CRIMINAL RESPONSIBILITY FOR VIOLATIONS OF THE LAWS OF WAR *

by

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1. INTRODUCTION

International law is a body of law characteristic of an underveloped legal community, lacking a central legislative body and a central power which is able to enforce the law. This lack of enforcement power is one of the characteristics of the law of nations, showing clearly its underdeveloped character. Another feature of its underdevelopment is the absence of a central court which can decide upon conflicts concerning the interpretation of the law. Because such a court with compulsory powers does not exist, international law is compelled to recognize the right of each party to interpret the law as it chooses. States, and other subjects of international law, are bound by international law, but their right of autointerpretation of that law is also recognized.

It is in connection with the laws of war that the impossibility of enforcing the law is most striking. The lack of a central authoritative power leaves the enforcement to the parties themselves, first of all by means of reprisals : acts which are usually forbidden, but permissible as a means of compelling the adversary to stop his violations of the laws of war. Reprisal-law is the most

* This paper is part of a research project on « Respect for Human Rights in Armed Conflicts : the Existing and the Emerging Law », directed by Prof. A. Cassese. The project has been made possible by a grant from the Italian « National Council for Research » (CNR).

disgusting part of the laws of war, but it cannot be dismissed. It is often the only means of law-enforcement that is available (1).

Another means of enforcement is the repression of war crimes by (the prospect of) prosecution and punishment. This criminal individual responsibility for violations of the laws of war, is the topic of this paper.

I would like to discuss some features of this criminality, of the criminals and the judges.

2. PROSECUTION OF WAR CRIMINALS

War criminals can be prosecuted and punished by their own country or by a foreign country, for example by the enemy State into whose hands the criminal has fallen, or by an international tribunal. Such an international tribunal can be composed of judges from the victor-States, from victor- and neutral countries, and even of judges from victor-, neutral and vanquished States. The post-war international tribunals of Nuremberg and Tokyo were tribunals composed of judges from the victorious countries. It would have been better to have included neutral judges, and judges from the defeated countries. They would not have had a decisive vote, being in the minority, but their presence, especially in chambers, would have had a favourable influence. Judges from neutral countries would probably have been more neutral in their attitude, and judges from the vanquished country would have had greater knowledge of conditions in their country, and would have thus been able to correct, in chambers, biased views and traditional misunderstandings.

The advantage of a pre-existing « international criminal court » would be that countries other than just the victor-nations would be represented on the bench. Another advantage would be that such a permanent court would be more aware of its precedent-creating capacity. Its ruling would also be applicable in future cases, and that might have a favourable effect.

(1) There is a tendency to restrict the right of reprisals. KALSHOVEN, F., *Belligerent Reprisals*, Leiden, 1971, supports this tendency. He comes to the conclusion « that the balance of the merits and demerits of belligerent reprisals has now become so entirely negative as no longer to allow of their being regarded as even moderately effective sanctions of the laws of war, and of the « law of The Hague » in particular : in the whole of the international legal order, they have become a complete anachronism » (p. 377). At the Red Cross Diplomatic Conference many restrictions of the right of reprisals have been adopted on the Committee level (see Protocol I, articles 20, 46, 47, 47 bis, 48, 48 bis, 49, 66, and Protocol II article 19 the decision concerning the prohibition of reprisals as proposed in articles 6 and 26 bis was postponed).

One may doubt whether such an absolute prohibition contributes to the elimination of the misbehaviour in question. Because the prospect that no reprisals in kind are allowed may induce a belligerent to violate the law. Another approach to reprisal-law might be to prohibit specific acts, except as reprisal in kind.

The laws of war derive their authority, during a war, from the threat of reprisals, prosecution and punishment after the war. The prospect of post-war trials was stressed in the « Moscow Declaration on Atrocities », of November 6th, 1943, and in a speech by Stalin, of November 11th, 1943, where, for the first time, it was stated officially that those responsible for the war would be punished.

Trials have taken place also during a war, but only in exceptional circumstances. American airmen who bombed cities, were sentenced by Japanese Courts, but after the war the Japanese judges involved were hanged (2). In general, it would seem to be unwise to punish captured war criminals in wartime. It is better to wait until the war is over. But then only the victor can decide what kind of trials will take place, and what kind of crimes will be prosecuted. The danger exists that trials will be used to uphold and more or less authenticate the war propaganda of the victor. Post war trials may be used, and have been used, to distort history. That more distortion did not take place is explained by the fact that judges begrudged each other specific distortions. For these reasons international tribunals with judges from several countries are to be preferred to national courts of a victor-State. In this connection, one can compare the findings of the International Military Tribunal for the Far East and the judgement of the USSR Tribunal of Chabarovsk.

Still, international tribunals are the exception, and national (enemy) courts the rule. In every field of international law, the international legal order depends, for the enforcement of the law, in the first place, on national judges, applying international criminal law or national criminal law in which the international rules are inserted.

International law relies heavily on national law. It uses different means for assuring that international rules are sanctioned by national courts. One of the means is, to grant national legislators the liberty (or impose upon them the duty) to apply universally their national penal provisions : the principle of universality, that is the universal application of national law.

More important is the duty of nations to insert into their criminal code specific « international crimes » : e.g. grave breaches of the Geneva Conventions. Here we are dealing with the national application of universal law.

