World War, and that the individuals responsible for it should be held penally liable and tried accordingly. The criminal nature of the last war was found to derive from its aims and methods. The aims were to enslave foreign nations, to destroy their civilisation and physically annihilate a considerable section of the population on racial, political or religious grounds. The methods arose from the fact that this was a “total” war, which disregarded all humanitarian considerations lying at the root of the laws and customs of war, and introduced indiscriminate means of warfare and barbaric methods of occupation.

The first reaction of the Legal Committee was to agree with these considerations and to include them in its draft resolution on the “Scope of the Retributive Action of the United Nations”, dealing also with crimes against humanity.(3) The Committee suggested that aggressive

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(1) See M.121, 22.1.47.
(2) Ill.4, Scope of the Retributive Action of the United Nations according to their official declarations.
(3) C.20, 16.5.44, Resolution under above heading proposed by Committee III.
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wars should be treated as crimes within the scope of the Commission's work, that is, as war crimes in the wider sense, and it defined them in the following terms:

"The crimes committed for the purpose of preparing or launching the war, irrespective of the territory where these crimes have been committed."

It also included in this concept "crimes that may be committed in order to prevent the restoration of peace".

This proposal was, however, not adopted by the Commission, the feeling prevailing that the Governments would be reluctant to go so far. The above definitions were, therefore, referred back to the Legal Committee for further consideration. (1)

(1) Majority Report

The Committee decided to entrust a special sub-committee with the task of effecting a thorough study and submitting a report. The Sub-Committee was composed of British, Czechoslovak, Netherlands and United States representatives or experts. An elaborate note was submitted by the British expert, (2) which took the line that aggressive war, however reprehensible, did not represent a crime in international law. It contained the following observations:

The problem was to be approached from the viewpoint of the lex lata and not of the lex ferenda. It consisted in whether a State can become, under the existing rules of international law, the subject of criminal liability. This approach was required "not because it was proposed to indict and punish any enemy State, but because a State could only act through human agents". Therefore "if it could be shown that a State had committed a criminal act the human agents responsible for it could properly be indicted for having procured that act".

The British expert reached the conclusion that "the State cannot be the subject of criminal liability" and that consequently the launching and waging of a war could not be regarded as a crime. He referred to the absence of any judicial or arbitral decision recognising penal liability of States. All that was recognised when a State made a breach of a rule of international law was the existence of a situation analogous to a breach of contract or to a delict but not a crime. Reference was also made to the precedent created after the first World War in respect of the ex-Kaiser. The report of the 1919 Commission on Responsibilities was not unanimous, and the United States had been unable to agree that heads of State should be treated as criminally responsible and had adopted the view that, in connection with a war, they could be held only "morally" responsible. (3)

In addition, when applying to the Netherlands for the extradition of the ex-Kaiser, the Allied Powers stated that they did not contemplate "a judicial accusation" but only "an act of high international policy". This position was not altered by the Kellogg-Briand Pact of 1928. Although illegal under the latter's terms, the launching of a war does not "convert a State into a caput lupinum" and has not "abolished war as an

(1) See M.2.1, 6.6.44.
(2) Sir Arnold McNair.
(3) For more details on this point see Chapter X, Section B, (6), p. 263 et. seq.
institution regulated by rules of law” or “enlarged the category of acts which international law permits States to punish as criminal”. Finally, even if these views were wrong and the procuring of aggressive war by individuals was a crime, it was certainly not a “war crime”.

The majority of the Sub-Committee and of the Legal Committee agreed with these considerations and conclusions, the Czechoslovak delegate dissenting. A majority and a minority report were consequently submitted to the Commission.

The majority report(1) submitted the following opinion:

“Acts committed by individuals merely for the purpose of preparing for and launching aggressive war, are, lege lata, not ‘war crimes’.

“However, such acts and especially the acts and outrages against the principles of the laws of nations and against international good faith perpetrated by the responsible leaders of the Axis Powers and their satellites in preparing and launching this war are of such gravity that they should be made the subject of a formal condemnation in the peace treaties.

“It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.”

The course thus taken was that war was not a crime in positive international law, but that it should be declared criminal for the future.

