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UNITED NATIONS WAR CRIMES COMMISSION.

COMMITTEE III.

Material for the preparation of a definition of

"crimes against humanity."

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I. Preliminary.

Committee III, to whom the case of Christoph Manner (No.2553) who is charged with a "crime against humanity" had been referred by Committee I, decided in its meeting held on 12th March 1946, to attempt a definition of "crimes against humanity", and charged this writer with the collection of the material and the preparation of a paper on the subject.

The present report contains:

- 1) A survey of the use of the term "crime against humanity" and similar expressions prior to the 1939-1945 War.
- 2) The preparatory discussions during the 1939-1945 War.
- 3) An analysis of the basic documents of the present post-war period.
- 4) Illustrations to be derived from the Nuremberg proceedings at present still in progress.
- 5) An attempt at a definition.

II. The Development prior to the 1939-1945 War.

- 1) The Fourth Hague Convention of 1907 recalls that the Contracting Parties have been animated by the desire to serve, even in the case of war, "the interests of humanity and the ever-progressive needs of civilization" (Preamble, paragraph 2). In the much quoted eighth paragraph of the Preamble the Contracting Parties declared, inter alia, that "the inhabitants and belligerents remain under the protection and governance of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience".

The term "humanity" here appears in a document which deals, as it were, per definitionem, with war crimes in the narrowest and technical sense, namely with violation of the laws and customs of war which are laid down in the document itself.

- 2) The Peace Treaty of Versailles provided in Art.227 that the Allied and Associated Powers "publicly arraign Wilhelm II of Hohenzollern, formerly the German Emperor, for a supreme offence against international morality and the sanctity of treaties." In its decision the special tribunal sitting over Wilhelm II was to be guided "by the highest motives of international policy with a view to vindicating the solemn obligations of international undertakings and the validity of international morality".

This arraignment of the Kaiser did not take effect on a charge of a violation of existing law, but the ex-Kaiser was charged, according to what the authors considered to be the then state of international law, with

offences against moral, not legal provisions. This precedent of Art.227, therefore, does not concern the present problem of "crimes against humanity", because the latter, as framed in the Charter of the International Military Tribunal, are crimes offending against legal and not only moral duties. Art.227 of the Treaty of Versailles was, of course, the predecessor not of the provisions of Art.6 (c) of the Charter, (Crimes against humanity), but of Art.6(a) of the Charter (crimes against peace), with this important distinction, that the crimes against peace under Art.6(a) are not merely contraventions of a moral code, but violations of legal provisions. This difference illustrates the development of international law - at least in theory - between 1919 and 1945.

3) The Commission of Fifteen, set up in January 1919 by the Preliminary Peace Conference, reported that "in spite of the explicit regulations, of established customs and of the clear dictates of humanity, Germany and her Allies have piled outrage upon outrage". The majority of the members of the Commission held that all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of States who have been guilty of offences against the laws and customs of war or the laws of humanity are liable to criminal prosecution". Here we find for the first time the juxta-position of offences against the laws and customs of war corresponding to Art.6(b) of the 1945 Charter, and offences against the laws of humanity corresponding to its Art.6(c).

4) I do not know whether the 1919 Commission, in using the terms "offences against the laws of humanity" had in mind offences which were not covered by the other expression "violation of the laws and customs of war", particularly whether the Commission thought of crimes against "any civilian population" committed by the Central Powers in World War I. It is common knowledge that to some extent also in the first world war persecutions of their own nationals had been conducted by the Central Powers on a considerable scale, though not on a scale comparable with what happened in Nazi dominated Europe between 1933 and 1945. Reference is made, e.g. to persecutions by the Austrian and Hungarian authorities of political opposition groups and of Slavonic and Rumanic races in Austria and Hungary, and crimes committed by Bulgars and Turks against racial minorities. Whatever the answer to these questions may be, in the actual text of the Peace Treaties, the phrase "laws of humanity" does not appear and Arts.228-230 of the Treaty of Versailles dealt only with acts in violation of the laws and customs of war.

