

WAR CRIMES TRIALS

General Editor

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K.C., M.P.

Volume VII—The Velpke Baby Home Trial

War Crimes Trials Series

- Vol. I—The *Peleus* Trial.
Vol. II—The Belsen Trial.
Vol. III—The Gozawa Trial.
Vol. IV—The Hadamar Trial.
Vol. V—The Natzweiler Trial.
Vol. VI—The Falkenhorst Trial.
Vol. VII—The Velpke Baby Home Trial.
etc. etc.

TRIAL OF

HEINRICH GERIKE GUSTAV CLAUS
GEORG HESSLING RICHARD DEMMERICH
WERNER NOTH FRITZ FLINT
HERMANN MÜLLER VALENTINA BILIEN

(The Velpke Baby Home Trial)

Edited by

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United Nations War Crimes Commission

With a Foreword by

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University of Cambridge

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G. B.

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1950.

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FOREWORD

By PROFESSOR H. LAUTERPACHT, K.C., LL.D., F.B.A.
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THE publishers of this Series of War Crimes Trials have performed—and are performing—a public service of significance, and I therefore gladly comply with their invitation to write the Foreword to the present volume of the Series. The trial of which it gives an account was not concerned with issues, such as responsibility for aggressive war, which have given rise to controversy. The subject of the indictment on which the accused, including a woman, were indicted and convicted was a war crime in the ordinary sense of the word. The accused were charged with a violation of Article 46 of the Regulations annexed to Hague Convention No. IV of 1907, which provides that “family honour and rights, individual lives and private property, as well as religious convictions and liberty, must be respected.” Possibly some readers of this volume will regard the expression “war crime in the ordinary sense of the word” as simplifying unduly the true nature of this trial. The accused were German nationals; they were civilians; and they were charged, before a British Military Court at Brunswick, with having been concerned “in the killing by wilful neglect of a number of children, Polish nationals.” This, it may be argued, was not a typical war crimes trial. However, there ought to be no doubt that the trial did not represent any drastic innovation and that it fell within the purview of the Hague Regulations and of the jurisdiction of military tribunals as authorized by international law.

As in other war crimes trials—including that of the major war criminals at Nuremberg—the impression of novelty has been due, in this and similar cases, to the extraordinary and unprecedented character of the offences resulting from the conduct of the war by the military and political leaders of National-Socialist Germany. The children, of whose pitiable deaths the accused were found guilty, were almost exclusively children of Polish mothers brought to Germany from Poland in pursuance of the policy of deportation

for slave labour. Next to the extermination of six million Jews in the territories occupied by Germany, the deportation for slave labour was the most cruel and most systematic of the war crimes committed by Germany. It involved millions of persons brutally torn away from their families and their native lands; conveyed to forced labour in conditions of inhuman neglect; and compelled to work in an atmosphere of economic exploitation, studied terror and humiliation. Of that latter aspect of slave labour the Velpke Baby Home Case supplies an instructive—and revolting—illustration. Babies were taken away from their mothers eight to ten days after birth (the interval was subsequently raised to four to six weeks). They were placed in a Home managed by the accused, German officials. In that Home they died in large numbers as the result of what the Court found to have been criminal neglect.

No such crime—or anything resembling it—could be found in the enumeration of war crimes appearing in text-books of international law published before the Second World War. But, as mentioned, it is only the novelty and the enormity of the outrage which creates the impression of novelty of the charge on which the accused were indicted. Essentially, the facts were covered by accepted principles of international law in the matter. The offence originated in a war crime committed within the territory occupied by Germany, namely, in the forcible deportation of its inhabitants to the territory of the occupant. Independently of that, there is no principle of international law which excludes the territory of the occupant from being regarded as the locality of a war crime; or which lays down that only members of the armed forces, as distinguished from civilians, can commit a war crime; or which provides that only nationals of the belligerent—as distinguished from nationals of neutral or allied States or even of the opposing belligerent—can properly be regarded as the objects of a war crime. Inasmuch as the practice of Allied Tribunals after the Second World War has tended, fully in conformity with international law, to rely on that aspect of the legal position, it has at the same time stressed other significant developments in international law. Those developments have consisted, in the first instance, in the growing recognition of the fact that the individual human being may benefit directly from rights conferred by international law and that he may be bound directly by the obligations imposed by it. The laws of war operate not only upon the State as such. They obligate also individual members of the armed

forces acting on its behalf. Moreover, they bind individuals who are not members of the armed forces of the belligerent. Similarly, the protection of the laws of war is not limited to the nationals of the belligerent responsible for the conduct of the trial. To the extent to which the Velpke Baby Home Case illustrates the possibilities of the universality of jurisdiction in the matter of war crimes, i.e. of jurisdiction independent of the locality of the crime or of the nationality of the offender or of the victim, it is in line with developments which must be regarded as beneficent and as emphasizing, in the words of the Charter of the United Nations, the "worth and the dignity" of the individual human being. That interpretation of the trial and of its results is not inconsistent with the fact that they were also fully in conformity with the accepted laws of war.

H. L.

INTRODUCTION

I

THE task of presenting the Velpke Baby Home Trial in the *War Crimes Trials Series* has not been undertaken by the Editor without considerable hesitation. This is no reflection on the importance of this case—far from it—but arose rather out of the knowledge that the Editors of certain other volumes in this Series have had actual experience of prosecuting or defending in war crime trials, whereas the present Editor's interest in war crime matters may be thought to have been much more academic in nature. Although the Editor has witnessed war crime courts in action on several occasions during brief visits to Hamburg, Nuremberg and Dachau, personal contact with the actual proceedings has not been sufficiently continuous to enable him to supply the reader with vivid verbal descriptions of the atmosphere of such a court, or with pen pictures of the character and behaviour of accused persons as might have been given by one with a more intimate working relationship with a given case. On the other hand, the Editor has at least been free from the toil of collecting and marshalling evidence which is never absent from the mind of the practising counsel, and this has enabled him to devote a greater proportion of his time to thought on the basic principles underlying the international criminal law which has grown up in recent years, and which has incidentally rendered so inadequate the term "war crimes law." Access has been close at hand to the records of war crime trials conducted by the Courts of a number of Allied countries—Great Britain, the United States, France, Canada, Australia, the Netherlands, Greece, Norway, Poland and China—and it may be that this close contact with the method of conducting various Allied Courts will enable the Editor, by comparing the practice of different nations, to say something new on points already discussed in companion volumes. Any apparently excessive interest in the legal aspects of the Velpke Trial which may be displayed arises from the feeling that it is on these aspects that the Editor may be thought best qualified to speak with profit to the reader.

Indulgence in a small digression is craved in order to introduce a series of volumes with whose preparation and publication the Editor has been mainly concerned during the years he spent on the staff of the United Nations War Crimes Commission, namely, the *Law Reports of Trials of War Criminals*. These are published in fifteen volumes through His Majesty's Stationery Office, and it will be necessary to mention them later as further illustrating or elabor-

ating upon points which can only briefly be described in a short Introduction such as this. The *History of the United Nations War Crimes Commission and the Development of the Laws of War* which the Commission published in 1948, also through H.M. Stationery Office, provides the reader with a very adequate account of most of the activities of the Commission between its establishment in 1943 and its winding up in March, 1948. The production of the *Law Reports* was at the latter date, however, still under way. In his Introductory Chapter to the History, Lord Wright, to whose indefatigable labours as its Chairman during the greater part of its life the Commission owed so much, wrote that: "As the Commission was from the first charged with the duty of recording and reporting cases, it has seriously occupied itself with the preparation of a series of Law Reports of Trials of War Criminals. This is a duty of the highest importance, because without such reports future generations would not be able to ascertain the law developed by the various courts nor would future authors engaged in producing works on the laws of war be able to garner the fruits of these few but very busy years of legal elucidation. . . . It is hoped that the publication of these Law Reports will facilitate the elaboration of a jurisprudence in connection with this branch of international law."

On the winding up of the Commission and the setting up of a Trust to complete the Law Reporting, the Editor was furnished with a small staff of loyal and highly skilled fellow lawyers with whose co-operation it was possible to complete the production of the fifteen volumes of the *Law Reports* by the end of March, 1949. With this stimulating experience still so fresh in mind, he begs leave to make occasional cross-reference to these *Law Reports* in the course of this Introduction; particular reference will be made from time to time to the final (XVth) volume of the series, which is entitled *Digest of Laws and Cases* and in which an attempt is made to summarize in a systematic way and analyse the outcome, from the point of view of international law, of the trials reported or cited in the other fourteen volumes (together with that of some others to which it was not possible to give previous treatment) and of the legal enactments, national and international, under which the relevant Courts worked.

The Commission's *Law Reports* are in no way rivals of the *War Crimes Trials Series*, under the General Editorship of the Right Hon. Sir David Maxwell Fyfe, K.C., M.P., of which the present volume on the Velpke Trial forms part. The importance of producing a permanent record of recent war crime trials which was underlined by Lord Wright in the passage quoted above applies equally to the present Series, but their intention differs markedly from the Commission's publications, if only in stress. The aim of a volume like the present one is to lay before the general

reader and the lawyer alike a record of an entire trial, pruned only of a few discussions in court of questions of procedure which would interrupt, in a manner of speaking, the flow of the narrative, and to provide a readable and understandable account which will reveal in full the nature of the offences involved in the trial, the character of the trial, and the type of persons being tried, while at the same time producing a work which is also not without considerable interest and value to the student of technical legal details. The United Nations War Crimes Commission's *Law Reports of Trials of War Criminals*, on the other hand, with their detailed legal commentaries on each case reported, are intended mainly to be of interest to the student of international law and comparative law, while at the same time it is hoped they will not be without interest to the general reader through the Outline of the Proceedings which precedes the Notes on the Case in each trial report. Moreover, the Commission has attempted to derive from the records in its possession all material containing any guidance for the building up of a jurisprudence of international law, and out of over 1,600 trials of which there were records 89 were given separate reports in the volumes while a further 92 were discussed or cited from time to time in the volumes. Due to this attempt to cover an entire field, it was of course impossible to set out the evidence produced in any of these trials in the complete form in which the evidence in the Velpke Trial is recorded in the present book. That trial occupies incidentally a mere six pages in Volume VII of the *Law Reports*, and even longer reports such as that of the Belsen Trial in Volume II, the Justice Trial (Alstoetter and Others, at Nuremberg) in Volume VI, and the I.G. Farben and Krupp Trials in Volume X provide no more than summaries of the interesting evidence produced in these proceedings. For a complete record of the Belsen Trial proceedings, for instance, the reader will resort to that so magnificently produced as Volume II of the *War Crimes Trials Series* under the editorship of Raymond Phillips, whilst the Justice Trial is similarly being dealt with by the capable hands of Earl W. Kintner, of the Bar of Indiana, lately a colleague of the present writer on the United Nations War Crimes Commission.

