SOME CONTROVERSIAL ASPECTS OF WAR CRIMES

by

İlhan LOTEM

Dr. Jur. Associate Professor of International Law
Faculty of Law, Ankara

There is a continuous conflict between those who insist that persons guilty of acts which have shocked the conscience of all civilized people shall be punished and those who insist that the principles of justice and customary international law must be observed. Thus the problem is mixed with all kinds of political, juridical and sentimental considerations (1).

On the last aspect there is a complete accord : the atrocities committed by the Nazi and Japanese were such that the human mind revolted and especially after the surrender of Germany the discovery of the conditions in the concentration camps and in the occupied territories was so appalling that the civilized world stood aghast (2) and everybody was convinced of the incontestable guilt of the accused and of the imperative need of punishment.

But how to punish, which way to choose ?

In our opinion the controversies started at that stage.

Once the trial of 'Major War Criminals' began at Nuremberg the controversies went on with the question of jurisdiction and the legality of the Tribunal ; some legal principles, the pleas of defence, and the criminality of aggressive war.

And when the trial was over the controversies persisted on the legal and practical value of the Tribunal and whether or not the judgements would become a precedent in the future.

We will try to reach some conclusions concerning those controversies.

I. Long before the start of the second World War the problem of dealing with War Crimes was considered 'immensely difficult' because the existing methods were ineffective, partial and in general about as unsatisfactory as they could well be, may be at once conceded' (3).

At the end of the war the difficulties still existed though contrary to the belief of Brierly these were not 'wholly practical' (4).

For even more than a small minority there were no great difficulties in making arrests, securing evidence and bringing them in front of the Courts.

At the end of the war, as Lord Justice Lawrence pointed out there were 'three possible courses : to let the atrocities which had been committed go unpunished; to put the perpetrators to death or to punish them by executive action; or to try them' (5).

The first course is named by Dr. Schwarzenberger 'the quietist pattern' (6). Here again Brierly without identifying himself with this attitude contrasts it with the 'righteous instinct which makes us desire to see justice prevail against the law breaker' (7). Later, the same author rather advocated the acceptance of the second course, saying that : ' the acts of the Nazi leaders ... can be fitly dealt with only by a high act of policy on the part of the Allied Governments. Napoleon's precedent, except for its leniency, is better than the Kaiser's' (8).

For the third course there were many ways of prosecution and each way had some advantages and some disadvantages (9).

For example, to permit German war criminals to be tried by German Courts, 'hase the advantage of precise rules and procedures and established tribunal' (10) but on the other hand 'co-nationals, are always inclined, or at least suspected of judging crimes of this kind either too leniently or too harshly, if the judges should be afflicted with political or other resentments against the accused. Therefore, the charge of partiality is always likely to be raised against this solution (11).

There is, of course, the bad example given by the Leipzig Trials (12).

A second solution was to let the affected State try the war criminals (13).

Thus Arts. 228, 229 and 230 of the Treaty of Versailles provided for the trial of war criminals by Courts of the affected States. The Courts had to be Military Courts. In cases where there were crimes committed against nationals of various States, a mixed Military Tribunal had to be established. Similar penal provisions were also laid down in the other Peace treaties but the stipulations of these treatises never came into force (14).

A third possibility is the trial of war criminals by neutral courts.

Charles Cheney Hyde suggested that solution and claimed that it would be advantageous. The decisions of neutral courts would more easily command respect; they would ' inspire a widespread and decent respect' for the stand of the Allies. As Manfred Lachs pointed out 'none of Hyde's arguments is convincing, if we think that there were very few neutrals during the second world war (15).

A fourth possibility was to bring war criminals before an International Tribunal. All efforts to create an International Criminal Court failed (16). The main body of the opponents is furnished by the adherents of State Sovereignty and all it stands for. Their arguments vary from assertion that international law is and should remain a law *between* States, or that is and should be a law between *States* only (17).

The victorious Powers of the war did not choose the second course. Justice Jackson was appointed by President Truman to visit Europe and report on a plan for carrying out this objective. In his report to the President on June 7, 1945 he pointed out that it would have been contrary to principle, to execute the Nazi leaders without trial. One of the objections to the Nazi behaviour was shooting people without accusation or trial (18). Justice Jackson negotiated for the United States with the representatives of Great Britain, France and the Soviet Union and as a result an agreement for the establishment of an International Military Tribunal was signed in London on August 8, 1945 (19).

The trial of Japanese major war criminals was carried out upon the same general principles applied in the case of the German war criminals, but it must be pointed out that "the situation arising out of Germany's unconditional surrender is very different than Japan's position in International Law. In the case of Japan, the State machinery has survived under the terms of the Postdam Proclamation. All acts, therefore, of the occupying Powers in Japan which go beyond the limits of Hague Convention IV of 1907 derive their validity from the consent on the part of the defeated enemy which is inherent in a practically unconditional surrender." (20).

The distinction between major and minor war criminals was made in the Allied Declaration on war crimes in Moscow on 1 November 1943. The Declaration drew a distinction as to trials of the so-called 'major criminals whose offences have no particular geographical localization' and for other war criminals. The non-major defendants were to be judged in the vicinity of their alleged crimes (21).

Since the trial of major war criminals by the first Int. Mil. Tribunal was completed in October 1946, twelve other cases have been presented in Nuremberg against German nationals charged with the commitment of crimes against peace, war crimes, and crimes against humanity. Judgments have been rendered in eight cases (22) and the remaining four cases are in various stages of completion (23). These subsequent proceedings ... though conducted in the name of the U. S. have in fact been International Trials. The Military Tribunals enforcing established Int. Law were constituted in the American zone in pursuance of legislation enacted by the four occupying powers. (Control Council Law. no. 10. 20 Déc. 1945) and similar tribunals were established in the other zones of occupation.

