CHAPTER IX

DEVELOPMENTS IN THE CONCEPTS OF CRIMES AGAINST HUMANITY, WAR CRIMES AND CRIMES AGAINST PEACE

A. CRIMES AGAINST HUMANITY

(i) DEVELOPMENTS PRECEDING THE CHARTER OF 1945

(1) Introductory

ARTICLES 6 and 5 respectively of the Charters of the International Military Tribunals at Nuremberg and Tokyo, and Article II of the Control Council (for Germany) Law No. 10(1) which laid down the jurisdiction of the International Military Tribunals and of the other courts in Germany which were to try war criminals, specify three types of crimes: (a) crimes against peace, (b) war crimes and (c) crimes against humanity.

As will be shown later, the terms "crimes against humanity" and "war crimes", as defined in these documents, and the concepts they represent, are juxtaposed and inter-related to the extent that while all acts enumerated under the heading "war crimes" are also "crimes against humanity", the reverse is not necessarily true. For instance, acts committed on enemy occupied territory or against allied nationals may be war crimes as well as crimes against humanity, whereas acts committed either when a state of war does not exist, or against citizens of neutral states, or against enemy nationals or on enemy territory, are crimes against humanity, but are not violations of the laws and customs of war, and hence not war crimes. It might be added that crimes against peace, namely the planning, preparation, initiation and waging of a war of aggression, which were declared by the Nuremberg Tribunal to be the supreme international crime, constitute also, in a general non-technical sense, a crime against humanity, since in certain circumstances they involve violations of human rights.

The terms "crimes against peace", "war crimes" and "crimes against humanity", although used in the documents as technical terms, do not represent conceptions entirely novel or without precedent. As was pointed out earlier, in connection with the development of the laws of war prior to the First World War,(2) all references to "humanity", such as "interests of humanity", "principles of humanity" "laws of humanity" as appear in the Fourth Hague Convention of 1907 and in the other documents and enactments of that period, have been used in a non-technical

(1) See:
(1) The Agreement of 8th August, 1945, for the Prosecution and Punishment of the Major War Criminals of the European Axis, together with the Charter.
(2) The Charter of the International Military Tribunal for the Far East, of 1946.
sense, and certainly not with the intention of indicating a set of norms different from the "laws and customs of war", which are covered by the term "war crimes" in the documents of 1945 and 1946.

It was also pointed out that the term "crimes against humanity" in a non-technical sense, was used for the first time in the Declaration of 28th May, 1915, which dealt precisely with the category of crimes that the modern conception of the term is intended to cover; namely inhumane acts committed by a Government against its own subjects. Finally, stress was laid on the fact that the two categories of offences with which the Commission of Fifteen was concerned—violations of the laws and customs of war on the one hand, and violations of the laws of humanity on the other—correspond generally speaking to "war crimes" and "crimes against humanity", as they are used in the documents of 1945-1946. It is not, however, known whether the Commission, in using the term "crimes against the laws of humanity", had in mind offences which were not covered by the other expression. It has also been shown what was the outcome of the recommendations put forward by the Commission of Fifteen as concerns the provisions of the Peace Treaties of 1919-1923.

(2) The Italo-Abyssinian War of 1935-36

During the Italo-Abyssinian conflict a number of protests, appeals and declarations were issued by Haile Selassie, the Emperor of Ethiopia, denouncing the many and various crimes committed by Italian forces and authorities against the Ethiopian population, both during the campaign and after the annexation of Ethiopia by Italy on 9th May, 1936. One category of these crimes was the use of poison gas by the Italian Army and Air Force. This was considered by an ad hoc Committee of Thirteen of the League of Nations, which pointed out that both parties had signed the Geneva Convention prohibiting the use of gases in any form or circumstance, and reference was made to the numerous confirmations of gas-poisoning received from impartial sources.

In his personal address to the Sixteenth Assembly of the League of Nations on 4th July, 1936, the Emperor of Ethiopia described how the Italian Government had made war not only on the armed forces, but had also attacked populations far removed from hostilities. He stated that towards the end of 1935 the Italians had used tear gas and then mustard gas, and later had extended the same technique to vast areas of Ethiopian territory, drenching not only soldiers but also women, children, cattle, rivers, lakes and pastures with this "deadly rain", systematically killing all living creatures.

On 17th March, 1937, the Emperor requested the Secretary General of the League to appoint a Commission of Inquiry to investigate the horrors committed in Ethiopia by the Italian Government. In addition to other

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(1) Declaration of the Governments of France, Great Britain and Russia issued in connection with the massacres of the Armenian population in Turkey, see Chapter III.
(2) See Chapter III, p. 41 et seq.
(3) Statement by Mr. Eden on 8th April, 1936, see Keesing’s Contemporary Archives, Vol. II, 1934-1937, p. 2066.
crimes committed, the Emperor denounced the execution of Ras Desta, a
prisoner of war, and the massacre of over 6,000 persons in Addis Ababa
which occurred in February, 1937. These allegations indicated that
crimes coming within different notions had been committed in Ethiopia.

The Peace Treaty with Italy signed in Paris on 10th February, 1947,
contains in Article 45 provisions relating to Italy's obligations regarding
the apprehension and surrender of war criminals in general. The
persons in respect of whom Italy must take all necessary steps to ensure
apprehension and surrender, are those accused of having committed,
ordered or abetted war crimes and crimes against peace or humanity.
With regard to Ethiopia's right to prosecute Italian nationals for crimes
committed in that country, the relevant Article 38 reads as follows:—

"The date from which the provisions of the present Treaty shall become
applicable as regards all measures and acts of any kind whatsoever entailing
the responsibility of Italy or of Italian nationals towards Ethiopia, shall be
held to be October 3rd, 1935."

This reference to "all measures and acts of any kind whatsoever"
clearly indicates that the provisions of Article 45 relating to war criminals
in general apply also to the Italo-Ethiopian war. It may thus be seen
that the crimes committed in Ethiopia during the war 1935-36 have been
qualified by these provisions as both war crimes and crimes against humanity.

(3) The Spanish Conflict

A further example of the use between the two World Wars of the
expression *dictates of humanity*, in a non-technical sense, may be found
in the "International Agreement for Collective Measures against Piratical
Attacks in the Mediterranean by Submarines" signed at Nyon on 14th
September, 1937, and supplemented three days later by an agreement
signed at Geneva in respect of similar acts by surface vessels and aircraft.
The agreement declares attacks committed during the Spanish conflict
against merchant ships not belonging to either of the conflicting Spanish
parties to be violations of the rules of international law and to "constitute
acts contrary to the most elementary *dictates of humanity*, which should
be justly treated as acts of piracy". (2)

(4) Other Developments

During the Second World War innumerable official and semi-official
declarations and pronouncements dealing with the problem of crimes
against humanity were issued. In 1943 the London International Assembly
passed a resolution to the effect that this was one of the crimes for which
the major war criminals should be indicted. (3)

The United Nations War Crimes Commission, as has been shown in
the preceding chapter, (4) recommended early in its existence that crimes
against stateless or other persons on account of their race or religion
should be considered as war crimes in the wider sense, and were, therefore,
within the Commission's terms of reference.

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(1) op. cit. p. 2499.
(2) doc. cit. the Preamble. Italics introduced.
(3) See Chapter V, Section B, p. 103.
(4) See Chapter VIII, Section B, p. 175.
All these documents and recommendations show that the insertion of the provisions concerning "crimes against humanity" in the Charters of the International Military Tribunals at Nuremberg and Tokyo was due to the desire that the retributive action of the United Nations should not be limited to bringing to justice those who had committed war crimes in the traditional and narrow sense—that is, violations of the laws and customs of war, perpetrated on Allied territory or against Allied citizens—but that atrocities committed on Axis territory and against persons of other than Allied nationality should also be punished.

(ii) Crimes against Humanity in the Light of International Enactments of 1945-1947

(1) The London Charter and the Nuremberg Judgment

(a) General Observations

Part II of the Charter of the International Military Tribunal at Nuremberg which sets forth the jurisdiction and states the general principles to be followed in the conduct of the trial of the Major War Criminals of the European Axis countries, and in particular its Article 6, is the law which the Charter required the Tribunal to administer, and by which the Tribunal was bound.

Article 6 declares that the following acts should be among the "crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:—

"(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

"(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian populations of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

"(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

The above text of sub-paragraph (c) is the English text as amended by the Berlin Protocol of 6th October, 1945(1) by virtue of which the semi-colon originally put between "the war" and "or persecutions" was replaced by a comma following the discrepancy which had been found to

exist between the originals of Article 6, paragraph (c) of the Charter in
the Russian text on the one hand and the originals in the English and
French texts on the other, all of which have equal authenticity. In
consequence, the Protocol declares that Article 6(c) in the Russian text
is correct, and that the meaning and intention of the Agreement and
Charter requires that this semi-colon in the English text should be changed
to a comma, with appropriate amendment of the French text.

These corrections have an important bearing on the interpretation
of the notion of crimes against humanity. Their consequence is that
the words "in execution of or in connection with any crime within the
jurisdiction of the Tribunal " refer now to the whole text of Article 6(c).

As previously mentioned, the Charter is the law by which the Tribunal
was bound, and it was recognised as such in the statement made in the
Judgment that " the law of the Charter is decisive, and binding upon the
Tribunal ".(1) The Tribunal also took the view that the Charter is an
expression of international law existing at the time of its creation, and to
that extent is itself a contribution to international law.(2) The Tribunal
considered itself bound by the law of the Charter also in regard to the
definition of both " war crimes " and " crimes against humanity ".(3)

(b) Article 6(c) and the general attitude of the Tribunal(4)

While the Nuremberg Charter is the first legal enactment to formulate
the definition of crimes against humanity, though the concept was not
without precedent, sub-paragraph (c) of Article 6 of the Charter appears
prima facie to lay down a set of novel principles, or at least to pave the way
to considerable progress in the relationship between the community of
nations, its members states and individual citizens of these states, and
between international law and municipal law. The following three elements
of the definition of crimes against humanity, as laid down in Article 6(c)
appear to contain these novel principles:

(1) " before and during the war ",

(2) " against any civilian population ",

(3) " whether or not in violation of the domestic law of the country
    where perpetrated ".