(2) It is remarkable how quickly official opinion can change. Of the bombing of Nanking by the Japanese in 1937, the U.S. Government protested : « This Government holds the view that any general bombing of an extensive area wherein there resides a large population engaged in peaceful pursuit is unwarranted and contrary to the principles of law and humanity ». Some years later the U.S. began regular attacks on Japanese cities, which culminated in the bombing of Hiroshima and Nagasaki. And even later the Japanese judges who had sentenced the American airmen for their violation of the laws of war were hanged.

A similar very rapid and fundamental change in opinion occurred with respect to unrestricted submarine warfare, which was described in the Nyon Convention of 1936, as « acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy ». At the Nuremberg trial it transpired that the U.S. and the U.K. had practised this form of warfare from the very start of the war.

This does not mean, however, that a national judge would have the competence to try everyone who had somewhere violated these provisions. It is necessary for there to be some special link with the national legal order (place, or agent, who may be a national, an ally of an enemy, or a victim). In short : notwithstanding the wording of the pertinent articles of the four Geneva Conventions of 1949, a neutral State has not the duty to prosecute and punish a war criminal who has come into its power. The principle of universal application of national legal provisions dealing with war crimes (art. 49 of Convention I), is only applicable if the State participates in the war. This was apparently not the intention of those who drafted the Conventions, but it follows from the fact that only specific articles (such as art. 4 of Convention I) are applicable to neutral States. Consequently the Conventions did not impose on neutral States the duty to extradite alleged war criminals. This should be changed : it is now generally recognized that a neutral State should have the duty to extradite alleged war criminals.

In the Hague Conventions of 1907, the duty of the national State to prosecute and punish war criminals was not recognized. There was at that time little talk of penal sanctions. The duty, imposed by international law, of inserting « war crimes », — that is grave breaches of the Conventions —, in the national criminal law is first found in the Geneva Convention of 1929.

3. INDIVIDUAL CRIMINALITY AND SYSTEM CRIMINALITY

International Courts or Tribunals, for the trial of war crimes, have been relatively rare. As a rule the accused were tried by the courts of the enemy. It is interesting to note that countries are in general reluctant to try their own nationals, and their own soldiers. National authorities are never eager to punish their own boys, their heroes, for misconduct in the war. Misconduct is something only found in enemy behaviour. But to understand better this general reluctance to prosecute one 's compatriots, it is necessary to distinguish between war crimes or war criminality. One must distinguish two types of war crimes. First of all there is incidental criminality, crimes committed by the individual for personal, selfish reasons, in disregard of national regulations and superior orders (murder, rape, looting, etc.). This kind of crime may be resented by the criminal's superiors. Although reluctant to bring such misbehaviour into the open, they may prosecute the criminal, because his conduct undermines military discipline, or makes the local population very hostile. I would like to call this kind of criminality *individual criminality* as opposed to crimes committed in the national interest, as a consequence of a general policy or in accord with the official attitude; crimes committed to serve national military goals, or illegal means used in the furtherance of victory. Such crimes, *e.g.* giving no quarter, terrorizing populations, using forbidden weapons, are examples of the *system criminality,* because they express the tendencies of the existing system. These tendencies find their

expression in official attitudes which lead to the commission of crimes under official orders, official request or official advice, or to crimes which are officially tolerated or at least not prevented, either deliberately or by neglect.

This criminality depends on societal forces, rather than on personal inclinations, the effect of these forces ranging from direct orders, through official favour, to conspicuous indifference. The crime is caused by the structure of the situation and the system, and might therefore be called system criminality. It is the most important kind of war criminality. The kind of things which happen in a war are mainly determined by official applied standards. Most significant is the official policy by which specific activities are planned and ordered (*e.g.* the use of herbicides, the establishment of free shooting zones, occupation with insufficient forces leading to a brutal administration, « coercive warfare »), the official policy which permits, tolerates and condones the violations of the laws of war, provided these violations contribute to victory, the official policy which is not willing to suppress violations of the laws of war if they are committed with the purpose of furthering military aims.

This sociological distinction of war criminality goes back, — I am sorry to say —, to a distinction made by S.S. General Himmler, with respect to Germans who killed Jews without permission, in his directive « Judenerschiessungen ohne Befehl und Befugnis ». The decision to prosecute depended on the motive : « Bei eigensüchtigen oder sadistischen, bzw. sexuellen Motiven erfolgt gerichtliche Ahndung... Bei rein politischen Motiven erfolgt keine Bestrafung, es sei denn, dass die Aufrechterhaltung der Ordnung eine solche erfordert ».