For three years the victorious nations have been trying war criminals. No central agency of any government has an exact record of all the cases, convictions ans sentences. According to the statistics available at the U. N. War Crimes Commission in early December 1946 (24), the following figures show that over 24 000 persons in Europe have been tried in British, U. S., French, Greek, Norvegian, Czechoslovak and Polish courts and of this number 1432

have been sentenced to death, 16,413 to terms of imprisonment and 6520 have been acquitted. 1468 persons in the Far East have been tried before U. S., U. K. and Australian courts and of this number 457 have been sentenced to death, 735 to terms of imprisonment and 276 have been acquitted.

Soon after the trial of the major War criminals at Nuremberg, criticisms of all sorts began and as time passed the controversies and criticism became more and more numerous and severe, which proved that Seldon Glueck was in a way right when he opposed the postponment of the trial (25).

II. In the major question of jurisdiction over war crimes the standpoint chosen has a great importance. Some writers prefer the standpoint of natural justice to more precise rules of existing international law.

To say that ' a state is free within wide limits, which may be defined as the limits set by natural justice, to adopt its own policy in these matters' (26) leads to criticism since the limits of natural justice are not definit.

In the way chosen by the Allies to try the war criminals, the influence of Soviet thought, specially in the question of jurisdiction was a strong one : ' consistent with their policy, proponents of Soviet Russia have repeatedly stated that they will not be guided by sacrosanct legal technicalities in punishing Axis master war criminals of their own accord. Fearing that the governments of Great Britain and the United States will be too lenient with Axis war criminals, they have not participated in the United Nations War Crimes Commission sitting in London ... as far as the jurisdiction of all of the Hitlerite crimes is concerned, Soviet exponents of international law postulate their arguments on the basis of the declaration signed by President Roosevelt, Stalin and Mr. Churchill, on Nov. 2. 1943, specifying " territorial " jurisdiction for the crimes perpetrated by the Germans in occupied territories, such cases to be tried at the place they were committed and " real " jurisdiction for the crimes perpetrated on German territory or on the high seas, such cases to be tried by the courts of the states whose citizens suffered from the crimes. Concerning Hitler and his associates it was held that' their crimes are so enormous and indisputable

that they do not require any specific investigation or legal procedure'. In view of this joint declaration the fate of Hitler and his clique was to be decided by a political verdict of the governments of the victorious democratic powers (27).

Some authors try to simplify the question in finding an analogy between the jurisdiction over pirates and the jurisdiction over War Criminals (28). It has been said that ' its is one of the older institutions of international law to treat pirates on the sea as outlaws and enemies of the human race and bring them to trial wherever they are taken. And the calculated savagery of the totalitarian States, both before and during the second world war, has stamped their rulers as enemies of the human race and to be so treated' (29).

The answer to this is that: ' the crime of piracy, only attaches to acts of violence committed without the authority of any political community and pirates are said to be ' *hostes humani generis* ' and by their acts they put themselves outside the protection of any state, Piracy stands on such an exceptional basis that it throws no light on the question of penal jurisdiction generally'. (30)

The opinion of Q. Wright who considered the Nuremberg trial jurisdiction a case of universal jurisdiction is based on these analogies with the jurisdiction over pirates (31).

From this standpoint Prof. Pella's opinion is much more realistic. He says that : ' the repression of crimes appears as a legitimate satisfaction given to all those who were victims rather than as a (politique criminelle internationale) establishing the principle of repression for such acts in the future so as to prevent their repetition. It is therefore not a question of permanent penal justice, but an *ad-hoc* repression. The Berlin Tribunal which sat at Nuremberg and that of Tokio are not in reality international criminal jurisdiction but inter-allied criminal jurisdiction'. (32)

In regard to the question of jurisdiction the established rules of international law were that no State can be subject to any jurisdiction without his consent, that under international customary law persons accused of war crimes are entitled to trial by a military court of the enemy (33); that international law considers only war crimes in the technical or narrower sense and belligerents are authorized to exercise over members of the enemy's armed forces

and enemy civilians a jurisdiction which is granted to them only in time of war. Only in accordance with these rules the trials of war criminals can be declaratory of international customary law. In the case of the Nuremberg trial, there is no consent by treaty of Germany to the trial of her nationals before the International Military Tribunal, and the rules of customary international law permitting the application of the stipulations laid down in the charter are applicable only in the case of violations of the laws or customs of war , especially in so far as violations of Hague Convention IV of 1907 are concerned'. (34)

Another argument is advanced in view of justifying the legality of the Nuremberg Tribunal's jurisdiction is the result of the exercise by the occupying powers of *condominium* over Germany. In view of Germany's complete breakdown owing to *debellatio* the four powers very logically declared that they assumed 'supreme authority' over Germany (35).

This *condominium* was exercised by the Control Council at Berlin, composed of the commanders in Chief of the Four Powers... it would have been possible for the four powers desirous of prosecuting alleged major German war criminals to create, by means of a legislative act of the Berlin Control Council a competent German Court and to promulgate the law to be applied by this court. Such a procedure, however, was not chosen (36).

The London Agreement by which the International Military Tribunal was established is an inter-Allied Treaty and not a legislative act promulgated by the Control Council. In this agreement the four original signatories declare expressly that they are ' acting in the interests of all the U. N. Nations '. Moreover, the Charter of the International Military Tribunal, which forms an integral part of this agreement, provides, in Art. I, not only for the trial of Germans but of major war criminals of all European Axis countries. Obviously the Control Council has legislative authority only with respect to the territory over which, in accordance with the Potsdam Declaration the occupying powers exercise their condominium; it can certainly not promulgate law binding upon other European Axis countries such as, for instance, Italy or Hungary, which never ceased to have their own national governments (37).

III. Another ground for controversy is provided by the alleged violation of the principle '*nulla poena sine lege*'. One must distinguish first the several meanings of the principle.