The first principle indicated by the words " before or during the war "
appears to imply that international law contains penal sanctions against
individuals, applicable not only in time of war, but also in time of peace.
This presupposes the existence of a system of international law under
which individuals are responsible to the community of nations for violations

(1) The Judgment of the International Military Tribunal for the Trial of German Major
    War Criminals, Nuremberg 1946. H. M. Stationery Office Cnd. 6964, p. 38. (Hereafter
    referred to as Judgment.)
(2) op. cit. p. 38.
(3) op. cit. p. 64.
(4) For a detailed analysis of the notion of crimes against humanity reference is made
to the article by E. Schweth, former Legal Officer of the Commission, on Crimes against
    Humanity written for the British Year Book of International Law, 1946, and which has
    been used as the basis for the drafting of this section, with the author's kind permission.

A number of preparatory papers on this subject issued by the Commission for purposes
other than this Report have also been utilised.
of rules of international criminal law, and according to which attacks on
the fundamental liberties and constitutional rights of peoples and individual
persons, that is inhuman acts, constitute international crimes not only in
time of war, but also, in certain circumstances, in time of peace. The
embodiment of this principle in the Charter, taken in conjunction with
the principle that it is irrelevant whether or not such crimes are committed
in violation of the domestic law of the country where perpetrated, meant that
the Tribunal had the competence to override the national sovereignty
and municipal law of the States of which the perpetrators are subject,
and where the crimes had been committed. This principle was, however,
restricted by the special qualification laid down in the provision, as
amended in the Berlin Protocol, that in order to constitute crimes against
humanity which call for international penal sanction, the inhumane acts
specifically enumerated in Article 6(c) must be committed in “execution
of or in connection with any crime within the jurisdiction of the Tribunal”,
that is, they must be connected with a crime against peace or a war crime
proper. This qualification therefore limited the scope of the concept of
crimes against humanity, with a further consequence that their greatest
practical importance in peace time is seriously affected.(1)

The second principle expressed by the words “against any civilian
population” is that any civilian population is under the protection of
international criminal law and that the nationality of the victims is
irrelevant. It seems to imply that such protection is also extended to
cases where the alleged violations of human rights have been perpetrated
by a State against its own subjects. The term, therefore, includes crimes
against both allied and enemy nationals.

In particular, it follows that a civilian population remains under the
protection of the provisions regarding crimes against humanity irrespective
of its status or otherwise of belligerent occupation; whether it is (a) the
population of a territory under belligerent occupation, effected with or
without resort to war (e.g. Austria and parts of Czechoslovakia in 1938
and 1939); or (b) the population of other States not under occupation, in
which armed forces of one belligerent are stationed (e.g. German forces
in Italy); or of countries adjacent to a belligerent (e.g. cases of kidnapping
and other violence); or (c) the population of a belligerent itself (e.g.
German or Italian nationals of the same or different race as the respective
State authorities).

The words “civilian population” appear to indicate that “crimes
against humanity” are restricted to inhumane acts committed against
civilians as opposed to members of the armed forces, while the use of
the word population appears to indicate that a larger body of victims is
visualised, and that single or isolated acts against individuals may be
considered to fall outside the scope of the concept.

As already mentioned, the violation of a certain human right, coming
within the scope of Article 6(c), may also constitute a violation of the laws
and customs of war, as enumerated under Article 6(b). The provision
dealing with war crimes (Article 6(b)) expressly states that its enumeration

(1) The position under Law No. 10 of the Control Council for Germany is different.
of specific criminal acts is not exhaustive. No such statement is to be found in Article 6(c). The wide scope of the term "other inhuman acts" indicates, however, that the enumeration in Article 6(c) is also not exhaustive, at least so far as substance is concerned.

There are two types of crimes against humanity; crimes of the "murder-type" such as murder, extermination, enslavement, deportation, etc., and "persecutions". With regard to the latter the provision requires that they must have been committed on political, racial or religious grounds.

The acts of the "murder-type" enumerated in Article 6(c) as crimes against humanity are similar to, but not identical with, those mentioned as war crimes in Article 6(b). Murder appears under both headings. Extermination, mentioned only in Article 6(c), is apparently to be interpreted as murder on a large scale—mass murder. The inclusion of both "extermination" and "murder" may be taken to mean that implication in the policy of extermination, without any direct connection with actual criminal acts of murder, may be punished as complicity in the crime of extermination.

It is difficult to tell whether there is any difference between "deportation to slave labour and for other purposes" as mentioned under (b), and the two separate items of "enslavement" and "deportation" mentioned under (c). "Ill-treatment" is mentioned under (b), but is omitted in (c). However, this particular crime might fall under the category of "other inhumane acts".

Finally, the third principle that it is irrelevant whether an offence alleged to be a crime against humanity was or was not committed in violation of the domestic law of the country where it was perpetrated, means that it is no defence that the act alleged to be a crime against humanity was legal under the domestic law of that country. The exclusion of this plea is closely connected with the provisions of Article 8 of the Charter regarding the defence of superior orders.

As concerns the attitude of the Tribunal to the law relating to crimes against humanity, its general considerations were given as follows:

"With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939 who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of the Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity and insofar as the inhumane acts charged in the Indictment, and committed after
the beginning of the war, did not constitute war crimes, they were all committed in execution of or in connection with, the aggressive war, and therefore constituted crimes against humanity".\(^{(3)}\)

It may thus be seen that the Tribunal applied the principle of the Berlin Protocol and restricted both crimes, of the murder type and persecutions, by the provision that they must have been committed in connection with crimes coming within the competence of the Tribunal.

This does not imply that no crime committed prior to 1st September, 1939, can be considered as a crime against humanity. Acts committed in connection with crimes against peace, perpetrated before 1st September, 1939, were recognised by the Tribunal as constituting crimes against humanity. On the other hand, in cases where inhumane acts were committed after the beginning of the war and did not constitute war crimes, their connection with the war was presumed by the Tribunal, and they were therefore considered as crimes against humanity. Although in theory it remains irrelevant whether a crime against humanity was committed before or during the war, in practice it is difficult to establish a connection between what is alleged to be a crime against humanity and a crime within the jurisdiction of the Tribunal if the act was committed before the war.

(c) The crime against peace as a crime against humanity

Crimes against peace, as such, are dealt with in a separate section of this report.\(^{(2)}\) This particular type of crime, however, has some definite bearing upon violations of human rights, and for this reason it seems necessary to record here the views of the Tribunal on this point.

When dealing with the question of "the common plan or conspiracy and the aggressive war ", the Tribunal declared:

"The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.

"To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."\(^{(3)}\)

The first acts of aggression referred to in the Indictment are the seizure of Czechoslovakia and the first war of aggression is the war against Poland, begun on 1st September, 1939. Having accepted the contention of the Prosecution as to the aggressive character of the seizure of Austria and Czechoslovakia, the Tribunal expressed itself satisfied that the German war against Poland was an aggressive war, and added that it was to "develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity ".\(^{(4)}\)

The Tribunal therefore thought it justifiable and of primary importance

\(^{(1)}\) Judgment, p. 65.
\(^{(2)}\) See Section C. below, p. 232 et seq.
\(^{(3)}\) Judgment, p. 13.
\(^{(4)}\) op. cit., p. 27.
to declare the initiation and waging of wars of aggression as a supreme war crime. This should be construed as meaning a supreme war crime in a wider sense, thereby constituting also in a general non-technical sense a supreme crime against humanity.

(d) Conspiracy to commit crimes against humanity

The Charter in its Article 6(a) provides that "conspiracy" to commit crimes against peace is punishable, but contains no such express provision in regard to "conspiracy" to commit war crimes or crimes against humanity. The doctrine of "conspiracy" is one under which it is a criminal offence to conspire or to take part in an alliance to achieve an unlawful object, or to achieve a lawful object by unlawful means.

Consequently the International Military Tribunal, in its Judgment, allowed only a very limited scope to this doctrine and held that, under the Charter, a conspiracy to commit crimes against peace is punishable, and it convicted some of the defendants on that basis; but it declined to punish conspiracies of the other two types as substantive offences, distinct from any war crime or crime against humanity, and expressed the opinion that the provision contained in the last paragraph of Article 6 does not define, or add as a new and separate crime, any conspiracy except the one to commit acts of aggressive war. In the opinion of the Tribunal, the above provision is only designed to establish the responsibility of persons participating in a common plan, and for these reasons the Tribunal decided to disregard the charges of conspiracy to commit war crimes and crimes against humanity.\(^{(0)}\)

(e) Crimes against humanity in "subjugated" territories

The Nuremberg Tribunal further dealt with the plea based on the alleged complete subjugation of some of the occupied countries in the following way:

"A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war, because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September, 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them."\(^{(9)}\)

(f) Special types of crimes as war crimes and crimes against humanity

(i) Genocide. Among the many and various types of murder and ill-treatment enumerated in the Indictment, there is one which is of particular interest. It is stated therein that the defendants "conducted deliberate

\(^{(0)}\) op. cit., p. 44.
\(^{(2)}\) op. cit., p. 65.
and systematic genocide, viz., the extermination of racial and national
groups, against the civilian populations of certain occupied territories
in order to destroy particular races and classes of people and national,
racial or religious groups, particularly Jews, Poles and Gypsies and
others.\footnote{10} By inclusion of this specific charge the Prosecution attempted
to introduce and to establish a new type of international crime.

The word "genocide" is a new term coined by Professor Lemkin to
describe a new conception, namely, the destruction of a nation or of an
ethnic group. Genocide is directed against a national group as an entity,
and the actions involved are directed against individuals, not in their
individual capacity, but as members of the national group. According
to Lemkin\footnote{10} genocide does not necessarily mean the immediate destruction
of a nation or of a national group, except when accomplished by mass
killings of all its members. It is intended rather to signify a co-ordinated
plan of different actions aiming at the destruction of the essential founda-
tions of the life of national groups, with the aim of annihilating the groups
themselves. The objectives of such a plan would be the disintegration of
political and social institutions, of culture, language, national feelings,
religion, and the economic existence of national groups, the destruction
of the personal security, liberty, health, dignity, and even the lives of the
individuals belonging to such groups. Genocide has two phases: one,
the destruction of the national pattern of the oppressed group, for which
the word "denationalisation" was used in the past; the other, the
imposition of the national pattern of the oppressor. Lemkin believes,
however, that the conception of denationalisation is inadequate because:
(a) it does not connotate the destruction of the biological structure; (b) in
connoting the destruction of one national pattern, it does not connotate
the imposition of the national pattern of the oppressor; and (c) de-
nationalisation is often used to mean only deprivation of citizenship.

