THE LIABILITY OF HEADS OF STATE TO FOREIGN DOMESTIC CRIMINAL JURISDICTION

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INTRODUCTION

This memorandum sets out the state practice from 1919 to 1945 of rejecting the immunity of sitting heads of state for international crimes. Adolf Hitler, as sitting Head of State, was indicted as being personally liable for domestic and international crimes before foreign domestic courts, and this finding was endorsed by the international community, including France and its Allies during World War II. This memorandum provides the contemporary documentation of these decisions and provides their context.

In its 2002 *Arrest Warrant* judgment, the International Court of Justice (ICJ) found that there was no State practice supporting an exception under customary international law to personal immunity for an incumbent Foreign Affairs Minister before domestic courts, even when accused of international crimes.[1] The *Arrest Warrant* judgment has since been widely interpreted as holding that the personal immunity of members of the "troika"—namely, the Head of State, Head of Government, and Minister of Foreign Affairs—before foreign domestic courts is absolute, including for international crimes. However, the *Arrest Warrant* judgment, and the resulting interpretation of absolute personal immunity, did not appear to consider and directly contradicts extensive State practice dating back to World War I, which favoured discarding personal immunity, particularly for sitting Heads of State. The evidence presented in this memorandum contradicts the view that there is no state practice of rejecting the immunity of sitting heads of state before foreign domestic courts for international crimes.

This memorandum summarises State practice concerning personal immunity, with a particular focus on Head of State immunity in the context of international crimes. Specifically, the work of the United Nations War Crimes Commission (UNWCC) between 1943 and 1948 and the relevant practices of its Member States were not presented to the ICJ. This analysis demonstrates that States widely held the view that Heads of State suspected of crimes under international law could be held individually criminally responsible before domestic courts. As will be shown, France was a key proponent of the position that Head of State immunity did not bar prosecution by foreign domestic courts.

[1] See para. 58 of ICJ*, Arrest Warrant*, Judgment

In contrast to what the ICJ found in the *Arrest Warrant* case, there was indeed State practice supporting an exception under customary international law to personal immunity for international crimes; however, the ICJ did not consider such practice.

Evidence of State practice rejecting the application of Head of State immunity to international crimes can be traced to at least the period following World War I. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, to which France contributed two members as an Allied power, adopted a report on 29 March 1919 rejecting Head of State immunity. The report stated:

> "The Commission desire[s] to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states."[2]

France accused the Kaiser of being fundamentally responsible for the atrocities committed by the generals and others under him. It was a leading advocate for the Kaiser to be prosecuted, advancing the position that,

> "[t]he immunity granted a chief of state by other nations has nothing to do with the immunity he may enjoy inside his own country. It is based only on international courtesy, and this courtesy depends on whether the sovereign in question conducted himself as a law-abiding and trustworthy chief of state. By invading neighboring countries, by violating treaties, and by exterminating masses of human beings without cause, a sovereign loses … any immunity he might claim under international law."[3]

States during and after World War II built on the precedents from World War I and further enshrined the principle that Head of States immunity did not bar domestic prosecution. Such can be seen through declarations of the Allied powers, the extensive work of the UNWCC, and national indictments against Adolf Hitler when he was the Head of State of Germany.

During World War II, the Allied Declaration of 13 January 1942 which was signed in London in the St. James Palace on punishment for war crimes, signed by General Charles de Gaulle for the French national committee, endorsed the principle that war criminals, regardless of rank, could be prosecuted whether they had ordered, perpetrated, or participated in these crimes.[4] General de Gaulle emphasised in an annexed declaration that:

> "By signing this joint declaration today, we intend, along with all the other representatives of the occupied countries, to solemnly proclaim that

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[2] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1920) 14 *American Journal of International Law* 95, 116.

[3] US Department of War, Education Manual, What Shall Be Done With The War Criminals? 2 August 1944, available at https://www.historians.org/resource/gi-roundtable-11-what-shall-be-done-with-the-war-criminals-1944/

[4] St James's Declaration on Punishment of War Crimes of January 1942 https://nla.gov.au/nla.obj-648522001/view?partId=nla.obj-648522340.

> Germany is solely responsible for the outbreak of this war and that it shares with its allies and accomplices the responsibilities for all the atrocities that result from it. We express our firm intention to ensure that all the guilty parties and all those responsible, in whatever capacity, cannot evade, as did those of the other war, the deserved punishment."[5]

The St. James Declaration, together with de Gaulle's statement, clearly exclude any immunity for Heads of State. Although Adolf Hitler, then Head of State of Germany, is not mentioned by name, the language and the focus on the need to hold accountable all perpetrators irrespective of rank unmistakably applies to Hitler, who was responsible for ordering crimes.

The work of the UNWCC further highlights that the Allied powers explicitly rejected Head of State immunity and supported the prosecution of Hitler before domestic courts. The UNWCC, established in 1943 by 16 States, including France, assisted Allied States in conducting trials to prosecute war crimes committed by the Axis powers.[6] Its work continued until 1948. The UNWCC as a whole had three specific duties: to investigate and record the evidence of war crimes; to report to the governments concerned cases in which it appeared that adequate evidence existed to support a prosecution; and to make recommendations to member governments concerning questions of law and procedure as necessary for them to be able to fulfil their role of conducting trials.[7]

As a result of the UNWCC's advice that Adolf Hitler could be charged with war crimes, Belgium, Czechoslovakia, and Poland issued indictments against Hitler while he was Germany's Head of State, as well as indictments by Belgium and Poland against Joachim von Ribbentrop while he was Germany's Minister of Foreign Affairs.

The UNWCC received these indictments, endorsed them, and unanimously decided to include Adolf Hitler and Joachim von Ribbentrop on the UNWCC's list of accused war criminals facing domestic prosecution at its 33rd meeting on 26 September 1944.[8] France, represented by Professor André Gros during this meeting, supported the inclusion of Adolf Hitler and Joachim von Ribbentrop on the list.[9]

Unfortunately, the significant contributions of the UNWCC to international law, including on the doctrine of Head of State immunity, remained largely inaccessible until the 2010s. The geopolitical pressures of the Cold War led the United States to demand the classification of the entire archive in 1949. Responding to US pressure, Ivan Kerno, the UN Legal Advisor, unilaterally declared the archive closed—even to

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[5] Declaration of General de Gaulle, 13 January 1942, https://mjp.univ-perp.fr/france/fli3.htm.
[6] Weiss, Thomas G., Plesch, Dan and Owen, Leah (2016) 'The UN War Crimes Commission and International Law: Revisiting World War II Precedents and Practice.' In: Ziccardi Capaldo, Giuliana, (ed.), *Global Community: Yearbook of International Law and Jurisprudence 2015.* Oxford: Oxford University Press, pp. 71-109.
[7] UNWCC, History of the United Nations War Crimes Commission and the Development of the Laws of War, 3, His Majesty's Stationary Office, London (1948)
[8] https://drive.google.com/drive/folders/1_rOKC5yWxZSVaxVeYcRAirNKGwzlRaKL.
[9] https://drive.google.com/drive/folders/1_rOKC5yWxZSVaxVeYcRAirNKGwzlRaKL.

government prosecutors—despite the objections of UNWCC chair Lord Wright and representatives from several member states.

In 2011, I initiated discussions with UN authorities, the US government, other relevant states, and the International Criminal Court (ICC) to advocate for wider access to the UNWCC archives. As a result, more material gradually became accessible, until, in 2014, the US government made a complete copy of the UNWCC archives available to the public through the US Holocaust Memorial Museum. These records were subsequently made available to the Legal Tools of the Research Office of the Prosecutor at the ICC. I have set up a website at http://www.unwcc.org/ to improve access to the archives of the UNWCC together with a guide to the use of the research material.[10]

After the archives of the UNWCC were opened to the public in 2014, the official *History* gathered academic attention.[11] Chapter X of this work, of which pages 262 to 274 have been annexed in full to this memorandum, categorically states that that the international community of Allies considered and, by consensus, rejected the doctrine that Heads of State enjoyed immunity from prosecution for war crimes:

> "The Commission and its Committee on Facts and Evidence adopted the rule of placing such persons on war crimes lists, and consequently rejected as irrelevant the doctrines of immunity of heads of State and members of Government, and of acts of State. Upon charges presented by various nations, Hitler was placed on the lists of war criminals on several occasions." [12]

Therefore, it is regrettable that the ICJ did not have at its disposal the significant contributions of the UNWCC in the field of immunities when it ruled on the *Arrest Warrant* case. Indeed, the pleadings submitted to the Court by the Democratic Republic of Congo and by Belgium do not mention the UNWCC. None of the decisions considered by the ICJ on the question of personal immunity, in other words the *Pinochet* or *Gaddafi* cases, refer to the UNWCC either. This explains why the ICJ judgment and the individual or dissenting opinions of its judges do not refer to the UNWCC.

Today, the relevance and validity of state practice associated with the UNWCC are further demonstrated by Poland's 2024 submission to the International Law Commission which referenced Poland's indictment of Hitler and other Nazi leaders in relation to the issue of immunities of state officials for international crimes.[13]

In sum, the UNWCC's assessment of the issue of Head of State immunity, together with the evidence of the use of UNWCC material, shows that as a matter of

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[10] https://unwcc.org/unwcc-archives/.
[11] History of the United Nations War Crimes Commission and the Development of the Laws of War, 1948, available at https://www.legal-tools.org/doc/cac045/pdf (hereinafter, *UNWCC History*).
[12] UNWCC History, p 248.
[13] https://legal.un.org/ilc/sessions/75/pdfs/english/iso_poland.pdf International Law Commission: Comments of the Republic of Poland to the topic 'Immunity of State officials from foreign criminal jurisdiction'.

international law, States considered that Heads of State could be held individually criminally responsible by other States for violations of international criminal law.

The material compiled in this submission builds on my book (Plesch 2017 *Human Rights After Hitler*) which the Associated Press reported with the headline "Hitler was an indicted war criminal at death".[14]

THE UN WAR CRIMES COMMISSION'S VIEW OF HEAD OF STATE IMMUNITY

The UN War Crimes Commission explicitly articulated its position on head of state immunity in its official 1948 *History*, a report that reflects the collective views of its 16 member states, including France, who approved its publication.

In Chapter X of the *History*, the UNWCC explains how the evolving nature of international crimes necessitated changes to the doctrine of head of state immunity. The Commission argued that, for accountability to be meaningful in the context of international crimes, punishment must extend beyond theoretical, moral, or political condemnation and apply to all leaders, including heads of state. To achieve this, the Commission firmly concluded that the doctrine of head of state immunity must be rejected.

As described in the *History*:

> "Developments which took place in respect of the concept of crimes against peace and crimes against humanity, as well as within the sphere of penal liability for war crimes proper, brought about profound alterations in the doctrines of immunity of heads of State, of individual responsibility of members of Governments and high-ranking administrators, and of acts of State… This could be done only by dismissing the doctrine of immunity of heads of state, on the one hand, and that of the acts of State legalising deeds of members of Governments and administrators on the other…"

In a notable section of the report, the UNWCC elaborates on its findings:[15]

> "The importance of the issue [of Head of State immunity], caused the [UN War Crimes] Commission to appoint a special Sub-Committee to study the question in all its details. The Sub-Committee was appointed on 13th December 1944 under the chairmanship of Lord Wright. The Czechoslovak delegate submitted a memorandum on the individual responsibility of members of the Nazi Government,[16] and the Sub-Committee investigated the issue based on this memorandum and information collected from various sources. The question was considered simultaneously from the viewpoint of

[14] Hitler was accused war criminal at death, Associated Press, 2017 https://apnews.com/article/d4d150367db4415180ef93dd82dbba86

[15] A concise history of these developments is contained in Chapter X of the UN War Crimes Commission report, as shown in Annex I.

[16] Doc C.88, 13.3.1945, *The Criminal and Personal Responsibility of Members of the Nazi Government*, memorandum by Dr. B. Ecer.

individual penal liability and from that of responsibility for membership in a criminal group or organization.[17] On the first point, the Sub-Committee considered the position of members of the Nazi Cabinet proper, including Hitler, and other high State administrators. In light of the information available, it concluded that certain ministers and various plenipotentiaries for specific spheres exercised a large part of the legislative power, while Hitler himself assumed much of it. Therefore, the Sub-Committee found that members of the *Reichsregierung* as a whole could not, under the circumstances, be held *prima facie* guilty of crimes without specific evidence. However, the Sub-Committee established that most of the legislative and executive powers of the *Reichsregierung* were exercised by an inner Cabinet called the Ministerial Council for the Defence of the Reich (*Ministerrat für die Reichsverteidigung*), and that laws which directed or influenced Nazi criminal policy were enacted by individual Ministers. The inner Cabinet's laws and decrees did not need to be countersigned by Hitler.

Consequently, the Sub-Committee concluded that, in view of such powers and the evidence proving the perpetration of numerous crimes upon the inner Cabinet's orders, its individual members were to be considered *prima facie* criminally responsible for acts committed by their subordinates. Similarly, ministers who individually enacted criminal laws, decrees, or orders were also held responsible.

