CASE No. 88

TRIAL OF HANS ALBIN RAUTER

NETHERLANDS SPECIAL COURT IN 'S-GRAVENHAGE (THE HAGUE)
(JUDGMENT DELIVERED ON 4TH MAY, 1948)
AND
NETHERLANDS SPECIAL COURT OF CASSATION
(JUDGMENT DELIVERED ON 12TH JANUARY, 1949)

Persecution of Jews and Relatives; Deportations; Slave Labour; Pillage and Confiscation of Property; Imposition of Collective Penalties; Arrests, Detentions and Killing of Hostages effected in "Reprisal" as War Crimes and Crimes against Humanity—Jurisdiction of Municipal Courts over War Crimes—The Rule "Nulla pœna sine lege"—Permissibility of Reprisals (Effect of an Act of Surrender; Right to Resistance of Inhabitants of Occupied Territory; Legitimate and Illegitimate Reprisals).

A. OUTLINE OF THE PROCEEDINGS

I. INTRODUCTORY NOTES

The accused, Hans Albin Rauter, was a Nazi S.S. Obergruppenfuehrer and a General of the Waffen-S.S. and the Police, who served during the occupation of the Netherlands as Higher S.S. and Police Leader (Höhere S.S. und Polizeiführer) and General Commissioner for Public Safety (General-Kommissar für das Sicherheitswesen) in the Occupied Netherlands Territories.

He was tried by the Special Court at the Hague, for a wide range of offences committed against the Dutch civilian population during the occupation, and on 4th May, 1948, was sentenced to death. The offences charged included persecutions of the Jews, deportations of inhabitants of occupied territory to Germany for slave labour, pillage and confiscation of property, illegal arrests and detentions, collective penalties imposed upon innocent inhabitants, and killings of innocent civilians as a reprisal for offences committed by unknown persons against the occupying authorities.

The accused appealed against the Judgment of the first court to the Special Court of Cassation, which passed judgment on 12th January, 1949. The death sentence of the first court was confirmed, with certain alterations made in regard to the solution given to a number of legal questions by the first court.

The trial of Rauter was one of the most important in the Netherlands, both as regards the type of crimes and the number of victims, and the legal issues to which it gave rise before the Netherlands courts. The judgments

reviewed include important findings which greatly contribute to the solution of certain problems which are of a complex nature in the sphere of international law, such as the issue of legitimate and illegitimate reprisals.

II. PROCEEDINGS OF THE FIRST COURT

1. *The Indictment*

The accused was charged with various offences, reviewed below, while " being in the forces and the service of the enemy and entrusted with the care for public peace and order, the command over the Waffen-S.S. units and the German police units and organs, the supervision of and giving orders to the Netherlands police in the occupied Netherlands territory, and while being in the course of the occupation vested with legislative powers in the sphere of public order and safety."

He was charged with having committed the offences concerned in violation of " the laws and customs of war and in connection with the war of aggression waged against, among others, the Netherlands."

The first charge concerned the persecution of Jews and was couched in the following terms :

> " The accused intentionally, in the framework of the German policy of persecution of the Jews, the object of which was to eliminate the Jews from Europe and exterminate them or at least a large number of them, which policy was already begun in the occupied Netherlands in 1940, insofar as this depended on him, took measures considered officially necessary for the success of this policy in the Netherlands, namely by issuing statutory provisions and supervising and directing the activities of the police subordinated to him, the general object being the segregation, congregation and arrest of the Jews as part of their deportation across the German frontier which, as the accused must have foreseen, resulted for many in their death, since according to data produced by the Red Cross, of the approximately 110,000 Jews who were deported only about 6,000 returned."

The second charge dealt with the recruitment of Dutch subjects and their deportation to Germany for slave labour. The charge read as follows :

> " The accused intentionally, in the framework of the German policy of the mobilisation of labour (Arbeitseinsatz), in so far as this depended on him, took measures considered officially necessary for the success of this policy in the Netherlands, such as having round-ups and raids carried out by the police subordinated to him with the object of apprehending those liable to labour service (ordered 15th July, 1943), introducing control by means of new rations registration cards . . . and setting up the ' Arbeitscontrolldienst ' . . . by which mobilisation of labour the workers seized from among the civilian population of the occupied Netherlands were deported to Germany with a view to slave labour, many of them dying as a result, at least 300,000 Netherlanders . . . having been driven away to Germany for labour service during the German occupation, some 9,900 having been seized in round-ups and raids between 7th January and 1st September, 1944, only and sent to that country through the transit camp at Amersfoort."