Employed as '*nulla poena sine lege*' it means that no person shall be punished except in pursuance of a statute which fixes a penalty for criminal behaviour. Employed as '*nullum crimen sine lege*' the prohibition is that no conduct shall be held criminal unless it is specifically described in the behaviour-circumstance, element of a penal statute. In addition '*nulla poena sine lege*' has been understood to include the rule that penal statutes must be strictly construed. A final, important signification of the rule is that penal laws shall not be given retroactive effect' (38).

Those who consider that the principle has a strict meaning in international law as well as in national law direct their criticism to some categories of crimes. In fact the Agreement of the 8th. August 1945 establishes different forms of tribunal and also of defendants and so does the trial concerning the Japanese defendants. Respecting these forms, it is established that some jurisdictions are connected with geographical considerations which, in each case, depend on the territorial law applicable to the defendants. The tribunal established for the major war criminals presents quite a different aspect, in asmuch as they are to be tried according to a law set down both in the agreement and in the Charters attached to them (39). The Judgment of the Nuremberg Tribunal denied that the rule nulla poena ... has any application to the case. It said : (40) ' Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germans, outlawing recourse to war for the settlement of international disputes. They must have known that they were acting in defiance of international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case then, it would appear that the maxim has no application to the present facts'.

Even those who support the decision of the tribunal accept that criticism is applicable to the charges of waging an aggressive war and acts against humanity (41).

On the other hand the retroactive liability made by the Germans at Nuremberg find a support by certain American lawyers (42). Many others believe that the objection of *ex post facto* law is not involved (43). In particular in the opinion of Kelsen the objection is not a 'veightiest one' : '... justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second world war may certainly be considered as more important than to comply with the rather relative rule against *ex-post facto* laws open to many exceptions' (44).

IV. Among the pleas of defence (45) the most common one is the plea of superior orders. There is a great diversity in the juridical and legislative practice of various states. In the doctrinal side of the question some authors advocate the acceptance of the plea. It has been said that : 'hundreds of thousands of soldiers who have just done their military duty — and perhaps with grave misgivings— would after the war have to face a tribunal whose duty it would be to send them to prison for the sins of their superior (46)' and... 'it is repugnant to the average person to think of punishing a soldier who, in the first place, would be ignorant of the legality or illegality of his act and, in the second place would be shot immediately if he refused to obey the order to perform the illegal act. If we admit war as a procedure, we must admit the exceptional situations which it produces; the inferior who is ordered to commit an illegal act cannot resign rather than obey' (47). It has been said also : ' in spite of the difficulties attending allocation of personal penal responsibility for authorized violations of the laws of war, and although varying standards of liability are employed, municipal regulations in fact recognize the principle of superior orders as a good defence to a criminal charge based on a violation of the law of war' (48).

The great majority of the other authors reject the plea saying that the 'unqualified acceptance of the principle that a subordinate is not responsible for what he does under orders of his superiors will

make it practically impossible to enforce proper penalties for violations of the laws of war designed to humanize, if such be possible, that grim recourse' (49).

A. Sack in an article on the plea of superior orders (50) rejects the plea : ' the plea of superior order, under condition of military discipline, especially in time of war, is often accepted in mitigation of punishment as when the unlawful order was obeyed solely *pro timore mortis*.

But it is not and has never been, the policy of International law, by approving the defence of superior orders as an absolute bar to the prosecution of war criminals, to destroy entirely any effectiveness of its rules of humane warfare, and to help a lawless government in maintaining discipline and 'morale' in its armies by assuring them that their crimes, being ordered or sanctioned by their government, may not be punished by their victims.'

On the whole the Anglo-American doctrine and practice do not favour the plea of superior orders. France has emphatically rejected the plea of superior orders when put forward by enemy soldiers and officers accused of war crimes (51).

This is a review of the Anglo-American practice: In the case *Rex v. Thomas* a crime is not necessarily excused by being committed in obedience to the command of a military superior (52). In *Keighley v. Bell* obedience to an order of a superior officer which is not necessarily of manifestly illegal may be a good defence to a criminal charge against a person subject to military law (53); In the case *Regina v. Dudley* (1884) the defence is rejected (54). In *Regina v. Smith* a crime probably would be excused when the command is such as the soldier might reasonably — even by a mistake of law — suppose himself legally bound to obey (55).

As to the American cases there is first *Little v. Barreme* (Flying Fish) (1804), in which Chief Justice Marshall, after weighing carefully the principle which should govern this class of cases, followed the common law rule that an officer who commits an unlawful act pursuant to an illegal order is not protected by such an order from personal responsibility (56).

In *Martin v. Mott*, 1872 (12 Wheaton 28) the Supreme Court accepted the plea of superior orders and said that violations in ac-

cordance with orders render responsible only the commander issuing the order, and not the subordinate who carries it out (57).

The Lieber Rules of 1863 did not recognize the plea and in 1865 Wirz, commandant of the Confederate War Prison at Andersonville, Ga.; was tried by a U.S. Military Commission for brutal treatment of federal prisoners, his plea of superior order was rejected, and he was convicted and hanged (58).

In *Mitchell v. Harmony* the Supreme Court reputiated the doctrine that an officer may take shelter under the plea of superior command (59). In *U. S. v. Carr* (1 Woods 480) Woods. J., said: 'a soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is neither by his duty not by his oath bound to do it '(60).

The doctrine according to which superior order is a complete and absolute defence, made its first appearance in 1912 ... the author of this doctrine is Oppenheim, who formulated it in his textbooks (2 Int. Law. 2nd. ed. 1912. sec. 253) and in the Rules of Land Warfare which he wrote (whith Colonel T. E. Edmonds) for the British Government, and which were published in 1912, and embodied in the official British Manual of Military Law in 1914. The British Rule was adopted by the Military authorities in the U. S. (The U. S. Rules of Land Warfare 1914. no. 366; 1940. no. 347) (61).

The Oppenheim Rule was rejected by such authorities as Bellot, Garner, Lord Cave (62), Higgins (63), Merignhac (64), Phillipson and many others. During the Leipzig Trials of 1921, The Leipzig Court held in *Llandovery Castle* that 'the order does not free the accused from guilt, if such an order is universally known to be against the law ' (65).