It will be observed that the Prosecution, when preferring against the
defendants the charge of genocide, adopted this term and conception in
a restricted sense only, that is, in its direct and biological connotation.
This is evident not only from the definition of genocide as stated in the
Indictment and from the inclusion of this charge under the general count
of murder and ill-treatment, but also from the fact that all other aspects
and elements of the defendants' activities, aiming at the denationalisation
of the inhabitants of occupied territories, were made the subject of a separate
charge which, under (J) of Count Three, is described as germanisation of
occupied countries.

When dealing with the substance of the charge of genocide the Tribunal
declared:

"The murder and ill-treatment of civilian populations reached its height in
the treatment of the citizens of the Soviet Union and Poland. Some four weeks
before the invasion of Russia began, special task forces of the S.I.P.O. and S.D.,

\footnote{10} The Indictment presented to the International Military Tribunal sitting at Berlin on
18th October, 1945, H.M. Stationery Office Cmd. 6696, p. 14. (Hereafter referred to as Indictment). In accordance with Article 22 of the Charter the first meetings of the
members of the Tribunal were held in Berlin.

\footnote{2} See R. Lemkin, Axis Rule in Occupied Europe, Carnegie Endowment for International
Peace, Division of International Law, Washington, 1944, pp. 79-95."
called Einsatz Groups, were formed on the orders of Himmler for the purpose of following the German armies into Russia, combating partisans and members of Resistance Groups, and exterminating the Jews and Communist leaders and other sections of the population” . . . and further down: “The foregoing crimes against the civilian population are sufficiently appalling, and yet the evidence shows that at any rate in the East, the mass murders and cruelties were not committed solely for the purpose of stamping out opposition or resistance to the German occupying forces. In Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans.”

Then the Tribunal referred very briefly to the policy and practice of exterminating the intelligentsia in Poland and Czechoslovakia, and to the problem of race which had been given first consideration by the Germans in their treatment of the civilian populations of or in occupied territories.

In a separate chapter of the Judgment the Tribunal devoted special attention to the persecution and extermination of Jews. It stated that the persecution of the Jews at the hands of the Nazi Government had been proved in the greatest detail before the Tribunal and forms a record of consistent and systematic inhumanity on the greatest scale.(2) The Tribunal then recalled the anti-Jewish policy as formulated in Point 4 of the Party Programme and examined, in great detail, acts committed long before the outbreak of war:

“... The Nazi Party preached these doctrines through its history. ‘Der Sturmer’ and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders the Jews were held up to public ridicule and contempt.

“... With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws were passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights to citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organised, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of one billion marks was imposed on the Jews, the seizure of Jewish assets was authorised and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettos was carried out on an extensive scale, and by an order of the Security Police, Jews were compelled to wear a yellow star to be worn on the breast and back.

“... It was contended for the Prosecution that certain aspects of this anti-Semitic policy were connected with the plans for aggressive war. The violent measures taken against the Jews in November, 1938, were nominally in retaliation for the killing of an official of the German Embassy in Paris. But the decision to seize Austria and Czechoslovakia had been made a year before. The imposition of a fine of one billion marks was made, and the confiscation of the financial holdings of the Jews was decreed, at a time when German armament expenditure had put the German treasury in difficulties and when the reduction of expenditure on armaments was being considered. These steps were taken, moreover, with the approval of the defendant Goering, who had been given responsibility for economic matters of this kind, and who was the strongest advocate of an extensive rearmament programme notwithstanding the financial difficulties.

(1) Judgment, pp. 50-52. Italics introduced.
(2) op. cit. p. 60.
"It was further said that the connection of the anti-Semitic policy with aggressive war was not limited to economic matters."

After referring to a German Foreign Office circular of 25th January, 1939, entitled "Jewish question as a factor in German Foreign Policy in the year 1938 ", the Tribunal stated:

"The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories. Originally the policy was similar to that which had been in force inside Germany. Jews were required to register, and forced to live in ghettos, to wear the yellow star, and were used as slave labourers. In the summer of 1941, however, plans were made for the 'final solution' of the Jewish question in all of Europe. This 'final solution' meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of Section B4 of the Gestapo, was formed to carry out this policy.

"The plan for exterminating the Jews was developed shortly after the attack on the Soviet Union. Einsatzgruppen, of the Security Police and S.D., formed for the purpose of breaking the resistance of the population of the areas lying behind the German armies in the East, were given the duty of exterminating the Jews in those areas. The effectiveness of the work of the Einsatzgruppen is shown by the fact that in February, 1942, Heydrich was able to report that Estonia had already been cleared of Jews and that in Riga the number of Jews had been reduced from 29,500 to 2,500. Altogether the Einsatzgruppen operating in the occupied Baltic States killed over 135,000 Jews in three months . . .

"Units of the Security Police and S.D. in the occupied territories of the East, which were under civil administration, were given a similar task. The planned and systematic character of the Jewish persecutions is best illustrated by the original report of the S.S. Brigadier-General Stroop, who was in charge of the destruction of the ghetto in Warsaw, which took place in 1943. The Tribunal received in evidence that report, illustrated with photographs, bearing on its title page: 'The Jewish Ghetto in Warsaw no longer exists.'"

After describing other atrocities against Jews which were all part of the policy inaugurated in 1941, and the gathering of Jews from all German-occupied Europe in concentration camps, which was another method of the "final solution", the Tribunal finally stated:

"Special groups travelled through Europe to find Jews and subject them to the 'final solution'. German missions were sent to such satellite countries as Hungary and Bulgaria, to arrange for the shipment of Jews to extermination camps, and it is known that by the end of 1944, 400,000 Jews from Hungary had been murdered at Auschwitz. Evidence has also been given of the evacuation of 110,000 Jews from a part of Roumania for 'liquidation'. Adolf Eichmann, who had been put in charge of this programme by Hitler, has estimated that the policy pursued resulted in the killing of 6,000,000 Jews, of whom 4,000,000 were killed in the extermination institutions."

It will be observed that in these statements the Tribunal did not make any reference to the term and conception of genocide, within which acts like those referred to above are comprised. However, the findings of the Tribunal have not been without influence on the subsequent events in
the sphere of the progressive development of international law. On 11th December, 1946, the General Assembly of the United Nations adopted a special resolution on Genocide, the main part of which reads as follows:

"1. Whereas, genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings, and such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations;

"2. Whereas, many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part;

"3. And whereas, the punishment of the crime of genocide is a matter of international concern;

"The General Assembly

Affirms that genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices, whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds, are punishable."(1)

Following the recommendations contained in the above resolution, this new type of international crime has already been the subject of advanced study and consideration by the appropriate organs of the United Nations with a view to arriving at an international convention for the prevention and punishment of the crime of genocide.

(ii) Killing of "useless eaters". In the part of the Judgment which deals with the slave labour policy, the Tribunal referred to the killing of insane and incurable people, in the following statement:

"Reference should also be made to the policy which was in existence in Germany by the summer of 1940, under which all aged, insane, and incurable people, 'useless eaters', were transferred to special institutions where they were killed, and their relatives informed that they had died from natural causes. The victims were not confined to German citizens, but included foreign labourers, who were no longer able to work, and were therefore useless to the German war machine. It has been estimated that at least some 275,000 people were killed in this manner in nursing homes, hospitals and asylums, which were under the jurisdiction of the defendant Prick, in his capacity as Minister of the Interior. How many foreign workers were included in this total it has been quite impossible to determine."(2)

It will be noted that the Tribunal was careful to point out that the victims included foreign labourers and were not confined to German citizens. Actually, most of the people killed in this manner were German citizens, a fact which brings these crimes predominantly within the notion of crimes against humanity. However, this new type of violation of the individual's right to life, so far as the persons killed were foreign workers, was considered by the Tribunal as a war crime.

(g) Conclusions

The conclusions which can be derived from the foregoing analysis

(2) Judgment, p. 60.
of the Nuremberg Judgment, as contrasted with the provisions of the London Charter, have been most ably presented by Dr. E. Schweb in his article already referred to. (1) We shall, therefore, simply record here under (i) to (iv), his observations which are the following:

(i) The International Military Tribunal, in interpreting the notion of crimes against humanity, lays particular stress on that provision of its Charter according to which an act, in order to come within the notion of a crime against humanity, must have been committed in execution of or in connection with any crime within the jurisdiction of the Tribunal, which means that it must be closely connected either with a crime against peace or a war crime in the narrower sense. Therefore the Tribunal declined to make a general declaration that acts committed before 1939 were crimes against humanity within the meaning of the Charter. This represents, however, only the general view of the Tribunal and did not prevent it from treating as crimes against humanity acts committed by individual defendants against German nationals before 1st September, 1939, if the particular circumstances of the case appeared to warrant this attitude. (2)

The restrictive interpretation placed on the term "crimes against humanity" was not so strictly applied by the Tribunal in the case of victims of other than German nationality. With respect to crimes committed before 1st September, 1939, against Austrian nationals, the Tribunal established their connection with the annexation of Austria, which is a crime against peace, and came, therefore, to the conclusion that they were within the terms of Article 6(c) of the Charter. (3) The same applies mutatis mutandis to crimes committed in Czechoslovakia before 1st September, 1939, as illustrated in the verdicts on the defendants Frick and von Neurath. With regard to the inhumane acts charged in the Indictment and committed after 1st September, 1939, the Tribunal made the far-reaching statement that in so far as they did not constitute war crimes they were all committed in execution of, or in connection with, aggressive war and therefore constituted crimes against humanity. The case of Ribbentrop and his activities with respect to Axis satellites is particularly illustrative of this view.