II

The Velpke Baby Home Trial provides yet another illustration of the many we have seen in recent years of the appalling results which often arise if ends are taken always to justify means. From the Nazi point of view, to win the war was the primary objective. For this it was considered necessary by the German rulers to compel millions of persons from the territories occupied by the invading armies to turn their labours to the benefit of the

German war economy, either in their own countries or after deportation to the Fatherland. These forced workers included women, and if some of them were to give birth to children while in servitude on German soil the unfortunate babies were from the Nazi point of view a useless by-product; further, the same inhuman logic which sent exhausted labourers to the gas chambers for execution in their thousands dictated that these children should be put away in Homes so that they would not prevent their mothers from performing their tasks for the Reich. Since the care of these tiny beings was not essential to the same war effort, many were in fact put into Homes during their first weeks of life and under conditions which made it inevitable that the majority would die in a very short space of time.

Of the deportation to Germany of foreign slave labour during the war little need be said. On page 67 of his work *Axis Rule in Occupied Europe* (New York, 1944), Dr. Raphaël Lemkin, a Polish scholar who has since had the satisfaction of seeing the United Nations General Assembly recognize as a punishable offence the crime of genocide, which he defined in this book, said the following of the purposes of the Nazi labour policy *vis-à-vis* the inhabitants of occupied territories: "Labor has been a subject of primary concern of the German occupant, and German labor policy in the occupied countries reveals several definite objectives. Thus, labor is mobilized in order to maintain and increase production in industry and agriculture to serve the German war effort. Deportation of labor to Germany also serves the purpose of replacing German workers to be released for the front. By deporting millions of able-bodied men and women from the occupied countries, Germany moreover hopes to disrupt centers of political resistance to the occupant, on the one hand; and on the other hand, by separating families and keeping the men far away from their homes, a policy of depopulation is being pursued." The International Labour Office, whose concern with an ever-widening range of aspects of working conditions led them at an early date to entertain a lively interest in population migrations of all kinds, was able, as early as October, 1944, to publish in the issue of *International Labour Review* of that date the estimate that the non-Germans employed inside Germany numbered in January, 1944, 6,400,000 foreign workers and 2,200,000 prisoners of war. Possibly the earliest exhaustive account of the social and working conditions of this vast labour force under the Nazi yoke was published under the title of *The Exploitation of Foreign Labour by Germany* (International Labour Office, Montreal, 1945) by Dr. John Fried, who later did great service behind the scenes to the unified development of international criminal law as Legal Consultant to the United States Military Tribunals in Nuremberg. Dr. Fried made it clear in this work that, while some attempts were made throughout the war to

influence these foreign workers ideologically, to discredit all anti-Nazi and anti-German propaganda and to diffuse National Socialist doctrine, nevertheless the main weapons relied upon by the slave-masters were those of intimidation and physical ruthlessness. The judgment of the Nuremberg International Military Tribunal, delivered on 30th September and 1st October, 1946, indicates that the earlier estimate of the International Labour Office quoted above, which was based upon the evidence then available, was probably not wide of the mark. The German occupation authorities, said the International Military Tribunal, "did succeed in forcing many of the inhabitants of the occupied territories to work for the German war effort, and in deporting at least 5,000,000 persons to Germany to serve German industry and agriculture. . . . Allied prisoners of war were also regarded as a possible source of labour. . . ."

Some aspects of the shocking conditions under which this deported labour force had to exist were revealed in evidence also in the trial of Field-Marshal Erhard Milch by a United States Military Tribunal in Nuremberg, which took place between 20th December and 17th April, 1947.¹ Milch, who during the Second World War had been Inspector-General and a Field-Marshal in the German Air Force, Aircraft Master General, Member of the Central Planning Board and Chief of the Jaegerstab, was found guilty of war crimes and crimes against humanity involving slave labour, deportation of civilian populations for slave labour, cruel and inhuman treatment of foreign labourers, and the use of prisoners of war in war operations by force and compulsion.

Milch was sentenced to imprisonment for life, and his application to the Supreme Court of the United States for leave to file a petition for a writ of habeas corpus was rejected.

The minutes of meetings of the German Central Planning Board, of which Milch was one of a total membership of three, were offered in evidence; they showed that the members of the Board knew and discussed the fact that workers from occupied territories were being forcibly taken from their homes without knowledge of their destination, and against their will crowded into box cars without food or water or toilet facilities, deported, and forced to work in factories manufacturing armaments and other necessary items for the prosecution of the war.

The deportees, with few exceptions, were deprived of the right to move freely or to choose their place of residence; to live in a household with their families; to rear and educate their children; to marry; to visit public places of their own choosing; to negotiate, either individually or through representatives of their own choice, upon the conditions of their own employment; to organize into trade unions; to exercise the free expression of opinion; or to

¹ See *Law Reports*, Vol. VII, pp. 27-66.

gather in peaceful assembly. They were frequently deprived of the right to worship according to their own conscience. They were inadequately fed, housed or cared for, and hundreds of thousands died of exhaustion and hunger. The victims included Frenchmen, Poles, Lithuanians, Ukrainians, Czechs, Dutchmen, Russians and Jews.

In the early stages of the war many of the female East-European labourers who had been drafted from Poland and Russia, although forbidden by German laws to marry, consorted with their male compatriots and numbers of children were born. At first, when this happened, the German authorities returned the women in question to their homes in their own countries. It was quickly seen that to become a mother had this great advantage. The many resulting repatriations began to have serious results on the German farm and factory economy, and it was to stop this wastage of labour power that Homes were created for the reception of children immediately after birth. It is perhaps not possible to say exactly how many such Homes were created, but two in particular came into prominence after the war when the atrocious and fatal neglect of the unfortunate children relegated to them became the subject of war crime trials before British Military Courts. The Velpke Baby Home Trial concerned the fate of certain children born of female Polish land labourers working compulsorily in Germany, and the Rügen Baby Home Trial related to children born of female Polish factory operatives working compulsorily in a German armament factory at Wolfsburg. When the Home at Velpke was closed, most of the babies therein having died of neglect, the survivors were transferred to the Rügen Home, where the proportion of deaths was even larger. The two cases were tried in the order in which they have been mentioned, the Prosecutor in both being Colonel Draper, then Major Draper. It is with the Velpke Trial that this present volume is concerned, but there will be occasion to mention the Rügen Trial again later in this Introduction.

The Velpke Baby Home Trial was conducted by a British Military Court at Brunswick, from 20th March to 3rd April, 1946. The accused, Heinrich Gerike, Georg Hessling, Werner Noth, Hermann Müller, Gustav Claus, Dr. Richard Demmerich, Fritz Flint and Frau Valentina Bilien, were charged with committing a war crime "in that they at Velpke, Germany, between the months of May and December, 1944, in violation of the laws and usages of war, were concerned in the killing by wilful neglect of a number of children, Polish nationals."

It was established in evidence that a Home for infant children of Polish female workers was established in Velpke in about May, 1944, that the children were to be compulsorily separated from their parents, and that the purpose of the separation was to advance the work on the nearby farms in order to maintain the supply of

food in the year 1944. In view of the protests to the effect that the tending of their babies by Polish women was hindering the production of food on the farms where they worked, the accused Gerike, then Kreisleiter of Helmstedt, was ordered by his Gauleiter to erect a Home where the children could be kept after being taken away from their mothers.

Gerike chose, though according to his account only as a temporary expedient, a corrugated iron hut, without running water, lighting, telephone or facilities for dealing with sickness.

As matron for the Home, the Labour Officer sent, against her will, the accused Valentina Bilien, who stated in court that she had been married to a Russian, but that her father was German and that she came to Germany in February, 1944. She had formerly been a school teacher in Russia and was the mother of two children, but she had had no previous experience of running a clinic for infant children. She knew Russian and Polish but comparatively little German. Frau Bilien was at first provided with no staff, no medical equipment and no records except for a register of incoming children. Gerike ordered her not to return the children to their mothers and not to send any to hospital. She was instructed to "call in a doctor if necessary." She later had the assistance of four helpers, Polish and Russian girls, but conditions were largely the same when, six months later, possession of the premises was required by the Volkswagen makers.

Gerike, though he knew of the death-rate, never visited the Home or interviewed Frau Bilien after the initial selection of the barracks. Nor did he engage the services of a trained nurse who lived in the village of Velpke. He did not provide Bilien with scales for weighing the children, and laid down no regulations as to the keeping of records beyond requiring that a register of incoming children be kept. Frau Bilien claimed that she was ordered by the Labour Office, and then by Gerike, to take over her post at the Home, and that she repeatedly tried to be released from her post as matron. The evidence showed that the premises were infested with flies and the sick children were not adequately separated from the rest. The infants' clothing was not kept clean. The matron went away for her meals and to do shopping, and was never in the Home at night, though the helpers stayed there. During six months, more than 80 Polish infants died. The evidence of the village registrar showed that the three most frequent causes of death as certified by the doctors were general weakness, dysentery, and what they called catarrh of the intestines. One witness claimed to have seen children in the Home with sores which she described as syphilitic; the building was fly-ridden. There was some evidence that the skull of a child, thought to have been taken away by a dog, had been seen in the vicinity of the Home.