(2) Minority Report

In his minority report(2) the Czechoslovak delegate maintained the attitude he had previously taken and opposed the thesis of the Legal Committee. He stressed that, when considering the problem, the Commission should decide only whether the second World War was a crime, and not whether this was the case with any aggressive war in general. He reiterated his previous arguments concerning the aims and methods of the war launched and waged by the Axis Powers, particularly its nature of a “total” war, and repeated that these were criminal events without precedent. In his opinion international law had clearly developed so as to treat aggressive war as a criminal act, entailing individual penal liability. The Geneva Protocol of 1924, although never ratified, was evidence of the “conviction of the whole civilised humanity”, and it expressly declared war to be an international crime. Such was the effect of the Kellogg-Briand Pact of 1928. Under its terms, as interpreted by Briand himself and by the United States Secretary of State for Foreign Affairs, Mr. Stimson, wars had become illegal and were outlawed altogether. As a consequence “as soon as international law deprived aggressive war of its legality” the latter automatically resulted in “a chain of crimes punishable by the heaviest penalties”. Finally, the Czechoslovak delegate referred to authoritative statements made by the Allied nations and their leaders, and quoted, inter alia, a remark by Churchill that those “who set out to subjugate first Europe and then the world must be punished”.

Both reports were considered by the Commission at two consecutive

(1) C.55, 27.9.44, Report of the Sub-Committee appointed to consider whether the preparation and launching of the present war should be considered “war crimes”.

(2) C.56, 27.9.44, Minority Report presented by Dr. B. Eder on the question whether the preparation and launching of the present war should be considered as crimes being within the scope of the United Nations War Crimes Commission.
meetings in October, 1944.\(^{(1)}\) Elaborate discussion took place, in the course of which the minority opinion of the Czechoslovak representative met with the approval of several members. Those in favour were the delegates of Australia, China, New Zealand, Poland and Yugoslavia. The majority opinion was, however, supported by the representatives of France, Greece and the United States, so that, with the nations represented in the majority report, members were divided on the issue in two approximately equal groups.

Agreeing with the Czech view, the Australian representative and future Chairman of the Commission, Lord Wright, could not approve of the majority's interpretation of the nature of *lex lata* in international law. He was accustomed to finding law in the developing principles of the Common Law. In English law, for instance, there was no specific statutory provision making murder a crime, and yet murder has been treated as a crime for centuries. International law had likewise no specific code, and its rules have to be extracted from a number of sources. One of these sources was the Kellogg-Briand Pact of 1928, which was categorical in declaring war as illegal, and consequently a criminal act. The absence of *lex lata* would no doubt prevent a person from being convicted and punished for an act whose criminal nature might in all fairness be regarded as doubtful. This did not apply in the case of aggressive war whose criminal nature, besides being declared by the Kellogg-Briand Pact, was recognised by a general consensus of authoritative opinion.

The Yugoslav delegate concurred with these views and stressed the fact that all members agreed that the launching and waging of a war of aggression was illegal. The difference existed as to whether it was at the same time criminal in the sense of penal law. *Lex lata* in international law was different from the position it has in municipal law. In international law it evolved from such sources as the dictates of public conscience or the laws of humanity. He feared that the majority in the Legal Committee acted too much under the impact of what *lex lata* was in the sphere of municipal law, that is, written, statutory law. He therefore thought that the main argument of the majority, that based upon the nature of *lex lata*, was erroneous, and that on this ground one could argue for ever without finding a clear and definite solution. The position in regard to the issue at stake was the same as in regard to war crimes *stricto sensu*. These were contained in the laws and customs of war as embodied in the Hague and Geneva Conventions, and yet in none of these Conventions was the word "war crime" used, nor any prohibited act accompanied by penal sanctions. This has not prevented everybody from agreeing that such acts were criminal acts entailing penal sanctions. The time had now come to recognise the same in respect of aggressive war, clearly prohibited by the Kellogg-Briand Pact. Similar views were expressed by the Chinese, New Zealand and Polish representatives.

The majority of members reached the conclusion that decision on the issue lay at any event in the hands of the Governments. Consideration of the matter was accordingly adjourned and the representatives requested to approach their Governments and vote according to instructions.