(ii) The Tribunal treats the notion of crimes against humanity as a kind of subsidiary provision to be applied whenever any particular area where a crime was committed is not governed by the Hague Rules of Land Warfare. Germanization is, therefore, considered as criminal under Article 6(b) in the areas governed by the Hague Regulations and as a crime under Article 6(c) as to all others. The crime against humanity, as defined in the London Charter, is not, therefore, the cornerstone of a system of international criminal law equally applicable in times of war and of peace, protecting the human rights of inhabitants of all countries, "of any civilian population", against anybody, including their own States and

(1) E. Schweb, op. cit., p. 205-208.
(2) See the verdict against the defendant Streicher who was also found guilty of crimes against humanity committed before 1st September, 1939, in Germany against German nationals, Judgment, p. 101.
(3) See the Tribunal’s reasoning in the case of Baldur von Schirach and of Seyss-Inquart, Judgment, pp. 112 and 126.
governments. As interpreted in the Nuremberg Judgment, the term has a considerably narrower connotation. It is, as it were, a kind of by-product of war, applicable only in time of war or in connection with war and destined primarily, if not exclusively, to protect the inhabitants of foreign countries against crimes committed, in connection with an aggressive war, by the authorities and organs of the aggressor state. It serves to cover cases not covered by norms forming part of the traditional "laws and customs of war". It denotes a particular type of war crime, and is a kind of clausula generalis, the purpose of which is to make sure that inhumane acts violating general principles of the laws of all civilised nations committed in connection with war should not go unpunished. As defined in the Nuremberg Judgment, the crime against humanity is an "accompanying" or an "accessory" crime to either crimes against peace or violations of the laws and customs of war.(1)

(iii) Before the Nuremberg proceedings and the Judgment were made accessible, it was assumed by many that for the purpose of deciding whether a crime against humanity has been committed, not only the time (peace or war) was irrelevant, but also the territory and the nationality of the victims. Here, again, the proposition remains true in theory, but must, according to the view of the Nuremberg Tribunal, be considerably qualified with regard to acts committed by the German Major War Criminals before the war in Germany against German nationals. Even with regard to revolting and horrible crimes the connection with aggression or with war crimes in the narrower sense must be proved, and where the proof is not satisfactory they are not considered by the International Military Tribunal as crimes against humanity within the meaning of the Charter.

(iv) The propositions asserting a far-reaching nature of the notion of crimes against humanity, as embodied in the Charter, are subject to very considerable qualifications. Concerning the first principle, assumed to be implied in the Charter, according to which international law contains penal sanctions against individuals guilty of inhumane acts, which are applicable not only in time of war but also in time of peace, it is clear that what has been introduced by the Charter are not international criminal provisions of universal application, but provisions concerning a crime which may be described as subsidiary or accessory to the traditional types of war crimes. Nor can the second principle, according to which it should not make any difference where the crimes are committed and what the nationality of the victim is, be said to be part of the law laid down in the London Agreement and applied at Nuremberg. It is, on the contrary, subject to fundamental reservations.

The third principle ascribed to the Charter, namely, the sweeping away of national sovereignty as an obstacle to bringing to justice perpetrators of crimes against humanity, can hardly be deduced from the terms of that document. The one state sovereignty involved, namely, the sovereignty of the German Reich, had been swept away not by the Charter of the International Military Tribunal nor by the Nuremberg proceedings and Judgment, but by the temporary disappearance of Germany as a sovereign

As far as State sovereignty was concerned, both the draftsmen of the Charter and the Court were operating in a vacuum, as it were, the sovereignty of the German State as the obstacle barring the enforcement of justice having been destroyed by the historic events of May and June, 1945. In view of this fact, it is doubly significant that the Charter and the Tribunal respected German sovereignty to the extent of subjecting to the Court’s jurisdiction only such criminal activities as were connected with either crimes against peace or with violations of the laws and customs of war, i.e., only such acts as directly affected the interests of other states. It is by no means a novel principle in international law that the sovereignty of one State does not prevent the punishment of crimes committed against other States and their nationals. The laws and customs of war are not a restriction on state sovereignty. They regulate the relationship between one State and persons who are not subject to its sovereignty. The Hague Regulations, for example, set the limits of what an occupant is permitted to do, and what is forbidden to him; the question of sovereignty is not involved. The Hague Regulations state, as it were, what is intra vires and what is ultra vires of an occupant qua occupant as distinguished from the sovereign. The Nuremberg Tribunal showed itself willing to extend the protection which the laws and customs of war on land afford to the population of territory under belligerent occupation to foreign territory other than under occupatio bellica (Austria, parts of Czechoslovakia in 1938), and, in time of war, to any population. As for the consistent extension of this principle so as to safeguard human rights also in time of peace against the victims’ own national authorities, the Charter and Tribunal proceed with great caution and reserve.

(v) The preceding observation will become more apparent when the question of the status of the Nuremberg Tribunal is considered. Here, it is sufficient to record only the following:

The Nuremberg Tribunal found its being in the Agreement entered into in London on 8th August, 1945,\(^2\) by the Four Major Powers, in which they provided for the establishment of an International Military Tribunal for the trial of war criminals whose offences had no “particular geographical location”. In accordance with Article 5 of the Agreement, nineteen Governments of the United Nations\(^3\) have expressed their adherence to the Agreement and the Charter, both of which had been concluded by the Four Powers “acting in the interests of all the United Nations.”\(^4\)

In its judgment the Tribunal stated that in creating the Tribunal the signatory Powers “have done together what any one of them might have

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3. These Governments are the following: Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxemburg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay.
4. The preamble to the *Agreement*, paragraph 4.
done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."(1) In addition, the Tribunal expressed the opinion that "the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world."(2)

These brief statements of the Tribunal, as well as the relevant provisions of the Agreement and the Charter, raise a number of intrinsic problems and questions as to the exact status of the Nuremberg Tribunal and its military, international, judicial and ad hoc characteristics which are of primary relevance in assessing properly the importance of the Nuremberg Trial and the authority of the Nuremberg Judgment for the development of international law in general, and for the protection of human rights in particular. Here, the question would arise whether and to what extent the attitude of the Tribunal with regard particularly to the violations of human rights which come within the notion of crimes against humanity, and its interpretation of the law in general, was or is binding in other cases tried or to be tried before other courts, whether the International Military Tribunal for the Far East, or the municipal, occupational or military tribunals of other United Nations or other countries.

(2) The Tokyo Charter and Indictment

The trial against the Japanese Major War Criminals which opened on 29th April, 1946, in Tokyo before the International Military Tribunal for the Far East is still in progress at the time of the writing. This Tribunal was constituted by a Special Proclamation issued on 19th January, 1946, by General D. MacArthur in his capacity as Supreme Commander for the Allied Powers.(3) The composition, jurisdiction, powers and rules of procedure of the Tribunal were regulated by a Charter, approved and enacted also by the Supreme Commander in the said Proclamation.(4)

For the reason stated, the following observations are necessarily based only on the Charter and the Indictment submitted to the Far Eastern Tribunal. It is therefore impossible to consider at this stage the manner in which that Tribunal applied the relevant provisions of the Charter and the effect it gave them in the cases brought before it for trial.

(a) The provisions of the Far Eastern Charter

The substantive law for the prosecution and punishment of the defendants tried at Tokyo is formulated in Article 5 of the Charter. After listing crimes against peace under (a) this article enumerates the following groups of crimes:

(1) Judgment, p. 38.
(2) op. cit., p. 38.
(3) Special Proclamation of the Supreme Commander for the Allied Powers establishing an International Military Tribunal for the Far East, Tokyo, 19th January, 1946.
(4) The Charter attached to the Proclamation of 19th January, 1946, was subsequently amended by General Orders No. 20 of 26th April, 1946.
(b) Conventional War Crimes: namely, violations of the laws and customs of war;

(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.\(^{(9)}\)

If we compare the provisions of Article 5(b) and (c) of the Far Eastern Charter with those of Article 6(b) and (c) of the Nuremberg Charter, the following differences become apparent:

(i) War crimes in the narrower sense are in the Far Eastern Charter called "conventional war crimes". This description is limited to the general definition that "conventional war crimes" represent "violations of the laws and customs of war". In the Nuremberg Charter a similar definition is followed by an extensive enumeration of specific offences cited _exempli causa_: It is hardly necessary to point out that there is no difference in the substance and that both Article 5(b) and 6(b) of the two Charters cover exactly the same field.

(ii) In the Far Eastern Charter, it is not expressly stated that "crimes against humanity" are crimes committed "against any civilian population"; these terms were inserted in the Nuremberg Charter chiefly with a view to including crimes perpetrated by the Nazi regime against their own citizens. The Indictment presented to the Tokyo Tribunal does not charge, however, the Japanese Major War Criminals with crimes committed against Japanese subjects on Japanese territory, but is restricted to offences committed against persons other than Japanese nationals.

(iii) In the Far Eastern Charter there is no mention of "persecutions on religious grounds", possibly because such violations by the Japanese Major War Criminals had not been committed. On the other hand, the relevant provision covers the same field as the Nuremberg Charter in regard to the comparatively more important "persecutions on political or racial grounds". In this connection it may be assumed that, in case any persecutions on religious grounds should be established and brought forward in the course of the proceedings, they could easily be included within the notion of persecution on political grounds. The example of the persecution of Jews in Nazi Germany, which motivated the express reference to persecution on religious grounds in the Nuremberg Charter, is a case in point. Persecutions of this nature, embracing communities or groups of individuals akin on account of their religion, are always carried out in pursuance of a "political" programme and a definite "political" aim, so that in that general and wide sense they are invariably of a "political" nature.

(iv) The text of the Far Eastern Charter did not give rise to any differences of opinion as to the effect and meaning of the definition of

\(^{(9)}\) The provisions of Article 5 were not affected by the amendments to the Charter introduced by General Orders No. 20 of 26th April, 1946.
"crimes against humanity" in Article 5(c) when such crimes are committed before the outbreak of war. The Charter, having been drafted and promulgated after the Berlin Protocol was from the outset clear on the point that, to constitute "crimes against humanity," not only acts representing "persecutions on political or racial grounds," but also acts consisting in "murder, extermination, enslavement, deportation" or any other "inhumane act," must have been committed in execution of or in connection with any other crime within the jurisdiction of the Tribunal.

(b) The Far Eastern Indictment

(i) Attempt to introduce new type of international crime. Apart from the classical types or categories of criminal offences committed in violation of the laws and customs of war, the Tokyo Indictment introduced a special category as to which it can be said that it has no parallel in the Nuremberg or any other trial held so far, and which, should it be admitted by the Far Eastern Tribunal, would be entirely new in international law.

The Prosecution charged the defendants with the loss of life ("killing" and "murder") of the combatants and civilians of a number of attacked countries, as a direct result of the military operations with which Japan opened the hostilities against those countries. The charge was based upon the fact that Japan "initiated unlawful hostilities" in violation of Article 1 of the Hague Convention relative to the Opening of Hostilities, that is to say without a warning or a declaration of war. The Prosecutors submitted the argument that such opening of hostilities being "unlawful", the accused and the Japanese armed forces "could not acquire the rights of lawful belligerents". Accordingly, the killing of servicemen and civilians on the occasion of these treacherously opened hostilities was regarded by the Prosecutors as representing a separate criminal act deriving from the unlawfulness of the attacks themselves.\(^{(0)}\)

Specific charges which were brought forward in this connection include the killing of Admiral Kidd and about 4,000 members of the U.S. Navy and Army on the occasion of the attack on Pearl Harbour on 7th December, 1941;\(^{(5)}\) the killing of British officers and soldiers during the attack on Kota Bahru, Hong Kong and Shanghai on 8th December, 1941;\(^{(6)}\) the killing of the servicemen of the Philippine forces whilst invading the Philippines territory on 8th December, 1941;\(^{(6)}\) and the killing of servicemen of the U.S.S.R. and Mongolia on the occasion of the aggressions waged against them in the summer of 1939 whilst these two countries were neutral.\(^{(6)}\) Jointly with these cases, charges were submitted for atrocities.