The Sub-Committee also considered the position of Nazi State administrators other than Government members. It found that administrators who had conceived or assisted in framing legal or administrative measures violating the laws and customs of war could equally not enjoy immunity under the doctrine of acts of State; the same was true of those who had carried out a criminal policy by giving or issuing orders or by taking action.

As a result of these findings, the Commission and its Committee on Facts and Evidence adopted the rule of placing such persons on war criminals' lists, rejecting as irrelevant the doctrines of immunity of heads of State and Government members, and of acts of State. Upon charges presented by various nations, Hitler was placed on the lists of war criminals on several occasions, as were other high State administrators, such as Mussolini. The number of accused persons increased over time, and separate lists of major or arch criminals were issued to deal exclusively with State administrators and other high officials.[18]" (bold emphasis added)

The UNWCC's *History* documents the process and reasoning by which international law evolved to recognize individual criminal responsibility for high-ranking state officials, including heads of state. In rejecting the doctrines of immunity for state leaders, the UNWCC affirmed that heads of state could no longer hide behind their official status to evade accountability for international crimes.

[17] (2) On this last point see Chapter XI, Section A, (ii) p.292.
[18] See Committee I Minutes No. 3/45, 17.4.45; also M.56, 18.4.45; M57, 24.4.45; M.62, 23.5.45.

STATE PRACTICE OF THE LEGAL LIABILITY OF ADOLF HITLER TO FOREIGN CRIMINAL JURISDICTION

In 1944 and 1945, criminal charges against Adolf Hitler, the German Head of State, and other senior officials were filed successively by Czechoslovakia, Poland, and Belgium. Joachim von Ribbentrop, Germany's Minister of Foreign Affairs, was charged by Belgium and Poland. Each state specified the crimes alleged under both international law and its own domestic laws. These indictments were brought under the national jurisdiction of the charging states, and received endorsed by the United Nations War Crimes Commission (UNWCC). The UNWCC advised states to base charges on both domestic and international law.

During the 1940s, the UNWCC played a key role in assessing and advising on international criminal law. It provided advisory opinions to member states, emphasizing the international criminal law, including the Hague Conventions and the "Versailles list," the latter document prepared by the 1919 Commission on Responsibilities.[19] Notably, this "Versailles List" had been endorsed by both Japan and Germany and was recognized as a significant source of law. The UNWCC referred to it as the "war crimes list." States had granted the UNWCC the authority to advise on matters of law and policy, as described in its *History*.[20]

In 1944, the UNWCC adopted the rule "rejecting as irrelevant the doctrines of immunities of heads of State and members of Government, and acts of State" for the purposes of criminal liability for international crimes.[21]

This decision of "rejecting as irrelevant" Heads of State immunities is significant evidence of customary international law, representing the *opinio juris* of UNWCC member states, as well as the views of leading jurists and legal experts that represented them. Based on this, Adolf Hitler and his senior officials were formally indicted by Czechoslovakia, Poland and Belgium. The UNWCC considered these indictments and confirmed that they met the *prima facie* standard. Consequently, the UNWCC listed Hitler and his officials as accused war criminals subject to arrest for trial in the domestic courts of the charging states.

At this point, from 1944 until the agreement of the Charter of the International Military Tribunal in the summer of 1945, the UNWCC was the only institutionalised international legal response to Nazi crimes. The UNWCC acted in the context of the 1942 St James's Declaration and the 1943 Moscow Statement in which the heads of the United Kingdom, the United States and the Soviet Union jointly condemned the atrocities committed by nazis. No international tribunal existed at the time of these indictments, and the legality of the charges was not predicated on prosecution before an international tribunal. The national indictments against Hitler predated the negotiations that would lead to the London Charter for the International Military Tribunal at Nuremberg. The subsequent death of Hitler does not negate the legal

[19] Citation needed.
[20] History, p 126
[21] History,p 269

authority of these indictments as an exercise of national criminal jurisdiction against a foreign sitting head of state to hold him liable for international crimes.

The extensive documentation supporting these charges comprises hundreds of pages and is reproduced in an online archive I have published.[22] For instance, Czechoslovakia's indictments of Hitler cover 11 separate cases amounting to over 600 pages of evidence. These charges include indictments for illegal Nazi "courts", which failed to meet any minimum standards of justice, as well as for atrocities such as mass exterminations of Jews, the massacre at Lidice, and crimes committed at Buchenwald and Dachau. The UNWCC archives confirm its formal approval of all these charges against Adolf Hitler.[23]

Poland's charges focused on the "biological extermination of the Jews in Poland" in violation of the 4th Hague Convention of 1907 and war crimes decrees issued by the exiled Polish government in 1943. These charges were approved by the UNWCC on 17 January 1945.[24]

Belgium also brought charges related to atrocities at Auschwitz and Buchenwald, citing its own domestic laws as the basis for these indictments.[25]

As a direct result of these charges, Adolf Hitler and Joachim von Ribbentrop, among other senior officials, were included in the UNWCC's official list of war criminals. These lists, which documented the accused, confirm Hitler's legal liability and the view of the 16 member states of the UNWCC, including France, that he could be prosecuted in the national courts of the charging states.[26]

The first UNWCC list of suspected war criminals was published on 28 September 1944, and by including Hitler in the list, it reflects endorsement of Czechoslovakia's indictment of "Hitler, Adolf[;] Reichsfuhrer[;] Mass murder, setting up illegal tribunals; complicity in the above."

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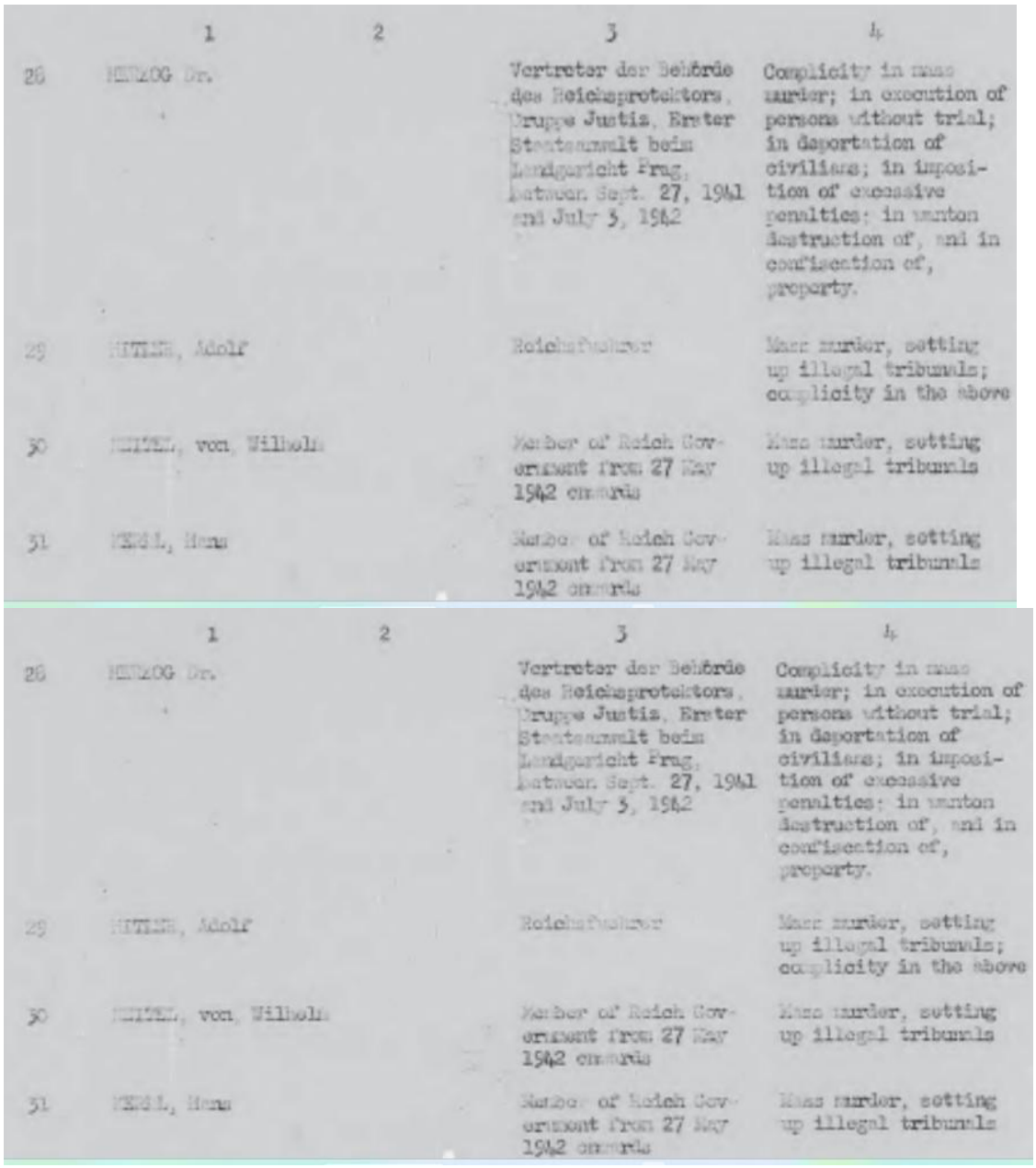
[22] https://unwcc.org/wp-content/uploads/2023/11/UNWCC-and-Head-of-State-Immunity-master.pdf Memorandum by Dan Plesch to the International Law Commission.
[23] UNWCC archives, correspondence with the National Office of Czechoslavakia, Pdf pp 5-17,
p14 Charges 6,7,8 Approved: retrospective Note from the Chief Clerk, 27 March 1945
p15 Charges 8,9,11,12 Approved 28 March 1945
p16 Charges 13 and 15 Approved (undated)
p17 Charges 10 and 14 Approved on 11 and 18 April 1945
[24] UNWCC, Charges: Poland vs Germans 34, Pdf Page 926
[25] UNWCC, Charges: Belgium vs Germans 22, 28 March 1945, Pdf page 193 ; Belgium vs Germans 25, 11 April 1945.
[26] UNWCC lists of major war criminals, including Hitler, available at https://drive.google.com/drive/folders/1hMy-p6oCMW8PzbBc9h02T1IkVPFaaYdg.



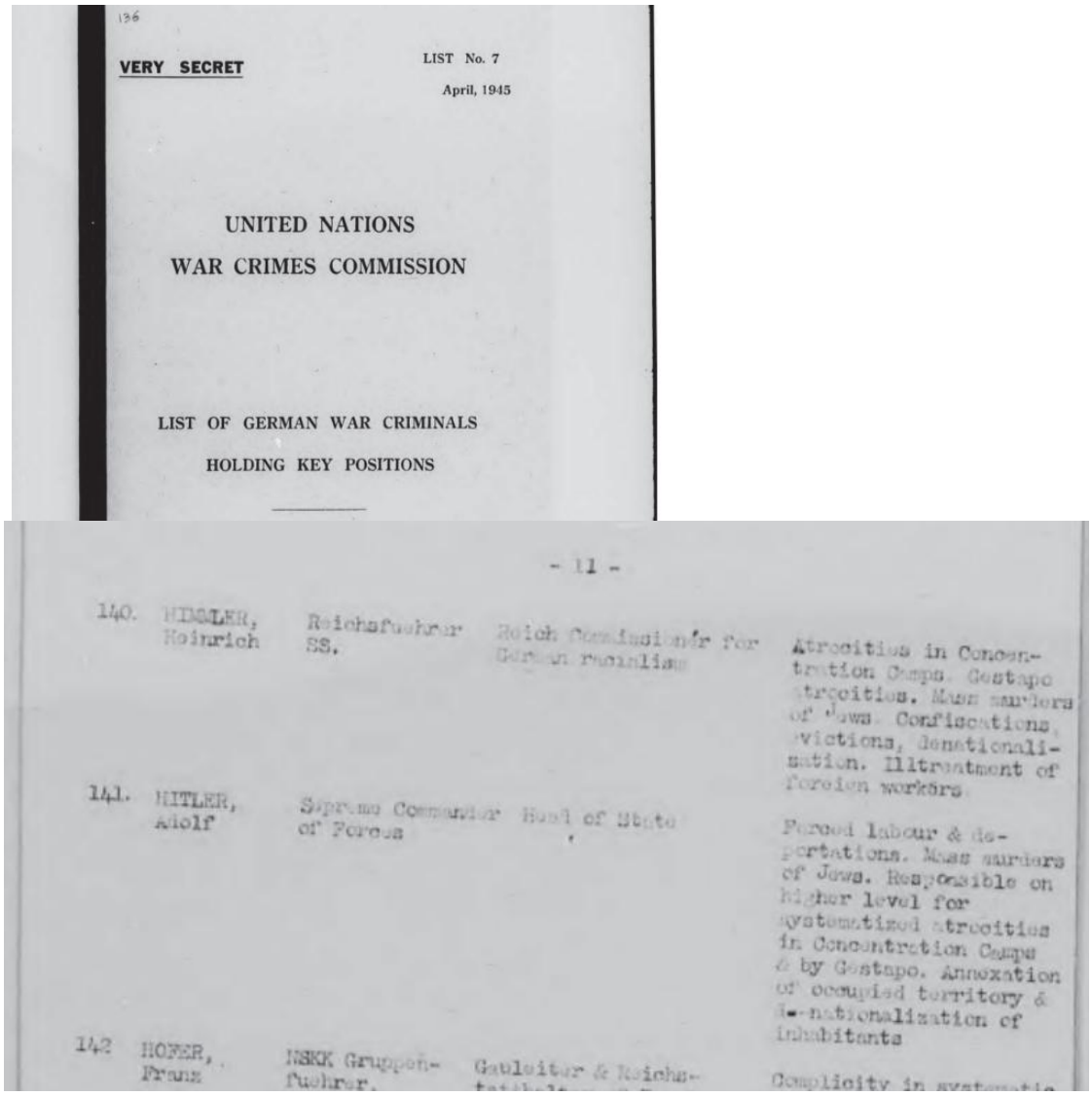
	1	2	3	4
28	HEINZOG Dr.		Vertreter der Behörde des Reichsprotektors, Gruppe Justis, Erster Staatsanwalt beim Landgericht Prag, between Sept. 27, 1941 and July 5, 1942	Complicity in mass murder; in execution of persons without trial; in deportation of civilians; in imposition of excessive penalties; in wanton destruction of, and in confiscation of, property.
29	HITLER, Adolf		Reichsführer	Mass murder, setting up illegal tribunals; complicity in the above
30	KEITEL, von, Wilhelm		Member of Reich Government from 27 May 1942 onwards	Mass murder, setting up illegal tribunals
31	KEDL, Hans		Member of Reich Government from 27 May 1942 onwards	Mass murder, setting up illegal tribunals