The Court took a different decision in the *Dover Castle*. Lt. Karl Neumann, charged with the sinking of the british hospital Ship Dover Castle pleaded that he was acting under instructions from the German Government. The tribunal gave him reason saying that all civilized nations recognized the principle that a subordinate is covered by the orders of his superiors (66).

After the first World War a treaty was concluded in Washington on the 6th. February 1922, regarding the use of submarines.

The signatories were US., The British Empire, France, Italy and Japan, the treaty after prescribing rules for the protection of the lives of neutrals and non-combatants at sea in time of war, excluded in Art. III the defence of superior orders (67).

Not long before the end of the second world war, a change was made in the British Manual of Military Law. The editors of the new text evidently thought that they would have to judge the Germans for crimes committed during the war; they thus wished to avoid the exception made on the occasion of the 'Dover Castle'. At the same time a change was made in Oppenheim's book.

The new provision of the Manual states : ' The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime...' (68).

As a natural result of this the Charter of Nuremberg does not recognise the plea of superior orders. Art. 8 of the Charter of the International Military Tribunal stipulated that the plea of superior command shall not free a defendant from criminal responsibility but may be considered in mitigation of punishment.

The Tribunal in its judgment interpreted the rule *respondeat superior* rather restrictively by declaring that ' the true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible (69).

Taking the Nuremberg Charter in example the various Laws, regulations and the legislations of many countries concerning war crimes rejected the plea of superior orders as a defence (70).

V. One of the most controversial aspects of the war crimes problem was the criminality of aggressive war. The source of the controversies was that aggressive war was not only illegal in international law but that those 'who plan and wage such a war ' with its inevitable and terrible consequences are committing a crime in so doing (71). Relying on the provisions of the Briand-Kellog Pact (72)as well as on ' the international history which preceded it ' the International Military Tribunal declared that ' all these expres-

sions of opinions, and others that could be cited so solemly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to war of aggression is not merely illegal but criminal '.

To this assertion this first criticism was made : it has been rightly said that : ' it does not follow because a particular action is illegal, that it is also criminal; thus a general restraint of trade has constantly been held to be illegal, but it has not therefore been held to be criminal, for, as Kenny points out, crimes are wrongs whose sanction is punitive and there is no sanction postulated in the Pact of Paris (73).' The 'Crimes against Peace' formed the most important part of the indictment against the accused, everything else in the Nuremberg Tribunal, as stated by the U. S. Prosecution, was only 'incidental, or subordinate to the supreme crime against peace ' (74).

This view was also confirmed by the International Military Tribunal itself when in its judgment it declared that ' to initiate a war of aggression, ... 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'. After according so much importance to this part of the indictment the judgment does not strictly consider whether and to what extend aggressive war was a crime before the execution of the London Agreement (75).

The jurists who support the criminality of aggressive war (76) with arguments drawn from international custom, the Briand - Kellogg Pact and other treaties have tried to prove their points, and in this respect a long list of the solemn international pronouncements was stated (77).

Also some references to these international pronouncements were made by the Tribunal itself. On the opinion of Dr. Schwarzenberger these 'references to the draft Treaty of Mutual Assistance of 1923, to the unratified Geneva Protocol of 1924 and to the League Resolution of 1927 on aggressive war, rather tend to weaken the conclusion at which the Tribunal arrived. Draft treaties and unratified conventions are legally non-existent and resolutions of the Assembly of the League of Nations — even if unanimously

adopted — were widely held not to be legally binding on the members of the League of Nations ' (78). The same author in reviewing the international practice since the conclusion of the Kellogg Pact shows that aggressive war before 1939 was far from being considered a crime : ' In 1929 the Soviet Union seized forcibly two places in Manchuria, which were garrizoned by Chinese troops, and agreement with China was achieved only on the basis of a Russian ultimatum. Then came the Japanese invasion of Manchuria, repeated large-scale battles between Soviet and Japanese forces on the Soviet-Manchurian frontier at a time when both countries were formally not at war with each other; the Italian aggression against Abyssinia and the express recognition of the King of Italy as Emperor of Italian East Africa by France and Great Britain ; the German invasion of Austria and Czechoslovakia - the latter with Hungarian and Polish participation; Italy's occupation of Albania; the secret German-Soviet Protocols of August 23 and September 28th 1939; the Soviet occupation of the Eastern parts of Poland; the incorporation into the U.S.S.R. of the Baltic States and the preventive Soviet War against Finland' (79).

The situation raised by the vitally important part played by Soviet Russia both before and after the war against Poland was a source of strong criticism (80). It has been objected that the question whether Russia is or is not guilty of a war of aggression is not relevant to the issue before the court at Nuremberg (81). Nevertheless as time passes the controversies on this point increase and the doubts and suspicions are far from being dispelled. (82)

VI. Apart from the criminality of agressive war another consequence of trials was challenged adding thus to the list of controversies some new material. One of these consequences follows the admittance of criminality of aggressive war and as a result of it the responsibilty of individuals. Aggressive war is a crime : those who take part in its waging or its initiation are personally responsible. The tribunals said : ' It was submitted that international law is concerned with actions of sovereign States, and provides no punishment for individuals ... these contentions must be rejected — crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes

can the provisions of international law be enforced". Some authors enforced the view of the tribunal, some others denied it.

Here too we are faced with a question of principle, according which the acceptance of the individual as a subject of international law will facilitate his criminal responsibility. Those who thinks that this is still premature will show some resistance to the idea that individuals are responsible for having resorted to an internationally illegal war. Prof. Lauterpacht who is rather inclined to accept individuals as subjects of international law thinks that insufficiant attention has been paid to the fact that the operation of the law of war constitutes a decisive refutation of the view that states only, and not individuals are subject to international duties (83). Lauterpacht said: '...one of the basic principles of the idea of punishment of war crimes is the notion that individuals are directly subject to the duties imposed by the rules of war. Without that we may in many cases be at a loss to know how to supply a satisfactory basis for the punishment of war criminals' (84).