III. The preparatory discussions during the Second World War. Action by the United Nations War Crimes Commission.

1) The necessity of including into the retributive actions of the United Nations also crimes committed against neutrals, against Stateless persons and last, but not least, against persons of enemy nationality, was felt early in the second World War, when the outrages committed by the German Nazis and the Italian Fascists against opposition groups and racial minorities became generally known. It was particularly the unprecedented crimes against the Jews, irrespective of their citizenship, that contributed to the general opinion that not only crimes committed against allied combatants and allied civilian populations, should be punished.

The London International Assembly, e.g., recommended in "The Punishment of War Criminals", Report of Commission I, p.7., that in defining the scope of the retributive action of the United Nations, "a comprehensive view should be taken, including not only the customary violations of the laws of war, but any other serious crime against the local law committed in time of war, the perpetrator of which has not been visited by appropriate punishment". In respect of the extermination of Jews, it was recommended "that punishment should be imposed not only when the victims were Allied Jews, but even when the crimes had been committed against stateless Jews or any other Jews, in Germany or elsewhere." Finally, the London International Assembly recommended "a speedy punishment of crimes such as those that were perpetrated

after the last war against peace-minded Germans who were assisting the Allies in re-establishing law and order".

2) The United Nations War Crimes Commission itself has from a very early date devoted its attention to the punishment of crimes such as those committed against German and stateless Jews in Germany. As a result of consideration by the Commission of the draft resolution submitted by Committee III under the title "Scope of the Retributive Action of the United Nations", (Doc.C.20), a letter was written by Sir Cecil Hurst to the Rt.Hon.Anthony Eden on the 31st May 1944. The following was stated in this letter, the text of which was approved by the Commission on 30th May 1944 (Minutes No.20):

" Technically, a distinction can well be drawn between atrocities committed by the enemy which are violations of the laws and customs of war and those which are not, but it will probably be the general view that the need to exact retribution is as great in the one case as in the other.

" A category of enemy atrocities which has deeply affected the public mind, but which does not fall strictly within the definition of war crimes, is undoubtedly the atrocities which have been committed on racial, political or religious grounds in enemy territory.

" The publicity which was given to the appointment of the Commission for the Investigation of War Crimes led many people to assume that it would be part of the duties of the Commission to investigate atrocities of this character committed by the enemy in enemy territory as well as in occupied territory. I have been approached on occasions by bodies and individuals desirous of knowing whether they could help the Commission in this part of its work. If some other machinery for dealing with the above category of cases is to be set up, the Commission feels that a public announcement to this effect would be helpful, in order that the public at large may understand that effective steps will be taken to ensure that the authors of these atrocities are brought to justice.

" The Governments of the United Nations may already have in view some plan for bringing the authors of these crimes to justice, but if that is not the case, it is right that you should know that the Commission is prepared to take up this work if by so doing it can assist the Governments of the United Nations. "

The then Lord Chancellor (Lord Simon) replied to Sir Cecil Hurst in a letter dated 23rd August 1944, inter alia,:

" Thirdly, in your letter of the 31st May you refer to a category of enemy atrocities which does not fall within the definition of war crimes, namely, atrocities committed on racial, political or religious grounds in enemy territory. This would open a very wide field. No doubt you have in mind particularly the atrocities committed against the Jews. I assume there is no doubt that the massacres which have occurred in occupied territory would come within the category of war crimes and there would be no question as to their being within the Commission's terms of reference. No doubt they are part of a policy which the Nazi Government have adopted from the outset, and I can fully understand the Commission wishing to receive and consider and report on evidence which threw light on what one might describe as the extermination policy. I think I can probably express the view of His Majesty's Government by saying that it would not desire the Commission to place any unnecessary restriction on the evidence which may be tendered to it on this general subject. I feel I should warn you, however, that the question of acts of this kind committed in enemy territory raises serious difficulties and it would probably be better that the Commission should not concern itself with these until the matter has been fully considered in the light of your recent recommendations.

His Majesty's Government do attach very great importance to the investigation which they feel sure is proceeding of the massacres committed in the occupied territories and the identification of those responsible. "

The matter was further discussed in the meeting of the Commission held on 26th September 1944. The record in the Minutes of the meeting is as follows, (Doc.M.33, p.3.):

" Persecution of Jews.