	1	2	3	4
28	HEINZOG Dr.		Vertreter der Behörde des Reichsprotektors, Gruppe Justis, Erster Staatsanwalt beim Landgericht Prag, between Sept. 27, 1941 and July 5, 1942	Complicity in mass murder; in execution of persons without trial; in deportation of civilians; in imposition of excessive penalties; in wanton destruction of, and in confiscation of, property.
29	HITLER, Adolf		Reichsführer	Mass murder, setting up illegal tribunals; complicity in the above
30	KEITEL, von, Wilhelm		Member of Reich Government from 27 May 1942 onwards	Mass murder, setting up illegal tribunals
31	KEDL, Hans		Member of Reich Government from 27 May 1942 onwards	Mass murder, setting up illegal tribunals

Figure 1. Image of UNWCC List 1.[27]

In April 1945, while Hitler was still in office, the UNWCC agreed to its seventh list of suspected German war criminals. The list consolidates charges brought by member states, including charges against Hitler, as “Supreme Commander of Forces [and] Head of State” for "Forced labour & deportations. Mass murders of Jews. Responsible on higher level for systematized atrocities in Concentration Camps & by Gestapo. Annexation of occupied territory & de-nationalization of inhabitants". Hitler is merely listed in an alphabetical list of accused war criminals along with many others. Although he is listed as a Head of State, he is accorded no distinctive position in the list as a result of that status.

[27] See “List 1” at UNWCC lists of major war criminals, including Hitler, available at https://drive.google.com/drive/folders/1hMy-p6oCMW8PzbBc9h02T1IkVPFaaYdg



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VERY SECRET

LIST No. 7

April, 1945

UNITED NATIONS

WAR CRIMES COMMISSION

LIST OF GERMAN WAR CRIMINALS

HOLDING KEY POSITIONS

- 11 -

140. HIMMLER, Heinrich — Reichsfuehrer SS. — Reich Commissioner for German Racialism — Atrocities in Concentration Camps. Gestapo atrocities. Mass murders of Jews. Confiscations, evictions, denationalisation. Illtreatment of foreign workers.

141. HITLER, Adolf — Supreme Commander Head of State of Foreign — Forced labour & deportations. Mass murders of Jews. Responsible on higher level for systematized atrocities in Concentration Camps & by Gestapo. Annexation of occupied territory & de-nationalization of inhabitants

142 HOFER, Franz — NSKK Gruppenfuehrer. — Gauleiter & Reichs- — Complicity in systematic

Figure 2. Extracts of UNWCC List 7 of War Criminals

Charge documents against Hitler[28]

The UNWCC's lists were drawn from charges made by States. Each of these charges is reflected in UNWCC documentation. The documents set out the national and international law under which Hitler was charged by each individual state, are summarized in Table 1, and images of the documents are shown in Figures below in the chronological order in which they were brought by Czechoslovakia, Poland and Belgium.

Table of National Charges against Hitler while he was sitting head of state

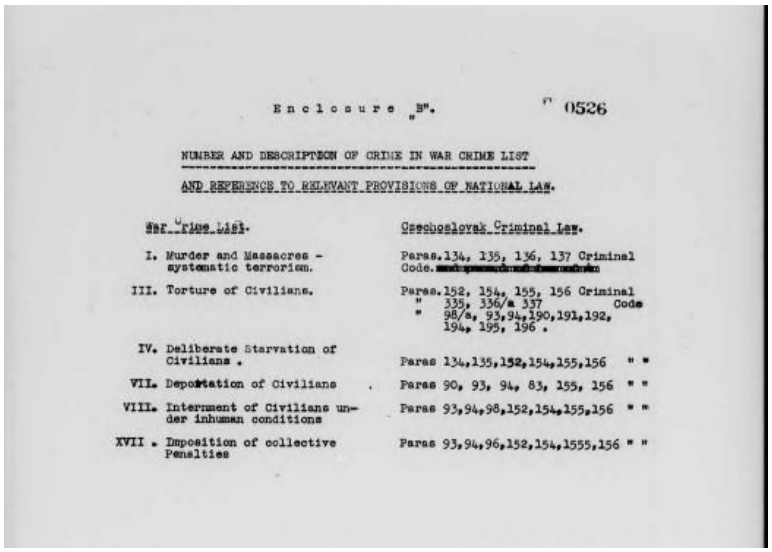
Country Indicting Hitler	Date of Indictment	Charges
Czechoslovakia	16 November 1944	Charge 6: Illegal Courts (Article I of the war crimes list: murder,

[28] Indictments of Adolf Hitler, available at https://drive.google.com/drive/folders/1CUw7FO63oJAXPfM6GaFfNv1D0J1gKlLs

		massacres, and systematic terrorism. Czechoslovak Legal Code, Paras 3, 134, 135 No 3 and 136).
	24 November 1944	Charge 7: Lidice (War crimes list: I. murder, III. torture of civilians, XVIII. wanton devastation and destruction of property).
	28 November 1944	Charge 8: Dachau (Articles I and III of the war crimes list; Czechoslovak Criminal Code provisions).
	5 December 1944	Charge 9: Buchenwald (Articles I and II of the war crimes list; Czechoslovak Criminal Code provisions).
	15 December 1944	Charge 10: Illegal Courts (Article I of the war crimes list; Czechoslovak Penal Code provisions Paras 5, 134, 135 /3/, 93, 34, and 136).
	18 December 1944	Charge 11: Natzweiler (Czechoslovak Criminal Code provisions 134, 135, 136, 137, 152, 154, 155, 156, 335, 336/a, 337, 98/a, 93, 94, etc.).
	19 December 1944	Charge 12: Forced Labour (War Crimes List: VII. deportation of civilians, IX. forced labor; Czechoslovak Criminal Code Sections 83, 93, 98, 99, etc.).
	22 December 1944	Charge 13: Prague/Brno (The text of the laws referenced in the indictment for this charge is unreadable, but the charge sheet contains an informative note on Czechoslovakia's position: "Notes on the case ad. I and II of Enclosure A; The criminal responsibility of Adolf Hitler and members of his Government, for crimes committed in the invaded and occupied countries of Europe, was already recognized by Committee No. 1. on November 22nd, and 29th. In addition to this general penal responsibility, Adolf Hitler is particularly responsible for the crimes which are the subject of this charge, because according to the Decree of March 22nd 1939, Art 1 and II, already quoted in our previous charges, the Reichsprotector in Bohemia and Moravia is the only representative of the Fuhrer and the German Government, being directly responsible to the Fuhrer and receiving for him, orders.")

	2 January 1945	Charge 14: Prague/Brno (War Crimes List: I. Murder and Massacres - systematic Terrorism, III. Torture of Civilians, VIII. Internment of civilians under inhuman conditions; Provisions of national law: Paras. 5, 134, 135 No. 3, 93, 98, 99, 152 and 34, 136/94, 100, 155, 156 of the Czechoslovak Penal Code, apply to the persons mentioned under 1 - 3 and Paras 134, 135 No.3, 93, 98, 99, 152 and 34, 136/94, 100, 155, 156/ of the Czechoslovak Penal Code apply to the persons mentioned under 4).
	2 January 1945	Charge 15: Terezin (a/ War Crimes List I. Murder and massacres - systematic terrorism. III. Torture of civilians. IV. Deliberate starvation of civilians VII. Deportation of civilians, VIII. Internment of civilians under inhuman conditions. XIV. Confiscation of property. b/ Czechoslovak Criminal Code. ad. I. Paras. 134, 135, 136, 137. ad. III. Paras. 152, 154, 155, 156, 335, 336, 337. AD. VII and ad.VIII Paras. 90, 93, 94, 98, 99, 155, 156. ad. XIV. Paras. 171, 190, 197.)
Poland	January 17, 1945	Charge 34: Extermination of Jews (Violation of the 4th Hague Convention of 1907 and Polish national decrees on war crimes of 1943).
Belgium	March 28, 1945	Charge 22: Auschwitz (Application of articles 392 and 410 of the Belgian Penal Code related to homicide and bodily injury, as well as articles 66-69 on participation in crime).
	April 11, 1945	Charge 31: Buchenwald (Application of Belgian Penal Code articles related to homicide and bodily injury, and participation in crime).

Table 1: The laws referenced on the charge files against Adolf Hitler are summarized in the above table. The charge number is from the numerical series of each state charging Germans. Thus, Czechoslovak charge No. 6 is the sixth charge brought against Germans by the Czechs. The Czechoslovak government explicitly stated that it was submitting charges against Hitler and others to the UNWCC, pursuant to the UNWCC's "'terms of reference' that provided that the purpose of preparing lists was *for trial*, e.g. for criminal justice purposes, and not for political purposes.



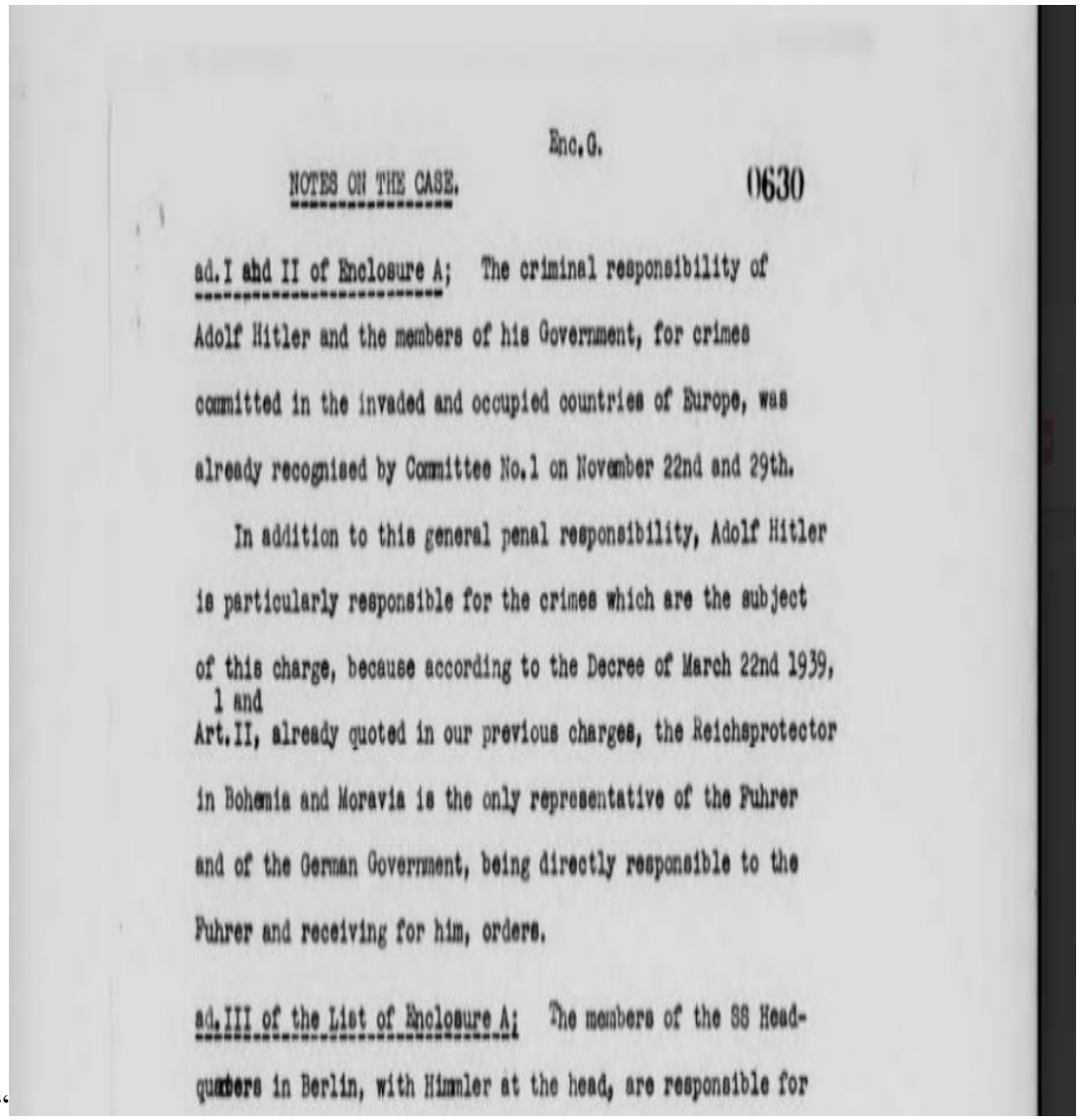
Enclosure "B". 0526

NUMBER AND DESCRIPTION OF CRIME IN WAR CRIME LIST

AND REFERENCES TO RELEVANT PROVISIONS OF NATIONAL LAW.