As administrator of the Home, Gerike appointed the accused Hessling, who was also without previous experience of operating a children's clinic. Hessling called at the Home at least once a month, and knew of the death-rate. Frau Bilien testified that she made many complaints to him, but that nothing was achieved except the raising, on Gerike's orders, of the entry age for children, which was previously eight to ten days after confinement, to four to six weeks thereafter. Hessling claimed that his only duty was to arrange the finances, but Gerike denied this. One witness testified that Frau Bilien, on finding that some of the children were dying because they needed mother's milk, sent some back to their mothers, but that Hessling, on discovering her action, forbade such a course.

Two doctors paid rare visits to the Home before September, 1944, when a local doctor, the accused Dr. Demmerich, though without official instructions, started to visit the Home and to tend sick infants. Later in the period from September to December, 1944, however, Demmerich, falling in with the matron's suggestion, only tended such of the children as Frau Bilien brought to him, and only visited to sign death certificates. Demmerich claimed that, due to his large practice, he could find no time to write any letters of protest to persons in authority, or, in the later period, to visit the babies.

The accused Müller was an Ortsgruppenleiter, the leading Nazi in the village. He had seen the Home and disapproved of it, but Gerike had told him that it was not his responsibility. Nevertheless, he once telephoned Gerike, told him of the frequent deaths and received an assurance that something would be done to improve matters. After that he appears not to have pursued the matter any further.

The accused Noth was Bürgermeister in the village, and held no official position in the Nazi Party, though he was a member thereof. He knew of the state of affairs at the Home, advised against its establishment and wanted to see it removed.

The accused Claus, a farmer of Velpke, was found not guilty immediately after giving his evidence. He admitted that he sent at least two children to the Home against the parents' will, but it was not proved that he knew of the neglect shown in the institution. The accused Flint died during the course of the trial.

Gerike, Hessling, Demmerich and Frau Bilien were found guilty. Müller and Noth were found not guilty.

Subject to confirmation by superior military authority, Valentina Bilien was sentenced to fifteen years' imprisonment, Dr. Richard Demmerich to ten years' imprisonment, and Georg Hessling and Heinrich Gerike to death by hanging. The findings and sentences were confirmed by higher military authority.

In passing a lighter sentence on Bilien than on Hessling and

Gerike, the Court may have taken into account her subordinate position and also the fact that she did make some efforts on behalf of the children; so that her negligence was not shown to have been unqualified. Thus, the Prosecution itself recognized that she had made unavailing complaints to Hessling, and that, with her Russian connections, she was not in a strong position to influence or to disobey the Nazi Party authorities; and, on the other hand, the Prosecution also admitted that she did send some children back to their mothers, against orders, and consulted various chemists and midwives on how she should properly feed the children.

In Demmerich's favour, once having found him guilty, the Court may have taken into account the many calls made upon his services at the relevant time. On the other hand, the supreme penalty was meted out to Gerike and Hessling, who were directly responsible for the conditions in the Home and who, as members of the Nazi Party, could have done whatever could possibly have been done in the circumstances for the children; and even if full allowance is made for the shortages of food, medical supplies and transport which existed in Germany during the fifth year of war, it is abundantly clear that these two accused were guilty of scandalous neglect, and even of positive wilful acts which increased the death-roll among the children: namely, the orders that children were not to be returned to their mothers and were not to go to hospital if they were ill. The Prosecution claimed that another act of a similar positive wilful type had been committed in that Gerike had told Müller, the leading Nazi in the village of Velpke, that the latter was to have no responsibility in connection with the Home.

III

When one turns to a more detailed study of the legal aspects of the Velpke Baby Home Trial one is immediately faced with the problems created by the absence in the trial of a reasoned judgment, i.e. of a judgment giving the Court's reasons for deciding as it did on questions of guilt and punishment. A glance at almost any of the sections contained in the *Digest of Laws and Cases*, Volume XV of the *Law Reports*, will indicate how indebted the student of war crimes law is to those Courts which, when declaring alleged war criminals guilty or not guilty, have gone further and have stated their reasons of fact and law for so finding.

Any differences that may exist between the *authoritativeness* of the decisions of one Court or type of Court, and those with war crimes and that of the decisions of another depends, on a number of factors, other than whether a reasoned decision has been handed down by the Court or type of Court, or whether instead the latter has been content with a mere finding of guilty or not guilty and a passing of

sentence on accused found guilty. It depends in part, for instance, upon the prestige in legal circles of the members of the Court. Nevertheless, it cannot be doubted that the Courts which have given reasoned judgments have tended to add the most detail to the existing store of knowledge on the international criminal law.

An accused is entitled to a fair trial, but there is no rule of customary international law providing that a Court delivering judgment in a war crime trial must state the reasons for its opinion, perhaps because the practice of trying war criminals in its earliest form envisaged trial by Military Courts in conditions of battle; consequently, international practice on this point varies. The United States Military Tribunals in Nuremberg were bound by Article XV of Ordinance No. 7 of the United States Zone of Germany, which provides that: "The judgments of the Tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based . . ." and the result has been the pronouncement of detailed reasoned judgments which provide the Tribunals' evidential and legal reasons for their findings, as did those of the Nuremberg and Tokyo International Military Tribunals. Again, the Norwegian, French and Dutch Courts trying war criminals provide, in various degrees of fulness, the reasons for decisions arrived at; the Norwegian judgments frequently enter into particularly detailed analysis and discussion of the relevant law and facts.

On the other hand, British, Canadian and Australian Military Courts and United States Military Commissions do not in general deliver reasoned judgments; they have only on very rare occasions departed from the rule, as when the Military Commission which tried General Yamashita set out in brief its reasons.¹ The discussions of such courts are held in private sitting, and usually only the final decision of guilty or not guilty and any sentence are announced. The arguments of counsel are of interest in so far as they throw light on considerations which the Court may have had in mind during their deliberations, but are not, of course, an infallible guide. In strict law, even the summing up of a Judge Advocate before a British, Canadian or Australian Military Court, when such an officer is appointed, is not a final indication even of the law on which the Court acted. Two relevant and applicable provisions setting out some of the powers and duties of the Judge Advocate are made by Rule of Procedure 103, (e) and (f), made under the Army Act, which run as follows:

"(e) At the conclusion of the case he will, unless both he and the Court consider it unnecessary, sum up the evidence and advise the Court upon the law relating to the case before the Court proceed to deliberate upon their findings;

"(f) Upon any point of law or procedure which arises upon the

¹ See *Law Reports*, Vol. IV, pp. 33-35.

trial which he attends, the Court should be guided by his opinion, and not disregard it, except for very weighty reasons. The Court are responsible for the legality of their decisions, but they must consider the grave consequences which may result from their disregard of the advice of the Judge Advocate on any legal point. The Court, in following the opinion of the Judge Advocate on a legal point, may record that they have decided in consequence of that opinion."

From these clauses it follows that, strictly speaking, a British or Commonwealth Military Court is the final judge of the law as well as of the facts of a case, and that a Judge Advocate's summing up does not necessarily set out the law on which the Court acted, although in practice his words carry a very high authority.

Nevertheless, while the trials in which some kind of reasoned judgment has been delivered have proved the most fruitful of legal precedents and so the most helpful in building up a jurisprudence of war crimes law, trials of the other type have often proved of value too; for instance, when there has been a simple finding of guilty upon a given charge an examination of that charge will often yield a valuable indication of what the Court regarded as a war crime; such was the case in the Velpke Baby Home Trial.

Judge Advocates were appointed to serve with most British, Canadian and Australian War Crime Courts, but the British Royal Warrant Army Order No. 81 of 1945,¹ and the equivalent Canadian and Australian legislation, provide that if no Judge Advocate is appointed to serve with a Court the Convening Officer must appoint at least one officer having legal qualifications as President or as member of the Court, unless in his opinion no such officer is necessary. Since the Legal Member, unlike the Judge Advocate, is a member of the Court, he has the right to vote, and, while the Legal Member does not announce in public a complete summing up on the case, he does on occasions (as in the present trial) reveal in court his attitude to a legal point, and when he does so his words are of particular interest since they represent the opinion of at least one member, and a very important member, of the Court itself.

Apart from its own particular points of legal interest, the trial illustrates certain general principles in common with other war crime trials. An instance of the latter is provided by certain illustrations, revealed by a study of the trial, of the sources from which international criminal law is derived (using the term "international criminal law" here to signify the international law relating to war crimes, crimes against humanity, crimes against peace and membership of criminal organizations).

The judgment delivered in the Hostages Trial (Trial of Field-

¹ See Appendix I, p. 344.

Marshal List and Others before a United States Military Tribunal in Nuremberg) included the following statement:

"The sources of international law which are usually enumerated are: (1) customs and practices accepted by civilized nations generally, (2) treaties, conventions and other forms of inter-State agreements, (3) the decisions of international tribunals, (4) the decisions of national tribunals dealing with international questions, (5) the opinions of qualified text writers, and (6) diplomatic papers."¹

Similarly, the Tribunal acting in the Justice Trial (Trial of Josef Alstötter and Others before a United States Military Tribunal in Nuremberg) said: "International law is not the product of statute. Its content is not static. The absence from the world of any governmental body, authorized to enact substantive rules of international law, has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions."

"It must be conceded that the circumstances which give to principles of international conduct the dignity and authority of law is their general acceptance as such by civilized nations, which acceptance is manifested by international treaties, conventions, authoritative text-books, practice and judicial decisions." (Hackworth, *Digest of International Law*, Vol. I, pp. 1-4.)²

These may be accepted as useful definitions of the sources of the international criminal law in particular, and the derivation of rules from most of these sources has been amply illustrated in the trials by Allied Courts of war criminals after the Second World War.