This distinction between individual and system criminality makes it easier to understand the attitude of national authorities. As a rule national authorities will refuse to prosecute or punish their own soldiers for criminality which has been officially promoted or tolerated, or which is an expression of the prevailing spiritual climate. A French Law of 1943 declared not punishable any act committed « dans le but de servir la cause de la libération de la France ». In Holland the same unwillingness existed to prosecute soldiers who had committed war crimes during the « police actions » in Indonesia. Westerling, a notorious culprit, was never tried (too many, and too high authorities, would have got involved). Sometimes it is said that Germany is an exceptional case, because in that country prosecutions for misbehaviour in World War II are still taking place. However, it appears from the publication « Justiz und Verbrechen », that prosecution only takes place with respect to crimes against humanity, and not for « war crimes ». In the Vietnam war, with the appearance of the « body count », and the « mere gook rule » (3), there was an unwillingness to prosecute any action resulting from such guiding principles. It was only popular American protest that compelled the

(3) See TAYLOR, T., *Nuremberg and Vietnam, an American Tragedy,* Bantam Books, 1971, p. 142 ff.

authorities to try people like Lieutenant Calley. But higher ranking officers escaped prosecution, though one general lost his position as governor of West Point (4), and a star. Whenever national authorities prosecute their own soldiers, it is for individual criminality, and not system criminality. On the other hand, before enemy or international courts, the main issue will be system criminality.

4. CRIMINAL RESPONSIBILITY FOR OMISSION TO ACT

Not every violation of the laws of war is a war crime. In the 1949 Geneva Conventions a distinction is made between *« grave breaches » and violations which are not grave breaches.* In case of grave breaches the obligations of the national State are :

1. to enact legislation providing for effective penal sanctions,
2. to search for persons alleged to have committed, or to have ordered to be committed such grave breaches and
3. to bring such persons before its own courts, unless the State prefers to hand such persons over for trial to another High Contracting Party.

In case of non grave breaches the State *shall take measures* necessary for the suppression of such acts (the right to punish, but not the duty).

We will consider further grave breaches, which are the more important violations. The 1949 Geneva Conventions mention only those who have *committed* or who have *ordered to be committed,* that is those who have themselves committed the crime. Compare, however, art. III of the U.N. *Genocide Convention,* which lists as punishable the following :

a. genocide,
b. conspiracy to commit genocide,
c. direct and public incitement, to commit genocide,
d. attempt to commit genocide,
e. complicity in genocide.

The *Convention concerning non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (G.A. Res. 2391 XXIII, Nov. 26 1968) mentions in art. II « representatives of the State authority and private individuals who as principals or accomplices participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion », and « representatives of the State authority *who tolerate their commission* ». The Geneva Conventions mention only those who commit or order to commit. They do not mention the authorities who tolerate the commission of crimes, or who, knowing that crimes are being committed, do nothing to stop that criminal

(4) To grasp the prevailing opinion in military circles about this « punishment », see ELLIS, J., and MOORE, R., *School for Soldiers. West Point and the Profession of Arms,* New York, Oxford University Press, 1974, p. 163 ff.

activity. The Geneva Conventions are in conformity with the rules applied in Nuremberg. Doenitz was accused of having ordered the killing of shipwrecked survivors. In this case the Court considered that it was not proved beyond doubt that he had given orders to kill survivors (5). The Court did not go into the question whether Doenitz might have been criminally responsible as a result of any of the following facts :

1. the killings took place regularly,
2. Doenitz knew about them,
3. he could have given orders for the practice to be stopped,
4. he had special responsibility for that branch of warfare.

We are dealing here with the question of criminal responsibility for omission to act, where a person has the duty to act. It is a responsibility not unknown in international law.

The « *Commission on the Responsibility of the Authors of War and on Enforcement of Penalties* » (1919) made up a list of war crimes, and recommended prosecution of : « All authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of States who ordered, or, with knowledge thereof and with power to intervene, *abstained from preventing or taking measures* to prevent, putting an end to, or repressing, violations of the laws or customs of war » (6).

The American members stressed this responsibility : « To establish responsibility in such cases it is elementary that the individual sought to be punished should have knowledge of the commission of the acts of a criminal nature and that he should have possessed the power as well as the authority to prevent, to put an end to, or repress them. Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential » (7).

From the treaties, it follows that a responsibility of authorities exists. The Hague Rules of 1907 (« Regulations respecting the laws and customs of war on land ») take as their starting point that troops « be commanded by a person responsible for his subordinates » (art. 1). In Art. 1, common to all four 1949 Geneva Conventions, it is stated : « The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances ». The fact that Nuremberg did not deal with this kind of omission can perhaps be explained by the overwhelming number of cases in which *criminal orders* were given.

The Tokyo Tribunal had to pronounce judgement in far more complicated circumstances. In the Pacific theatre, war crimes were committed on a mass scale on land and at sea. But the Tribunal did not receive evidence of central

(5) See Judgment of Nuremberg, Brit. ed. London 1946, p. 109.

(6) Report presented to the preliminary peace conference, March 1919, p. 14.

(7) Report cit., p. 59.

orders to commit war crimes. In the trials of Japanese accused, the prosecution charged *that the central authorities had neglected their duty to stop the regular commission of these crimes.* First of all, in the *Yamashita case.* Yamashita was condemned to death by an American Court in Manila, because he had not put a stop to the regular misconduct of troops under his Command. The US Supreme Court upheld the decision, although some people wondered whether Yamashita had the power to do so (in view of the destruction of his lines of communication). In the Tokyo Trial before the IMTFE, 19 of the accused were indicted on Count 55 because they, « being by virtue of their respective offices responsible for securing the observance of the said Conventions and the Laws and Customs of War... deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war ». It seems to me that this responsibility is a real and important one.