\(^{(1)}\) See M.35, 10.10.44; M.36, 17.10.44.
Before re-examination of the matter for the purpose of taking a vote, the Chairman of the Commission intervened by circulating a letter to the members. He drew attention to the fact that the motion concentrated on the concept of “war crimes”, in that both those in favour of and those against treating aggressive war as a crime were supposed to decide on the issue whether or not it represented a “war crime”. He emphasised that this concept had obviously been used in different meanings by the members, some identifying it with the narrower field of the violations of the laws and customs of war, and some treating it in a far wider sense. In his opinion any vote on such a motion would lead people to think that members voting in the negative, because to them a war crime was limited to the violations of the laws of war, were not in favour of the punishment of the Axis leaders, which was not the case. The Allied leaders and Allied Governments were all in favour of such punishment. Disagreement existed only as to whether such punishment should be imposed also for the launching and waging of the war as a separate act, distinct from “war crimes” *stricto sensu*, for which the Axis leaders bore full responsibility in any case.

(3) *Attitude of Member Governments*

Consideration of the matter was resumed in December, 1944. Several members announced that they had received instructions to vote in favour of the motion that aggressive war was an international crime. Thus, the Yugoslav delegate submitted, on behalf of his Government, a written statement, according to which “war in general and aggressive war in particular represents a clear violation of international obligations and an offence against the principles of the laws of nations and international good faith”. The Yugoslav Government was of the opinion that “taking into account that peace was indivisible and was a fundamental condition of the very existence of the international community and of each nation and State” and “having regard to the fact that total war exposed to destruction entire populations on an unprecedented scale” aggressive war could no longer “be considered as a mere violation of international obligations”. It was “a crime against the international community as a whole and all the nations” subjected to aggression. The statement referred to the Kellogg-Briand Pact of 1928 and the dictates of the public conscience of the world as sources of such a legal conclusion.

The New Zealand representative announced that, under the terms of a cable received from his Government, “it was New Zealand’s policy that those responsible for launching the war should be punished on that account”. They “were to be regarded as war criminals within the sphere of action of the Commission” and the New Zealand Government was “prepared to accept the Minority Report”.

No vote on the final decision was, however, taken, several members stating that they had not yet received instructions.

A similar communication was received at a later date from the Australian

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(1) C.64, 30.11.44, *Examination of the question whether the preparation and launching of the present war can be considered as a “war crime”*.  
(2) See M.41, 6.12.44.
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Government.(6) It considered "that the preparation for and launching of an aggressive war were in their nature criminal acts", and that in the case of the Axis Powers, the war "was a breach of solemn International Treaties, particularly the Pact of Paris, 1928". It therefore held the view that the Commission was "authorised to put those responsible for launching the war on the lists of war criminals for the fundamental crime of 'total' war".

No resolution was adopted as a result of all these activities; neither were discussions resumed.

(ii) RECOMMENDATIONS TO THE UNITED NATIONS

The subject was, however, considered on one more occasion, in connection with other proposals of members of the Commission. In March, 1945, the Czechoslovak representative submitted a memorandum suggesting that the attention of the United Nations Conference at San Francisco should be drawn to problems concerning the punishment of war criminals.(8) One of the main points mentioned was the problem of punishment for the preparation, launching and waging of the second World War. It was suggested that the Conference offered the best opportunity for seeking agreement required on the part of the Governments on this point. It was therefore proposed that the United Nations should be approached and their consent obtained for the participation at their Conference of representatives of the Commission.

After much discussion, during which objections of a formal nature were raised, the proposal was rejected and the decision taken to submit, instead, a report on the main problems involved and suggest solutions in the form of a recommendation to member Governments taking part in the San Francisco Conference.(9)

The matter was referred to the Enforcement Committee for study as to whether penal sanctions should be imposed for the threat or use of force on the part of States against States. In May, 1945, the Committee presented a draft recommendation on the subject,(4) and took as a basis for its study the following principle declared in Chapter II of the Dumbarton Oaks Proposals:

"All members of the Organisation (i.e. the future United Nations Organisation) shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organisation."