A word of explanation should perhaps be added here concerning "customs and practices accepted by civilized nations generally." A rule of international law may be valid and enforceable without being stated in any international agreement. The statement just quoted from the judgment delivered in the Justice Trial was followed by the comment that "It does not, however, follow from the foregoing statements that general acceptance of a rule of international conduct must be manifested by express adoption thereof by all civilized States." The judgment implicitly adopted a passage from Hyde's *International Law* pointing out that a binding rule of law could become established even by "the failure of interested States to make appropriate objection to practical applications of it."

It is mainly through changes in generally recognized customs that international law has developed and displayed its progressive character. An illustration of the types of factors which are regarded as contributing to the causes of a change in customary international

¹ See *Law Reports*, Vol. VIII, pp. 49-50.

² See *Law Reports*, Vol. VI, pp. 34-35; also *The Justice Trial*, ed. Earl W. Kintner, in *War Crimes Trials Series*.

law is given by the statement of the Tribunal acting in the Justice Trial that Control Council Law No. 10 "is not limited to the punishment of persons guilty of violating the laws and customs of war in the narrow sense; furthermore, it can no longer be said that violations of the laws and customs of war are the only offences recognized by common international law. The force of circumstance, the grim fact of world-wide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law."¹

One of the "customs and practices accepted by civilized nations generally" is of course the right of a belligerent to try nationals of an opposing belligerent for breaches of the laws and usages of war (i.e. for war crimes) at any time up to the formal signing of a treaty of peace.

Thus, the judgment delivered in the Justice Trial stated: "As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognized that tribunals may be established and punishment imposed by the State into whose hands the perpetrators fall. Those rules of international law were recognized as paramount, and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the State or in occupied territory, has been unquestioned. (*Ex parte Quirin*, *supra*; *In re: Yamashita*, 90 L. ed. 343.)"

And regarding the duration of the right to try alleged war criminals it is in point to quote the words of Chief Justice Stone, who, in delivering the majority judgment of the United States Supreme Court in the *Yamashita Case* stated that:

"We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial."

"No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war

¹ See *Law Reports*, Vol. VI, pp. 45-48, where the Tribunal expand upon this statement by setting out a number of authorities showing how world opinion had grown to favour a right of humanitarian intervention, i.e. a right on the part of one State to intervene to prevent atrocities being committed by a second State against the subjects of that second State.

has ended. In our own military history there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offences against the law of war committed before the cessation of hostilities.

"The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the Courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace. Here, peace has not been agreed upon or proclaimed. Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the law of war. The conduct of the trial by the military commission has been authorized by the political branch of the Government, by military command, by international law and usage, and by the terms of the surrender of the Japanese Government."¹

The dissenting judges made little objection to this point, although Mr. Justice Rutledge thought that there was less necessity for a military commission to be appointed after active hostilities were over, since "there is no longer the danger which always exists before surrender and armistice. . . . The nation may be more secure now than at any time after peace is officially concluded."²

The position under customary international law, as recognized by the Supreme Court and by general international practice following the recent war, seems to be that jurisdiction over war crimes exists without limitation beyond the cessation of fighting and up to the conclusion of peace. It may of course be extended beyond that point by international agreement.

Under this rule of customary international law providing jurisdiction to try war crimes, an alleged war criminal may properly be tried by a Military Court, but this does not prevent his captors from trying him before an ordinary civil court with jurisdiction under municipal law, should they choose to do so. From this point of view, the municipal law enactments concerning the trial of war criminals fall into three categories, according to whether they (i) create new Courts; or (ii) refer cases of alleged war crimes to already existing Military Courts; or (iii) refer such cases to already existing Civil Courts.

The relevant United Kingdom and United States municipal provisions fall into the first class. The French War Crimes Ordinance of 28th August, 1944, is an example of the second, while the Norwegian War Crimes enactments illustrate the third.

The jurisdiction of the British Military Courts for the trial of war criminals is based on the Royal Warrant dated 14th June, 1945, Army Order 81/45 as amended: The Royal Warrant, the

¹ See *Law Reports*, Vol. IV, pp. 41-42.

² *Ibid.*, p. 56.

text of which appears in Appendix I to this volume, states that His Majesty "deems it expedient to make provision for the trial and punishment of violations of the laws and usages of war" committed during any war "in which he has been or may be engaged at any time after the 2nd September, 1939." It is His Majesty's "will and pleasure" that "the custody, trial and punishment of persons charged with such violations of the laws and usages of war" shall be governed by the Regulations attached to the Warrant. The Royal Warrant is based on the Royal Prerogative, which in English law, as Dicey said, is "nothing else than the residue of arbitrary authority which at any given time is legally left in the hands of the Crown."

Regulation 1 of the Royal Warrant provides that "war crime" means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939. It will be noted that the jurisdiction of British Military Courts for the trial of war criminals, like that of their Canadian equivalents, is limited to war crimes proper, i.e. violations of the laws and usages of war, and that they have not jurisdiction, as have the Courts of some other countries, over crimes against humanity which are not at the same time war crimes (i.e. offences by one enemy subject against another), crimes against peace, or membership of criminal organizations; the United States Military Tribunals which conducted an important series of trials in Nuremberg, including the Justice, I.G. Farben and Krupp Trials, on the other hand, have been provided with jurisdiction over all these.

The Velpke Trial illustrates how far even the conception of a war crime (putting aside the other types of offences against international law which are being given recognition) has developed since the older days when the idea was essentially limited to either a breach of the rules of war in actual combat or ill-treatment of prisoners taken in combat. Even as late as 1945, the Defence in the Belsen Trial regarded it as worth while to argue that an offence could only be punished as a war crime if it was directly connected with operations of war, since the purpose of the punishment of war crimes, it was claimed, was to secure the legitimate conduct of those operations. The contention that this would not include ill-treatment and killing of internees in Belsen and Auschwitz Concentration Camps was rejected by the British Military Court which tried the case.¹

Similarly, in the Velpke Trial, it may be that the deportation and use as forced labour of Polish women would be regarded as having a connection with operations of war, but the neglect of the children of such women could have no purpose in furthering the

¹ See *Law Reports*, Vol. II, pp. 72-73; also *The Belsen Trial*, ed. R. Phillips, in *War Crimes Trials Series*.

German war effort except in the diabolical indirect sense that, since the care of these children was irrelevant to the war operations, to neglect them would free medical and food supplies and resources for other uses. The victims moreover were not military personnel but civilians and, of all civilians, those who were the remotest from all thought of warlike activity.

In addition to practices generally followed by States in their relations with one another (usually referred to as "State practice"), the term "customs and practices accepted by civilized nations generally" may also be taken to include, and in connection with war crime trials has been taken to include, the general principles of law recognized in most national systems of law. If the same general principles of law are recognized in most national systems of law, such as the rules relating to the possible parties to crimes (principals and accessories), those rules are readily assimilated into international law by Courts administering that law. There is in fact a trend of opinion according to which, if a practice is generally regarded by States in the conduct of their internal affairs as representing a principle of justice, it is also enforceable as a rule of customary international law. The most important manifestation of this process in war crime trials has been the reliance placed, not only by counsel in their arguments, but also by Judge Advocates in their advice to British and Commonwealth Courts, and by the Courts themselves when they have delivered reasoned judgments, upon analogies from municipal law.¹ The nature of the process was well defined by the Legal Member in the trial by a British Military Court at Essen of Erich Heyer and Six Others.² In this case the Prosecutor pointed out that the charge alleged that the accused were concerned in the killing of three British airmen. That was the wording of the charge, but, the Prosecutor added, for the purpose of this trial he would invite the Court to take the view that this was a charge of murder and of nothing other than murder. The allegation would be that all the seven Germans in the dock were guilty either as an accessory before the fact or as principals in the murder of the three British airmen.

This proposition was not accepted by the Court. The Legal Member pointed out that this was not a trial under English law. Murder was the killing of a person under the King's peace. The charge here was not murder, and if counsel spoke of murder he was not using the word in the strict legal sense but in the popular sense. As long as everyone realized what was meant by the word "murder" for the purposes of this trial, the Legal Member did not think there was any difficulty. As to using words like "accessory before the fact" and so on, which are applicable to English law and to felonies, the Legal Member again saw no objection to that,

¹ See *Law Reports*, Vol. XV, *Digest of Laws and Cases*, pp. 5-10.

² See *The Essen Lynching Case in Law Reports*, Vol. I.

as long as all concerned knew exactly what they were talking about. They were using the words almost in inverted commas as analogies to English law.

In his closing address in the Velpke Trial, Colonel Draper followed this practice of citing municipal law analogies by quoting a number of passages from *Archbold* which expounded certain aspects of the English law of murder and criminal negligence. These were as follows:

"If a man, however, does any other act, of which the probable consequence may be and eventually is death, such killing may be murder, although no stroke were struck by himself; as was the case of the gaoler, who causes the death of a prisoner by imprisoning him in unwholesome air; of the unnatural son, who exposed his sick father to the air against his will, by reason whereof he died; of the harlot, who laid her child in an orchard, where a kite struck it and killed it; of the mother, who hid her child in a pig-sty, where it was devoured; and of the parish officers, who moved a child from parish to parish till it died from want of care and sustenance."¹

"Neglect of the helpless: Premeditated neglect or ill-treatment by persons having custody, charge, or control of helpless persons, whether children, imbeciles, or lunatics, or sick or aged, by deliberate omission to supply them with necessary food, etc., if attended with fatal results, may be murder; and if the same result flows from gross neglect in such a case, the offender is guilty of manslaughter."²

"If a grown-up person chooses to undertake the charge of a human creature helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without wicked negligence; and if a person who has chosen to take charge of a helpless creature lets it die by gross negligence, that person is guilty of manslaughter. Mere negligence will not do; there must be negligence so great as to satisfy a jury that the prisoner was reckless and careless whether the creature died or not. 'Reckless' is a more accurate epithet to be applied to the negligence required than 'wicked.' If a person has the custody of another who is helpless, and leaves that other with insufficient food or medical attendance, and so causes his death, he is criminally responsible."³

"Where death results in consequence of a negligent act, it would seem that to create criminal responsibility the degree of negligence must be so gross as to amount to recklessness. Mere inadvertence, while it might create civil liability, would not suffice to create criminal liability." The next paragraph reads: "In explaining to juries the test which they should apply to determine whether the negligence in the particular case amounted or did not amount to a crime, judges have used many epithets such as 'culpable,'

¹ *Archbold, Pleading Evidence and Practice in Criminal Cases*, 31st Edition, p. 861.