" Lord Wright was of opinion that the persecution of the Jews in Germany was, logically, a war crime, and that the Commission might have to consider extending its definition of war crimes. "

The Chairman, Sir Cecil Hurst remarked that Lord Simon's letter had indicated a desire that the Commission should not interpret its mandate in any narrow spirit, but pointed out the difficulties in the way of including in the Commission's duties the handling of German crimes against Germans in Germany. He, (the Chairman) should like to remind the Commission that the vast majority of the crimes committed against the Jews fell within the Commission's terms of reference because they had been carried out in occupied territory such as Poland, or because the victims were non-Germans.

A further letter by Mr. Eden, dated 8th November 1944, was received from the Foreign Office, confirming the attitude taken in the Lord Chancellor's letter dated 23rd August 1944. It stated:

" The views of the War Cabinet on your letter of the 31st May were communicated to your Commission in the letter from the Lord Chancellor to yourself as Chairman on the 23rd August 1944. The fourth paragraph of that letter dealt with the suggestion put forward by the Commission as to atrocities committed on racial, political or religious grounds in enemy territory. In that letter, after stating the view then held, the Lord Chancellor went on to say that His Majesty's Government would give further consideration to this question. I am therefore writing to let you know that His Majesty's Government adhere to the views as stated in that letter. The majority of these atrocities will have been committed against enemy nationals; if committed against Allied nationals they are within your Commission's terms of reference already. I think it is clear from the letter that there was no intention to exclude atrocities on these grounds in enemy territory if they in fact came within the category of war crimes, but you were clearly raising the wider issue. His Majesty's Government do not - as was stated in the letter, - wish to preclude the Commission from collecting any evidence which they feel would be of value in relation to the general extermination policy which has undoubtedly been carried out in occupied territory in circumstances which constitute war crimes.

" Apart from other considerations His Majesty's Government feel that the progress of the war has made the war criminal question one of some urgency, and it would be a mistake for the Commission to undertake this additional and heavy burden. It is unnecessary to say that His Majesty's Government sincerely hope that those who have been responsible for these atrocities may one day have the punishment which their actions deserve. "

3) On the 12th June 1944, President Roosevelt made a statement containing, inter alia, the following paragraphs:

"This nation is appalled by the systematic persecution of helpless minority groups by the Nazis. To us the unprovoked murder of innocent people simply because of race, religious or political creed is the blackest of all possible crimes. Since the Nazis began this campaign...

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citizens in all walks of life and of all political and religious persuasions have expressed our feeling of repulsion and our anger. It is a matter with respect to which there is and can be no division of opinion amongst us. "

"To the Hitlerites, their subordinates and functionaries and satellites, to the German people and to all other peoples under the Nazi yoke, we have made clear our determination to punish all participants in these acts of savagery. In the name of humanity we have called upon them to spare the lives of these innocent people. "

The then United States Under-Secretary of State, Mr. Grew, said on 1st February 1945 that the State Department plan calls "for the punishmentfor the whole broad criminal enterprise, including offences wherever committed againstminority elements, Jewish, and other groups and individuals",

4) In the House of Commons on 4th October 1944, in reply to a question asking that the names of those responsible for crimes against German democrats and anti-Nazis, such as the murder of 7,000 internees in Buchenwald concentration camp, should be added to the list of war criminals, Mr. Eden said:

" Crimes committed by Germans against German, however reprehensible, are in a different category from war crimes and cannot be dealt with under the same procedure. His Majesty's Government have this matter under consideration, but I am not in a position to make any further statement at present. "

In reply to a further question as to whether the murder of anti-Nazi Germans in Germany was not just as criminal as the murder of other anti-Nazis elsewhere, Mr. Eden said:

" I was not trying to measure the degree of the reprehensible in any of these deeds; all I was saying was that it was not a war crime in the sense of other crimes that are being committed, and other means would have to be found for dealing with it. "

Finally, in reply to a question by Mr. Silverman as to whether the terms of reference of the War Crimes Commission should be widened so that all these matters could be dealt with by exactly the same procedure, Mr. Eden said:

" No, Sir. We really have given some thought to this. I cannot agree with my Hon. Friend about widening the work of the War Crimes Commission; they have a very definite and circumscribed task. I agree, however, about the offensiveness of these crimes; all I say is, that they must be handled in some other way. "

In the House of Commons on 31st January 1945, the then Minister of State, Mr. Richard Law stated, in reply to a question:

" Crimes committed by Germans against Germans are in a different category from war crimes and cannot be dealt with under the same procedure. But in spite of this, I can assure my hon. Friend that His Majesty's Government will do their utmost to ensure that these crimes do not go unpunished. It is the desire of His Majesty's Government that the authorities in post-war Germany shall mete out to the perpetrators of these crimes the punishments which they deserve. "

" The authorities to which I refer are the authorities who will be in control in Germany when the war comes to an end. I think I can leave it to my hon. and learned Friend to imagine who those authorities will be. "

5) In view of the quotations from Commission documents, recommendations from semi-official bodies like the London International Assembly and from the quoted official statements of spokesmen of the British and American Governments, it is not difficult to conclude that Art. 6(c) of the Charter of the International Military Tribunal and its corollaries, particularly Law. No.10, are the outcome of the deliberations of this Commission, and similar discussions in other quarters.

IV. Crimes against Humanity in recent basic documents.

The following documents contain provisions regarding crimes against humanity:

- 1) the Charter of the (European) International Military Tribunal,
- 2) Control Council Law No.10,
- 3) the Charter of the International Military Tribunal for the Far East.

It may be noted, in this connection that the Austrian "Constitutional Act concerning War Crimes and other National Socialist Misdeeds", which was enacted on 26th June, 1945, i.e. before the conclusion of the Four-Power Agreement dated 8th August 1945, contains, in section 1 (2) a penal sanction for "acts repugnant to the natural principles of humanity against other persons" (i.e. other than enemy combatants and civilian populations of occupied territories.)

1) The Definition of Crimes against humanity in the Charter of the (European) International Military Tribunal.

(A) Art.6. of the Charter annexed to the Four-Power Agreement of 8th August 1945 provides that the International Military Tribunal shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes:

- (a) crimes against peace
- (b) war crimes
- (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.

(B) From the text the following can be gathered:

- (a) in order to fall under Art.6 (c) a crime must have been committed by persons acting in the interests of the European Axis countries;
- (b) it is irrelevant whether the crime was committed by an individual as such or by a person as a member of an organisation;
- (c) there are two types of crimes against humanity:

crimes of the "murder-type", namely, murder, extermination, enslavement, deportation and other inhumane acts, and

"persecutions".

- (d) In the case of the former, i.e. the more serious type, the Charter provides that they must have been committed against any civilian population. This means that (1) crimes committed against military forces are outside the scope of the provision; (2) single and isolated acts committed against individuals are also outside the scope. The wording "civilian population" clearly indicates that a larger body of victims is visualised. (3) The nationality of the civilian population affected is irrelevant. (arg. "any" civilian population). The term, therefore, includes crimes both against allied and against enemy nationals. As far as allied civilian populations are the victims, the crime falls both under Art.6 (b) and Art.6 (c).
- (e) It is irrelevant whether a crime of the "murder type" has been committed before or during the war.
- (f) With regard to "persecutions", the Charter provides that, in order to fall under the provision, two conditions must be complied with: (1) the persecution must have been committed on political, racial or religious grounds, and (2) in execution of, or in connection with any crime within the jurisdiction of the tribunal.
- (g) The word "persecutions" covers activities which are less grave than murder, extermination, enslavement, deportation and other inhumane acts. Persecutions are distinguished from these more serious types of crimes against humanity in that they fall under the provision only if they were committed on certain grounds (political, racial or religious) and in execution of or in connection with either a crime against peace, or a war crime in the narrower sense, or a crime against humanity of the murder type.
- (h) The last paragraph of Art.6. provides that leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes (which include "crimes against humanity") are responsible for all acts performed by any persons in execution of such plan. From this provision stipulating the vicarious liability of leaders, organisers, etc., it can be gathered that the leaders and organisers are responsible for acts performed by third persons. Nothing is said about the responsibility of the actual performers, but it seems to be implied that the perpetrators are also criminally liable though the Charter itself in general and this provision in particular, deals only with persons responsible on the high level.
This is borne out by the Control Council Law No.10, (Military Government Gazette, No.5, p.46) which was passed to give effect, inter alia, to the London Agreement of 8th August 1945.
- (i) It is expressly stated that for the question whether there is a punishable crime against humanity, it is irrelevant whether or not it has been committed in violation of the domestic law of the country where perpetrated. This means that the defendant cannot successfully plead that he was allowed to commit a crime by the law of the territory where it was committed. Compliance with municipal law