This clearly excluded war as a full expression of the use of force. The Committee referred to the majority and minority opinions of the Legal Committee concerning the criminal nature of war, and emphasised the unanimous opinion as to the need for making aggressive war punishable in the future. In this respect it recommended the adoption of the following rule:

(1) C.129, 25.6.45, Views of the Governments as to whether the preparation and launching of the war is a war crime. Opinion of the Government of Australia.
(2) C.81, 5.3.45, Proposal by Dr. B. Eitel (Czechoslovakia), for the participation of the United Nations War Crimes Commission in the San Francisco Conference.
(3) See M.51, 7.3.45; M.52, 14.3.45.
(4) C.108, 2.5.45, Draft Recommendation to the Governments concerning penal sanctions for the threat or use of force.
ACTIVITIES ON QUESTIONS OF SUBSTANTIVE LAW

"Any person in the service of any State who has violated any rule of international law forbidding the threat or use of force, or any rule concerning warfare, especially the obligation to respect the generally recognised principles of humanity, shall be held individually responsible for these acts, and may be brought to trial and punishment before the civil or military tribunals of any State which may secure custody of his person."

At the same time the Committee considered the question of whether the second World War could be regarded as a crime from the viewpoint of existing international law. It found that, having regard to the diversity of views expressed in the Commission on this point, the meaning and effect of the main source at stake, the Kellogg-Briand Pact, was "ambiguous". It therefore recommended that this should be clarified by inserting another provision in the Charter of the United Nations. The formula suggested read as follows:

"It being the original intent and meaning of the Kellogg-Briand Pact, signed 27th August, 1928, that any person in the service of any Party-State who violated its provisions condemning recourse to war for the solution of international controversies and renouncing war as an instrument of international policy in the relations of the parties to one another should be held individually responsible for these acts, it is declared that the aggressions of the Axis States since the signing of the Pact violated its provisions and that the persons in the service of such Axis States are individually responsible for such acts and may be brought to trial and punishment before any United Nations Court or other tribunal of competent jurisdiction which may secure custody of such persons or any of them."

These recommendations were considered by the Commission on 2nd and 3rd May, 1945.(1) Several members objected to the recommendation relating to the second World War, repeating the arguments of the majority opinion of the Legal Committee that war was not recognised as yet as a crime. This attitude was taken in particular by the French representative. The Belgian and Chinese representatives were in favour of limiting the recommendation to the future for other reasons. They thought that the San Francisco Conference was not concerned with the past, and could therefore not embody a statement as suggested in the United Nations Charter. Other members supported both recommendations by stressing that the one dealing with the second World War was proposed only in case the Governments agreed with the opinion that the Kellogg-Briand Pact was ambiguous as to the criminal nature of aggressive wars. This left them full freedom of decision.

In the final event, it was decided to submit both recommendations in two separate documents,(2) and thus clearly disconnect the problem of the future from that of the past.

The United Nations Charter, as finally adopted, contains a provision only in regard to future international relations. This is, however, limited to a statement of policy and does not deal with the criminal nature of wars

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(1) See M.58, 2.5.45; and M.59, 3.5.45.
(2) C.103, 4.5.45, Recommendations to the Governments concerning penal sanctions for the threat or use of force. Adopted by the Commission on 3rd May, 1945; C.104, 4.5.45, Recommendations to the Governments concerning the interpretation of the Kellogg-Briand Pact. Adopted by the Commission on 3rd May, 1945.
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or its consequences in penal law. The provision, Article 1, 1., reads as follows:

"The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

The necessity, however, to deal with the problem of the criminal nature of aggressive wars and with that of individual penal liability of those responsible for acts of aggression, was recognised by the United Nations after its formation. In a Resolution adopted on 11th December, 1946, the General Assembly affirmed "the principles of international law recognised by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal" and directed the Committee on the Codification of International Law "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognised" in the above Charter and Judgment.\(^1\)

Finally, it can be noted that the criminal nature of aggressive wars was formally recognised by the Commission in its Resolution of 30th January, 1946, previously referred to in connection with crimes against humanity. In its full text the Resolution declared that "crimes against peace and against humanity, as referred to in the Four Power Agreement of August 8th, 1945, (i.e. the Nuremberg Charter), were war crimes within the jurisdiction of the Commission".\(^2\)

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\(^1\) United Nations, Resolutions adopted by the General Assembly during the Second Part of its First Session from 23rd October to 15th December, 1946, Lake Success, 1947, Resolution No. 95, p. 188.

\(^2\) See M.23, 30.1.46, p. 4.