² *Ibid.*, p. 867.

³ *Ibid.*, p. 863.

'criminal,' 'gross,' 'wicked,' 'clear,' 'complete.' But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability, the facts must be such that, in the opinion of the jury, the negligence of the prisoner went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."¹

In general it is recognized that the distinction made in English law between murder and manslaughter is not relevant in trials of war criminals; the Prosecutor did not in fact indicate on which of the above statements he chose to place most reliance in the present case, and his intention was clearly to help the Court in deciding whether the neglect shown by certain accused could be regarded as culpable neglect or not.

The Prosecutor placed particular stress on the claim that once the child came from the farm where the female Polish worker had it, and passed into the Home, then all the obligations of motherhood, and the tests laid down by the passages quoted, became applicable to Gerike, Hessling and Bilien. From the moment Gerike established the Home for infant children of female Polish workers, whose children were to be taken away from their parents, if necessary by force, "the Home became a Party affair, an N.S.D.A.P. institution, entrusted by the Gauleiter to the control, administration and responsibility of the Kreisleitung of Helmstedt. . . . As long as the children of these workers remained in the custody of their mothers, albeit they were working on the farms, then no harm or hap should come to those children, then it may well have been the fault of the Polish mother, but once you have removed those children by force and against the will of the mother into that Home which is run by the Party from Kreis downwards, then and there the Party at the Kreisleitung takes over the parental responsibility of those infant children, and with that responsibility they take over naturally a whole burden of complicated duties relating to every branch of ordinary child welfare." Counsel claimed that the care of infant children had from time immemorial been "the act and attribute of a civilized community." In dealing with Frau Bilien he claimed that: "Although she has said that what she did she did under order, she seems to have had very little idea of service and devotion and sacrifice to duty. If you undertake a task of skill, then in law you are called upon to show the skill of the task that you have undertaken." That municipal law principles were assumed in these statements is clear to a student of, for instance, English criminal law.

A further example of the application to war crime trials of the general principles of law recognized generally in civilized systems of law is provided by Colonel Draper's advice to the Court at the

¹ Archbold, *Pleading Evidence and Practice in Criminal Cases*, 31st Edition, p. 882.

beginning of his closing speech that the burden of proof lay with the Prosecution, and that an accused was to be considered innocent until proved guilty beyond a reasonable doubt. Had there been a Judge Advocate in the trial he would certainly have underlined these same points.

Of the other "usually enumerated" sources of international law catalogued by the judgment delivered in the Hostages Trial, the Military Court which conducted the Velpke Trial may have considered previous judicial precedents, or diplomatic papers; in the absence of a reasoned judgment or a Judge Advocate's summing up we cannot say. "Treaties, conventions and other forms of inter-State agreements" are exemplified by the Hague Convention No. IV of 1907, concerning the laws and customs of war on land. The Prosecutor referred to Article 46 of the Regulations attached to this Convention which forms part of Section III (*Military Authority over the Territory of the Hostile State*) and which provides that:

"Art. 46. Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected.

"Private property may not be confiscated."

Counsel pointed out that under international law it was forbidden in time of war to kill the innocent and defenceless population of any country overrun "either in their own country or in the country of the occupying Power." He added that it was unlawful for an occupying Power to deport slave labour from the occupied country to its own territory, in the first place.

It is to be noted that Article 46 of the Hague Regulations of 1907, which were drafted at a time when deportations for forced labour on the scale carried out by Nazi Germany could not have been contemplated, strictly speaking applies only to the behaviour of the occupying Power *within occupied territory*. Nevertheless, it is clear that the general rule laid down therein must be followed also in respect of inhabitants of occupied territory who have been sent into the country of the occupant for forced labour, as had the mothers of the children who were sent to the Velpke Home, and to children born to them while in captivity.

It is as an illustration of the application of the protection of international law to the children *born in Germany* that the Velpke Trial is of particular interest; punishment as war crimes of offences committed in Germany against deportees from occupied territories has been very common. For instance in the Hadamar Trial (the trial of Alphonse Klein and Six Others before an American Military Commission at Wiesbaden), various accused were found guilty of taking part in the deliberate killing of, among other people, over 400 Polish and Soviet nationals, many if not most of whom were civilians, by injections of poisonous drugs. Here, the fact that the

offences took place in Hadamar, Germany, and not in occupied territory, was treated as entirely irrelevant.¹

Another example, among many, is the Belsen Trial. In this trial, the offences committed in Auschwitz and those committed in Belsen were treated by the Court as being on entirely the same footing, the fact that Belsen was on German territory and Auschwitz in occupied Poland being treated as beside the point from the legal point of view.²

In the Velpke Trial the Prosecution, as we have seen, pointed out that the original forced deportation of the Polish women into Germany was itself illegal. In this connection, Colonel Draper quoted from Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition, pp. 345-6, the following passage:

"... there is no right to deport inhabitants to the country of the occupant, for the purpose of compelling them to work there. When during the World War the Germans deported to Germany several thousands of Belgian and French men and women, and compelled them to work there, the whole civilized world stigmatized this cruel practice as an outrage."

Incidentally, it may be noted that the Prosecutor is here basing an argument upon one of the most authoritative of the writers on international law to whom the judgment in the Hostages Trial, previously quoted, refers.

It could have been argued by the Defence in the present case that the offence of deportation was committed by persons other than the accused; nevertheless, it seems reasonable to assume that the inhabitants of an occupied territory keep their rights under international law when forced to leave their own country, even though this is not expressly provided in the Hague Regulations. Indeed, the Tribunal which conducted the Justice Trial stated clearly that the transfer of "Night and Fog" prisoners from occupied territories to Germany did not cleanse the "Night and Fog" Plan of its iniquity "or render it legal in any respect."³

Similarly, the Judge Advocate acting in the Trial of Georg Tyrolt and Others by a British Military Court, Helmstedt, 20th May to 24th June, 1946 (the Rügen Baby Home Trial, already mentioned), said of the victims of the offences charged in that case: "Quite obviously if it is wrong to show lack of respect to their family life and individual life in their own country, you cannot get out of that obligation simply by taking them to your country and then ill-treating them there."⁴

¹ See *The Hadamar Trial*, ed. Earl W. Kintner, in *War Crimes Trials Series*; also *Law Reports*, Vol. I, pp. 46-54.

² See *The Belsen Trial*, ed. R. Phillips, in *War Crimes Trials Series*; also *Law Reports*, Vol. II, pp. 4 and 121-2.

³ See *Law Reports*, Vol. VI, p. 56.

⁴ See *Law Reports*, Vol. XV, *Digest of Laws and Cases*, pp. 117-19, for details concerning the offence of deportation.

Another interesting point concerning the enforcement of the provisions of the Hague Regulations in war crime trials is that, during all the trials held in recent years, the Courts have never doubted that these provisions were enforceable against individuals, yet, as was pointed out by the Defence in the Krupp Trial, no references to individual responsibility were made in the Hague and Geneva Conventions. Article 3 of the actual text of the Hague Convention No. IV only provides, for instance, that: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Article 41 of the Regulations attached to the Convention, which falls into a section dealing with armistices, provides merely that: "A violation of the terms of the armistice by individuals acting on their own initiative only entitles the injured party to demand the punishment of the offenders and, if there is occasion for it, compensation for the losses sustained." The responsibility for breach of the Convention, according to the text, rests only on the States which are parties to it.

The trend of opinion and the practice followed by the Courts, however, has been to make the individual responsible for his acts in breach of international conventions, and this trend was illustrated on a high level by the decision pronounced by the International Military Tribunal at Nuremberg, that certain accused had made themselves criminals by waging war in breach of the terms of an inter-governmental agreement renouncing war undertaken as an instrument of national policy, the Briand-Kellogg Pact. Indeed, the International Military Tribunal made use of the fact that the Hague Convention No. IV of 1907 had been enforced personally against its violators. The judgment, on this point, runs:

"But it is argued that the Pact does not expressly enact that such wars are crimes, or set up Courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a Court to try and punish offenders. For many years past, however, Military Tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much

greater moment than a breach of one of the rules of the Hague Convention."

It cannot be said that every possible breach of the Hague and Geneva Conventions constitutes a war crime, because not every such breach has come before the Courts; it is quite certain, however, that individual responsibility has been laid down in many cases on the basis of the terms of these Conventions, and it may be taken that any breach thereof which causes appreciable injury to the persons protected would constitute a war crime.

These few paragraphs on the sources of international law with special reference to international criminal law have illustrated incidentally a heartening fact, namely, that on a number of points where there may previously have been a legal doubt as to the extent of the scope of international criminal law, that doubt has been resolved in such a way as to extend the range of effective operation of the law.