Some are very critical of this « negative criminality » (8). But there is no reason to make a sharp legal difference between commission and omission. Today especially at a time of growing awareness of interdependence, the attitude is disappearing which maintains that Society can only forbid acts (crimes), and cannot demand actions (in such a way that omission is regarded as a crime). How far this responsibility for omission should be taken is a very difficult question. As a judge in the Tokyo Tribunal, I took exception to the sentencing of foreign ministers Hirota, Shigemitsu and Togo, who in my opinion had done what they could. But the principle of criminal responsibility for omission to act cannot be denied, when the man in authority

1. knew, or should have known, that crimes were regularly being committed
2. had the power of interfering with the criminal practices, and
3. had special responsibility for the field in question.

The danger of the responsibility for « omission to prevent the commission of war crimes » is that this responsibility allows a victor to indict commanding officers of the vanquished for omission to act. The most celebrated case was the aforementioned trial of the Japanese general Yamashita, who was sentenced by an American Court-martial in Manila for not having prevented the commission of atrocities by his soldiers. The plea that the communications between him and his soldiers had been destroyed by American gunfire, was of no avail. The sentence was upheld by the US Supreme Court and confirmed by General MacArthur (9). After the Tokyo trial of Tojo and 28 others was finished, the trial was begun of Admiral Soemu Toyoda (29 Oct. 1948 - 6 Sept. 1949), who had been Chief of the Naval General Staff. Toyoda was acquitted. The difference in the circumstances of the two trials is clear. Admiral Toyoda was an officer of even greater prominence, but he was on trial in Tokyo and not in Manila, in a post-war Japan in which General MacArthur was making every effort to win the confidence and respect of the

(8) MINEAR, R., *Victor's Justice, The Tokyo War Crimes Trial,* Princeton 1971, p. 67 ff.

(9) See the wording of this confirmation, quoted in TAYLOR, T., *op. cit.,* p. 181.

people. In the trial of General Yamashita, in contrast, General MacArthur's concern had been for the Filipinos.

Responsibility for omission has also been recognized, in the European theater, in the later Nuremberg trials when Telford Taylor was chief-prosecutor. In the *High Command Case* a commander's responsibility was recognized « where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates ». The same kind of responsibility, where a commander knew of these actions and failed to take adequate steps to prevent them, is recognized in the *Hostage Case* (against general List), the *Pohl* trial and the « *Einsatzgruppen trial* » (10).

This responsibility for omission is also recognized in national law. Para, 501 of the US Field Manual (FM 27-10) of 1958 reads as follows :

> « The commander is... responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control, are about to commit or have committed a war crime, and he fails to take the necessary and reasonable steps to ensure compliance with the law of war... ».

A separate obligation to prosecute war criminals is mentioned in para. 507 b : « Commanding officers... must insure that war crimes committed by members of their forces... are promptly and adequately punished ». The UK Manual of Military Law (Law of War on Land, 1958), para. 631, considers a commander to have acquiesced in an offence « if he fails to use the means at his disposal to ensure compliance with the law of war ». Such rules can be found in many national legal systems. They are the logical consequence of the duty of every State to ensure respect for the laws of war.

In the Draft Additional Protocol I to the 1949 Geneva Conventions (Geneva 1973), the ICRC has proposed the following provision (Art. 76) on « Failure to act » :

« 1. The High Contracting Parties undertake to repress breaches of the Conventions or of the present Protocol resulting from a failure to perform a duty to act.

2. The fact that a breach of the Conventions or of the present Protocol was committed by a subordinate does not absolve his superiors from penal responsibility if they knew or should have known that he was committing or would commit such a breach and if they did not take measures within their power to prevent or repress the breach ».

(10) For a general survey of the post-war trials dealing with the responsibility for omission to act, see Law Reports of Trials of War Criminals, selected and prepared by the UNWCC, vol. XV Digest of Laws and Cases, London, H.M. Stationery Office 1949, p. 65-76.

At the Conference of Government Experts (Second Session), Geneva 3 May - 2 June 1972, the Dutch delegation proposed the following text :

> « The Civilian and Military Authorities of the High Contracting Parties shall be criminally liable for any failure on their part to take all those steps within their power to make an end to breaches of the law of war which were, or ought to have been, within their knowledge » (11).

The wording of art. 76 of Draft Additional Protocol I needs changing. I would prefer to formulate art. 76 *sub* 2 thus :

> « 2. If breaches of the Convention or of the present Protocol are committed by a subordinate his superiors are criminally responsible if they knew or should have known that these breaches were committed, and if they did not take measures within their power to repress those breaches ».

But, whatever the exact formulation, some provision for the omission to act should be adopted. Such a provision should be directed against the authorities who are responsible for the « climate » which, as during the Vietnam War, is, more than anything else, the « climate of opinion » responsible for system criminality on a massive scale. It is in the interest of the army concerned that such a climate of opinion be changed. The events in Vietnam have discredited the American army in the eyes of the civilian population. And it is not good for a country that its army should be despised. The profession of arms should be regarded as an honourable profession, for many reasons, one of them being that a despised army may seek power having lost popular esteem.