War Crime List.	Czechoslovak Criminal Law.
I. Murder and Massacres - systematic terrorism.	Paras.134, 135, 136, 137 Criminal Code.
III. Torture of Civilians.	Paras.152, 154, 155, 156 Criminal " 335, 336/a 337 Code " 98/a, 93,94,190,191,192, 194, 195, 196.
IV. Deliberate Starvation of Civilians.	Paras 134,135,152,154,155,156 " "
VII. Deportation of Civilians	Paras 90, 93, 94, 83, 155, 156 " "
VIII. Internment of Civilians under inhuman conditions	Paras 93,94,98,152,154,155,156 " "
XVII. Imposition of collective Penalties	Paras 93,94,96,152,154,1555,156 " "

Figure 3: A page of the Czechoslovakia charge sheet against Hitler, dated 18 December 1944, showing international and domestic laws under which Hitler was charged.



Enc.G.

NOTES ON THE CASE. 0630

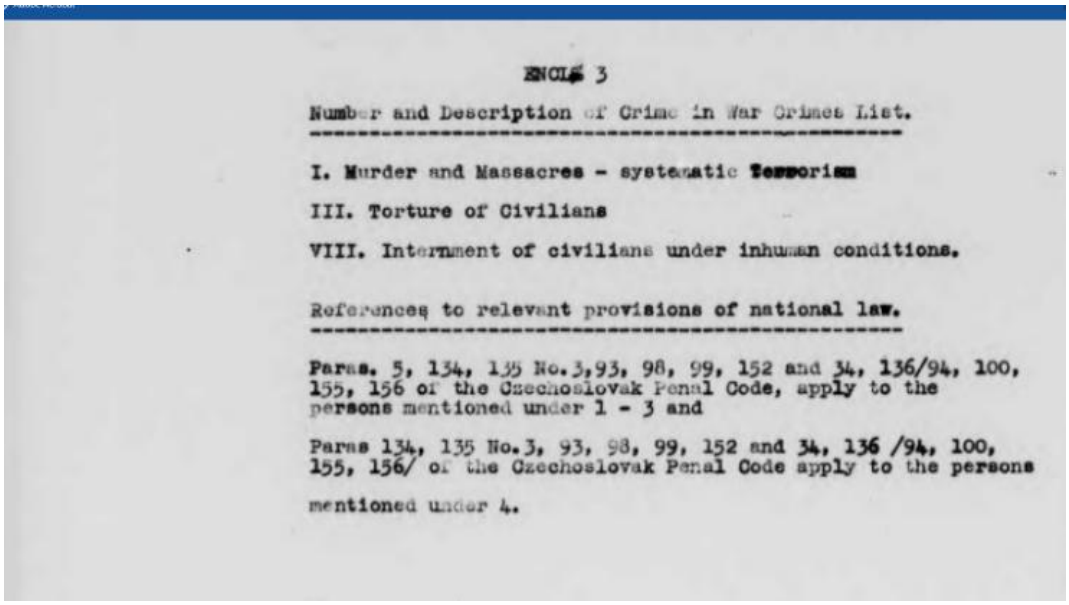
ad.I and II of Enclosure A; The criminal responsibility of Adolf Hitler and the members of his Government, for crimes committed in the invaded and occupied countries of Europe, was already recognised by Committee No.1 on November 22nd and 29th.

In addition to this general penal responsibility, Adolf Hitler is particularly responsible for the crimes which are the subject of this charge, because according to the Decree of March 22nd 1939, Art.II, already quoted in our previous charges, the Reichsprotector in Bohemia and Moravia is the only representative of the Fuhrer and of the German Government, being directly responsible to the Fuhrer and receiving for him, orders.

ad.III of the List of Enclosure A; The members of the SS Headquarters in Berlin, with Himmler at the head, are responsible for

"

Figure 4: A page of the Czechoslovakia charge sheet for Charge 13 against Hitler, dated 22 December 1944, showing the Czechoslovak government's explanation of Hitler's criminal responsibility for crimes committed at Prague and Brno.



ENCL 3

Number and Description of Crime in War Crimes List.

I. Murder and Massacres - systematic Terrorism

III. Torture of Civilians

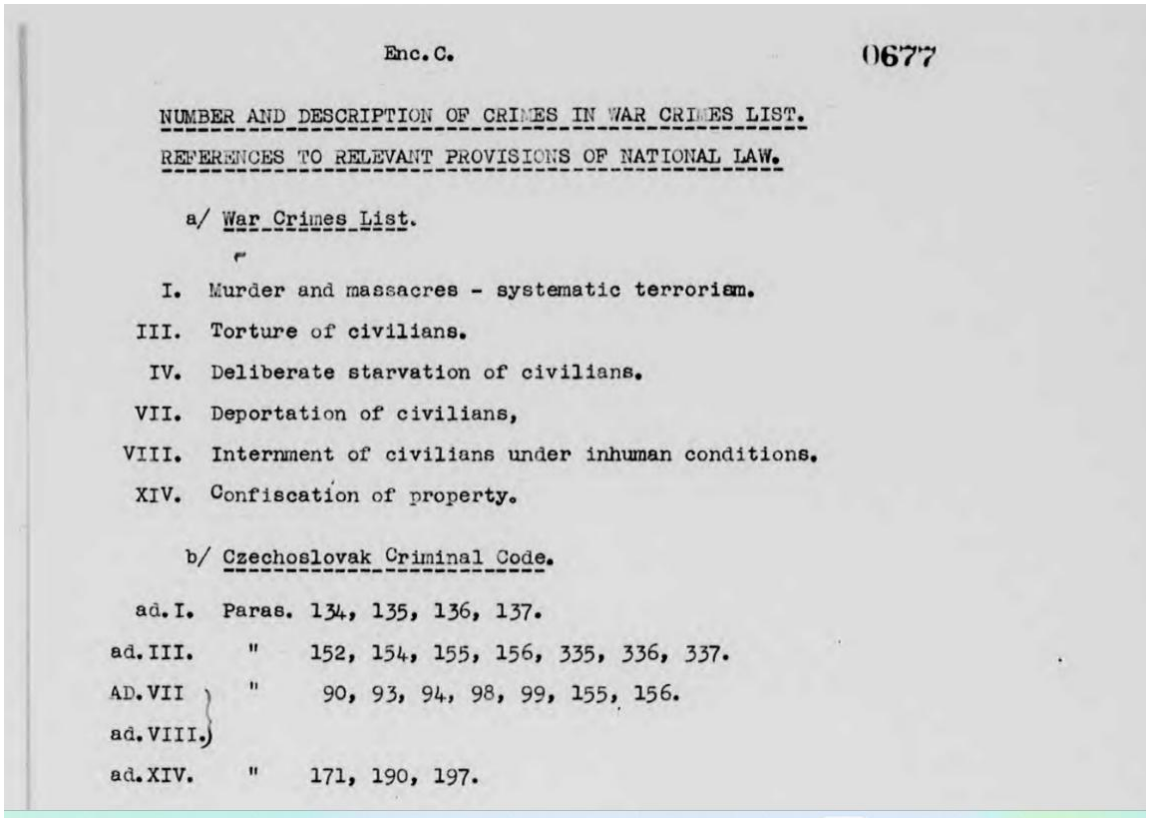
VIII. Internment of civilians under inhuman conditions.

References to relevant provisions of national law.

Paras. 5, 134, 135 No.3, 93, 98, 99, 152 and 34, 136/94, 100, 155, 156 of the Czechoslovak Penal Code, apply to the persons mentioned under 1 - 3 and

Paras 134, 135 No.3, 93, 98, 99, 152 and 34, 136 /94, 100, 155, 156/ of the Czechoslovak Penal Code apply to the persons mentioned under 4.

Figure 5: A page of the Czechoslovakia charge sheet for Charge 14 against Hitler, dated 2 January 1945, showing the international and domestic laws under which he was charged for crimes committed at Prague and Brno.



Enc. C. 0677

NUMBER AND DESCRIPTION OF CRIMES IN WAR CRIMES LIST.

REFERENCES TO RELEVANT PROVISIONS OF NATIONAL LAW.

a/ War Crimes List.

I. Murder and massacres - systematic terrorism.

III. Torture of civilians.

IV. Deliberate starvation of civilians.

VII. Deportation of civilians,

VIII. Internment of civilians under inhuman conditions.

XIV. Confiscation of property.

b/ Czechoslovak Criminal Code.

ad. I. Paras. 134, 135, 136, 137.

ad. III. " 152, 154, 155, 156, 335, 336, 337.

AD. VII " 90, 93, 94, 98, 99, 155, 156.

ad. VIII.

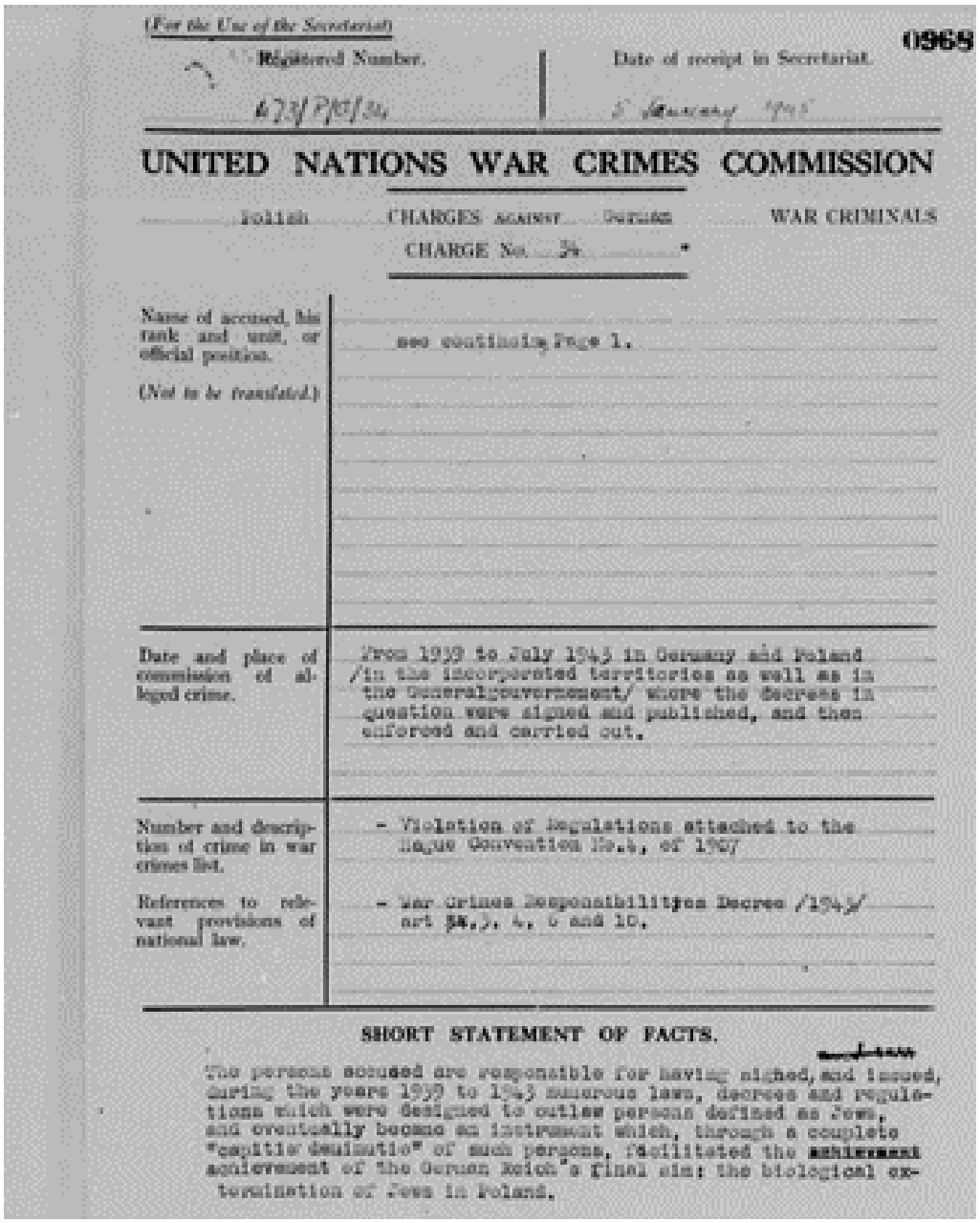
ad. XIV. " 171, 190, 197.