Thus, whereas it had been argued that only offences committed in the course of actual combat or amounting to ill-treatment of prisoners of war could be regarded as war crimes, it is now clear that the protection of international law extends to all aspects of the relations between an occupying Power and the inhabitants of occupied territory, and the offspring of the latter even if born on enemy soil.¹ Again, whereas the Hague Regulations lay down no liability to be tried as a war criminal for breach thereof by Courts of the opposing Power, such liability has in fact been recognized in practice and enforced by the Courts. There is seen to be therefore a development in the direction of extending to Allied victims the protection of laws analogous to those which would have protected them under systems of municipal laws in peace-time, and the law relating to war crimes is seen to be largely the supplying of a missing link in the jurisdiction over criminal offences. Moreover, it might have been thought that a State would have power to punish enemy nations who committed war crimes against its own nationals, but not to try cases of such crimes committed against nationals of other States. But this approach has not in fact been the one accepted, and, according to the generally recognized doctrine, the right to punish war crimes is not confined to the State whose nationals

¹ It is instructive to note how many different types of offences against inhabitants of occupied territories have been recognized as war crimes. The relevant pages of Section VI, *Offences*, of *Digest of Laws and Cases* are arranged under the following headings: the unwarranted killing of inhabitants of occupied territories; denial of a fair trial to inhabitants of occupied territories; ill-treatment of inhabitants of occupied territories; subjection to illegal experiments; deportation of inhabitants of occupied territories; putting civilians to forced labour; enforced prostitution; false imprisonment; denunciation to the occupying authorities; illegal recruiting into armed forces; incitement of civilians to take up arms against their own country; genocide; denationalization; invasion of the religious rights of inhabitants of occupied territories; offences against property.

have suffered or on whose territory the offence took place, but is possessed by any independent State whatsoever, just as is the right to punish the offence of piracy. This doctrine, under which every independent State has in international law jurisdiction to punish war criminals in its custody regardless of the nationality of the victims or the place where the offence was committed, a doctrine which has received the support of the United Nations War Crimes Commission and is generally accepted as sound, received exhaustive treatment by Professor Willard B. Cowles in an article entitled *Universality of Jurisdiction over War Crimes*¹ in which the learned author states: "... when it is a matter of doing justice in places where ordinary law enforcement is difficult or suspended, the military tribunals of the United States ... have acted on the principle that crime should be punished because it is crime. They have no concern with ideas of territorial jurisdiction. ... No evidence has been found that any of the decisions just discussed were the subject of protest by the governments of the accused persons. Certain it is that in none of these United States cases is there any evidence of a consciousness on the part of the Courts of any duty not to assume jurisdiction." The author then argued that "while the State whose nationals were directly affected has a primary interest, all civilized States have a very real interest in the punishment of war crimes," and that "an offence against the laws of war, as a violation of the law of nations, is a matter of general interest and concern." He concluded that "every independent State has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offence was committed."

One limiting comment should, however, be added. To be a war crime in the first place an offence must in principle be committed by a national of a State which is an enemy from the point of view of the State of which the victim is a national. That is the general principle, although exceptions are sometimes admitted, as when certain States extend the protection of their war crimes laws not only to their own nationals but also to neutral nationals who have personally associated themselves with the war effort of those States, or as when, for instance, a British Military Court in the Belsen Trial condemned as war criminals certain nationals of an Allied State, Poland, since those accused had, by helping to operate a German concentration camp, in effect associated themselves, in the view of the Court, with the German cause.

As an instance of the principle of the universality of jurisdiction over war crimes the reader will note that in the Velpke Trial a British Military Court meted out retribution for offences committed wholly against Polish nationals. International law takes account of a crime itself rather than (a) the nationality of the victim, pro-

¹ *California Law Review*, Vol. 33 (1945), p. 177.

vided he can be regarded as an Allied national *viz-d-viz* the Court, or treated as such; (b) the nationality of the accused, provided that he can be regarded as having identified himself with the enemy—i.e. enemy from the point of view of the victim; or (c) the place of the offence. Some interesting cases have been tried by United States Military Commissions in which German accused were found guilty of war crimes committed in concentration camps against non-United States but Allied nationals from European countries, *such offences having been committed before the United States entered the war.*

In many other ways also the international criminal law has been developed in recent years in the direction of affording a greater protection of the individual human being; these cannot be elaborated in detail here since they are not illustrated in the Velpke Trial. There are, for instance, the rise of the important concepts of crimes against humanity and crimes against peace; again, under the war crimes laws of some countries attempts to commit war crimes are punishable as well as actual offences; and further it is not only what is called in America the "trigger-man" who is liable to be punished but all who fall within the recognized categories of accomplices. And, far from a war crime being an offence which only a military man may commit, those actually found so guilty have included not only soldiers but civilians coming within the categories of administrators, political party officials, industrialists, judges, prosecutors, doctors, nurses, prison wardens and concentration camp inmates. Soldiers held guilty have included not only the rank and file but high ranking officers and chiefs of staff. It is clear that the mere fact of being a civilian affords no protection whatever to a charge based upon international criminal law. In an early British trial already mentioned, the Essen Lynching Case, civilians appeared among persons found guilty of being concerned in the killing of three British prisoners of war. These accused were of no particular known vocation; indeed their calling was irrelevant. In the Velpke Trial those found guilty were two Nazi Party officials, a nurse and a doctor. Similarly, in the Hadamar Trial civilian personnel of a medical institution were found guilty of unlawfully putting to death Russian and Polish nationals. They included a doctor and nurses, while doctors were found guilty of war crimes and crimes against humanity also in the Trial of Karl Brandt and Others by a United States Military Tribunal in Nuremberg,¹ and both a doctor and children's nurses of a war crime in the Rùhen Trial, which has so many similarities to the Velpke Trial.

There may possibly be those who will make the suggestion that as the babies who died in the Velpke Home were born on German

¹ See *Law Reports*, Vol. VII, pp. 49-53; also *The Doctors Trial*, ed. Earl W. Kintner, in *War Crimes Trials Series*.

soil they were to be regarded as German nationals, that therefore no war crime had been committed, and that consequently any crime that had been committed was outside the jurisdiction of a British Military Court acting under the Royal Warrant. Apart from the obvious impossibility of allowing an enforced deportation of parents to Germany to deprive their children of the protection of international law, there was another probable reason why the Defence did not raise this point. By the German nationality laws in force at the time the children of a Polish woman born in Germany, where the father was not known, were Polish, and there were decrees according to which these Polish babies were in no circumstances to receive medical supplies or services or baby foods required for German children. The children who died at Velpke were in fact victims of the Nazi racial doctrines, including the opinion, consistently held and applied, that the Slav races, like the Jews, were somehow inferior to the Germans. Some horrifying facts concerning the results of the application of this policy in occupied Poland may be seen in the reports of certain important Polish war crime trials which have been dealt with in Volumes VII, XIII and XIV of the *Law Reports*. The discriminatory racial policies pursued by the Nazi Government led to the suggestion that such policies, aimed at the suppression of whole groups, should be outlawed by international law. The origin of the concept of genocide has already been mentioned; it is worth adding that the term has received judicial recognition from the Tribunal which conducted the Justice Trial, in whose judgment it is used to signify a type of crime against humanity which may be committed either by enemy nationals against enemy nationals or by enemy nationals against Allied nationals. The Tribunal quoted with approval a resolution of the United Nations General Assembly which defined genocide as "a denial of the right of existence of entire human groups as homicide is a denial of the right to live of individual human beings."

While the facts proved in the Velpke Trial may be taken to be evidence of racial discrimination, it will be noted that such discriminatory treatment did not constitute the offence charged. During the cross-examination of the defendant Claus, Colonel Draper explained that he was putting certain questions to the accused in an endeavour to substantiate "that the alleged policy which is supposed to have had an economic origin . . . has a racial origin rather than an economic one." The Legal Member of the Court pointed out, however, that "these accused are not being charged with instituting a policy which resulted in the separation of Polish babies from their mothers." Nor did the Court find it possible to regard mere proof of the separation of parent and child as evidence tending to inculpate the accused. During the cross-examination of Gerike, Colonel Draper explained to the Legal

Member that the Prosecution were "suggesting firstly that you prejudice the future of a child by early separation, and then when you build on to it the other state of affairs, namely bad conditions, you have set up a state of affairs where the chance of survival is remote." The Legal Member, however, said that in the absence of medical evidence the Court could not assume "that the separation of a child from its mother, provided it is well looked after afterwards, would be detrimental in any way to its health."

The true nature of the charge was revealed in a statement of the Legal Member addressed to counsel for Gerike: "Dr. Herdegen, you appreciate that the charge against Gerike is that he was concerned in the killing by wilful neglect of a number of children. In those circumstances it would appear that whether or not he was forced to open the Home is not a matter of primary importance, but the real matter in dispute is whether in the preparation and the carrying on of that Home he did all that he possibly could in order to ensure that the children were properly looked after." This may be taken to apply to all the accused, since the charge against them all was the same.

Although, as has been seen, certain of the accused were shown to have taken positive steps calculated to hasten the deaths of the children in the Home, the charge was nevertheless essentially one of inaction, albeit deliberate inaction; the accused were said to have been concerned in the killing by wilful neglect of a number of Polish children. Crimes of omission have commonly been punished in war crime courts just as they are in the criminal courts of the various nations. In the Essen Lynching Case, already mentioned, one accused—an army private—was found guilty on the grounds of having failed to intervene to protect prisoners of war under his care from attacks on the part of the German populace. There have also been a considerable number of cases in which military commanders who took no action to prevent war crimes committed by troops under their command have been held criminally responsible for those crimes.

A charge of illegal failure to act presupposes, however, the existence of a duty to take positive action, and in cases of this sort the extent of criminal liability depends upon the extent of the duty which international law imposes in the circumstances of the case. A case which turned mainly if not entirely on allegations, not of acts, but of omissions, necessarily raised difficult questions as to what standard of care each accused could reasonably have been expected to observe. The Prosecution claimed that the accused, each "according to his function," had been guilty of such a gross and criminal disregard of their duties towards these defenceless Polish infants as to show a total disregard as to whether they lived or whether they died, and were therefore guilty under the charge. For various accused it was argued that they had done all that they

could in the difficult position as regards accommodation, transport, suitable labour and medical services which resulted from the war. For Noth it was claimed that he had no power to alter a state of affairs which was actually under the control of the Nazi Party.