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\(^{(0)}\) See Indictment, Count 37. The Treaty Article referred to is Article 1 of the Hague Convention relative to the Opening of Hostilities.

\(^{(1)}\) See Count 39.

\(^{(2)}\) See Counts 40, 41 and 42.

\(^{(3)}\) See Count 43.

\(^{(4)}\) See Counts 51 and 52.
against the civilian population and prisoners of war ("disarmed soldiers") committed in the course of similar attacks and aggressions, particularly against China.

All these charges were grouped separately from the section dealing with "conventional war crimes and crimes against humanity", and treated under the heading "murder". In this section they were described as representing "at the same time crimes against peace, conventional war crimes, and crimes against humanity".\(^2\)

Leaving aside the purely technical question whether charges for atrocities perpetrated against "civilians and disarmed soldiers" ought not to have been included in the section dealing with war crimes and crimes against humanity\(^3\) rather than in the section headed "murder", a prosecution for the loss of the lives of combatants and civilians during military operations is undoubtedly a novel attempt to develop to the utmost the legal consequences which follow logically from the fact that, to open hostilities without a declaration of war, is a breach of existing treaties and consequently represents an illegal act in international law.

The novelty consists in qualifying this illegal act as being at the same time a criminal act, and accordingly, in regarding persons who lost their lives during such military operations as victims of war crimes and crimes against humanity. This attempt is the more significant in that identical acts committed by Germany on the occasion of every aggression launched by the Nazis in Europe, were not prosecuted before the Nuremberg Tribunal.

It remains to be seen whether the above mentioned charges, made in Tokyo will be accepted by the Far Eastern Tribunal. If so, this would represent a further development of the laws of war. At this stage of the Tokyo Trial it is still difficult to see clearly all the elements which would compose that development. They could, however, be tentatively described as follows:

The loss of lives inflicted upon the military personnel and other persons of a nation attacked without a declaration of war would be a crime in itself, presumably on account of the fact that such persons were unprepared to meet a military attack from the adversary. To deprive them of their lives under such circumstances would be tantamount to sheer murder and therefore criminal. The course which could then be taken is an alternative one. One might lay down as a legal presumption that in the absence of a declaration of war the attacked nation is to be deemed unprepared in all cases; or, on the other hand, one might judge each case upon its own merits, i.e., whether the attacked nation was in fact ready to meet the aggression or not.

Judging upon, and within the limits of, the concrete instances for which the Japanese war criminals were indicted, the criminal nature of such acts would in either case be restricted to the period of the opening of hostilities,

1. See Counts 45-50.
2. See Group, Two, Introductory paragraph and Counts 37-52. Italicics introduced.
i.e. to the period during which it is justifiable to consider that the armed forces of the attacked nation were taken unaware and could not therefore undertake the requisite operations to engage in regular combat with the aggressor. The killing of combatants and civilians during such operations after the period of surprise and unpreparedness had elapsed would not prima facie represent a crime.

(ii) Crimes committed in the territory of non-belligerent or neutral powers, or against nationals of such countries. In the Tokyo Indictment the Prosecution also included charges of crimes committed in the territories of Portugal and of the Soviet Union, and/or against nationals of these countries.

In this respect the important point is that Portugal remained neutral throughout the whole period of the last war and that the Soviet Union entered into a state of war with Japan only on 8th August, 1945, just a few days before Japan’s capitulation.(1) Prior to that date, the Soviet Union and Japan were linked by a Pact of Non-Aggression signed on 13th April, 1941, which represented the legal basis of their mutual neutrality in the wars in which they were respectively engaged after that date, and until the Soviet Union declared war on Japan.

In their charge relating to war crimes and crimes against humanity the Prosecution indicted the defendants for “breaches of the law and customs of war... against the armed forces of the countries hereinafter named and against many thousands of prisoners of war and civilians then in the power of Japan belonging to... the Republic of Portugal and the Union of Soviet Socialist Republics...”(2) Both these countries were named, without distinction, together with those at war with Japan, none of which entered into a state of war with Japan at a date later than 1941.(3) The period of time indicated as relevant to the charges is the period between 7th December, 1941, and 2nd September, 1945.(4)

The Indictment does not provide a clear answer to the question whether the defendants of the Tokyo Trial were charged in connection with crimes which were actually committed in Soviet and Portuguese territory, or against such nationals outside those territories. In this connection concrete instances of crimes perpetrated against nationals of several countries which were at war with Japan in the relevant period of time (between 7th December, 1941, and 2nd September, 1945) were given, whereas no such cases were produced with regard to Portugal or the Soviet Union. As regards Portugal, the only fact produced was the invasion of

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(1) The readiness of the Japanese Government to accept the terms of surrender as laid down in the Declaration issued at Potsdam on 26th July, 1945, was communicated on 10th August, 1945. The formal acceptance of these terms was notified on 14th August. For the text of both communications see Department of State Bulletin, Vol. XIII, 1945, No. 320, p. 205, and No. 321, p. 255.

(2) See Indictment, Counts 53 and 55.

(3) These other countries are: China, the U.S.A., the British Commonwealth of Nations, comprising for the purpose of the indictment (see Count 4), the United Kingdom, Australia, Canada, New Zealand, South Africa, India, Burma and the Malay States; France, the Netherlands; Philippines; Thailand. For particulars concerning the dates of the declarations of war between these countries and Japan, see Department of State Bulletin, Vol. XIII, 1945, p. 230-238. For dates concerning the aggression made by Japan against the territories of these countries see Indictment in its various counts, and Appendix A.

(4) See Indictment, Counts 53 and 55.
the Portuguese part of the island of Timor on 19th February, 1942.(1) As to the Soviet Union, reference was made to two military agressions both of which took place before the beginning of the relevant period of crimes. One concerns the attack at Lake Hassan in Soviet territory proper, which took place in 1938. The other concerns the attack made on the territory of the Mongolian People's Republic in 1939 at the Halkin-Gol River, which lies outside the territory of the Soviet Union, but where members of the Red Army were involved in combats as allies of the Mongolian Republic.(2) The main feature of this part of the Indictment is that it extended the provisions of Article 5(b) and (c) of the Charter to acts which were perpetrated against nationals and/or on the territory of countries which at the time of the commission of such crimes were not in a state of war with the Power whose nationals were held criminally responsible for the said acts.

(iii) Inhumane acts and persecutions which are not considered as "crimes against humanity". The Tokyo Indictment made reference to a number of acts, which throw light on the violation of certain human rights of particular interest both in time of war and peace.

(a) One type of these acts concerns the illicit traffic in narcotics, and more particularly in opium. In the description of facts and circumstances relevant to prove inter alia the planning, preparation and waging of unlawful wars, the Prosecutors made reference to the following events:

"During the whole period covered by this Indictment, successive Japanese Governments, through their military and naval commanders and civilian agents in China and other territories which they had occupied or designed to occupy, pursued a systematic policy of weakening the native inhabitants' will to resist... by encouraging increased production and importation of opium and other narcotics and by promoting the sale and consumption of such drugs among such people."(3)

The Indictment went on to describe how the Japanese Government secretly provided large sums of money for this purpose, how it used the proceeds of the traffic in narcotics to finance aggressive wars, and how it conducted these illegal affairs through governmental channels and organisations.(4) The main legal point made by the Prosecutors in this respect was that the harm inflicted upon the civilian populations concerned was in violation of existing treaties, which were all referred to expressly.(5)

These acts could be regarded as representing one of the types of the "inhumane acts" falling within the notion of "crimes against humanity", as defined in Article 5(c) of the Far Eastern Charter.

(b) Another group of acts of the persecution type affect the political or civic rights of the citizens of Japan itself. In the description of relevant events attached to the main body of the Indictment, the Prosecutors described in the following manner how the "militarists" imposed their rule on Japan and violated the political and civic rights of their compatriots:

(1) See Indictment, Appendix A, Section 10.
(2) See Appendix A, Section 8.
(3) See Appendix A, Section 4. Italics introduced.
(4) See Appendix A, Section 4.
(5) See Appendix B, under 10, 16, 32 and 35.
"... Free Parliamentary institutions as previously existed were gradually stamped out and a system similar to the Fascist or Nazi model introduced...

"... Government agencies... stamped out free speech and writing by opponents of this policy... Opposition to this policy was also crushed by assassinations of leading politicians... The civil and especially the military police were also used to suppress opposition to the war policy.

"The educational systems, civil, military and naval, were used to inculcate a spirit of totalitarianism, aggression, desire for war, cruelty and hatred of potential enemies."

Reference was made to breaches of the then binding treaties thereby committed, for instance the reference to Article 22 of the Covenant of the League of Nations.(2)

(c) Finally, there are in the Indictment references to a number of other breaches of treaties. Such, for instance, is the reference, already mentioned, to Article 22 of the Covenant which bound mandatory Powers to guarantee in the mandated territories the prohibition of abuses such as the slave trade and the liquor traffic.(3) Another instance is a reference made to Article 3 of the Mandate granted by the League of Nations to Japan in 1920, prohibiting slave trade and forced labour in the mandated territories.

In regard to most of the acts referred to in the parts of the Indictment quoted above under (a), (b) and (c), one could put forward the question whether offences or abuses such as the illicit traffic in narcotics and liquors or slave trade are to be recognised as being criminal in themselves and consequently as entailing definite penal retribution, or whether they are to be treated as lying only within the limits of violations of international obligations, allowing or calling for certain sanctions but not for those provided by penal law. Mutatis mutandis, the same question applies to the suppression of political or civic rights on the part of a State (Government) in regard to its own citizens.