Kelsen, who strongly believed in the act of State doctrine rejected this point of view. His opinion is that : ' such responsibility can be established only by a rule of international or national law providing punishments to be inflicted upon definite individuals. To deduce individual criminal responsibility for a certain act from the mere fact that this act constitutes a violation of international law, to identify the international illegality of an act by which vital human interests are violated with its criminality meaning individual criminal responsibility for it, is in contradiction with positive law and generally accepted principles of international jurisprudence' (85). ' No military tribunal has, so far, tried and punished individuals for having resorted to an internationally illegal war. The military tribunals to whose practice the judgment refers, tried and punished individuals for acts of illegitimate warfare performed by them as private persons, not as an act of State' (86). The same writer denied the value of the decision of the Nuremberg trial as a precedent. (87).

CONCLUSIONS :

As the political and military situation in 1945 was very different from that of the end of the first World War, it will be relati-

vely easy to reach a conclusion as to the method to choose for the trial of war criminals. We think trial of the criminals by their own countrymen was possible.

" Most of the brutalities were not borderline cases or cases that the decisions of which depends on obscure or controversial rules of international law " and it was rightly remarked by Dr. Shwarzenberger that ' the barbarities were contrary even to the criminal law of the Third Reich '. If the course suggested were chosen some measures such as the creation of an international supervisory commission and the exclusion or limitation of the plea of superior orders (88) would have been necessary for avoiding the criticism made of the Leipzig Trials.

As to the question of jurisdiction it will be difficult to accept the arguments of the judgment of Nuremberg and the explanations given by the supporters of the trials. The jurisdiction was not in accordance with the established rules of international customary law.

In the example of Nuremberg " the tribunal (was) a municipal tribunal of extraordinary jurisdiction which the four contracting Powers shared in common " (89). ' Within the framework of its Charter, the Nuremberg Tribunal has extended the normal range of municipal jurisdiction in the field of criminal justice, and, in this respect, assimilated jurisdiction in crimes under the Charter to jurisdiction in war crimes under international customary law' (90). We should like to recall the words of Prof. Donnedieu de Vabres who was one of the judges at the Tribunal. In a lecture delivered at The Hague in the summer of 1948 Prof. Vabres said that : " ...les condamnations sont prononcées en vertu du droit pénal commun — qui est un droit pénal interne. Le Tribunal de Nuremberg était condamné à être une juridiction *ad hoc* parce qu'en 1919 quand on a créé une Cour on a omis de lui adjoindre une Chambre Criminelle. ' These words showing the opinion of one of the judge's are characterictic of the real value of the jurisdiction applied.

The criticism made in connection with the " nulla poena... " rule and the objection of ex-post facto law, has been purportedly answered by an argument drawn from the evolutional character of international penal law.

According to our point of view this argument is not convincing. The creation of an international criminal Court was considered premature after the first World War (91) and in spite of the so-called evolutional character of international penal law even the judgment of Nuremberg has not led to the creation of an international Criminal Law and now a days one notices the same hesitation. The matter is only taken into consideration in connection with Genocide and the sanctions to be applied for the establishment of Human Rights.

The changes made in 1944 in the Manual of Military Law show clearly that the punishment of war crimes was a problem of politics rather than of law. It was a case of opportunism and the purpose was to facilitate the functioning of the various tribunals.

But it can be said that these changes are for the better. Indeed the objection cannot be well taken that such a theory will make it impossible to punish anyone for the crimes of war.

" The plea may under certain circumstances hold good but if accepted as a general rule it may lead to a *reductio ad absurdum*, to the effect that the only war criminals are those few at the top from whom the orders emanated (92) " For the question of criminality of aggressive war we are far from being convinced that aggressive war was a crime before 1939. It was very difficult to define aggression and even the judgment of Nuremberg does not enunciate a criterium on this matter. Moreover the fact that others besides the Germans had started and waged wars of aggression will increase the " malaise " of even the most ardent supporters of the trials (93).

Is it possible to share the belief of those who think that in the years to come it will be increasingly recognized that the trials were a foundation-stone on which a new and effective international law can be built? (94).

It's very doubtful. It is true that the second World War made many changes in various spheres of international law; it is true also that the sovereignty of States has lost its absolute meaning. But we cannot agree with those who consider the individual a subject of international law ; Art. 34 of the Statute of International Court of

Justice which lays down that only States may be parties in cases before the Court and the reading of proceedings of the Human Rights Commission convinced us that it is rather early to consider the individual a subject in international law.

As to Sovereignty, the following words of the delegate of the U. S. R. R. at a meeting of the U. N. shows that this obsolete doctrine is far from being buried : " Nobody will blind us and confuse us with beautiful words about the necessity of waiving part of our national sovereignty " (95).

We are living in an epoch in which we have more than one reason to be sceptical. Though we admire the efforts of the supporters of the war crime trials and agree with them that the records of these tribunals will become a great help for the historians of tomorrow we are inclined to say that these authors express what should be rather than what it is. We are indeed sceptical as to the salutary effect of the trials on the German, Japanese ond other peoples. We do not think that these peoples are convinced of the guilt of their leaders (96).

But if all these tribunals were not formed in accordance with the existing rules of International law, if the punishment of war criminals was rather a political issue, if they did not succeed even to interest the peoples of vanquished nations and convince them, what then was their real practical value ?

As far as we can see to satisfy the desire of vengeance of those who suffered during the war and to form a precedent and a ground for the Allied of yesterday to attack each other in the political facts of today. We are referring to the charges made against Russia on the occasion of the Berlin Blockade.