The Court refused to accept the allegation of the Prosecution in all cases. For instance, the Prosecution, while pointing out that Müller had, unlike Demmerich, Hessling and Gerike, never assumed the care of the children, submitted that Müller was neglectful in his functions as chief Nazi in the village, and that he thus "did contribute to the whole miserable affair and allowed it to go forward." Ortsgruppenleiter Müller was nevertheless acquitted. So also was the Bürgermeister, Noth, who, according to the Prosecution's submission, turned a blind eye to the Home, while he and the Ortsgruppenleiter together could have done much to relieve the conditions and death-rate therein. On the other hand, the Court inflicted a term of ten years' imprisonment on Dr. Demmerich, who had never received official instructions to tend the babies but who, according to the Prosecution, had by his acts "assumed the care of those children in place of their mothers."

A possible defence to a charge of illegal inaction is of course the denial of the existence of any duty to act. It would be difficult to suppose that such a defence could seriously have been put forward on behalf of, say, Gerike, Hessling or Frau Bilien, but for accused less closely connected with the Baby Home this defence may be thought to have been an obvious choice. Counsel for Noth recognized this fact and argued as follows: "The accused are charged with a certain neglect. We differentiate between two different crimes in criminal law. A crime can be committed both through doing something and through omitting to do something. Such an omission is the case here. A crime of omission can only be the case when it is proved that it was the legal duty of the accused to perform a certain thing—a moral duty would not suffice. Furthermore, it would have to be proved that the accused had violated his legal duties. What duty had Noth to take action? . . ."

Without suggesting that the decision of the Court was influenced thereby, it is permissible to observe that the same argument was not put forward on behalf of the accused Demmerich. The essence of the case of the Prosecution against this accused did not go beyond a statement that "Dr. Demmerich, having been in that Home, cannot have been in any doubt as to what the conditions, the health precautions were there, and the chances of survival of those children, and yet he fell in with the proposition of Frau Bilien that she should visit him. . . . Is it conceivable that a doctor with any feeling of his calling at all can go into a Home, look at the dead and sign the death certificates and disregard the living, and then come out knowing that some of those living which he has not looked at may

die in the room the next day and he will be signing death certificates for them? . . . Once Dr. Demmerich had treated in the Home and seen the conditions, it was for him then and there to have done his utmost at all times to fight for the life of every child in that Home, even to the detriment maybe of some of his other patients who were not so near to death's door as an infant child is when its diet is wrong, when it has got vomiting, when it has got diarrhoea." Now, without wishing to evaluate the legal weight of such a counter-argument, it is permissible to feel surprised to find that Demmerich's counsel did not in his opening or closing speech argue first, that since Demmerich had never been appointed physician to the Home, had only voluntarily treated individual children and had not undertaken to care for all the children, no legal duty—as distinct from a moral duty—to treat the children in general had arisen; secondly, that the Prosecutor had proved the existence of nothing more than a moral duty to act such as rests upon a man who stands on a river bank and watches another man drowning; and thirdly, that it would be difficult to prove that any duty to take professional action would have existed under municipal law systems. It was only in his speech in mitigation of sentence delivered after the finding of guilty on Demmerich that counsel for Demmerich submitted that the latter "had never had any obligation as far as the welfare of the children was concerned. . . ."

The Rügen Baby Home Trial, which has already been mentioned, is not merely similar in its factual aspect, but is also a useful parallel in its legal aspects, to the Velpke Children's Home Trial. The charge against the accused was one of "Committing a War Crime in that they at Wolfsburg, and Rügen, Germany, between the months of April, 1943, and April, 1945, in violation of the laws and usages of war, were concerned in killing by wilful neglect a number of children of Polish and Russian nationals." The general facts of the case were as already stated very similar to those in the trial of Gerike and others and again concerned the operation of a Children's Home. In his closing address the Prosecutor quoted the first three passages from *Archbold* which are cited above, and added:

"In a war crime we do not have to distinguish in charging a person between murder and manslaughter. To kill infant children who are admittedly helpless and in their care either by premeditated neglect or by wicked neglect is equally a war crime whether it be murder or manslaughter, but it is for you to decide in the case of each accused which degree is applicable to each accused."

The Judge Advocate acting in the case referred to the Prosecutor's words as follows:

"Again, I have no quarrel whatever with the authorities that Major Draper cited to you in support of his contention that these accused, if they did what is alleged against them, come within the

doctrines of our English law regarding the standard of behaviour that must be expected of persons who undertake the care of young children. . . . I agree with those submissions in law that he has made to you, and my advice to you is that they are sound and that they should govern your decisions when you come to consider the verdict. Either of those standards would include the wording of the charge in this case, namely 'concerned in killing by wilful neglect,' and the final question of which of those two standards any one of those accused neglected to observe, if any of them did, can only affect, in my opinion, your sentence at a later stage and not your verdict."

Death sentences were passed on the accused Dr. Korbel, who had been responsible for the medical care and health of the children, and on Ella Schmidt, a nurse in whose charge they were placed. A sentence of five years' imprisonment was passed on Liesel Bacher, a nurse, who also had charge of the infants for a period. Seven others accused were found not guilty. The findings and sentences were confirmed.

We have seen, in the words of the Judge Advocate just cited, as well as previously, that the difference between murder and manslaughter in English law is not generally treated as relevant in war crime trials before British Military Courts, and it is possible for British Military Courts to mete out a lesser sentence than death for the war crime of illegal killing, as indeed for any war crime. On the other hand, the French Military Tribunals which conduct war crime trials apply the relevant provisions of the French Penal Code, which differentiates between *meurtre* and *assassinat*. Article 295 of the Code defines the former as "homicide committed voluntarily"; Article 296 thereof defines the latter as "*meurtre* committed with premeditation or by foul play (*guet-apens*)." Both are thus committed voluntarily, i.e. deliberately, but the second requires some form of previous contemplation. The punishments attaching to the two crimes—and this is the important point here—differ. Article 302 of the Code provides that the penalty for premeditated murder, patricide and poisoning shall be death, while Article 304 lays down that simple murder (i.e. voluntary homicide) shall be punished by penal servitude for life, except in two cases, when the death penalty shall be pronounced. The first arises when the murder has been preceded, accompanied or followed by another crime. The second arises when the murder has had as its object the preparation, facilitation or execution of a delict, or the facilitating of the flight, or assuring the impunity, of the authors or accomplices of a delict.

This small example of the divergence between the British and French practices in the punishment of war crimes illustrates the process whereby customary international law develops. All that international law says beyond dispute concerning the punishment

to be inflicted on persons found guilty of war crimes is that the death sentence is always permissible. Clearly, however, no civilized State would inflict such a penalty for, say, an instance of petty theft, and an international practice appears to be growing up according to which War Crime Courts are attempting to make the punishment fit the crime; any habitual practice of this kind would tend in time to modify the general rule that any war crime is punishable by death. The death sentence has been generally reserved for cases of killing illegally, torturing and rape. To determine the British or the United States practice on the matter of deciding appropriate penalties it is necessary to study the sentences passed by the Military Courts, Commissions or Tribunals; in France, Norway and some other countries, however, the law requires that before an alleged war criminal may be found guilty he must be proved to have violated provisions of the national (i.e. French, Norwegian, etc.) law as well as international law. In studying the practice of these latter countries it is therefore necessary to examine not only the decisions of their Courts but the provisions of their national laws which they were bound to observe. This makes the municipal law provisions of these Courts of particular interest not only on questions of punishment but also, and perhaps mainly, on matters concerning the precise definition of offences which are punishable as war crimes.

Before leaving the question of offences and their punishment, mention may be made of a curious point concerning Article 46 of the Hague Regulations previously quoted. It will be seen that this Article protects not only individual life and private property but also "family honour and rights" and "religious convictions and worship." As far as is known to the writer, the passage protecting family rights has never been applied; i.e. no invasion of those rights which involved no other offence has been punished. Perhaps the term "family rights" has not been thought capable of accurate definition. In the Velpke Trial, the separation of children from mothers within a few weeks of birth was clearly not the offence charged, yet it seems an obvious invasion of a family right. The protection of religious rights as such has been almost but not quite a dead letter. It may be a crime against humanity to persecute people on religious grounds, but that is a different matter. "Forced conversion to another faith" is declared criminal by Article 3 (3) of a Yugoslav War Crimes Law of 25th August, 1945, and in the Trial of Willy Zuehlke,¹ the Netherlands Special Court of Cassation held that "This Court . . . is of the opinion that the refusal to allow spiritual assistance to someone under sentence of death does . . . in itself definitely constitute a crime, both a war crime and a crime against humanity." Again, the Polish Supreme National Tribunal has regarded "repression, genocidal in character, of the religion

¹ See *Lancet Reports*, Vol. XIV.

of the local population" by, among other things, the restriction of religious practices to a minimum, as representing an offence under international law.

The defences raised explicitly or implicitly by the accused in the Velpke Trial may be classified as follows:

- (i) the plea that certain acts were performed in accordance with superior orders;
- (ii) the claim that the accused did their best under the circumstances to help the children;
- (iii) the related claim that these circumstances were very difficult ones, because in the fifth year of the war there were shortages of food, medical supplies and personnel, and transport.