is no defence to a charge for a crime against humanity. It is submitted that this is only one application of the general rule permeating the modern law of war crimes that superior order is no defence, if the order is illegal. Art.6 (c) of the Charter provides in effect that superior order is no defence even in cases where the illegal order or, for that matter, the illegal permission is given in the form of a municipal enactment. Here the Charter expressly lays down the supremacy of International law over municipal law.

2) The definition of Crimes against Humanity in the Control Council Law No.10.

The assumption made above (1(h)) about the criminal liability not only of the planners and instigators, but also of the actual perpetrators, is borne out by Art.II(1)(c) of the Control Council Law No.10.

In Law No.10, the definition of crimes against humanity which is, roughly, taken from the Charter of the International Military Tribunal, is preceded by the words "atrocities and offences including but not limited to ..." Here, expressly, the perpetration of the individual atrocities and offences is declared a punishable offence. The actual text is as follows:

" Each of the following acts is recognised as a crime:

(a)

(b)

(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. "

It will be noted that as far as "persecutions" are concerned, the second of the two conditions contained in the Charter (supra 1(f)) is dropped for the province of the local law as intended for the territory of Germany. This means that to be a crime against humanity, within the meaning Law No.10, it is not necessary that the persecution was committed in execution of or in connection with a crime against peace, a war crime or a crime against humanity of the murder type.

The above quoted provision to the effect that domestic law is irrelevant for the question whether or not a crime against humanity has been committed applies also under Law No.10.

3) Crimes against humanity according to the Charter of the International Military Tribunal for the Far East.

Art.6. of the Charter of the International Military Tribunal for the Far East (established by Special Proclamation of General MacArthur, Supreme Commander for the Allied Powers - see Doc.C.182) is framed on the pattern of Art.6. of the Charter of the (European) International Military Tribunal. The differences are as follows: The provision that the accused person must have been "acting in the interests of the European Axis Countries", does, of course, not appear in the Far Eastern Charter. The latter speaks of "Far Eastern war criminals".

The definition of crimes against peace differs insofar as the Far Eastern Charter speaks of the "waging of declared or undeclared war of aggression" and adds International law, obviously International customary law, to International treaties, agreements or assurances.

War crimes in the narrower sense are in the Far Eastern Charter called "conventional war crimes", namely violations of the laws and customs of war. The illustrations contained in Art.6 (b) of the European Charter are omitted.

The definition of crimes against humanity in the Far Eastern Charter differs only in that religious grounds of persecutions are omitted. Persecutions on political and racial grounds are crimes against humanity both in Europe and in the Far East. Persecutions on religious grounds are punishable only under the European Charter.

4) Delimitation of crimes against humanity from other types of crimes.

We have now to attempt to distinguish crimes against humanity within the meaning of the instruments analysed above, from other types of crimes. This task, again, is three-fold because crimes against humanity must be distinguished from 1) crimes against peace, 2) war crimes in the narrower sense and 3) simple or common crimes punishable under municipal criminal law.

In order to attempt this delimitation it is necessary to keep in mind that in a certain general sense, every crime, or nearly every crime, is inhumane and therefore a crime against humanity. What greater crime against humanity can be conceived than the planning, preparation, initiation and waging of a war of aggression? If the documents analysed distinguish crimes against humanity from crimes against peace, they obviously use the former term not in its general connotation, but in a limited technical sense.

Moreover, what can be considered more inhumane and a greater crime against humanity than the violation of the laws and customs of war and particularly the type of violations enumerated in Art.6(b) of the (European) Charter.