5. THE QUESTION OF SUPERIOR ORDERS

Especially in situations where official policy disregards the laws of war, one is confronted with the problem of *superior orders* and the juridical position of the criminal who committed his criminal act on the command of a superior. It makes no difference whether or not the criminal command was in accord with national criminal law. This question was very important in the Nuremberg proceedings, because everyone could plead that he was only executing existing German laws on the clear commands of his Führer. The International Military Tribunal based its judgment on Article 8 of the Charter of Nuremberg : « The fact that the defendant acted pursuant to order of the Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment ».

The Judgment of Nuremberg (Brit. ed. 1946, p. 42) reads :

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

(11) See Report on the Work of the Conference, Second Session, Vol. II Annexes p. 107. Doc. CE-COM IV-45, par. 4, 122.

One remark in this respect : according to the American and the British Army manuals, published in 1914, a *superior order was a complete defence.* Telford Taylor stated correctly :

> « Both explicitly exempted from liability those whose violations of the laws of war were committed under orders of their « government » or « commanders », while declaring that the commanders who ordered or authorized the offences might be punished » (12).

In 1944 this regulation was altered in favour of something that more or less approached the applicable German law of 1872 (13). The present American rule reads as follows :

> *a.* « The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.
>
> *b.* In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders ».

In this provision two rules are embodied : that lack of knowledge of an order's unlawfulness is a defence, and that fear of punishment for disobedience may be a mitigating circumstance.

The International Law Commission, in its Draft Code of Offences against the Peace and Security of Mankind, adopted in 1954, laid down the following rule :

> Article 4.
> « The fact that a person acted pursuant to orders of his Government or of a superior does not relieve him from responsibility under international law, provided *a moral choice was in fact possible to him* ».

It seems to me that the problem of superior orders has two aspects : The aspect of *knowledge* and the aspect of *fear* (14).

> 1. The superior order to commit a war crime is a complete defence *if it leads to an excusable « error juris ».* Certain *rules of war* are controversial. It may be difficult to come to a correct decision in case of reprisals. It is possible that the alleged criminal did not know and could not reasonably have been expected to know that the act

(12) *Op. cit.*, p. 47.

020 (13) The new English and American rules are quoted in VOGLER, T. : « The Defense of «5Superior Orders » in International Criminal Law », in BASSIOUNI and NANDA, *A Treatise on International Criminal Law,* Vol. I, *Crimes and Punishment,* Springfield (III), 1973, p. 619-635, p. 632.

(14) For a discussion along these lines, see TAYLOR, *op. cit.*, p. 49-51.

ordered was unlawful. In case he thought, in good faith, that the superior did *not* order a war crime to be committed, and *if he was entitled* to come to that conclusion — that is : if there *did not exist any negligence on his part* — the only conclusion should be that he cannot be punished.

He is exonerated, because he was not aware that what he was doing was a criminal act. This is the first aspect, the first line of defence with respect to the superior order : it may lead to a valid excuse.

2. In case he knew *that the order was an illegal one*, demanding the commission of a crime, *then* a second defense is feasable. The accused may argue : I knew that what I was going to do was criminal, but I did not dare disobey : I would have been shot on the spot. I was in a clear position of duress, because I realised that serious personal harm would be the consequence of disobedience. This position of duress can have all shades of intensity. Consequently, this line of defence may lead *to mitigation of punishment* and *even to no punishment at all.*

In this connection attention should be drawn to the *Milgram experiments* (15), in which persons were requested to cause pain to others (the persons in question being told that research was done on the question whether inducing pain might accelerate the learning-process). The result was that more then 60 % of the persons involved were willing to administer electric shocks indicated as « severe, dangerous shocks ». Surroundings, especially after having entered « the agentic state », the spiritual climate of the environment, have on enormous impact (16). The conscience of the individual is replaced by the conscience of the authorities, or rather the individual conscience is dominated by the duty of obedience, especially in military circles, where the principle of hierarchy and obedience is cultivated, because it is needed in times of stress (17). It will always be very difficult for a soldier to disobey, especially in times of war, when disobedience is « a capital crime ». Therefore it is necessary that the two features of a superior order are clearly outlined :

— the command as cause of forgivable *error juris*, and
— the command as cause of duress.

This needs to be clearly stated because the persons who are sitting in judgment are mostly *hostile judges*, the victorious enemy.

(15) MILGRAM, S., *Obedience to Authority*, Harper and Row, 1974.

(16) MILGRAM (p. 133) defines the agentic state as « the condition a person is in when he sees himself as an agent for carrying out another person's wishes », and considers this concept « the keystone » of his analysis. It is the state in which the individual replaces the values of his own conscience by the values of the authority, in the system of which he entered. It means a loss of responsibility. « Superego functions shift from an evaluation of the goodness or badness of the acts to an assessment of how well or poorly one is functioning in the authority system » (*op. cit.*, p. 146). Military education tends to replace individual values by the values of the academy, for instance West Points' « Honor, Duty, Country ». See ELLIS and MOORE, *op. cit.*, p. 159-191.

(17) In the case of the *Llandovery Castle* against naval lieutenants, the Leipzig Court observed : « A refusal to obey the commander of a submarine would have been something so unusual, that it is humanly possible to understand that the accused could not bring themselves to disobey (TAYLOR, *op. cit.*, p. 46).

The most important sentence, in the Nuremberg Judgment, concerning the problem of superior orders, reads :

> « the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State ».