Figure 6: A page of the Czechoslovakia charge sheet for Charge 15, against Hitler, dated 2 January 1945, showing the international and domestic laws under which he was charged for crimes committed at Terezin.

473/P/G/34

0967

1. HITLER, Adolf
2. ROSENBERG, Alfred, Dr.
3. GOEBBELS, Joseph, Dr.
4. WEH, Albert, Dr.
5. WESTERKAMPF
6. GOERING, Hermann
7. KEITEL, Wilhelm, von
8. BRAUCHITSCH, Walter, von
9. HESS, Rudolf
10. BORMANN, M., Dr.
11. LAMMERS, Hans, Heinrich, Dr.
12. FRICK, Wilhelm, Dr.
13. RIBBENTROP, Joachim, von
14. SCHWERIN von KROSIGK, Graf
15. SCHLEGELBERGER, Dr.
16. THIERACK, Otto, George, Dr.
17. STUCKART, Wilhelm, Dr.
18. PFUNDTNER, Dr.
19. FRANK, Hans, Dr.
20. KRUEGER, Heinrich, Wilhelm
21. SIEBERT, Fritz, Dr.
22. FRAUENDORFER, Max, Dr.
23. UEBELHOER, Dr.
24. LEY, Robert



(For the Use of the Secretariat)

Registered Number. 473/P(P)/34

Date of receipt in Secretariat. 5 January 1945

0969

UNITED NATIONS WAR CRIMES COMMISSION

Polish CHARGES AGAINST German WAR CRIMINALS

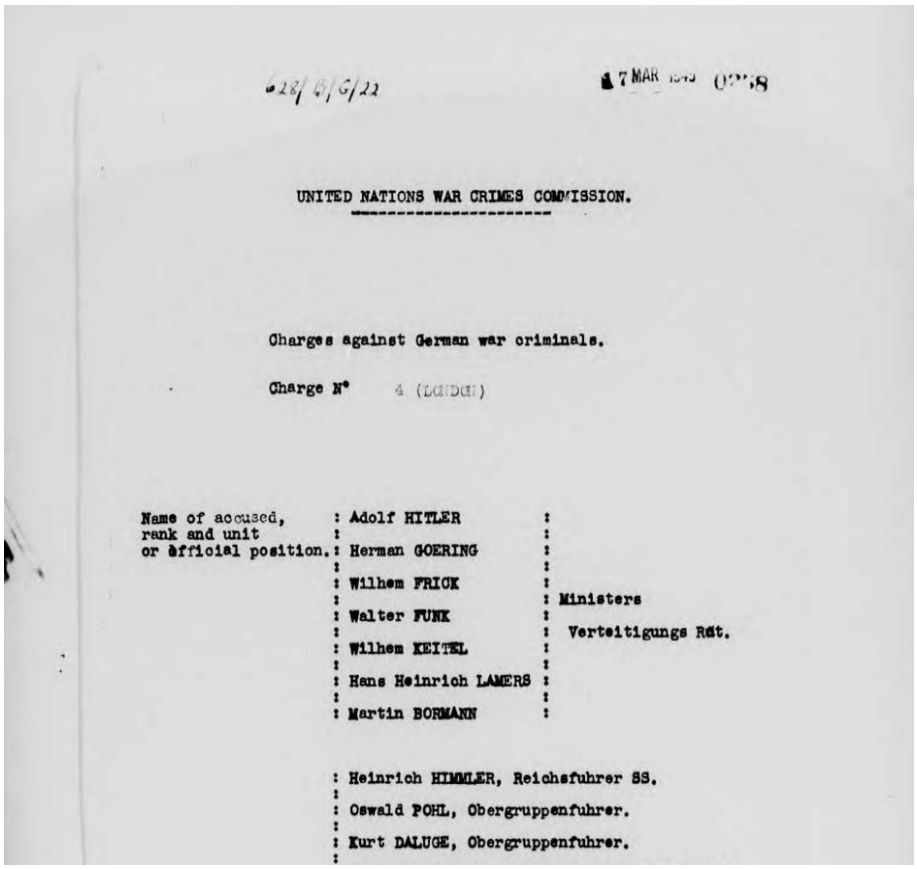
CHARGE No. 34 *

Name of accused, his rank and unit, or official position. (Not to be translated)	see continuing Page 1.
Date and place of commission of alleged crime.	From 1939 to July 1943 in Germany and Poland /in the incorporated territories as well as in the Generalgouvernement/ where the decrees in question were signed and published, and then enforced and carried out.
Number and description of crime in war crimes list.	- Violation of Regulations attached to the Hague Convention No.4, of 1907
References to relevant provisions of national law.	- War Crimes Responsibilities Decree /1943/ art 34, §. 4, 5 and 10.

SHORT STATEMENT OF FACTS.

The persons accused are responsible for having signed, and issued, during the years 1939 to 1943 numerous laws, decrees and regulations which were designed to outlaw persons defined as Jews, and eventually became an instrument which, through a complete "capitis deminutio" of such persons, facilitated the achievement achievement of the German Reich's final aim: the biological extermination of Jews in Poland.

Figure 7: Two pages from the Polish charge sheet for Charge 34 against Hitler, Joachim von Ribbentrop, and others, dated January 17, 1945, for the extermination of Jews, under the Hague Convention of 1907 and Polish national decrees on war crimes of 1943.



628/8/G/22

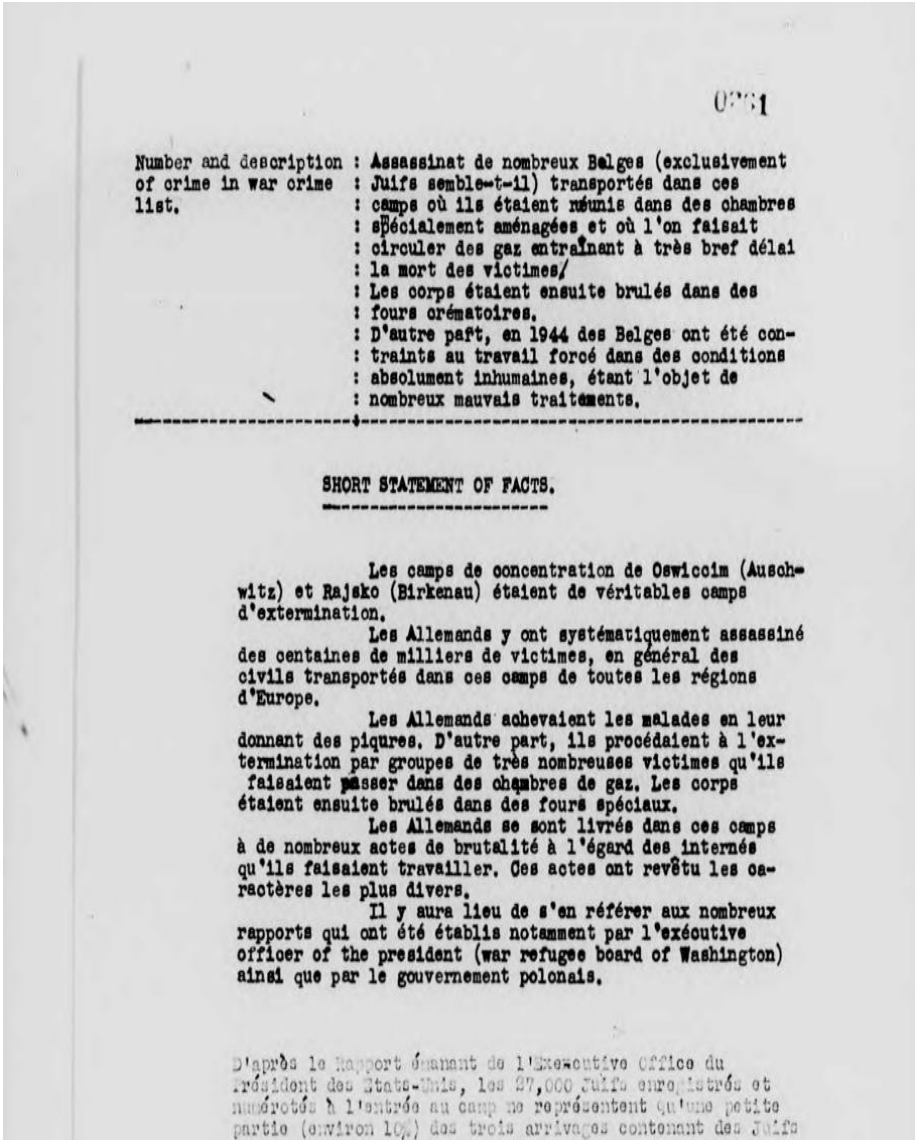
17 MAR 1945 0938

UNITED NATIONS WAR CRIMES COMMISSION.

Charges against German war criminals.

Charge N° 4 (LONDON)

Name of accused, rank and unit or official position.	Adolf HITLER	
	Herman GOERING	
	Wilhem FRICK	Ministers
	Walter FUNK	
	Wilhem KEITEL	Verteitigungs Rat.
	Hans Heinrich LAMERS	
	Martin BORMANN	
	Heinrich HIMMLER, Reichsfuhrer SS.	
	Oswald POHL, Obergruppenfuhrer.	
	Kurt DALUGE, Obergruppenfuhrer.	



0731

Number and description of crime in war crime list. : Assassinat de nombreux Belges (exclusivement Juifs semble-t-il) transportés dans ces camps où ils étaient réunis dans des chambres spécialement aménagées et où l'on faisait circuler des gaz entraînant à très bref délai la mort des victimes/
: Les corps étaient ensuite brulés dans des fours crématoires.
: D'autre part, en 1944 des Belges ont été contraints au travail forcé dans des conditions absolument inhumaines, étant l'objet de nombreux mauvais traitements.

SHORT STATEMENT OF FACTS.

Les camps de concentration de Oswiccim (Auschwitz) et Rajsko (Birkenau) étaient de véritables camps d'extermination.

Les Allemands y ont systématiquement assassiné des centaines de milliers de victimes, en général des civils transportés dans ces camps de toutes les régions d'Europe.

Les Allemands achevaient les malades en leur donnant des piqures. D'autre part, ils procédaient à l'extermination par groupes de très nombreuses victimes qu'ils faisaient passer dans des chambres de gaz. Les corps étaient ensuite brulés dans des fours spéciaux.

Les Allemands se sont livrés dans ces camps à de nombreux actes de brutalité à l'égard des internés qu'ils faisaient travailler. Ces actes ont revêtu les caractères les plus divers.

Il y aura lieu de s'en référer aux nombreux rapports qui ont été établis notamment par l'exécutive officer of the president (war refugee board of Washington) ainsi que par le gouvernement polonais.

D'après le Rapport émanant de l'Executive Office du Président des Etats-Unis, les 27,000 Juifs enregistrés et numérotés à l'entrée au camp ne représentent qu'une petite partie (environ 10%) des trois arrivages contenant des Juifs

Figure 8 : Two pages of the Belgian charge sheet, dated March 28, 1945, for Charge 22 against Hitler and von Ribbentrop for crimes committed at Auschwitz. The charge sheet indicates the international and domestic law under which Hitler was charged.