Reference has already been made (supra II(1)) to the Preamble of the Fourth Hague Convention where it has been stated that the laws of humanity are the basis and the source of the laws and customs of land warfare. This, in connection with Art.6(c) ("any civilian population") leaves no room for doubt that crimes committed against the civilian population of occupied territory are both violations of the laws and customs of war (Art.6(b)) and crimes against humanity (Art.6(c)). Where enemy combatants are the victims of a crime - irrespective of whether or no the crime is an "inhumane act" - we are faced with a war crime in the narrower sense, not falling under the notion of a "crime against humanity".

5) Strictly speaking also most of the common crimes of the municipal law of civilised nations offend somehow or other against "humanity". There can be no doubt that homicide (murder, manslaughter) is also an offence against humanity in this non-technical sense. The same applies to causing grievous bodily harm, assault, sexual offences and the like. Also among the common crimes against property, there are such as may be considered inhumane, e.g. robbery, arson.

Drawing the distinction between crimes against humanity and ordinary common law crimes is particularly difficult, because the definition of crimes against humanity contained in the Charter enumerates roughly speaking, only acts which are visited by punishment under the criminal law of all civilised nations; but also speaks of "other inhumane acts" a phrase which in this connection is tautological. (An inhumane act is a crime against humanity.) The solution probably is that "inhumane"

common crimes become crimes against humanity, if by their purpose or magnitude they become the concern of foreign Powers and, consequently, the concern of International law.

A further difficulty lies in the fact that the Charter expressly stipulates that it is irrelevant whether an act violates the *lex loci*.

It has been shown in previous papers (e.g. in Doc.C.156, Report on the case of Sepp Dietz) that the term "war crime" in the wider sense comprises crimes against peace, war crimes, violations of the laws and customs of war and crimes against humanity, but it follows on the other hand from what has been said above that the term "crime against humanity" comprises also violations of the laws and customs of war committed against the civilian population and that the phrase "crime against humanity" used in a non-technical sense, covers also crimes against peace, war crimes also if committed against combatants, and ordinary common crimes punishable in municipal criminal law.

V. The Nuremberg Indictment and Proceedings.

- 1) It remains to examine whether the Nuremberg proceedings up to the present stage, throw any additional light on our problem.

In assessing the indictment and the speech of Mr. Justice Jackson in opening the case for the prosecution regarding crimes against humanity, we must be careful to keep in mind that these pronouncements were not made by the Committee of Prosecutors or by Mr. Justice Jackson in any legislative or judicial capacity. The Four-Power Agreement itself was signed on behalf of the four Contracting Powers as an instrument laying down provisions of law. The charge, on the other hand, was presented on behalf of the same governments, but not in their law giving capacity, but in their capacity of a party to judicial proceedings.

That the American representative both in concluding the law making agreement and in presenting the case of the prosecuting party happened to be the same person, (Mr. Justice Jackson), does not alter this position. In the case of Great Britain, France and the U.S.S.R., even the persons were different.

The indictment and Mr. Justice Jackson's speech, to which reference will be made below, is therefore nothing but the statement of the view of one party in judicial proceedings.

- 2) With this proviso reference may be had to Count 4 of the Indictment Cmd. 6696. In paragraph X, (statement of the offence), it is stated that the plan to commit crimes against humanity as defined in Art. 6(c) in Germany, and in the occupied territories, involved, among other things, the murder and persecution of all who were or who were suspected of being hostile to the Nazi party.

These methods and crimes constituted, inter alia, violations of internal penal laws, ^{and} of the general principles of criminal law as derived from the criminal law of all civilized nations. It is also said that the prosecution will rely upon the facts pleaded under Count 3, as also constituting crimes against humanity, which means that the prosecution considers war crimes in the narrower sense falling also under the notion of crimes against humanity. The following examples of crimes against humanity are given in the indictment:

imprisonment of persons without judicial process,
holding them in protective custody and in Concentration Camps,
subjecting them to persecution, degradation, despoilment,
enslavement, torture and murder,

establishing special courts to carry out the will of the conspirators, permitting favoured branches or organs of the State and Party to operate outside the range even of nazified law, persecution of the Jews, confiscation of their property, ordering by the Chief of the Gestapo of anti-Jewish demonstrations all over Germany, destruction of Jewish property, gassing of Jews.