The plea of superior orders was not in fact strongly pressed by the Defence since the only relevant orders which could be proved were those of Gerike that sick babies were not to be sent to hospital or returned to their mothers. The orders from the Gau Party Leadership that a Baby Home be established and the order to Bilien that she take up duties as matron were not relevant since the charge against the accused related to the neglect of babies while in the Home and not to the original setting up of the Home. The attitude generally adopted to the plea of superior orders in war crime decisions and laws¹ is that it does not constitute a complete defence in the sense of depriving an act of its guilty character, but that it may be considered in mitigation of sentence if the orders were not known by the accused to be illegal under international law and were not of such a nature that an average person would have seen them to be illegal under international law. Thus the orders forbidding the sending of sick children away from the Home could not have deprived of their criminal character the acts or omissions which caused the death of the children, even if such deaths could be regarded as resulting entirely from such orders; and they could not be so regarded. Furthermore, at the very least the legality of the orders must have seemed suspect to the accused.

The second plea, namely that the accused did their best to save the lives of the children, was also rejected, although as we have seen the Court may be thought to have taken into account as mitigating factors certain efforts which were made by Frau Bilien on behalf of the children. The same type of facts may explain the relatively light sentence passed upon Dr. Demmerich after he was found guilty along with Gerike, Hessling and Frau Bilien of being concerned in the killing by wilful neglect of Polish children.

The plea that the prevailing situation in Germany excused the frightful conditions in the Home was rightly rejected, just as a

¹ Reference to the relevant authorities are set out in *Digest of Laws and Cases*, p. 157, note 4.

similar plea had been rejected by a British Military Court earlier in the Belsen Trial.

To one who is concerned not only with purely legal questions but also with the philosophical and social implications of legal rules and decisions, the international criminal law as it has so far developed offers many avenues of particular interest. One such avenue concerns the right to a fair trial of any person accused of having committed a crime, and this question has arisen in the study of the international criminal law in two different ways. In the first place, there is a group of cases in which enemy nationals—judges and prosecutors being included among them—have been found guilty of war crimes and/or crimes against humanity involving the denial of a fair trial to certain victims, which resulted in their unjust imprisonment or execution.¹ Secondly, it is of interest to study the attempts which have been made to ensure a fair trial to enemy nationals, accused of war crimes and other offences against international law, during their trial by Allied Courts.²

The first aspect is of no direct interest in the study of the Velpke Trial, since by no stretch of the imagination could the infants involved be considered guilty of any offence for which their cruel and fatal neglect could be regarded as retribution. On the other hand, the Velpke Trial does provide some illustration of the second aspect—the attempts made to secure a fair trial to enemy accused.

Many aspects of a trial which are not reflected in the record thereof are yet relevant to the issue of whether the trial was a just one. The record usually says nothing about pre-trial proceedings, unless perhaps a defendant claims in court that undue pressure was brought to bear upon him in securing a written statement from him. Again, the record does not indicate the tone in which a prosecutor cross-examines an accused; moderation in a prosecutor's delivery can appreciably help an accused to keep his head and put his case adequately. Allied Courts which have tried enemy nationals on charges involving the denial of a fair trial have been able not merely to study records but also to profit by the evidence of the alleged victims of false trial and by that of accused judges, prosecutors, confirming officers and executioners. The types of evidence which such Courts have at least admitted as relevant to the issue of whether a trial was a fair one may, by and large, be classified into evidence indicating (i) that unjust laws were applied in a trial; (ii) that the accused were not told of the charges against them, and this a reasonable time before trial; (iii) that the accused were denied the aid of counsel; (iv) that the accused were not allowed to know the evidence against them, or to give or produce evidence on their own behalf; (v) that the accused were denied

¹ See *Digest of Laws and Cases*, pp. 161-6.

² *Ibid.*, pp. 189-97.

interpretation of the proceedings into their own language; (vii) that the proceedings, whether by their briefness or otherwise, were insufficient for an adequate hearing of the case; and (viii) that the accused were sentenced to penalties out of proportion to such offences as they may have committed. Clearly, while a study of the records of a trial of a German or of a Japanese accused by an Allied Court will afford some idea of whether lapses of some of these types have or have not been avoided, it will not do so in respect of all.

After that word of warning, a few remarks may be made on the provision of a fair trial to accused war criminals with particular reference to British Military Courts, and where possible with illustrations from the Velpke Trial.

On the matter of the procedure to be followed in trials for offences against the international criminal law, customary international law makes no provisions except for requiring that an accused shall be accorded a fair trial. The judgment delivered in the Justice Trial, for instance, pointed out that it was essential to recognize that: "The jurisdictional enactments of the Control Council, the form of the indictment, and the judicial procedure prescribed for this Tribunal are not governed by the familiar rules of American criminal law and procedure. This Tribunal, although composed of American judges schooled in the system and rules of common law, is sitting by virtue of international authority and can carry with it only the broad principles of justice and fair play which underlie all civilized concepts of law and procedure."¹

On the second day of the Velpke Trial, during a discussion on a point of procedure, one of the defence counsel, Dr. Will, claimed that "according to the German law if a man is sick one can hold a local court by his bedside and interrogate him there." The Legal Member of the Military Court, however, interjected: "This Court is not administering German law, but English law. . . ." The Legal Member probably meant this remark to refer to matters of procedure only, since the substantive law (i.e. the law relating to offences and defences) applied by British Military Courts for war crime trials derives from international law. The ruling of the Legal Member, when viewed in this light, serves further to illustrate the fact that under international law war crime courts are obliged to apply no particular set of rules of procedure, provided a fair trial is afforded to the accused; the United States Military Tribunals, one of which conducted the Justice Trial, were bound by a special set of rules of procedure different from those applied in the regular Courts of the United States, whereas the British authorities have chosen to apply in war crime trials as far as practicable rules of procedure followed in the ordinary Courts-Martial, subject to a few changes made in the Royal Warrant.

¹ *Law Reports*, Vol. VI, p. 49 (italics inserted).

Further, international law makes no special provision relating to the composition of war crime courts. In his scholarly article, *War Crimes under International Law*,¹ Lord Wright stated: "Nor can a criminal complain that he is entitled to be tried by an impartial and neutral Court and not by a Court constituted by the enemy. All he is entitled to is a trial on fact and law conducted on the principles of elementary justice." This opinion has been completely borne out by subsequent practice; in no instance known to the writer have neutral nationals been added to war crime courts of Allied nations. Courts of *inter-Allied* composition (the International Military Tribunals) have conducted the trials of certain major German and Japanese war criminals at Nuremberg and Tokyo respectively, and provision has sometimes been made for other Allied Courts to include members of more than one nationality. Such a provision is made in Regulation 5 of the Royal Warrant, which was applied when a member of the Polish Forces was appointed to the Court which conducted the Velpke Trial.

The rules relating to evidence and procedure which were applied in trials by Courts of the various countries, and by the International Military Tribunals in Nuremberg and Tokyo, when viewed as a whole are seen to represent an attempt to secure to the accused his right to a fair trial while ensuring that the guilty shall not escape punishment because of legal technicalities. A study of certain rules of evidence and procedure relating to war crime trials has shown that a marked general similarity exists between the rules laid down in the Charters of the International Military Tribunals and in the various municipal enactments governing all the matters examined on the rights of the accused.² These procedural rules, as much as those rules which lay down provisions of substantive law, represent a further contribution to the development of an international criminal law. They will prove of value in the sphere of the codification of international law and will serve as a convenient basis for further developments in this sphere.

Rules which safeguard the right of an accused to know the substance of the charge to be made against him include a provision governing trials by British Military Courts, Rule of Procedure 15, which states that: "15 (A). The accused, before he is arraigned, shall be informed by an officer of every charge on which he is to be tried . . . the interval between his being so informed and his arraignment should not be less than twenty-four hours."

"(B). The officer, at the time of so informing the accused, shall give the accused a copy of the charge-sheet, and where the accused is a soldier, should, if necessary, explain the charge-sheet and charges to him, and should also, if he is illiterate, read the charges to him."

¹ *Law Quarterly Review*, January, 1946.

² See *Digest of Laws and Cases*, pp. 189-97.

Regarding the right of an accused to be present at his trial and to give evidence, Rule of Procedure 40 makes the following provision relating to trials by British Military Courts:

"40 (A). At the close of the evidence for the prosecution the accused shall be told by the Court that he may, if he wishes, give evidence as a witness, but that if he gives evidence he will subject himself to cross-examination."

The practice is for the Judge Advocate or, if there is none, the President of the Court, to tell the accused that he has three alternatives: to give evidence on oath, to make a statement not on oath or to remain silent, and to explain to him his position along the lines set out in the following footnote to Rule of Procedure 40 (A): "The Judge Advocate or, if there is none, the President must explain in simple language to the accused, especially if he is not represented by counsel or defending officer, that he need not give evidence on oath unless he wishes to do so. He must also be told that if he gives sworn evidence he is liable to be cross-examined by the prosecutor and questioned by the Court and Judge Advocate. He should also be informed that evidence upon oath will naturally carry more weight with the Court than a mere statement not upon oath."

A reading of the proceedings in the Velpke Trial will, it is felt, leave no doubt that the accused were given a full opportunity to put their own cases to the Court.

Another important right of an accused is the right to have the aid of a defending counsel. Regulation 7 of the Royal Warrant provides that counsel may appear on behalf of the Prosecutor and accused in like manner as if the Military Court were a General Court-Martial. The appropriate provisions of the Rules of Procedure, 1926, apply accordingly. In practice, accused persons tried as war criminals are defended either by advocates of their own nationality or by British serving officers appointed by the Convening Officer, who may or may not be lawyers. In the Belsen Trial, for instance, British or Polish serving officers were appointed as defending counsel, whereas in the Velpke Trial the accused chose to be defended by German lawyers. It may sometimes be thought, on reading the speeches and examining the general performance of certain German counsel in certain war crime trials, that the accused being defended would have been better served had he allowed the Allied authorities to appoint counsel for him; but if a right to choose is given it necessarily involves the right to choose unwisely. It is perhaps natural that an accused should prefer a lawyer of his own nationality, but it is inevitable that the years which Germany endured under the arbitrary Nazi rule should have had a damaging effect on standards of legal education, particularly on matters of international law.

Before attention is turned from the right to counsel, it may be