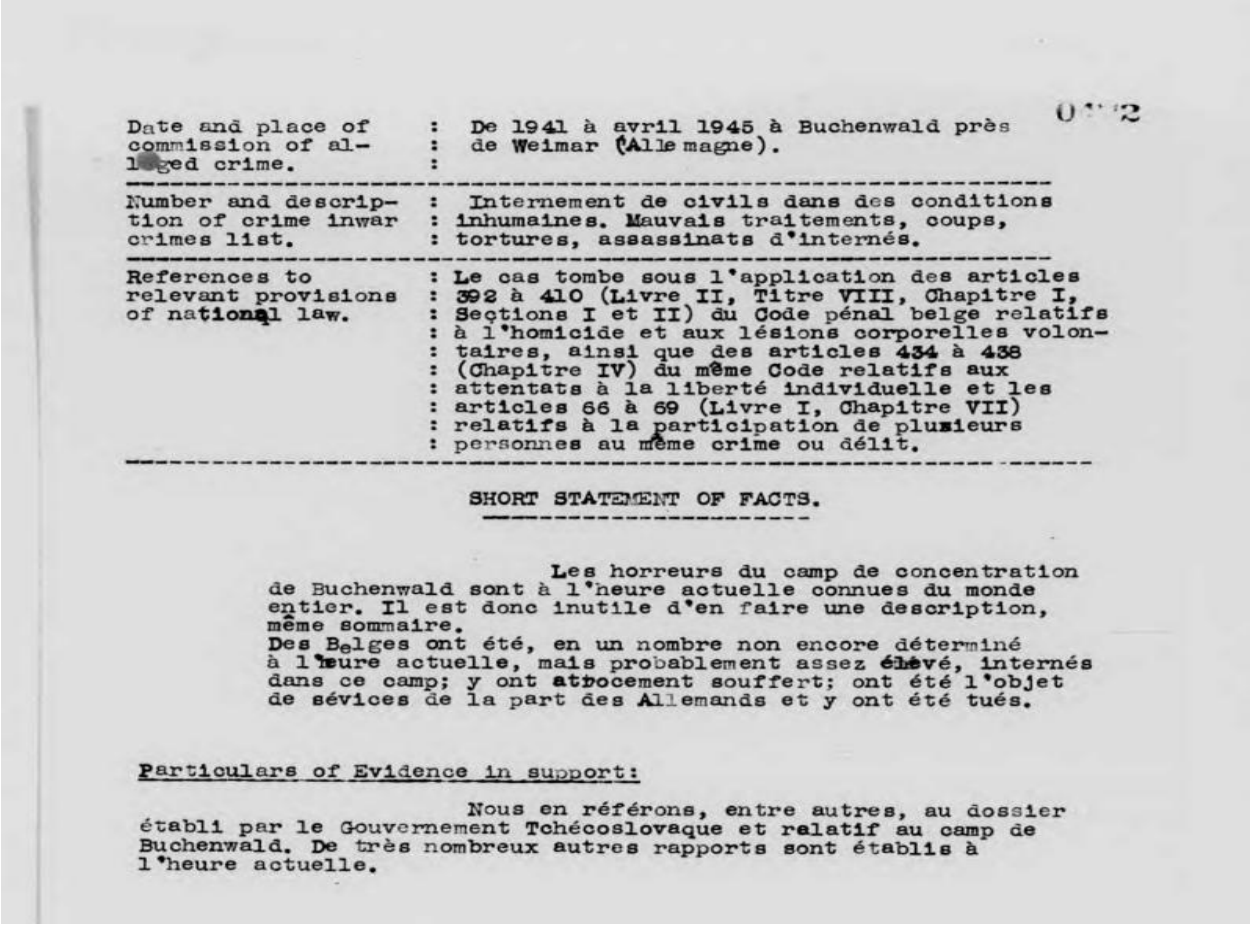
795/B/G/31

UNITED NATIONS WAR CRIMES COMMISSION.

BELGIAN Charges against: GERMAN WAR CRIMINALS.

Charge N° 15 (LONDON)

Name of accused, rank and unit, or official position.	I.	1. ADOLF HITLER
	II.	Membres du Gouvernement allemand:
		2. Hess Udolf
		3. Ribbentropp von, Joachim
		4. Frick Dr. Wilhelm
		5. Schwerin-Krossigh Count
		6. Guertner Dr. Wilhelm
		7. Schlegelberger Dr.
		8. Goering H. Reichsmarschal
		9. Funk Walther
		10. Rust Dr. Bernhard
		11. Goebels Dr. Josef
		12. Seldte Franz
		13. Dorpmueler, Dr.
		14. Ohnesorge Dr. Ing.
		15. Darré
		16. Backe Herbert
		17. Speer Albert Prof.
		18. Epp Franz von
		19. Keitel von Wilhelm, Feldmarschal
		20. Lammers Dr. Heinz Heinrich
		21. Kerrl Hans
		22. Meissner Dr.
		23. Seyss- Inguart Dr. Arthur
		24. Rosenberg Alfred
		25. Hierl Konstantin
		26. Frank Hans Dr.
		27. Schacht Hjalmar Dr.
	III.	Membres des S.S. G.H.Q. Berlin-Oranienburg
		28. Himmler Heinrich, Reichsführer der S.S. und Oberster Polizeiführer
		29. Wolff Karl, SS Obergruppenführer



Date and place of commission of alleged crime. : De 1941 à avril 1945 à Buchenwald près de Weimar (Allemagne).

Number and description of crime inwar crimes list. : Internement de civils dans des conditions inhumaines. Mauvais traitements, coups, tortures, assassinats d'internés.

References to relevant provisions of national law. : Le cas tombe sous l'application des articles 392 à 410 (Livre II, Titre VIII, Chapitre I, Sections I et II) du Code pénal belge relatifs à l'homicide et aux lésions corporelles volontaires, ainsi que des articles 434 à 438 (Chapitre IV) du même Code relatifs aux attentats à la liberté individuelle et les articles 66 à 69 (Livre I, Chapitre VII) relatifs à la participation de plusieurs personnes au même crime ou délit.

SHORT STATEMENT OF FACTS.

Les horreurs du camp de concentration de Buchenwald sont à l'heure actuelle connues du monde entier. Il est donc inutile d'en faire une description, même sommaire.
Des Belges ont été, en un nombre non encore déterminé à l'heure actuelle, mais probablement assez élevé, internés dans ce camp; y ont atrocement souffert; ont été l'objet de sévices de la part des Allemands et y ont été tués.

Particulars of Evidence in support:

Nous en référons, entre autres, au dossier établi par le Gouvernement Tchécoslovaque et relatif au camp de Buchenwald. De très nombreux autres rapports sont établis à l'heure actuelle.

Figure 9 : Two pages of the Belgian charge sheet, dated April 11, 1945, for Charge 31 against Hitler for crimes committed at Buchenwald. The charge sheet indicates the international and domestic law under which Hitler was charged.

FRANCE'S ROLE IN THE UNITED NATIONS WAR CRIMES COMMISSION

France played a foundational and fully integrated role in the formal diplomatic multinational organisation that was the UNWCC. It would be incorrect to view France's position on Head of State immunities as informal or unofficial.

France's involvement in the UNWCC

The French government in London (the French National Committee led by General Charles de Gaulle) and the post-liberation government in Paris were at the forefront of the multinational effort to hold the Nazis accountable under international law.

General Charles de Gaulle signed the St James's Declaration on Punishment of War Crimes of January 1942[29] on behalf of the French National Committee. This declaration explicitly cited the Hague Convention of 1907 as a source of international law. Article 3 of the Declaration affirmed that the signatories "place among their principal war aims the punishment, through the channel of organized justice, of those

[29] St James's Declaration on Punishment of War Crimes of January 1942 https://nla.gov.au/nla.obj-648522001/view?partId=nla.obj-648522340

guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them". In his remarks, General de Gaulle held Germany fully responsible for the war, emphasizing that "all the guilty parties and men who are responsible in any way should not be allowed to avoid just punishment." Although Adolf Hitler was not mentioned by name, the Declaration's language and De Gaulle's statement are clear that there is no exclusion for Heads of State and that all perpetrators needed to face justice.

Following this, the French national committee participated in the informal governmental discussions on International criminal law, conducted under the auspices of the London International Assembly.

In October 1943, the French committee of national liberation, which succeeded to the French national committee, participated in the drafting of the UNWCC Constitution[30] alongside 15 other states, at a meeting at the British Foreign Office in London. Other members included the other exiled governments of continental Europe, China, the UK, India and the Imperial Dominions, and the USA.[31] France continued to play then played an active role in the UNWCC's development of policies and programs until its closure in 1948.

In addition to its national representation on the Commission, the FCNL then established a National Office based in the Ministry of Justice as the liaison office with the UNWCC in accordance with standard practice.

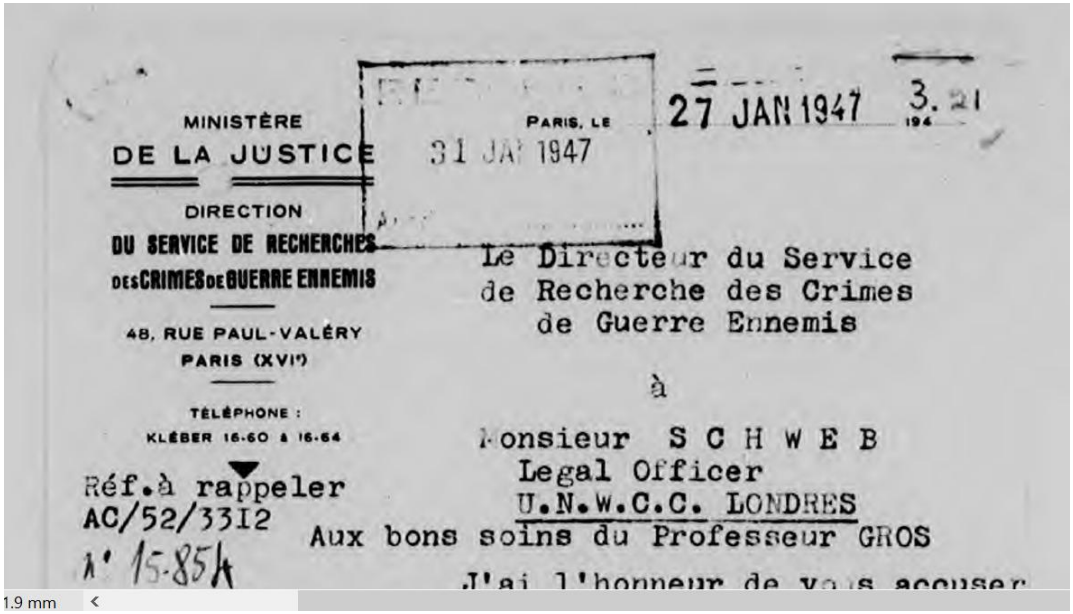

MINISTÈRE
DE LA JUSTICE
DIRECTION
DU SERVICE DE RECHERCHES
DES CRIMES DE GUERRE ENNEMIS
48, RUE PAUL-VALÉRY
PARIS (XVI^e)
TÉLÉPHONE :
KLÉBER 16-60 à 16-64
PARIS, LE 31 JAN 1947
27 JAN 1947 3.21
Le Directeur du Service
de Recherche des Crimes
de Guerre Ennemis
à
Monsieur S C H W E B
Legal Officer
U.N.W.C.C. LONDRES
Aux bons soins du Professeur GROS
Réf.à rappeler
AC/52/3312
n° 15.854
J'ai l'honneur de vous accuser

Figure 10: Example of correspondence, dated 27 January 1947, between the French Ministry of Justice and the UNWCC

[30] Constitution of the UNWCC https://www.legal-tools.org/doc/32e856/pdf
[31] South Africa signed the Constitution but never participated thereafter.

Through this National Office, the FCNL—and then the new government in Paris—processed 2231 charges against Nazi officials with the Commission.[32] The Commission provided a non-binding review of these charges, determining whether they met a *prima facie* standard. At a minimum, this placed the accused on lists of war crimes suspects, subject to arrest and further investigation by Allied forces including by the Central Registry of War Criminals and Security Suspects (CROWCASS) run by the Supreme Headquarters of Allied Powers in Europe (SHAPE) initially commanded by General Dwight D. Eisenhower.

France continued this process from early 1944 until the Commission's closure in 1948. As was the practice of the time, France reported the outcomes of trials stemming from Commission-endorsed charges back to the UNWCC[33]. France continued its war crimes trials even after the closure of the Commission in 1948.

France also provided a comprehensive summary of its domestic war crimes proceedings to the Conference of the National Offices in London held in May and June 1945.[34] The French National Office was represented by Professor Paoli, Ct. Maloy, and M Monneray along with France's Commissioners, Professors René Cassin and André Gros. A newsreel[35] from that period shows French officials, including Cassin, at the conference in the London Royal Courts of Justice, and the minutes confirm the active participation of French officials.

France's Legal Actions and Stance on Head of State Immunity

France's position on discarding head of state immunity was consistent with its broader actions in the UNWCC. This stance was also evident in other matters where France expressed divergent or assertive views compared to its fellow UNWCC member states. For example, in the autumn of 1944, France opposed the adoption of a definition of the Crime of Aggression under the Kellogg-Briand Pact. It also sought a legal definition of collective responsibility of military and paramilitary units,and remained firm that Italy's change of sides in the war did not absolve Italian officials of responsibility for crimes against French citizens. These actions contextualize France's willingness to challenge established norms and set aside head of state immunity.

France was a leading force in the effort to bring Nazi war criminals to justice through the UNWCC. It fully participated in the decision to reject the doctrine of head of state immunity as irrelevant, repeatedly approved charges brought against Adolf Hitler, and

[32] France charges against Germans https://unwcc.org/wp-content/uploads/2023/06/Reel-10-Charge-files-France-vs-Germans-2061-2231.pdf
[33] French Trial Reports https://onedrive.live.com/?redeem=aHR0cHM6Ly8xZHJ2Lm1zL2IvcyFBb2dyZnAxaVhmYjNnd3Y1ZC1KZEFqbnNVZ2Iy&cid=F7F65D629D7E2B88&id=F7F65D629D7E2B88%21395&parId=F7F65D629D7E2B88%21129&o=OneUp
[34] https://unwcc.org/wp-content/uploads/2022/11/National-Offices-Conference-minutes.pdf (Pdf pages 48-52).
[35] 1945 British Newsreel of the UNWCC National Offices Conference https://unwcc.org/wp-content/uploads/2023/06/BMN_45830_32.mp4

was assertive in advancing dissenting or innovative legal positions on other significant matters of international law.