It has been said that : " The Russian blockade of Berlin is an act of aggression in two respects. It is an act of aggression against Britain, America and France to close, by military force, roads and railway which these states have an established treaty right to use. It is an act of aggression against the city of Berlin to attempt deliberately to starve 2.000.000 of its population. It is worth reflecting that, if the Nuremberg Charter were what it purported to be, the basis of a new international criminal law, Stalin and Molotov would

have to face charges of a crime against peace and a crime against humanity " (97). We are remembering that the same accusations were made by communist China, in connection with the Korean War towards the United Nations.

It is a sad result, a result which strenghtened our belief in this phrase of a French philosopher :" " I tremble every time I think that men are judged by men ".

(1) For the political character of the question, **Garner** in his Recents Developments in Int. Law (1925) has said that : " It is a question of policy and expediency, to be exercised by the victorious belligerent or not accordingly as he may judge whether considerations of retributive justice of its moral effect upon the mind of belligerents in the future may make it desirable. "

(2) **Namier (J. L.)**.— The Nuremberg Trial. History or Law ? The Manchester Guardian. Nov. 19. 1945.

(3) **Brierly (J.L.)**.— Do we need an Int. Criminal Court?. B. Y. I. L. 1927. p.82.

(4) **Brierly (J.L.)**.— War Crimes : What the Law can do? The Observer Ap. 8.45.

5) **Lawrence** (Lord Justice).— The Nuremberg Trial. International Affairs vol. XXII. no. 2. April 1947. p. 152-3.

(6) **Schwarzenberger (G.)** — Int. Law and Totalitarian Lawlesness. 1943. p. 73.

(7) B. Y. I. L. 1927. p. 84.

(8) **Brielrly**.— The Observer. April 8.1945.

(9) **Wright (Quincy)**.— War Criminals A. J. I. L. vol. 39. no. 2. April 1945. p. 284.

(10) **Wright (Quincy)**.— War Criminals. A. J. I. L. vol. 39. no. 2. April 1945. p. 284.

(11) **Dr. Schwarzenberger** called this solution " The **de facto** Versailles Pattern ".

(12) Cf. on tis matter **Lachs (M.)** : War Crimes. An attempt to define the Issues. London 1945.

Creel (George).— War Criminals and punishment. London 1945. p. 58, 59.

Baer (Marcel de).— The Treatment of War Criminals. Message. Nov. 1942. Trans. of The Grotius Society. Vol. 14.1929. p. 79, 80.

Descheemaker (Jacques).— Le Tribunal Mil. Int. des Grands Criminels de guerre. Paris. 1947.

Cohn (Ernst J.).— The Problem of War Crimes To-day. Trans. Grotius Soc. vol. 26. 1941. p. 133, 134.

Goodhart (A. L.).— Canadian Bar Review. vol. XX. 1942. p. 231.

(13) **De jure** Versailles Pattern. In the opinion of Dr. Schwarzenberger, de jure Versailles pattern suffers from its inconsistency in the treatment of those who were regarded as the authors of the first World War. This category has either to be left to moral condamnation or war criminals of this type have to be tried in accordance with **ex post** created legal rules.

(14) **Lachs (M.).**— Op. cit. p. 80.

(15) **Lachs (M.)** Op. cit. p. 81.

(16) Cf. on this matter : Caloyanni (M. A.) — Memorandum on Int. Criminal législation and peace. Rev. Int. de Dr. Pénal. 1946. no. 3-4. p. 315.

Phillimore (Lord).— An Int. Cr. Court and the Resolutions of the Committee of Juristes. B. Y. I. L. 1922-23. p. 80-84.

Brown (P.M.)— Int. Criminal Justice. A. J. I. L. vol. 35. 1941. p. 120.

Kuhn (A. K.).— Int. Criminal Jurisdiction. A. J. I. L. vol. 41, no. 2. p. 432, 3.

Jessup (P.C.).—A Modern Law of Nations. New-York. 1948. p. 179.

Ottolenghi (Giacomo).— Le Problème des Criminels de guerre. Rev. de Dr. Int., et de Sc. dip. 1946. Janvier-Mars. no. 1. p. 6.

(17) **Schwarzenberger (G.).**— Int. Law and Totalitarian Lawlesness. p. 78.

(18) **Wright (Q.).**— The Nuremberg Trial. 'The Annals of The American Academy of Political and Social Sciences. July. 1946. P. 74.

(19) **Wright (Q.).**— The Law of The Nuremberg Trial. A. J. I. L. Vol. 41. 1947. p. 39.

(20) **Schwarzenberger (G.).**— The Judgment of Nuremberg. Tulane Law Review. Vol. XXI. no. 3. March. 1947. p. 340.

(21) **Cowles (Willard B.).**— Trials of War Criminals (Non-Nuremberg) A. J. I. L. vol. 42. 1948. no. 2.

(22) **Ferencz (Benjamin B.).**— Nuremberg trial procedure and the rights of the accused. The Journal of Criminal Law and Criminology. Chicago. Vol. 34. no. 2. July-August. 1948. The cases are : no. I: Medical case, no. 2: Milch case; no. 3: Justice case; no. 4: Pohl case; no. 5. Flich case; no. 7: Hostage Case; no. 8: Race and Settlement office Case, and no. 9 Einsatzgruppen Case; no. 6. Farben Case; no. 10 : Krupp Case; no. 11: Ministries case; no. 12 : High Command Case.

(23) **Ferencz.**— Op. Cit.

(24) Int. Law Quarterly. vol. I. no. I. 1947. P. 42.

(25) **Glueck (Sheldon).**— The Nuremberg Trial and Aggressive War. Harward Law Review. vol. 59. 1946. no. 3. P. 447: ...by the time, the evidence would be "cold", most of the accused and witnesesses would be dead, the public would have lost all interest, the punishment all deterrent value.

(26) **Brierly (J.L.).**— The Nature of War Crimes Jurisdiction. The Norseman vol. 11 no. 3. May-June 1944. P. 171.

27) **Prince (Charles).**— Current wiews of the Soviet Union. A. J. I. L. vol. 39. no. 3. 1945. p. 496 et seq.