According to this statement, *rules of international law* exist *which prevail over rules of national law or national orders.* It does not imply that *all* rules of international law have prevalence over national laws. But international « *jus cogens* » exists. Who should be called upon to decide that a rule of international law has a specific content (interpretation of the mostly confusing juridical situation), and that this rule has the character of *jus cogens* (again interpretation of a mostly confusing juridical situation) ? In present day international law, the concept of *auto-interpretation* is adopted. Every State and every international organization has its own interpretation of international law. Compulsory jurisdiction does not exist. If different interpretations clash, a dispute exists which should be peacefully solved according to the recommendation of art. 33 UN Charter. Every State legislates which organ is to be called upon to give the national interpretation of international law (government, legislator, judge). International law *leaves it to national law* to decide who will interpret. The sentence of the Nuremberg Judgment provides an *exception* to this rule. Here international law confronts the individual himself with the demand to give his own interpretation, even when his government has given a contrary decision and ordered him to obey the official interpretation. One of the Judges of Nuremberg, Donnedieu de Vabres, called the Nuremberg Judgment « une œuvre révolutionnaire ». This is correct. It was so revolutionary, that one may doubt whether most States are prepared to accept its rulings as valid international law.

6. TRIALS OF PRISONERS OF WAR

Awareness of the difficult position in which the subordinate finds himself and of the extended duties of commanding officers, stresses the significance of the traditional rule that a military man should be judged by his peers.

During and after World War II a special problem existed with respect to prisoners of war. Art. 63 of the 1929 Geneva Convention on Prisoners of War reads : « Sentence may be pronounced against a prisoner of war only by the same Courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power ». Before World War II a reluctance existed to make regulations concerning the trial and punishment by the enemy of war criminals. But the rationale of art. 63 is clear : one needs qualified persons to evaluate the acts of soldiers and only military men equal in rank, who are able to judge the predicament of a commanding officer, are entitled to sit in judgment. *Art. 63 has no sense if it is applied only to acts committed in captivity. During* the war the US State Department took the position that art. 63 was applicable to proceedings for alleged war crimes

committed before captivity. *After* the war, especially in and after the Yamashita case, it took the standpoint that art. 63 deals only with trials for crimes committed during captivity. This latter standpoint is formulated in the following way : a captured soldier is only entitled to the status of P.o.W. *if he is not a war criminal.* It means, in practice, that a captured soldier is denied the status of P.o.W. on the mere suspicion that he has committed a war crime. This is, however, incompatible with the presumption of innocence until conviction (Universal Declaration on Human Rights, art. 11; Covenant on Civil and Political Rights, 1966, art. 14 sub 2). A more reasonable description of these situation would be : a privileged combatant has, in case of capture, the status of P.o.W. This means, inter alia, that he cannot be punished for the act of fighting, but he may be tried for war crimes, by a Court, as indicated in art. 63 of the 1929 Convention on Prisoners of War. This was the line followed by French law. In Holland and many other countries the post-Yamashita American standpoint was followed. It is an interpretation of art. 63, based on its place and its history, and disregarding its function (an example of the general trend in post-war trials to interpret conventions and customs in a way unfavourable to the accused !)

After most post war trials were over, the Geneva Convention of 1949 concerning prisoners of war restated the traditional rule :

> Art. 102 :
> « A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same Courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed ».

This rule applies to all criminal procedures, including proceedings concerning war crimes committed before captivity.

7. THE PURPOSE OF PROSECUTING WAR CRIMINALS

A last question should be put, and answered : what is the purpose of prosecuting war criminals ? This is a difficult question, touching upon the general problem of the function of criminal law, and upon the special problem of the function of the humanitarian law of war. Here it is helpful to know how many war criminals were prosecuted after the Second World War. Exact and reliable figures are not available for certain countries, e.g. the USSR and East-European countries. According to a report of the German Minister of Justice of 26th February 1965, 5025 Germans were tried in Germany by French, English and American Courts, 5426 by German Courts, and about 70.000 outside Germany, mostly in East-European countries (Poland, Yugoslavia, Czechoslovakia, Soviet Union). It is remarkable in this respect that so few Germans were tried in Western European countries, where apparently, there was a far greater eagerness to prosecute collaborators. For example, Denmark tried 13.600 Danes (for collaboration), but only 10 Germans, Norway tried 51.384 Norwegians, but only 72 Germans. In

Holland 4.700 Dutchmen were tried, but only 241 Germans, of these Germans 16 were sentenced to death but only 5 executed; this in a country where more then 100.000 Dutchmen (Jews) were murdered in cold blood .