ANNEX: EXTRACT FROM CHAPTER X OF THE UNWCC'S *HISTORY*

CHAPTER X

DEVELOPMENTS IN THE DOCTRINES OF INDIVIDUAL RESPONSIBILITY OF MEMBERS OF GOVERNMENTS AND ADMINISTRATORS, OF ACTS OF STATE, OF IMMUNITY OF HEADS OF STATE, AND OF SUPERIOR ORDERS

INTRODUCTORY NOTES

Developments which took place in respect of the concept of crimes against peace and crimes against humanity, as well as within the sphere of penal liability for war crimes proper, brought about profound alterations in the doctrines of immunity of heads of State, of individual responsibility of members of Governments and high-ranking administrators, and of acts of State. If the proposition that aggressive wars or persecutions on racial, political, or religious grounds in time of war were criminal acts, was not to be confined to the sphere of moral principles, advocated by learned jurists or philosophers or to that of the wishful thinking of politicians, the only way to deal with it was to recognise that individuals upon whose decisions such acts depended were to be held penally responsible. This could be done only by dismissing the doctrine of immunity of heads of state, on the one hand, and that of the acts of State legalising deeds of members of Governments and administrators on the other. As a corollary to the theory of national sovereignty, these two denominators served for centuries the purpose of providing a legal cover for a series of acts undertaken by one State against another, or by a Government against its own citizens within the boundaries of a State. There was no international liability for acts such as the launching of a war, but only the bearing of the natural consequences of a military defeat. Constitutional sanctions recognised for mishandling national or international affairs of a State were of a political nature only. A head of State could resign, abdicate or be dismissed, and members of a Government or administrators could similarly be forced into retirement or deprived of political power by other methods, but none could be held penally responsible for acts undertaken in the exercise of their State functions. In this manner, the whole system was one of utter official irresponsibility.

The grave consequences of modern warfare for all the nations of the world, and particularly the impact of the last War with its unparalleled human suffering and economic, political, and social upheavals, made these doctrines inconsistent with the vital requirements of international peace and the stability and prosperity of nations. By consent of the great majority of nations, these doctrines were eventually discarded and replaced by the rule that individuals could no longer shelter behind acts of State, and that the former were consequently to be held answerable for acts amounting to international crimes, in the same manner as any other individual was answerable for common crimes under municipal law.

Another doctrine was closely connected with those affecting heads of State and members of Governments. It is that concerning acts committed upon superior orders. The question requiring answer was to what extent persons pledged by law to obey orders of their superiors, in particular those issued by heads of State and

Governments, were to be held personally responsible for acts committed by them in subordinate positions. Was liability to be confined only to those persons who issued the orders, or were the executants to share responsibility with them? If so, what were the limits for holding a subordinate guilty of committing acts upon superior orders?

Developments in all these various fields took a sinuous line of progression. There were hesitations and hindrances, and there were also complete reversals of attitude on the part of Governments within a given period of time. The ultimate result was the elaboration of rules embodied in contemporary international law which provide clear answers to all the main issues at stake; and which will be the law until a further development takes place in the future. Such as it is, this law meets the requirements of the present world in a manner which is designed to act as a deterrent to breaches of peace and to crimes incidental to such breaches, and even to acts committed by Governments and heads of State within their national territory in connection with aggressive wars.(1) One of its principal effects is that it introduces international penal liability for such individuals and makes some of their acts the concern of the community of nations as a whole. In this way, it subjects the real actors in national and international affairs to the rule of law in all matters affecting the maintenance of international peace and of the fundamental human rights of mankind.

A. INDIVIDUAL RESPONSIBILITY OF HEADS OF STATE, MEMBERS OF GOVERNMENTS AND STATE ADMINISTRATORS

The problem of personal responsibility of heads of State, members of Governments and similar high State administrators, and the relevance of the doctrine of acts of State affecting their liability, were the subject of thorough investigation and discussion at several international conferences. After the First World War they were analysed by the 1919 Commission on Responsibilities; during the Second World War they were dealt with by bodies such as the Inter-Allied Commission on the Punishment of War Crimes, the London International Assembly, and the International Commission for Penal Reconstruction and Development; they were also carefully studied by the United Nations War Crimes Commission. These phases ended in the trial of German and Japanese Major War Criminals at Nuremberg and Tokyo after the end of the Second World War, and the adjudications made in their respect by the International Military Tribunal at Nuremberg.(2)

(i) THE 1919 COMMISSION ON RESPONSIBILITIES

In the report submitted to the Allied Powers sitting at Versailles,

(1) See Chapter IX, Section A, (ii) (i) (c) p. 195 et seq.

(2) The Judgment of the Tokyo Tribunal had not been given at the time of going to press.

the members of the 1919 Commission on the Responsibilities of the Authors of the War and the Enforcement of Penalties(1) were divided on the main issue.

The majority dismissed the doctrines of immunity of heads of State and of acts of State in the following terms:

“The Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of States. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a State. But this privilege, where it is recognised, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in his own country, the position from an international point of view is quite different”.

The majority therefore recommended the setting up of a High Tribunal which would try the German Kaiser, and in this connection expressed the following opinion:

“If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him (a Sovereign), could in no circumstances be punished. Such a conclusion would shock the conscience of civilised mankind”.

On these grounds, the majority came to the following formal conclusion:

“All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution”.

The above views and conclusions were dissented from by the United States and Japanese delegations.

In a Memorandum of Reservations, the American delegation drew a distinction between “two classes of responsibilities.” They set on the one side “responsibilities of a legal nature, justiciable and liable for trial and punishment by appropriate tribunals,” and on the other side “responsibilities of a moral nature” and “moral offences,” which “however iniquitous and infamous, and however terrible in their results, were beyond the reach of judicial procedure, and subject only to moral sanctions.” They applied the latter to heads of State, members of Governments, and other persons in high authority, and advocated that they could, consequently, not be brought to trial. Making special reference to heads of State, the American delegation said that they “were not hitherto legally responsible for the atrocious acts committed by subordinate authorities” and that to hold them now responsible was an “inconsistency” to which “the American members of the Commission were unwilling to assent.” As a consequence, they dissented to that extent from the formal conclusion reached by the majority, and reiterated the traditional rule that a head of State could be held responsible only to the “political authority of his country” and not to the judicial authority”(1).

(1) See Chapter III.

For similar reasons, the Japanese delegation made reservations excluding penal liabilities of heads of State.(2)

The Allied Powers adopted the view of the majority and provided for the trial of the Kaiser in the Versailles Treaty (Art. 227). The Kaiser was held responsible "for a supreme offence against international morality and the sanctity of treaties," and was to be tried by a special interallied tribunal of five powers (U.S.A., Great Britain, France, Italy, and Japan).

It will be noted that in its conclusion as to the individual penal responsibility of high State administrators, the majority of the 1919 Commission had declared their liability for violations of the laws and customs of war or of the laws of humanity. It is generally agreed that the former cover the field of war crimes stricto sensu and that—in the light of the Nuremberg Trial—the latter comprise what are now called crimes against humanity.

As to the launching and waging of an aggressive war, the 1919 Commission was of the opinion that "by reason of the purely optional character of the institutions at The Hague for the maintenance of peace (International Commissions of Inquiry, Mediation, and Arbitration), a war of aggression may not be considered as an act directly contrary to positive law." Consequently, at this stage, the penal liability of State administrators, including heads of State, was contemplated primarily for war crimes proper.

(ii) INTERNATIONAL BODIES PRECEDING THE ESTABLISHMENT OF THE UNITED NATIONS WAR CRIMES COMMISSION

(1) Inter-Allied Commission on the Punishment of War Crimes

The Nine Powers, signatories to the St. James's Declaration of 13th January, 1942(3), had set up a Commission on the Punishment of War Crimes.

The Commission drafted a questionnaire, which was referred to member Governments for answer. One of the questions asked was how individuals responsible for planning, inciting, or ordering violations of international law were to be punished. The question was framed in general terms so as to include the responsibility of high State administrators. The collection of governmental views on this subject could not be completed in time, for the Commission ceased its activities on 23rd October, 1943, the date of the establishment of the United Nations War Crimes Commission. A questionnaire, however, of the International Commission for Penal Reconstruction and Development brought answers from many Governments, as will be seen later.

(1) The U.S. delegation made, however, one practical concession. They agreed that the above rule on judicial immunity did not apply to a head of State who had abdicated as was precisely the case with the ex-Kaiser. Therefore they apparently did not object to his trial, but did so on the grounds that in such case the head of State was "an individual out of office".

(2) It can be noted that in Japan, the Emperor was considered to be of divine origin, and that the Japanese delegation had of necessity to be in line with this principle.

(3) See Chapter V, Section A, (iv), p. 89 et seq.

(2) London International Assembly

The London International Assembly, which was created in 1941 under the auspices of the League of Nations Union,(1) studied post-war problems and the framing of the future world organisation. Most of its members were designated by the Allied Governments, so that it indirectly reflected their views.

The problem of retribution for war crimes committed during the Second World War held a prominent place on its agenda and gave rise to thorough discussions. Analysing the position of a head of State, the Assembly made a distinction, and held the view that heads of State, who constitutionally had no power to order or prevent the framing of a specific policy, could not be held personally responsible for acts of other State administrators or of the Government, as the case might be. As to the principle, they followed the majority of the 1919 Commission and agreed that, with the above exception, rank or position, however high, conferred no immunity in respect of war crimes.

(3) International Commission for Penal Reconstruction and Development

A second semi-official body established by the same Nine Powers who signed the St. James's Declaration of 13th January, 1942, was the Cambridge "International Commission for Penal Reconstruction and Development." It started functioning on 14th November, 1941, and studied, among other things, rules and procedures to govern the case of crimes committed against international public order, with particular reference to events of the Second World War. It performed brilliant work and in July, 1943, submitted to the Governments a learned and comprehensive report on this matter.

In a questionnaire submitted to its members, the Commission requested their opinion as to the "immunity of a head of State and of other State officials." Answers were received from eight members of different nationalities. The majority declared that in the field of war crimes, no such immunity could be accepted. With particular reference to the Axis powers, the argument was used that in such regimes, the head of State had concentrated all powers in his own hands, and that consequently, the doctrine of immunity had no justification. Another argument was that immunity was an accepted principle in time of peace, for reasons of expediency and courtesy vital to peaceful intercourse between nations, but that it ceased to exist in time of war and could not be maintained for the benefit of the aggressor. The practice of making and detaining heads of State and other State administrators prisoners, such as in the case of Napolean I, Napolean III, King Leopold of Belgium and Rufolf [sic] Hess, were also invoked as evidence that immunity did not exist in war time.

The question was also touched upon, though only in a general manner, in the part of the report dealing with superior orders, and prepared by Professor H. Lauterpacht:

"The rules of warfare", said Professor Lauterpacht, "like any other rules of international law, are binding not upon impersonal entities, but"

(1) See Chapter V, Section B, (ii), p. 9 et seq.

"upon human beings . . . In no other sphere does the view that international law is binding only upon States but not upon individuals lead to more absurd consequences, and nowhere has it in practice been rejected more emphatically than in the domain of the laws of war. The direct subjection of individuals to the rules of warfare entails, in the very nature of things, a responsibility of a criminal nature".

(iii) THE UNITED NATIONS WAR CRIMES COMMISSION

In the United Nations War Crimes Commission, the problem of individual penal responsibility of State administrators was treated for a considerable period of time in conjunction with two other allied questions: with the preparation of lists of "major war criminals," "arch criminals," or "key men," as they were alternatively called, and with the question of collective criminality of Governments.(1) Both questions were considered in connection with Axis leaders, particularly with concrete cases implicating Hitler and members of the Nazi Government.

From March to May 1944, the Belgian delegate, acting at the same time as Chairman of the Committee on Facts and Evidence, raised several questions in this respect. He pointed out the desirability of supplying the Committee not only with evidence against ordinary war criminals but also against the Axis leaders and placing their names on war criminals' lists prepared by the Commission. He complained that the German criminals were not being prosecuted.(2) Therefore, he suggested that such information be obtained from the Governments or else that it be collected by the Commission on its own initiative. As to the alternative method of bringing major war criminals to justice, he considered that the proper course was to try them before a court of law, and not to impose penalties by political decision. However, should the latter course be taken, he suggested that it be applied only to the Axis top leaders, such as Hitler, Mussolini, and Hirohito, and not to other Axis high State administrators. The Commission agreed in principle.(3)

In May of the same year, the Czechoslovak Government presented a charge against eight Nazi administrators, including members of the Nazi Government, for the destruction of two Czech villages, Lidice and Lezaky, and the deliberate killing of most of their inhabitants. The accused persons were placed on the Commission's list of war criminals wanted for trial.

A few months later, in August and September 1944, the Netherlands representative stressed that charges brought by member Governments were still very limited in number, and that the Commission should not wait for the Governments to act, but should collect the evidence and place arch-criminals on its lists without further delay. The Commission agreed.(4) At this stage, however, the decision of the Commission, as

(1) On this last subject see Chapter XI. Section A, (ii) p. 292.

(2) See Doc. C.14, 25.4.1944.

(3) M.16, 2.5.1944

(4) M.29, 29.8.1944; M.33, 26.9.1944.

well as the proposals of the Netherlands and Belgian representatives, was admittedly made without prejudice as to whether the Nazi and other high State administrators would be punished as a result of a trial or a political decision by the Allied Governments. Nevertheless, the principle that such administrators, including heads of States and members of Governments, could not shelter under the cloak of immunity, was clearly established by the majority of the Commission's members.