By the provisions of Art. 5(c) and 6(c) respectively of the Tokyo and Nuremberg Charters, which introduced the legal concept of “crimes against humanity” the right of the international community to conduct criminal proceedings for “inhumane acts committed against any civilian population, before or during the war”, was recognised only inasmuch as such acts were committed “in execution of or in connection with any crime within the jurisdiction of the Tribunal”, particularly in execution of or in connection with the planning, preparation, initiation or waging of an aggressive war. In its judgment the Nuremberg Tribunal dismissed the case for such suppressions of the rights of German citizens committed before the war, on account of lack of evidence to support the charge that they were linked up with aggressive wars prepared and waged by the Nazi Government.

As far as the Tokyo Indictment is concerned, it should be pointed out that the offences or abuses mentioned above under (a), (b) and (c) have not been made the subject of any of the charges preferred against the defendants and have not even been mentioned in the charge sheets of

(1) See Appendix A, Section 6. Italicized.
(2) See Appendix B, under 15.
(3) See Appendix B, under 15.
the indictment. They have merely been included in Appendix A to the indictment, which contains summarized particulars showing the principal matters and events upon which the Prosecution will rely in support of the several counts of the indictment relating to crimes against peace, and in Appendix B which is a list of Articles of Treaties violated by Japan and incorporated in Groups One and Two of the indictment dealing with crimes against peace and with special types of murder crimes.

(3) The Peace Treaties of 1947

The Peace Treaties which, following the Peace Conference of Paris of 1946, were concluded with Italy and the four satellite countries and signed in Paris on 10th February, 1947, were a further step in making the notion of “crimes against humanity” part of the common law of nations.

All these Treaties contain provisions regarding not only persons accused of war crimes in the traditional sense of the term, but also of crimes against humanity (and crimes against peace). Thus Article 45 of the Peace Treaty with Italy provides in paragraph I that “Italy shall take all necessary steps to ensure the apprehension and surrender for trial of:

(a) Persons accused of having committed, ordered or abetted war crimes and crimes against peace or humanity.”

In paragraph 2 it is further stated that “at the request of the United Nations Government concerned, Italy shall likewise make available as witnesses persons within its jurisdiction, whose evidence is required for the trial of persons referred to in paragraph I of this Article.” As already mentioned, the Peace Treaty with Italy provides also for punishment of crimes against peace, war crimes and crimes against humanity committed during the Italo-Abyssinian war of 1935-36.

Similar provisions have also been included in the Peace Treaties with Roumania, Bulgaria, Hungary and Finland. It must be presumed that the terms “war crimes”, “crimes against humanity”, as well as the term “crimes against peace”, which are not defined in these Treaties, have the same connotation as in the London Charter of 1945.

(4) Endorsement by the United Nations

On 13th February, 1946, the General Assembly of the United Nations passed a resolution regarding the surrender of war criminals, in the Preamble of which it took note of the definition of war crimes, crimes against peace, and crimes against humanity contained in the Charter of the International Military Tribunal dated 8th August, 1945. In December, 1946, at a time when three States which had been neutral during the Second World War had joined the ranks of the United Nations (Sweden, Iceland, and Afghanistan), the General Assembly again took note “of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European

(2) See Article 38 and Section A (1), 2 above. The Italo-Abyssinian War of 1935-36.
(3) Resolutions adopted by the General Assembly during the first part of its first session from 10th January to 14th February, 1946 (Doc. A/64), p. 9.
Axis signed in London on 8th August, 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19th January, 1946", and affirmed "the principles of international law recognised by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal".

(5) Occupational and municipal legislation

(i) Crimes against humanity in the Control Council Law No. 10. On 20th December, 1945, the Control Council for Germany enacted a law regarding the punishment of persons guilty of war crimes, crimes against peace and against humanity which is generally known as "Control Council Law No. 10". This law was passed "in order to give effect to the terms of the Moscow Declaration of 30th October, 1943, and the London Agreement of 8th August, 1945, and the Charter issued pursuant thereto, and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal ".

Article I of Law No. 10 provides, inter alia, that the London Agreement, is made an integral part of the law. Article II provides that each of the following acts is recognised as a crime and enumerates under (a) crimes against peace, under (b) war crimes, under (c) crimes against humanity, and under (d) membership in a category of criminal groups or organisations declared criminal by the International Military Tribunal. The provision concerning crimes against humanity reads as follows:

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

If we compare the definition of crimes against humanity under Law No. 10 with the definition of crimes against humanity in the Charter of the International Military Tribunal, we find the following differences:

(1) The definition of Law No. 10 begins with the words "Atrocities and offences, including but not limited to ... " . These words are not contained in the Charter. This means that the enumeration in the Charter is exhaustive, in Law No. 10 exemplative. This difference, however, is not important, because the words used in the Charter, "or other inhumane acts", are so wide that the enumeration is, in practice, also merely exemplarive.

(2) Law No. 10 enumerates the following acts which are not contained in the Charter, namely, "imprisonment, torture and rape".

(1) Resolution (9) passed in the 55th plenary meeting, 11th December, 1946. General Assembly Journal, No. 75: Supplement A-64, Add. I, p. 945.
(2) For most of this Section, which was included in his article on Crimes against Humanity, the Commission is indebted to Dr. E. Schweib, op. cit., p. 216-224.
(4) Signed on 30th October 1943, but published on 1st November, 1943.
(3) The word "and" before "other inhumane acts" is replaced in Law No. 10 by the word "or". This again indicates that it was the intention of the makers of Law No. 10 to give it a wider scope, although the practical effect of this alteration should not be too great.

(4) The words "before or during the war" are omitted in Law No. 10. It is submitted that this alteration has no practical importance because from other provisions of Law No. 10 it is quite clear that Law No. 10, too, applies to crimes committed both before and during the war. One of the provisions bearing this out is Article II(5) of Law No. 10 regarding the Statutes of Limitation. It provides: "In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30th January, 1933, to 1st July, 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment ".

The implication of this provision is, of course, that crimes committed before 30th January, 1933, can be made the subject of criminal prosecution. In other words, even crimes committed during Hitler's "struggle for power", i.e. before 1933, can be investigated and prosecuted. The words "before or during the war" may have been omitted because the legislators intended the provisions to cover not only acts committed before and during the war, but also acts committed after the war.

(5) Law No. 10 does not contain the words "in execution of or in connection with any crime within the jurisdiction of the Tribunal ". This, of course, is the most fundamental and most striking difference between the Charter and Law No. 10, particularly in view of the great importance attributed by the Nuremberg Prosecution and by the International Military Tribunal to these very words. From this difference between the text of the Charter and the text of Law No. 10 it follows that this qualification of the term "crime against humanity", as understood by the International Military Tribunal, is entirely inapplicable in proceedings under Law No. 10. Contrary to what was said by the International Military Tribunal with regard to the law to be applied by it, it is not necessary for an act to come under the notion of crime against humanity within the meaning of Law No. 10 to prove that it was committed in execution of, or in connection with, a crime against peace or a war crime.

Owing to this difference between the Charter on the one hand and Law No. 10 on the other, the whole jurisprudence evolved in the Nuremberg proceedings with a view to restricting crimes against humanity to those closely connected with the war becomes irrelevant for the courts which deal with crimes against humanity under Law No. 10. At first sight it seems rather startling that the law applied to the Major War Criminals, who were tried under the Charter, should be less comprehensive and therefore less severe than the law applied to perpetrators of lesser rank. In reply to this objection, it may be said: (a) that the objection is a theoretical and doctrinal one only, because the Major War Criminals were certain to be caught in the net of the law in spite of the qualification contained in Article 6(c) of the Charter; (b) that the striking difference in the texts of the Charter on the one hand, and of Law No. 10 on the other, does not permit of any other interpretation; (c) that the difference
between the Charter and Law No. 10 probably reflects the difference both in the constitutional nature of the two documents and in the standing of the tribunals called upon to administer the law. As has been pointed out, the International Military Tribunal was, in addition to being an occupation court for Germany, also—to a certain extent—an international judicial organ administering international law, and therefore its jurisdiction in domestic matters of Germany was cautiously circumscribed. The Allied and German courts, applying Law No. 10, are local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities.

There remains one difficulty in the interpretation of Law No. 10. Article I makes the London Charter an integral part of that Law. Article II contains, as shown, provisions respecting, inter alia, crimes against humanity which differ from the London Charter. Which provision is to prevail? It is submitted that Article II is the operative provision, the quoted part of Article I only incorporating the provisions regarding Major War Criminals in the local law of Germany. The question of the guilt or innocence of persons other than the Major War Criminals, is then, governed by Article II.

In the British zone of Control in Germany, a special Ordinance concerning crimes against humanity was issued in accordance with Control Council Law No. 100 which authorised German ordinary courts to exercise jurisdiction in all cases of crimes against humanity committed by persons of German nationality against persons of German nationality or stateless persons. This Ordinance contains a provision pertaining to the relationship between the concept of crimes against humanity and offences under ordinary German law. Article II of the Ordinance provides that if in a given case the facts alleged, in addition to constituting a crime against humanity, also constitute offences under ordinary German law, the charge against the accused may be framed in the alternative and that the above-quoted provision of Law No. 10 regarding the statutes of limitation and the irrelevance of Hitler's amnesties apply mutatis mutandis to the offences under ordinary German law. In the United States zone of Occupation, the Control Council Law No. 10 was carried out by the Military Government Ordinance No. 7, which became effective on 18th October, 1946. In the French zone of Occupation, Ordinances of 25th November, 1945, and 8th March, 1946, were promulgated by the French Commander-in-Chief. (1) In the Instructions issued by the French Supreme Command in Germany, General Directorate of Justice, for the investigation, prosecution, and trial of war crimes, the term “crime against humanity” is defined as follows: “crimes against humanity are crimes committed against any civilian population of whatever nationality including persecutions on political, racial or religious grounds.” In the

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(1) Ordinance No. 47, published in Military Government Gazette, Germany, British Zone of Control, No. 13, p. 306.
Instructions it was added that where such crimes have been committed against nationals of Axis countries the prosecution and punishment of the offenders may involve considerations affecting the general policy of the Allies: investigations in regard to such matters should therefore only be undertaken in pursuance of instructions from higher quarters.\(\)\(^1\)

(ii) Crimes against humanity in trials before American Military Commissions in the Far East. The United States military authorities issued different sets of Regulations for the United States Military Commissions in the Far Eastern and China Theatres of War, which also contain provisions regarding crimes against humanity, and which, in general, are based on the definition contained in the London Charter of 8th August, 1945.\(\)\(^2\) Under the Regulations which were issued by General Headquarters of the United States Armed Forces, Pacific, on 24th September, 1945, the Military Commissions were given jurisdiction to try all three types of crimes defined in Article 6 of the London Charter, namely, war crimes, crimes against peace, and crimes against humanity. Crimes against humanity are, though this term is not actually used, defined as follows: “Murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or in connection with any offence within the jurisdiction of the Commission, whether or not in violation of the domestic law of the country where perpetrated”.