One may wonder why so little prosecution took place. In the case of Holland one category of crimes, those in the economic field, might have been purposely neglected because so many influential Dutchmen would have been implicated. But that so many Germans who had been involved in the extermination of the Jewish part of the population escaped prosecution may perhaps be explained by the fact that the whole judiciary apparatus was disorganized after the war, and overloaded with work. That so many Germans were sent home without a trial may be partly explained by the fact that the population in general was more interested in Dutchmen who had misbehaved. Probably more complaints were made to the authorities about that misbehaviour, concerning *e.g.* concentration camps in Holland, or political denunciations, than concerning the persecution of Jews. When the few Jews who had survived came home, and the full horror of what had happened became clear, most of the Germans had already gone. In general, it can be said, that only a few of the hundreds of thousands of German criminals have been prosecuted and sentenced. The choice of criminals to be prosecuted seems to have been more a question of chance, of « bad luck » from the viewpoint of the guilty, than selection according to rational standards concerning the severity of the crime. Some well-known figures were chosen, *e.g.* Rauter in Holland, and some persons who had become well-known to their victims, such as the commanders and torturers in concentration camps. They became the symbol of German criminality, and were sentenced accordingly. The justice meted out to German criminals in Holland — as in other countries — was « exemplary justice ». The purpose was not to punish all cases of criminal guilt, but to give expression to the abhorrence of what had happened. The exemplary punishments served the purpose of restoring the legal order, that is of reassuring the whole community that what they had witnessed for so many years was criminal behaviour. And this is the foremost, essential function of criminal prosecutions : to restore confidence in the rule of law. The legal order is the positive inner relation of the people to the recognized values of the community, which relation is disturbed by the commission of crimes. If crimes are not punished, the confidence in the validity of the values of the community is undermined and shaken. The effect of the crime on the spectator is neutralized by the meeting out of punishment, the weight of which corresponds to the heinousness of the crime. Deterrence in cases of violations of the laws of war, plays only a minor role. For a long time the conviction will exist that one'sown party will be victor, and that a victor will not be tried for his misbehaviour. And even in case of defeat the chances are small that one will be caught, prosecuted and tried. With a bit of cleverness and foresight, one can take the necessary precautionary measures, including those that assure that one is back in one's own country, hidden amongst a friendly population. Post-war punishments are not primarily concerned with carrying out threats made during a war to influence the

behaviour of the enemy, as *e.g.* in the Moscow Declaration on Atrocities, of 6th November 1943. To achieve that aim, the chances of apprehending the criminal are too small. Nor is the aim of the punishment to resocialize the criminal. That so many criminals who behaved as scoundrels during the war, and then lived for years, under an assumed name, peacefully as law-abiding citizens — until they mere discovered and tried — demonstrates that people's behaviour will generally change in peacetime in response to the changed « moral climate » (« à la guerre comme à la guerre »). The « exemplary justice » of post-war trials has as its main aim the vindication of traditional values. But if responsibility for the omission to prevent the commission of war crimes is clearly recognized, some element of effective deterrence would be introduced. Higher ranking authorities might thus be influenced by the prospect of future trials, especially when the fortunes of war were clearly turning against them. Criminal prosecution of war criminals is only one of the factors contributing to honourable behaviour in war. It might be far more important :

1. that, in peace-time, the laws of war be taught to officers and soldiers (and to civilians) and that a general climate be brought about according to which, also in the view of the military, the laws of war are regarded as belonging to the ethics of the profession;
2. that, in war-time, provision be made for violations of the laws of war to be observed and publicised as much as possible. The Vietnam war showed the importance of the publicity given to the increasingly dishonorable and detestable methods of warfare practised in that war. The possibility of on-the-spot observation might be institutionalized in some way or another. Probably professional news-gathering will be the most important factor.

A short remark about the shady side of the prosecution of war criminals. First of all, the proceedings and trials can be misused for purposes of revenge. Through the trials, the killing might continue after the war — as it did in former times — now after a trial. The danger of such a development was apparent after the Second World War. The Nuremberg Tribunal's decision with respect to « criminal organisations » was clearly based on the suspicion that mass killings of members of such organisations might take place (18). Prosecution of the vanquished may also be used for the purpose of distorting history. All participants in wars have taken liberties with the truth in their

(18) Realizing that a member of an organisation, which had been declared criminal by the Tribunal, might subsequently be convicted of the crime of membership and be punished for that crime by death, the I.M.T. took precautions to prevent mass punishments without previous determination of personal guilt. Therefore as far as was possible the Tribunal made declarations of criminality in such a way as to ensure that innocent persons would not be punished. For instance, with respect to the S.S., it declared that the criminal group consisted only of those members who knew about the crimes or who were personally implicated in their commission, and excluded those who were drafted into membership in such a way as to give them no choice in the matter, and who had committed no such crimes. See Chapter VII of the Judgment : The Accused Organizations (Brit. Ed., 1946, p. 66 ff.).

war propaganda. Trials can be misused, not only to shift the attention for the crimes of the victor to those of the vanquished, but an attempt may be made even to hold the crimes of the former against the latter. Judgments may be misused to uphold the war propaganda of the victor.

The prospect of prosecutions and trials may prolong the war and make fighting more desperate. Certainly the inclination to capitulate will be diminished if the prospects are that the leaders of the country will be tried and hanged. Just as the demand for unconditional surrender prolonged the war in Europe, perhaps for years, so the uncertainty about the fate of the Japanese emperor prolonged the war in Asia.

Still, the arguments in favour of prosecution of war criminals — even if it is a prosecution restricted to exemplary cases — prevail. Letting the major criminals live undisturbed to write their « memoirs » in peace, as Jackson wrote to Roosevelt, « would mock the dead and make cynics of the living ». Shooting the most notorious scoundrels without trial (as Churchill and Cordell Hull wished) would « not sit easy on our conscience, and would not be remembered by our children with pride ». Moreover, as has already been remarked, values which were undermined by the spectacle of their continuous neglect, should be restored. From the political point of view, it is helpful for future peaceful relations with former enemy countries, that a distinction be made, via the Judgments, between the guilty leaders and their mislead and deceived populations.