This principle was confirmed and still further developed in the course of the following months and years, though not without certain difficulties. In November 1944, the Czechoslovak Government brought a charge for crimes committed by Nazi special courts and placed primary responsibility on Hitler and members of his Government. The Commission admitted the charges and placed the accused on its lists of war criminals. On the grounds of this decision, the Czechoslovak Government extended its previous charge concerning crimes perpetrated in Lidice and Lezaky so as to include Hitler and individual members of his Government. At this juncture, some members objected to the procedure. For instance, the British member thought that, before deciding whether the Nazi Government could be held responsible, the German constitution should be consulted, and the decision reached according to German constitutional rules for the liability of members of the Government. This was unacceptable to other members, including the Czechoslovak representative, who argued that the decision would thus depend entirely on the will of Hitler himself, who had framed the constitution of the Third Reich so that his subordinates would bear no responsibility.

The importance of the issue, as raised above, caused the Commission to appoint a special Sub-Committee to study the question in all its details. The Sub-Committee was appointed on 13th December 1944 under the chairmanship of Lord Wright. The Czechoslovak delegate submitted a memorandum on the individual responsibility of members of the Nazi Government, and the Sub-Committee investigated the issue based on this memorandum and information collected from various sources. The question was considered simultaneously from the viewpoint of individual penal liability and from that of responsibility for membership in a criminal group or organization.(1) On the first point, the Sub-Committee considered the position of members of the Nazi Cabinet proper, including Hitler, and other high State administrators. In light of the information available, it concluded that certain ministers and various plenipotentiaries for specific spheres exercised a large part of the legislative power, while Hitler himself assumed much of it. Therefore, the Sub-Committee found that members of the Reichsregierung as a whole could not, under the circumstances, be held prima facie guilty of crimes without specific evidence. However, the Sub-Committee established that most of the legislative and executive powers of the Reichsregierung were exercised

(1) Doc C.88, 13.3.1945, The Criminal and Personal Responsibility of Members of the Nazi Government, memorandum by Dr. B. Ecer.

(2) On this last point see Chapter XI, Section A, (ii) p.292.

by an inner Cabinet called the Ministerial Council for the Defence of the Reich (Ministerrat für die Reichsverteidigung), and that laws which directed or influenced

Nazi criminal policy were enacted by individual Ministers. The inner Cabinet's laws and decrees did not need to be countersigned by Hitler.

Consequently, the Sub-Committee concluded that, in view of such powers and the evidence proving the perpetration of numerous crimes upon the inner Cabinet's orders, its individual members were to be considered prima facie criminally responsible for acts committed by their subordinates. Similarly, ministers who individually enacted criminal laws, decrees, or orders were also held responsible.

The Sub-Committee also considered the position of Nazi State administrators other than Government members. It found that administrators who had conceived or assisted in framing legal or administrative measures violating the laws and customs of war could equally not enjoy immunity under the doctrine of acts of State; the same was true of those who had carried out a criminal policy by giving or issuing orders or by taking action.

As a result of these findings, the Commission and its Committee on Facts and Evidence adopted the rule of placing such persons on war criminals' lists, rejecting as irrelevant the doctrines of immunity of heads of State and Government members, and of acts of State. Upon charges presented by various nations, Hitler was placed on the lists of war criminals on several occasions, as were other high State administrators, such as Mussolini. The number of accused persons increased over time, and separate lists of major or arch criminals were issued to deal exclusively with State administrators and other high officials.(1)

(iv) TRIALS OF MAJOR WAR CRIMINALS

The irrelevance of the doctrines of acts of State and immunity of State administrators, and the principle of individual penal responsibility of the latter in contemporary international law, received its highest judicial sanction at the trials of Nazi war criminals at Nuremberg.

The most important trial was that of the members of the Nazi government and other Nazi high officials, with Goering and Ribbentrop at the head of those tried and convicted.(2) Other trials, held by United States courts, also at Nuremberg, included administrators of various ministries of the Nazi government, such as the Ministry of Justice and the Ministry for Foreign Affairs. In all these cases, criminal procedure was applied to, and penalties of criminal law were imposed upon, individual State administrators for acts which, by virtue of the doctrines under review, would have enjoyed immunity.

A similar development took place in the Far East, in the prosecution of the Japanese Major War Criminals before the International Military

(1) See Committee Minutes No. 3/45, 17.4.45; also M.56, 18.4.45; M.57, 24.4.45; M.62, 23.5.45.

(2) See Chapters IX and XI.

Tribunal sitting in Tokyo. The accused were mainly members of the Japanese Government.

The above trials were held under express provisions of international law, which were preceded by authoritative declarations made by the Allied Governments.

(1) The Moscow Declaration

The determination of the United Nations to bring to trial all those responsible for crimes against peace, war crimes, and crimes against humanity, irrespective of position and rank, was first formulated in the Moscow Declaration of 1st November, 1943, by the United States, Great Britain, and the U.S.S.R. on behalf of all the United Nations. This Declaration drew a distinction between ordinary or lesser war criminals on one hand, and "major" war criminals, on the other. The trial of the latter was to be made in an international procedure, as distinct from the case of lesser war criminals, whose trial devolved to national courts:

". . . The major war criminals, whose offences have no particular geographical localization . . . governments of the Allies will be punished by the joint decision of the Allied representatives."

This formula left open the choice between an executive and a judicial international procedure, and this was subsequently decided in favor of the latter course.

(2) Surrender Document regarding Germany and Potsdam Declaration

The bringing to trial of the Nazi State administrators, including members of the Nazi Government, was prescribed in two international documents related to Germany.

In the "Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany"—otherwise known as the "Unconditional Surrender of Germany"—issued by Great Britain, the U.S.A., the U.S.S.R., and France on 5th June 1945, it was declared:

"The principal Nazi leaders as specified by the Allied representatives, and all persons from time to time named or designated by rank, office, or employment by the Allied representatives as being suspected of having committed, ordered, or abetted war crimes or analogous offences, will be apprehended and surrendered to Allied representatives."

The fact that the obligation to hand over Nazi leaders was laid down for the purpose of bringing them to trial was stressed in the "Protocol of the Proceedings of the Berlin Conference," known as the Potsdam Declaration, of 2nd August 1945:

"War criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgment. Nazi leaders, influential Nazi supporters and high officials of Nazi organisations and institutions, and any other person dangerous to the occupation or its objectors, shall be arrested and interned".(1)

Statements with the same effect were made in the terms of surrender for Japan, issued at Potsdam on 26th July 1945, and appropriate obliga-

(1) Paragraph 5. Italics introduced.

tions to hand over Japanese Major War Criminals for trial were undertaken by the Japanese authorities in the instrument of surrender signed at Tokyo Bay on 2nd September 1945.

(3) The Nuremberg and Tokyo Charters

During the preliminary phases for the establishment of the International Military Tribunal at Nuremberg, the United States Chief of Counsel in the prosecution of European Axis war criminals, Justice Robert H. Jackson, defined the main issues at stake. In a report submitted to the President of the United States in June 1945, he referred to the intended procedure and stressed that it was conceived so as to secure a fair trial and full rights of defense. He then said:

"Nor should such defense be recognized as the obsolete doctrine that a head of State is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of Kings. It is, in any event, inconsistent with the position we take towards our own officials, who are frequently brought to court at the suit of citizens who allege their rights. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still 'under God and the law".

Justice Robert H. Jackson then stated that the prosecution was to be directed against "a large number of individuals and officials who were in authority in the government."

These preparatory steps culminated in the provisions embodied in the two Charters governing the jurisdiction of the International Military Tribunal at Nuremberg and of that at Tokyo.

In Article 7 of the Nuremberg Charter, the following principle was declared:

"The official position of defendants, whether as heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment."

Article 6 of the Tokyo Charter provides:

"Neither the official position, at any time, of an accused, nor the fact that they acted pursuant to the order of his government or of a superior, shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires".

Both provisions thus proclaimed that, within the sphere of crimes covered by the two Charters, the doctrines of acts of State and of immunity of heads of State and State administrators were no longer relevant or operative as a basis for freeing the individuals concerned from penal responsibility.

The principle was repeated in Law No. 10 of the Allied Control Council for Germany, under whose terms the trials were held of State administrators other than those tried by the International Military Tribunal at Nuremberg. Article II of Law No. 10 reads:

"The official position of any person, whether as head of State or as a responsible official in a Government Department, does not free him from responsibility for any crime or entitle him to mitigation of punishment."(1)

It thus appears that, in the main body of what is taking the shape of international penal law, the doctrines under review have clearly and definitely been discarded.

(4) The Trials

At the trial of the German Major War Criminals held before the International Military Tribunal at Nuremberg, 13 of the 21 accused sitting at the bar had been members of the Nazi government. They included Goering, Ribbentrop, Hess, Rosenberg, Frank, Speer, Frick, Schacht, Papen, Neurath, Seyss-Inquart, Keitel, and Raeder. They were indicted for crimes against peace, war crimes, and crimes against humanity, as leaders, organizers, instigators, or accomplices who, under Article 6 of the Nuremberg Charter, bore responsibility "for all acts performed by any persons" in execution of plans and orders issued by them.

When prosecuting the case against them and the other accused, the United States Chief Prosecutor, Justice Robert H. Jackson, referred to the provision of the Charter discarding the doctrines of acts of State and of immunity of State administrators, and stressed that "the idea that a State commits crimes is a fiction." Crimes, said Justice Jackson, "are always committed only by persons. While it is quite proper to employ the fiction of responsibility of a State for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity." He referred to certain precedents and requested the punishment of the accused members of Government on the basis of the terms of the Charter and of the evidence submitted.

As was to be expected, the defense invoked both the doctrine of acts of State and that of immunity of State administrators. Replying to this, the International Military Tribunal declared in its Judgment the following:

"It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected . . . The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter behind their official position in order to be freed from

punishment. In appropriate proceedings . . . On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law".

(1) It will be noted that, unlike the Nuremberg Charter and Law No. 10, the Tokyo Charter makes possible the admission of the plea of acts of State or of immunity of state administrators in so far as mitigation of punishment is concerned.

(2) The Trial of German Major War Criminals. Opening Speeches of the Chief Prosecutors, His Majesty's Stationery Office, London, 1946, p. 42.

Of the 13 accused members of the Nazi government only two were acquitted (Papen and Schacht); they were, however, not acquitted on account of the plea of their immunity, but for lack of evidence that they had committed crimes for which they had been prosecuted. The remainder were all sentenced to various punishments, including the death penalty.

A remarkable feature in connection with this judgment is that the irrelevance of the doctrines of heads of State and State administrators was pronounced in regard to the whole field of international crimes covered by the Nuremberg Charter. Unlike the position as it developed after the First World War, this now includes crimes against peace as the paramount international offense, for which nobody but heads of State and members of Governments can conceivably be held responsible.

A similar judgment, though not including crimes against peace, was passed by a United States Military Tribunal at Nuremberg in the case of 16 Nazi high officials, comprising 9 administrators of the German ex-Ministry of Justice and 7 judges or prosecutors of Nazi courts.(1) The trial was held under the terms of Law No. 10 of the Allied Control Council for Germany. The accused were prosecuted for criminal offenses committed by misusing legislative or judicial power as part of the criminal policy of the Nazi regime.

The evidence submitted was to the effect that the whole of the Nazi legal machinery at governmental level and that of the courts of law was used "for terroristic functions in support of the Nazi regime." Severe punishments, including the death penalty, were prescribed by the Nazis and systematically implemented upon acts which did not represent criminal offenses under standards of modern justice or which did not warrant such heavy penalties.

State administrators prosecuted included chiefs of departments of the Reich Ministry of Justice, ministerial counselors, state secretaries, and legal advisers. Judicial officers included senior magistrates and prosecutors. Eleven were found individually responsible for and guilty of war crimes or crimes against humanity under the terms of Law No. 10, and were sentenced to various penalties, including imprisonment for life.

At the time of writing, another trial is still in progress which also involves high Nazi State administrators. It is the important trial of 9 leading officials of the Nazi ex

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At the time of writing, another trial is still in progress, which also involves high Nazi State administrators. It is the important trial of 9 leading officials of the Nazi ex-Ministry for Foreign Affairs, including a Minister for Foreign Affairs, and 12 administrators of other governmental agencies connected with the planning and operations of Nazi foreign policy. The former include the short-lived Minister, Schwerin von Krosigk, who succeeded von Ribbentrop in May, 1945, in Doenitz's government, and 8 top-ranking officials of the Ministry, who were in function for a number of years as heads of departments. The latter include the chief of the Nazi Party Foreign Affairs Organisation, the Reich Minister for Food and Agriculture, the chief of the Presidential Chancellery, State Secretaries of other ministries, leading directors of German banks, heads of economic planning agencies, and others. They are tried for crimes against peace, war crimes, or crimes against humanity.

(1) See also Chapter XI, Section D (2), p. 334.

The trial of all these high officials is conducted on the basis of the rule that they do not enjoy immunity and cannot claim impunity on account of having acted in the course of their official functions.

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