It will be seen that while the Regulations were, in general, based on Article 6(c) of the London Charter, the following differences occur:

(a) While the London Charter speaks of persecutions on political, racial or religious grounds, the Pacific Regulations add the concept of “national grounds”. This is the more remarkable, because, as was already stated, the Charter of the International Military Tribunal for the Far East speaks only of political or racial grounds, omitting one of the grounds contained in the European Charter, namely, religious grounds.

(b) The words “before or during the war” are omitted in the Pacific Regulations of 24th September, 1945.

Both these differences between the Pacific Regulations and the London Charter were removed when the Regulations of 24th September, 1945, were replaced by similar Regulations of 5th December, 1945, in which the definition of crimes against humanity is as follows: “Murder, extermination, enslavement, deportation and other inhumane acts, committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds, in execution of, or in connection with, any crime defined herein, whether or not in violation of the domestic laws of the country where perpetrated”. The “national” grounds have been omitted, and the expression “before or during the war” has been added. The latter phrase has been extended by a further provision, which reads as follows: “The offences need not have been committed after a

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particular date to render the responsible party or parties subject to arrest, but in general should have been committed since or in the period immediately preceding the Mukden incident of 18th September, 1931”.

Provisions on the same lines as those contained in the Regulations for the Pacific Theatre, dated 24th September, 1945, were made for the China Theatre on 21st January, 1946. Under the Regulations issued for United States Military Commissions in Europe, their jurisdiction is restricted to war crimes in the narrower sense and does not include crimes against humanity.

(iii) Regulations for British Military Courts. The instrument under which the trials of persons charged with war crimes by British Military Courts are conducted is the Royal Warrant of 14th June, 1945.(1) This instrument restricts the jurisdiction of the military courts to the trial of “war crimes”, and “war crime” is defined as “violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939.” Acts committed before the war, and acts which are not violations of the rules of warfare, are, therefore, outside the jurisdiction of British war crimes courts. They cannot, therefore, try crimes against humanity, unless they are simultaneously violations of the laws and customs of war and have been committed after 2nd September, 1939. The Canadian Order in Council, the “War Crimes Regulations (Canada),”(2) which came into force on 30th August, 1945, and which was re-enacted in statutory form with effect from 30th August, 1945, by the War Crimes Act of 1946,(3) contains a definition based on the same principle: “War crime” means “a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September, 1939.” The Commonwealth of Australia War Crimes Act, 1945,(4) defines “war crime” as meaning: (a) a violation of the laws and usages of war; (b) any war crime within the meaning of a previous instrument of appointment of a Board of Inquiry, committed in any place whatsoever, whether within or beyond Australia, during any war. The Instrument of Appointment referred to in the Act(5) explains the term “war crime” by adopting the list of thirty-two items drawn up in 1919, by the Commission of Fifteen, with a few modifications and additions, the most important among the latter being the crime against peace as defined in Article 6(a) of the London Charter. There is, however, no item in the enlarged list corresponding to Article 6(c) of the London Charter.

(iv) Crimes against humanity in municipal legislation. The legislative instruments so far discussed afford the basis for proceedings against

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(2) P.C. 5831 of 30th August, 1945, made by the Governor-General in Council under the authority of the War Measures Act of Canada.
(3) An Act, respecting War Crimes: 10 George VI, c. 73, assented to 31st August, 1946.
(4) Regulation 2 (f).
(5) Regulation No. 48 of 1945, assented to 11th October, 1945.
(6) Instrument of Appointment of the Board of Inquiry of 3rd September, 1945, under the National Security (Inquiries) Regulations, Statutory Rules 1941, No. 35, as amended.
alleged perpetrators of crimes against humanity, in military and occupation courts and in courts, such as the German courts, which derive their jurisdiction in this respect from Allied legislation. Where the ordinary municipal courts of a territory, be it Allied or former enemy, are trying similar offences, they do so, as a rule, under pre-existing positive penal law; it is therefore neither necessary not has it happened frequently that the concept of crimes against humanity has expressly been made part of codified municipal criminal law. The French Ordinance of 28th August, 1944, which was passed at Algiers and forms the basis of the prosecution of war criminals by French courts, is a good illustration of the general attitude of the laws of continental countries to the problem of war crimes in the wider sense. The French Ordinance provides, inter alia, that enemy nationals or agents of other than French nationality who are, or have been, serving enemy administration or interests, and who are guilty of crimes or offences committed since the beginning of hostilities either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a person serving or having served in the French armed forces, or a stateless person resident in French territory before 17th June, 1940, or a refugee residing in French territory, or against the property of any person enumerated above, or against any French corporate bodies, shall be prosecuted by French Military Tribunals and shall be judged in accordance with the French laws in force and according to the provisions set out in the Ordinance, where such offences, even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war. This French provision subjects perpetrators of war crimes (in the wider sense) to the provisions of internal penal law and exempts from their operation acts of legitimate warfare. Similarly, the Netherlands Royal Decree establishing a Commission for the Investigation of War Crimes defines war crimes as "facts which constitute crimes considered as such according to Dutch law and which are forbidden by the laws and usages of war".

What, in the London Charter, are called war crimes and crimes against humanity are treated as violations of the pre-1938 provisions of municipal penal law in the Retribution Decree of Czechoslovakia. This contains, inter alia, provisions relating to membership in criminal organisations (Sections 2 and 3(2)), deportations for forced labour (Section 6), unjustified imprisonment (Section 7) and also refers to "national, political or racial persecution" (Section 10). The following are examples of enactments in the passing of which the legislature has either referred, in a general way, to such conceptions as "laws of humanity" or "obligations of humanity" or has positively embodied the notion of "crimes against humanity" in the respective system of internal penal law.

(a) In Belgium the Decree (Arrêté) of 13th December, 1944, regarding the establishment of a Commission charged with the investigation of violations of international law and of the laws and customs of war.

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(2) Decree of 29th May, 1946, No. F.85, Art. 1.

(3) Decree of 19th June, 1945, Collection of Laws and Decrees, No. 16.

in its Preamble recalls that "numerous violations of the rules of international law and of the obligations of humanity (des devoirs d'humanité) have been committed by the invaders ". The Commission is described as a commission of inquiry into the violations of the laws and customs of war and the obligations of humanity (Art. 1).

(b) Similarly, in Luxembourg the Grand Ducal Decree of 3rd July, 1945, establishing a National Office for the Investigation of War Crimes, in its Preamble refers "to the numerous violations of international law and of the obligations of humanity (des devoirs de l'humanité) which have been committed by the invader", and the National Office, is charged, in particular, to collect evidence concerning violations of the rules of international law, of the laws and customs of war, of the obligations of humanity, and of all crimes and offenses committed by the invader.

In both the Belgian and Luxembourg statutes the term "obligations of humanity" (des devoirs de l'humanité) is hardly used in the technical sense in which the expression "crimes against humanity" has been adopted in the (subsequent) London Charter to which both Belgium and Luxembourg eventually adhered.

(c) Vespasien V. Pella draws attention to the Romanian Decree-Law of April, 1945, regarding the prosecution of war criminals and those responsible for the national disaster. According to Pella, this law seems to anticipate the Charter annexed to the London Agreement of 8th August, 1945. It subjects to punishment, in addition to violators of the rules of warfare, inter alia, persons "who have ordered or have committed acts of suppression either collective or individual, in accordance with a political or racial plan", or "the removal and transportation of persons in order to exterminate them", or "have imposed inhuman treatment upon those who were in their power", all of which are facts either covered by, or very akin to, crimes against humanity as defined in Article 6(c) of the London Charter.

(d) The Austrian Constitutional Law of 26th July, 1945, concerning war crimes and other National-Socialist misdeeds also enacted before the London Four Power Agreement, distinctly juxtaposes war crimes and crimes against humanity in providing that:

"Any person who, in the course of the war launched by the National Socialists, has intentionally committed or instigated an act repugnant to the natural principles of humanity or to the generally accepted rules of international law or to the laws of war, against the members of the armed forces of an enemy or the civilian population of a state or country at war with the German Reich or occupied by German forces shall be punished as a war criminal.

"Any person who, in the course of this war, acting in the real or assumed interest of the German armed forces or of the National Socialist tyranny, has committed or instigated an act repugnant to the natural principles of humanity against any persons, whether in connection with warlike or military actions or the actions of militarily organised groups, shall be considered guilty of the same crime."

(1) Mémorial du Grande Duché de Luxembourg, No. 33, of 7th July, 1945, p. 373.
(3) Staatgesetzeblatt No. 32, amended 18th October 1945, Staatgesetzeblatt No. 199.
(4) Section I(1) and (2).
(e) The Danish Act concerning the punishment of war crimes after stating that a foreigner who has infringed the rules or customs of international law regulating occupation and war and has performed, in Denmark or to the detriment of Danish interests, any deed punishable per se in Danish law, can be prosecuted in a Danish court, goes on to provide as follows:

"In addition to the instances cited in paragraph I, persons having committed the following crimes shall be liable to prosecution under this Act: war crimes or crimes against humanity such as murder, ill-treatment of civilians, prisoners or seamen, the killing of hostages, looting of public or private property, requisitioning of money or other valuables, violation of the Constitution, imposition of collective punishments, destruction by explosives or otherwise, in so far as such actions were performed in violation of the rules of international law governing Occupation and War. This Act shall further apply to deportation or other political, racial or religious persecution contrary to the principles of Danish Law, and further to all actions which, though not specifically cited above, are covered by Article 6 of the Charter of the International Military Tribunal."

Here Article 6 of the London Charter, including its provision concerning crimes against humanity, is expressly embodied in Danish domestic law.

(f) Since the above observations on municipal legislation were written the United Nations War Crimes Commission has made a voluminous collection of enactments regarding the punishment of war crimes in the wider sense, promulgated by all Allied and former enemy countries. The municipal legislation on war crimes constitutes an immense subject for itself and cannot be properly presented in this History. This particular field of interest, however, will be covered in a separate publication prepared by the Commission.(2)

(6) Conclusions

The comparative novelty of certain parts of the law formulated in the Nuremberg and Far Eastern Charters, and the fact that they represent in themselves a partial and new codification in the field of international penal law which is in the making, give rise to some difficulties in establishing a precise classification of all the various effects of the law developed and codified in the Charters. This is particularly true in regard to the drawing of a clear line between "war crimes" proper on the one hand and "crimes against humanity" on the other, and in establishing in a precise manner the scope of the latter.