(28) In this connexion **Max Radin** said :',.. we need really not trouble ourselves to find analogies in international procedure, such as the jurisdiction over pirates, the " communes hostes generis humani " a proper enough designation for those Nazis who have openly and defiantly denied any obligation. Justice at Nuremberg. Foreign Affairs vol. 24. April 1946. no. 3. p. 733.

(29) **Bentwich (Norman).**— International Law (pamphlet). 1945. p. 36.

(30) **Beckett (W.E.).**— The exercise of Criminal jurisdiction over Foreigners. B. Y. I. L. 1925. p. 45.

(31) **Wright (Q.).**— The Nuremberg Trial. The Annals of American Academy of Political and Social Science. July 1946 p. 79.

(32) **Pella (V.V.).**— Fonctions Pacificatrices du droit pénal supranational et fin du système tradionnel des traités de Paix. Rev. Gén. de Dr. Int. Public. Tome LI. 1947. p. 7.

(33) " It appears highly erroneous to quote this case in evidence of a general rule of international law (the case in question is Ex Parte Quirin (1942) 317 U.S. I) supporting the criminal liability of the Nuremberg defendants. Ex parte Quirin, it is well known dealt substantially with the crime of war treason **juris gentium** a crime for which general international law has established individual criminal responsibility as an exception to the rule. **Schick** : The Nuremberg Trial and the Int. Law of the future. A. J. I. L. vol. 41, p. 191.

(34) **Schwarzenberger (G.).**— Tulane Law Review. vol. XXI. no. 3. 1947. p. 343-4.

(35) **Schwarzenberger (G.).**— Tulane Law Review. vol. XXI. no. 3. 1947. p. 340.

(36) **Kelsen** : A. J. I. L. vol. 39, no.3. July 1945. p. 525, 6.

(37) **Schick (F.B.).**— The Nuremberg Trial and the International Law of the future. A. J. I. L. vol. 1947 p. 781.

(38) **Hall (Jerome).**— Nulla Poena sine lege. The Yale Law Journal. vol. 47. December 1937. no. 2. p. 165.

For the analyzing of the doctrine nulla poena, Cf: **Glasser (S.).**— Journal of Comparative Legislation an Int. Law. vol. 24. 1942. p.İ 28-30-34.

Glueck (Sheldon).— Harward Law Review. vol. 59. 1946. no. 3. p. 438 et seq.

(39) **Caloyanni (M.A.).**— Rev. Int. de Dr. Pénal. 1946. no. 3-4. p. 321.

(40) Cmd. 6964. p. 39.

(41) Cf. **Goodhart (A.L.).**— The Legality of the Nuremberg Trial. The Juridical Review. vol. LVIII, no. 1, p. 17.

Cf. **Goodhart (A.L.).**— The International Law Quarterly. no. 4. p. 528.

(42) **Cf. Glueck (S.).**— Harward Law Review. vol. LIX. no. 3. p. 437.

(43) **Gregory (Tappan), Ottolenghi (G.), La Pradelle (A. de), Smith (W.).**

(44) **Kelsen (H.).**— Int. Law Quarterly. vol. 1. no. 2. 1947. P. 165.

(45) For the others pleas Cf: **Schwarzenberger:** Czechoslovak Yearbook of Int. Law. March. 1942. p. 75 and **Lachs (M.)** : War Crimes an attempt to define the issues. London 1945. p. 83-85.

(46) **Cohn (E.J.).**— The Problem of War Crimes To-day. Tr. Grotius Soc. vol. 26.

(47) **Eagleton (Clyde).**— A. J. I. L. vol. 37. 1943. p. 497.

(48) **Manner (George).**— A. J. I. L. vol. 37. 1943. p. 418.

(49) **Finch (G. A.).**— Superior Orders and War Crimes., A. J. I. L. vol. 15. p. 445.

(50) **Sack (A.N.).**— The Law Quarterly Review vol. 60. 1944. p. 63-64.

(51) " The French... would hold responsible the commander who issues an improper order, the subordinates who transmit it, and the individual who carries it out " **Colby (E.)** : —A. J. I. L. vol. 17. 1923. p. 115.

(52) Cf. **Kenny.**— Selection of cases. 8 éd. 1935 p. 59, 60:, and **Dicey.**— Introduction to the Study of the Law of the Constitution. 9th éd. p. 302.

(53) **Dicey.**— op. Cit. p. 303.

(54) **Godhart (A. L.).**— Canadian Bar Review. vol. XX. 1942. p. 233.

(55) Cf. **Finch.**— A. J. I. L. vol. 15. p. 442-444; **Garner.**— Int. Law and the World War. (1920). vol. II. p. 485.

(57) **Colby (E.).**— Courts-Martial and the Laws of War. A. J. I. L. vol. 17, p. 11.

(58) **Sack (A.N.)** — The Law Quarterly Review. vol. 60. p. 65.

(59) **Garner.**— op. cit. p. 485.

(60) **Kenny.**— op. cit. p. 62.

(61) **Sack.**— op. cit. p. 65 et seq.; **Finch.**— A. J. I. L. vol. 15. p. 441.

(62) Cf. **Lord Cave** : War Crimes and their punishment. Trans. Grotius Society. vol. 8. 1922. p. XXII and
XXIII.

(63) Cf. **Higgins (A.P.).**— The Law Quarterly Review. Vol. 38. 1922. p. 105.

(64) Cf. **Merignhac (A.).** — Rev. Gén. de Dr. Int. Pub. tome XXIV. 1917. p. 49 et s.

(65) For the judgment of the Supreme Court in the case of Lts. Dithmar and Boldt (Hospital Ship Llandovery Castle) Cf. **Schwarzenberger** : Int. Law and Totalitarian Lawlesness. 1943. pp. 113-146.

(66) Cf. **Sack.**— The Law Quarterly Review. vol. 60. p. 67; **Finch.**- A. J. I. L. vol. 15. 1921. p. 440-441; **Hackworth.**— Digest of Int. Law vol. VI. p. 462, 3; **Lauterpacht (H.)** — B. Y. I. L. 1944. p. 70.