Among individual crimes the indictment cites as crimes against humanity the murder of the Austrian politician, Dollfuss, and the imprisonment of the Austrian politician Schuschnigg, the murder of the German politicians Breitscheid and Thaelmann, and the imprisonment of Pastor Niemöller. The mentioning of Dollfuss is interesting because Dollfuss was at the time of his death the dictator (Prime Minister) of an independent State, which was itself organised on Fascist lines and closely allied to Fascist Italy. The mentioning, in the indictment, of the imprisonment of Schuschnigg, shows that an offence committed against the citizen of a country not under hostile occupation is considered as falling under the term of a crime against humanity. Breitscheid, Thaelmann and Niemöller are examples of the persecution of Social-Democrats, Communists and Churchmen of German nationality constituting crimes against humanity.

3) Mr. Justice Jackson, in his introductory speech delivered at Nuremberg on the 21st November 1945, stated: "We charge guilt on planned and intended conduct that involves moral as well as legal wrong. And we do not mean conduct that is a natural and human, even if illegal, cutting of corners, such as many of us might well have committed had we been in the defendants' positions. It is not because they yielded to the normal frailties of human beings that we accuse them. It is their abnormal and inhumane conduct which brings them to this bar."

He also said: "That attack upon the peace of the world is the crime against international society which brings into international cognizance crimes in its aid and preparation which otherwise might be only internal concerns". In dealing with the Nazi party programme of 1920, Mr. Justice Jackson pointed out that it declared that no Jew or any person of non-German blood could be a member of the nation, such persons were to be disfranchised, disqualified from office, subject to the alien laws and entitled to nourishment only after the German population had first been provided for. Under the heading "The consolidation of Nazi Power", Mr. Justice Jackson proposed to consider the steps "which embraced the most hideous of crimes against humanity, to which the conspirators resorted in perfecting control of the German State; and in preparing Germany for the aggressive war indispensable to their ends". In describing the committing of crimes against humanity prosecuting counsel mentioned the decree suspending the guarantees of individual liberty contained in the Weimar Constitution. Mr. Justice Jackson quoted a document emanating from Col. Gen. von Fritsch, who said in 1938, that shortly after the first war he came to the conclusion that the Nazis would have to be victorious in three battles if Germany were to become powerful again.

- 1) The battle against the working class,
- 2) the battle against the Catholic church,
- 3) the battle against the Jews.

"The warfare against these elements was continuous. The battle in Germany was but a practice skirmish for the world wide drive against them. Here in point of geography and of time are two groups of crimes against humanity - one within Germany before and during the war, and one in occupied territory during the war. But these two are not separate in Nazi planning. They are a continuous unfolding of the Nazi

plan to exterminate peoples and institutions which might serve as a focus or instrument for overturning their "new world order" at any time or place. "

Mr. Justice Jackson proposed to unfold to the court the prosecution's proof regarding crimes against humanity according to Gen. von Fritsch's classification.

In connection with "the battle against the working class", the prosecution mentioned the dissolution of the free trade unions, the confiscation of their funds, the establishment of the German labour front, the appointment of "trustees of labour", and the elimination of the association character of the employers and trade associations.

With regard to crimes against humanity, committed by persecuting the churches, Mr. Justice Jackson pointed out that it is not because the Nazis themselves were irreligious or pagan, but because they persecuted others of the Christian faith that they became guilty of crime and it is because the persecution of the churches was a step in the preparation of aggressive warfare that the offence became one of international consequence. A secret decree by Martin Bormann of June 1941 on the relation of Christianity and National Socialism was quoted. An organised demonstration against the Bishop of Rothenburg was given as an example of a crime against humanity in connection with the battle against the churches. Further examples given were the conflicts within the Protestant Church, the sending of Pastor Niemöller to a concentration camp. Further, the violation of the concordat with the Holy See was adduced, consisting of persecutions of the Catholic Church, its priesthood and members and the suppression of church schools and educational institutions.

With regard to crimes against humanity, committed against Jews, the American Chief Prosecutor said: "What we charge against these defendants is not those arrogances and pretensions which frequently accompany intermingling of different races and peoples and which are likely, despite the honest efforts of Government, to produce regrettable crimes and convulsions. It is our purpose to show plans and designs to which all Nazis were fanatically committed, to annihilate all Jewish people."