8. ON THE DESIRABILITY OF LAWS OF WAR

The question of whether prosecution of war criminals makes sense and is desirable, depends, in the end, on whether or not it is desirable to have laws of war limiting the right « to adopt means of injuring the enemy » (art. 22, Hague Rules of 1907). Especially after the shocking reports of Henri Dunant about the battlefield of Solferino, the movement started to « humanize » warfare. In the beginning it was restricted to the care of the wounded, but it expanded to methods and means of warfare (19). The laws of humanity and the demands of the public conscience were to have an impact on the legality of specific weapons, of ways of fighting, of specific killings and destructions.

(19) Distinction is often made between « the law of Geneva » and « the law of the Hague », the law of Geneva giving rules for the protection of and assistance to the victims of war, the law of the Hague giving rules for the prevention of people becoming victims. Stimulated by the appeal made by Henri Dunant, the Red Cross was established, and its primary interest concerned the victims of war. But the Conventions adopted at the Second Peace Conference of the Hague, convened on the initiative of the Russian Czar, in which many rules of warfare were codified, contained also rules for the protection of victims. A third impulse to the development of the laws of war originated in the human-rights movement. The General Assembly of the U.N. adopted several resolutions on « human rights in armed conflict ». Out of the cooperation of the U.N. and the I.C.R.C. came the present Diplomatic Conference, in which the Draft Additional Protocols to the Geneva Conventions of August 12, 1949 are discussed.

One may wonder whether this endeavour to humanize warfare has the hidden tendency to maintain war as a recognized institution, as an acceptable way of behaving. Is the recognition of laws of war and the legal restriction of its destructiveness — in the same way as the law of arms control and disarmament —, one of the means of upholding the institution of war ? Does it mean a taking care that war will not become « impossible » ? Would it not be bettej to leave war alone, so that it may perish through its ever more recognized destructiveness and repulsiveness ? It seems to me, that war might disappear from our world in this manner, but it is probable that the first victim of this strategy would be our own culture, and only then would the rest of the world have learned the lesson. War might disappear at the price of our civilisation. Our highly developed part of the world would have been destroyed at an earlier date, before the disappearance of war. As long as we are not been able to abolish war completely we should, especially in the atomic age in which we live, restrict its violence and its destructiveness, lest « our world » perish through its technology (20).

Wars are still commonplace today. Since 1945 there have been more than 25 international wars and more than 100 civil wars. It would be morally impossible to ignore those wars, to recognize that those wars were not subject to any laws, that everything was permissible in war — humanly impossible for a world which would the witness the events on T.V. But it is clear, that civil war — in many respects — has taken over the role that war played in former times. The laws of war should be, as far as possible, applied to civil wars. That is the purpose of Protocol II of the ICRC. But we all know the difficulties in this field :

1. Legally : the rebels of the future are not parties to the Geneva Conference. So we have here clearly the character of legislation rather than treaty making (binding only on the consenting parties);
2. Factually : rebels usually are not in the same position as the government; there exists an asymmetry in their respective positions, because a week and unorganised group is revolting against a government with an organized military power. Prohibitions, which do not diminish the power of the powerful, might take away all power from the weak. But laws of war are not intended to alter power relations, and if they do they will not be observed !

Here we touch upon an aspect of the laws of war which should be mentioned, a dangerous feature which is often overlooked. If law enters into a relation, granting rights and imposing duties, such a relation becomes ideologically loaded. As such law has a « trip-wire » quality, what formerly was merely regarded as a violation of interests becomes now a violation of

(20) The main significance of the present development of the laws of war may lie in the fact that this development could lead to the prohibition of nuclear weapons. Such a prohibition might contribute to the raising of the threshold which separates conventional from nuclear weapons. See on this aspect SIPRI : *The Law of War and Dubious Weapons*, Stockholm 1976.

rights, and as such aggravates a conflict. Law gives an ideological intensity to conflicts. This aspect of « law » plays also a role in the laws of armed conflict. If the enemy kills and destroys, this will be resented. But there will be even more resentment if what he does is illegal. Therefore, one should take care not to prohibit what will foreseeably occur.

In thinking about the laws of war, and of how to strengthen their impact on warfare, we should not lose sight of the fact that any development on this score will probably be surpassed by technological developments in weaponry, tending to make wars more and more horrible, devastating, and « inhuman ». The only way to avoid the horrors of war is to abolish war. This was the conclusion reached by Henri Dunant, who started the humanitarian movement after his personal experiences at Solferino. First, Dunant cared for the wounded, and later the movement started by him established humanitarian restrictions in warfare. But in the meantime, Dunant had become convinced that the struggle for « humane warfare » should become a struggle against war itself. Dunant had given up the hope of saving humanity by humanitarian laws of war : mankind needed the elimination of war itself.

Dunant saw the world on the way to world wars. Our conclusion cannot be different on that score. Our general conclusion might, however, be : it is necessary to elaborate the laws of war, and to prohibit the kind of weapons and methods of warfare which might put in jeopardy humanity itself (that danger is recognized in several treaties concerning weapons of mass destruction). But the main concern of humanity should be to find ways and means of eliminating war itself.