(67) **Schwarzenberger.**— Op. cit. p. 62, 63; **Cave (Lord).** : Trans. Grotius Soc. vol. 8. 1922. p. XXX; **Glueck (S.).** — Harward Law Rev. vol. LIX, no. 3. p. 429.

(68) Cf. **Rowson (S.W.D.).** — Punishment of War Criminals. The Law Quarterly Review. vol. 60. 1944. p. 225-226.

(69) Cmd. 6964. and **Schick** (F. B.). — A. J. I. L. vol. 41. 1947 p. 793.

(70) Cf. Danish Provisions regarding punishment of War Crimes (Danish act of 12th. July. 1946. Ch. 1. 4); Austrian Constitutional Law of the 26th June 1945. parag. I (3); Norvegian War Crimes lég. of 1946 parag. 5; Belgian Law of 20th June 1947 art. 3; Polish War Crimes Légis. Dec. 11. 1946. art. 5; Czechoslovak War Crimes Lég. 24th. Jan. 1946. parag. 13; Chinese Law governing the trial of War Criminals October 24th. 1946. Art. VIII.

(71) Cmd. 6964. p. 39.

(72) The General Treaty for the Renunciation of war of 27th. August, 1928.

(73) **Green (L.C.).** — The Modern Law Review. vol. 11. no. 1. p. 105.

(74) Congressional Record. vol. 92. no. 154. p. 10850.

(75) Cmd. 6964. p. 38.

(76) **Lord Wright, Sheldon Glueck, Murray C. Bernays, Trainin, Willard B. Cowles, Albert G. D. Levy, A. N. Sack, H. Lauterpacht, Nicholas Doman, Q. Wright.**

(77) Cf. **Glueck (S.)** : The Nuremberg Trial and Aggressive War. Harward Law Review. vol. LIX. no. 3. p. 408-112. and **Lachs (M.).** — War Crimes an attempt to define the issues. London. 1945. p. 6.

(78) **Schwarzenberger (G.)** : The Judgment of Nuremberg. Tulane Law Review. vol. XXI. no. 3. March. 1947. p. 346. and **Radin (Max)** : Justice at Nuremberg. Foreign Affairs, vol. 124. April 1946. no. 3 : " the word int. crime used about an aggressive war in the Geneva Protocol of 1924 cannot be rated higher now than it was rated then, as a rhetorical term-a noble rhetoric to be sure-but not a term with definite legal content." — same opinion **Schick** : A. J. I. L. vol. 41. p. 784.

(79) **Schwarzenberger** : Tulane Law Review. vol. XXI. no. 3. P. 347.

(80) Cf. **Kelsen (H.).** — " Will the Judgment in the Nuremberg Trial constitute a precedent in international law ". The Int. Law Quarterly. vol. I. no. 2. 1947. p. 158. ; **Finch (George A.).** — The Nuremberg Trial and International Law. A. J. I. L. vol. 41. no. 1.

(81) **Glueck (Sheldon).** — The Nuremberg Trial and Aggresive War. Harward Law Review. vol. 59. no. 3. 1946. p. 449.

(82) Cf. : **Finch.** — A. J. I. L. vol. 41. no. 1. p. 29 et seq.

Fenwick (Charles G.). — International Law. 3rd. éd. 1948. p' 673.

Blakeney (B. Bruce). — International Military Tribunal. American Bar Ass. Journal. August 1946. vol. 32. p. 476.

(83) **Lauterpacht (H.).** — The subjects of the Law of Nations. The Law Quarterly Review, vol. 63. Oct. 1947. P. 442.

(84) Trans. Grotius Society. 1945. P. 67. Cf. also, **Wright (Q.).** — A. J. I. L. vol. 39. no. 2. p. 264, 265, **Gregory (Tappan)** — American Bar Ass. Journal. September 1946. vol. 32. p. 548.

(85) Kelsen. — op. cit. p. 156.

(86) Kelsen. — op. cit. p. 160.

(87) Kelsen. — op. cit. p. 153 et seq. Cf. also: **Schick.** — A. J. I. L. vol. 41. p. 778; **Finch.** — A. J. I. L. vol. 41. p. 35; **Glueck (S.).** — Harward Law Rev. vol. 59 no. 3. 1946. p. 452.

(88) **Schwarzenberger.** — Int. Law and Totalitarian Lawlesness. p. 79.

Cohn (E. J.). — Trans. Grotius Sov. vol. 26. 1941. p. 136, 137.

Anderson (Arnold). — The American Political Science Review. vol. 37. Dec. 1943. no. 6p. 1099.

(89) **Schwarzenberger.** — Tulane Law Review. vol. 21 no. 3. p. 335.

(90) **Schwarzenberger.** — Tulane Law Review. vol. 21 no. 3. p. 360, 1.

(91) Cf. **Phillimore** B. Y. I. L. 1922-23. p. 80-84.

(92) **Lachs (M.).** War Crime. London. 1945. p. 84.

(93) This opinion was epressed by Prof. **L. B. Namier** thus : " For reasons good, bad or indifferent, France and Great Britain abetted Nazi action in 1938, and so did Russia in 1939. This does not diminish Germany's guilt a whit, but is bound to produce 'malaise' and lead to complications which had better been avoided ". (The Manchester Guardian. November 20. 1945).

(94) **Goodhart (A.).** — Justice at Nuremberg. The Spectator. May 17. 1946.

(95) Time, October 11. 1948. p. 13.

(96) Cf. **Goodhart (A. L.).** — Questions and answers concerning the N. Tribunal. The Int. Law Quarterly. vol. 1. no. 4. 1947. p. 530.

Doman (Nicholas). — Political Consequences of the Nuremberg Trial. Annals of the American Academy of Political and Social Science. July. 1946. p. 90.

(97) The Observer. Sunday, June 27, 1948.