This difficulty of drawing a clear line of demarcation between the two categories of crimes was confirmed by the Judgment of the Nuremberg Tribunal. It did not say in what cases and under what conditions or circumstances "crimes against humanity" are at the same time "war crimes" and in what cases they are not. Nevertheless, it established, on the one hand, the fact of the possibility of situations arising where the two categories overlap and intermingle, and on the other hand of situations arising where they remain distinct and separated.

Without entering into the question whether the reason for such a close relationship between the two categories lies in the similar nature of the

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(1) of 12th July, 1946, Ch. i (1) and (2).
offences which they are intended to cover, it is evident that the law is apparently not clear enough to provide a definite line of demarcation.

On the other hand, the fact remains that, however closely intermingled, both categories preserve their individuality both in the text of the law and in the sphere of facts as established by the Nuremberg Judgment, and that they can never reach the point of being entirely absorbed one by the other.

B. WAR CRIMES IN THE NUREMBERG TRIAL(1)

(i) THE LAW RELATING TO WAR CRIMES

At the outset of the preceding Section(2) it was explained that the general attitude of the Nuremberg Tribunal to the law of the Charter found its expression in the statement that "the law of the Charter is decisive, and binding upon the Tribunal."(3) It was pointed out there that the Tribunal considered itself bound by the Charter also in regard to the definition which it gives of war crimes in the narrower sense of the term. The Tribunal added, however, that the crimes defined by Article 6(b) of the Charter "were already recognised as war crimes under international law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument".(4)

However, when explaining the law of the Charter in connection with the criminality of planning or waging a war of aggression, and in particular when dealing with fundamental principle of *nullum crimen sine lege*, the Tribunal found an opportunity of touching indirectly upon this question and expressed its view in the following way:

"The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions have been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention".(5)

The Tribunal said, further, that it must be remembered that international law is not the product of an international legislature, and that international agreements have to deal with general principles of law, and not with administrative matters of procedure. The Tribunal went on to say that:

"The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from...

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(1) For the development of the concept of war crimes proper prior to the Nuremberg Charter, see Chapters II-V and VIII of this History.
(2) See Chapter IX, Section A: The Development of the Concept of Crimes against Humanity.
(3) Judgment, p. 38.
(4) op. cit., p. 64.
(5) op. cit., p. 40.
the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.\(^1\)

The Tribunal also thought it important to recall that in Article 228 of the Treaty of Versailles, the German Government expressly recognised the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.\(^2\)

Dealing with the Defence argument that the Hague Convention does not apply in this case, because of the "general participation clause" contained in Article 2 of the Fourth Hague Convention of 1907, to which several of the belligerents in the recent war were not parties,\(^3\) the Tribunal expressed the opinion that it was not necessary to decide this question, and added:

"The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter."

There being no need to re-state here the view and judgment of the Tribunal on the question of the applicability of the rules of land warfare in the "subjugated" territories, as well as in regard to the charge of conspiracy to commit war crimes, consideration can now be given to the findings of the Tribunal in regard to specific war crimes preferred against the defendants.

Before doing so it is necessary to observe that, without exception, all the crimes specifically enumerated in Article 6(b) of the Charter as constituting war crimes in their technical sense,\(^4\) are crimes which constitute attacks on the integrity or the physical well-being of individuals or groups of people, and of property. But, from the law as stated in that Article and in particular from the words: "such violations (i.e. of the laws or customs of war) shall include, but not be limited to . . ." it is clear that these crimes are not the only ones which the authors of the Charter had in mind and with which the Tribunal was expected to be concerned in the Trial. It also follows that not only crimes of the atrocities-type, but also violations of any other law or custom of war may be considered war crimes irrespective

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\(^1\) op. cit., p. 40.
\(^2\) op. cit., p. 41.
\(^3\) This clause provides: "The provisions contained in the regulations (Rules of Land Warfare) referred to in Article I as well as in the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention."

\(^4\) Article 6(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
of whether such crimes might, or might not, violate certain human rights, and whether in the latter case they only constitute purely technical offences.

(ii) SPECIFIC WAR CRIMES

(1) General Observations

Under Count Three of the Indictment, in a statement of a general nature, the defendants were charged with war crimes in the traditional sense of this term, i.e. with violations of the laws and customs of war, committed between 1st September, 1939, and 8th May, 1945, in Germany and in all those countries and territories occupied by the German armed forces since 1st September, 1939. In addition, they were charged with such crimes committed during the period stated above in Austria, Czechoslovakia, Italy, and on the High Seas. The Indictment stated that all the defendants, "acting in concert with others, formulated and executed a common plan or conspiracy to commit war crimes as defined in Article 6(b) of the Charter . . . The said war crimes were committed by the defendants and by other persons for whose acts the defendants are responsible . . . as such other persons when committing the said war crimes performed their acts in execution of a common plan and conspiracy to commit the said war crimes . . . "(1)

The particular crimes preferred in the Indictment resulted from the practice of "total war" as regards methods of combat and military occupation, applied in direct conflict with the laws and customs of war, and perpetrated in violation of the rights of combatants, of prisoners of war, and of the civilian population of occupied territories. The Indictment stated that these methods and crimes constituted violations of international conventions, of internal penal laws and of the general principles of criminal law as derived from the criminal law of all civilized nations, and were involved in, and part of, a systematic course of conduct.

The apparently criminal character of the conception and practice of "total war", as waged by Nazi Germany, was described by the Tribunal in the following statement:

"For in this conception of 'total war', the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the over-mastering dictates of war. Rules, regulations, assurances and treaties alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbarous way. Accordingly, war crimes were committed when and wherever the Führer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation."(2)

The ideas of Nazi Germany, which were contrary to the established principles of all civilized nations, sprang directly from what one of the Prosecutors called a crime against the spirit, meaning thereby a doctrine which, "denying all spiritual, rational and moral values by which the nations have tried, for thousands of years, to improve human conditions, aims to plunge humanity back into barbarism, no longer the natural and

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(1) Indictment, p. 13.
(2) Judgment, p. 44.
spontaneous barbarism of primitive nations, but a diabolical barbarism, conscious of itself and utilising for its ends all material means put at the disposal of mankind by contemporary science.\(^{(1)}\)

In a statement of a summary nature, the Tribunal said the following:

"Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate. Whole populations were deported to Germany for the purpose of slave labour upon defence works, armaments production and similar tasks connected with the war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity.\(^{(2)}\)"

With reference to the planning of these violations, the Tribunal found that on some occasions, war crimes were deliberately planned long in advance. This was the case, for instance, in the ill-treatment of civilians and the plunder of the Soviet territories, which were settled in minute detail before the actual attack began. Similarly, the exploitation of the inhabitants for slave labour was planned and organised to the last detail. In other cases, such as the murder of prisoners of war, of Commandos and captured airmen, such crimes were the result of direct orders issued on the highest level.

In its Judgment, the Tribunal stated that the evidence relating to war crimes and crimes against humanity had been so overwhelming, both as regards volume and detail, as to render it impossible for the Judgment adequately to review it, or to record the mass of documentary and oral evidence that had been presented. Accordingly, the Tribunal dealt only quite generally with these crimes\(^{(3)}\) and did not follow the order of charges or the grouping of crimes as presented in the Indictment. The following survey of selected types of war crimes is based on that part of the Judgment which deals with war crimes and crimes against humanity generally, without taking into account the findings of the Tribunal in relation to the individual defendants.

It is also proposed to limit this investigation to problems and points of particular interest to the question of insufficiency of, or lacunae in, the existing laws and usages of war and of other provisions of international law which purport to afford protection against violations of the rights of members of the armed forces and of the civilian population in time of war.

\(\text{(2) Crimes against Prisoners of War and other Members of the Armed Forces}\(^{(4)}\)\)

In a general observation the Tribunal established that prisoners of war


\(^{(2)}\) Judgment, p. 45.

\(^{(3)}\) op. cit., pp. 44 and 45.

\(^{(4)}\) As to crimes of the atrocities-type committed against the civilian population see Chapter IX, Section A on Crimes against Humanity: Genocide, and Killing of "useless eaters", p. 196 et seq.
were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. The Tribunal said further, in some detail, that many and various violations of the rights of prisoners of war and of other members of the Allied armed forces were committed in the course of the war, often as a matter of deliberate and calculated policy. Particular reference is made to the handing over to the S.I.P.O. and S.D. for execution of recaptured prisoners, and to systematic killing by the civilian population of Allied airmen who were forced to land in Germany.

The Tribunal referred at some length to a directive circulated, with the authorisation of Hitler, by the defendant Keitel on the 18th October, 1942, which ordered that all members of Allied "Commando" units, often when in uniform and whether armed or not, were to be "slaughtered to the last man", even if they attempted to surrender. This order further provided that if such Allied troops came into the hands of the military authorities after being first captured by the local police, or in any other way, they should be handed over immediately to the S.D. This order was supplemented from time to time, and was effective throughout the remainder of the war, although after the Allied landings in Normandy in 1944, it was made clear that the order did not apply to "Commandos", captured within the immediate battle area.

The Tribunal established that under the provisions of this order, Allied "Commando" troops, and other military units operating independently, lost their lives in Norway, France, Czechoslovakia and Italy. Many of them were killed on the spot, and in no case were those who were executed later in concentration camps ever given a trial of any kind.(1)

The Tribunal devoted special attention to the treatment of Soviet prisoners of war which was characterised by particular inhumanity. This was due not merely to the action of individual guards, or the exigencies of life in the camps, but was the result of systematic plans made some time before the German invasion started.

With regard to the murder and ill-treatment allegedly committed against Soviet prisoners of war, the Defence submitted that the U.S.S.R. was not a party to the Geneva Convention, which therefore was not binding in the relationship between Germany and the U.S.S.R. This argument, which correctly stated the legal position, was, however, discarded by the Tribunal. The latter took the view that in this case the principles of general international law on the treatment of prisoners of war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.(2)

In making the above statement the Tribunal did not refer to any particular provisions of general international law. It is, however, clear that the provisions which the Tribunal had in mind, and on the basis of which

(1) Judgment, p. 45.
(2) op. cit. p. 48.