After having given an outline of the innumerable crimes committed against Jews, the American Chief Prosecutor discussed terrorism as a preparation for the war. He said: "How a Government treats its own inhabitants generally is thought to be no concern of other Governments or of international society. Certainly few oppressions or cruelties would warrant the intervention of foreign Powers. But the German mistreatment of Germans is now known to pass in magnitude and savagery any limits of what is tolerable by modern civilization. Other nations, by silence, would take a consenting part in such crimes. These Nazi persecutions moreover, take character as international crimes because of the purpose for which they were undertaken. The purpose, as we have seen, of getting rid of the influence of free labour, the churches and the Jews was to clear their obstruction to the precipitation of aggressive war. If aggressive warfare in violation of treaty obligations is a matter of international cognizance, the preparations for it must also be of concern to the international community. Terrorism was the chief instrument for securing the cohesion of the German people in war purposes. Moreover, these cruelties in Germany served as atrocity practices to discipline the membership of the criminal organisation to follow the pattern later in occupied countries."

Later, Mr. Justice Jackson said: "Under the clutch of the most intricate web of espionage and intrigue that any modern State has endured, the persecution and torture of a kind that has not been visited upon the world in many centuries, the elements of the German population

which were both decent and courageous were annihilated. Those which were decent and weak were intimidated." Mr. Justice Jackson went on stating that the Nazis not only silenced discordant voices, they created positive controls as effective as their negative ones. Propaganda on a scale never before known stimulated the party and party formations with permanent enthusiasm.

Mr. Justice Jackson also said: "The fourth count of the indictment is based on crimes against humanity. Chief among these are mass killings of countless human beings in cold blood. Does it take these men by surprise that murder is treated as a crime?...."

VI. Summary.

The law as laid down in the basic documents and as explained in the course of the Nuremberg proceedings, which is at present in progress, is capable of being summarized by the following propositions:

- 1) "Crimes against humanity" are offences committed against civilian populations.
- 2) Crimes committed against combatants are outside the scope of the notion.
- 3) Crimes against humanity may consist in violations
either of the laws and customs of war,
or of positive municipal provisions of criminal law,
or of the general principles of criminal law as derived
from the criminal law of all civilised nations.
- 4) Isolated offences do not fall within the notion. A greater number of victims or a greater number of acts of the same pattern is necessary to constitute a crime against humanity which thereby becomes a concern of foreign States and, consequently, of International law.
- 5) There are two different types of crimes against humanity:
 - (a) crimes of the murder type, (murder, extermination, enslavement, deportation and other inhumane acts). The words "other inhumane acts" cover only serious crimes of a character similar to murder, extermination, enslavement and deportation - *eiusdem generis* rule of interpretation;
 - (b) persecutions, (on political and racial, in Europe also religious, grounds.)
- 6) Crimes of the murder type are crimes against humanity, if committed by persons acting in the interest of the European Axis countries or by "Far Eastern war criminals".
This condition does not apply in the local law of Germany as laid down by Law No. 10 for criminals other than major war criminals.
- 7) "Persecutions" constitute crimes against humanity only if perpetrated on political and racial (in Europe also religious) grounds. In the case of the major war criminals it is a further condition that "persecutions" be in execution of or in connection with any crime within the jurisdiction of an International Military Tribunal. (i.e. crimes against peace, violations of the laws and customs of war, crimes against peace of the murder type.)

- 8) The nationality of the victims is irrelevant.
- 9) It is irrelevant whether a crime of the murder type has been committed before or during the war. Though this is not expressly stated as to "persecutions" it is submitted that it is also irrelevant whether persecutions have been committed before or during the war.
- 10) Not only the ringleaders, but also the perpetrators of crimes against humanity are criminally responsible.
- 11) It is irrelevant whether or not a crime against humanity has been committed in violation of the lex loci.
- 12) A crime against humanity can be committed by enacting legislation which orders or permits crimes against humanity, e.g. unjustified killing, deportations, racial discrimination, suppression of civil liberties, etc.