The third and fourth charges concerned pillage and confiscation of property :

" The accused intentionally, after the ruthless seizure of household contents belonging to Netherlands citizens who had done harm or shown themselves hostile to the occupying Power had been decided upon in the framework of the systematic pillage of the Netherlands population of household articles, clothing, etc., ordered by Goering in August, 1943, took the necessary measures that this was drastically carried out by the German police under his command, as a result of which from that time onwards such goods were stolen on a large scale from Netherlands citizens, while replacement at that time was not possible or practically impossible.

" The accused intentionally, by a Decree dated 13th May, 1943, ordered the confiscation of wireless sets in the occupied Netherlands territories and ordered that these be handed in, this order being reinforced by drastic threats which were supplemented in October, 1943, by the threat that the entire contents of a household would be confiscated, compelling in this manner many Netherlanders to surrender their sets and thus depriving them unjustly of their property."

The fifth charge dealt with the deportation of Dutch students to Germany :

" The accused intentionally, by raids held on 6th February, 1943 ; by a call to report which was accompanied by threats (against, among others, parents and guardians) on about 5th May, 1943 ; and by later arrests, apprehended a large number of Netherlands students and placed them at the disposal of the competent German authorities for deportation to Germany, about 1,800 students being seized in the raids in February, 1943 . . . while about 3,800 reported in May, 1943, and many others were apprehended later, a number of them dying as a result of the deportations."

The sixth charge concerned orders issued by the accused in August, 1942, to arrest and detain relatives of Dutch police officials leaving their service and going into hiding, as a result of which numerous members of such families were deprived of their liberty and kept in concentration camps.

Finally, the seventh and last charge dealt with a series of measures undertaken in reprisal against innocent inhabitants, and including collective penalties, illegal arrests and detentions, and the putting to death of hostages. The charge ran as follows :

" The accused intentionally, as a retaliation for acts directed against the occupying Power or regarded as being so directed, systematically applied the following measures :

(*a*) Collective fines imposed by him or on his behalf on municipalities as a result of damage done to cables and other individual acts for which the population as a whole could not be considered mainly responsible.

(*b*) Removal of contents from houses (at the same time pillage in the circumstances explained in the third charge, in particular pillage which took place after the introduction of the first measures).

(*c*) Arrest and imprisonment of innocent civilians (very often the next of kin of the person sought for) or carrying out of raids (also for the purpose of the labour service mentioned in the second charge) and removal of persons thus arrested, while it was a matter of common knowledge that the treatment received in German detention was, as a rule, very bad and resulted in the death of many individuals, a large number of those thus deprived of their liberty having in fact died.

(*d*) Reprisal murders of Netherlands civilians in the course of which :

1. Civilians were shot on or after arrest, or (especially after the Allied advance through France and Belgium) while they already happened to be in German custody for another act than that for which the reprisal murder took place ;

2. From September, 1943, the murder action, known as ' Silbertanne,' was carried out, this being an arrangement by which members of the Germanic (Netherlands) S.S., in collaboration with the Security Police, shot civilians as a reprisal for attacks on agents of the enemy, the prepetrators of which crimes (assassinations) were ostensibly not discovered ; by which policy carried out in this manner and more particularly by acts mentioned in the first, second, fifth, sixth and seventh charge, Rauter intentionally committed systematic terrorism against the Netherlands people."

2. *Facts and Evidence*

The evidence at the trial consisted of statements of witnesses and documents, including a very large number of reports, letters, decrees and other documents originating from the accused himself.

(i) *Position of the accused*

It was ascertained that the accused had been appointed Higher S.S. and Police Leader (Höhere S.S.-und Polizeiführer) in the Occupied Netherlands Territories by Hitler himself.

His position was only second to that of the Reich Commissioner (Reichskommissar) for the Netherlands, Seyss-Inquart, the highest Nazi officer in the occupied territory. Rauter held the position of General Commissioner for Public Safety (General-Kommissar für das Sicherheitswesen). As such he was in charge of the entire police forces in Holland, including the Netherlands Police, and had under his orders the heads of the most important branches of the German police, such as the " Befehlshaber der Sicherheitspolizei " (Commander of the Security Police), commonly known as " Sipo," the " Befehlshaber des Ordnungspolizei " or " Orpo " and the " Befehlsheber des Waffen S.S." The Security Police included the State Police (Staatspolizei or Stapo) and the Criminal Police (Kriminalpolizei or Kripo).

The accused's position of Higher S.S. and Police Leader and General Commissioner for Public Safety involved wide powers, one of which consisted of the authority to issue orders by decrees. He remained in office until the very end of the occupation of Holland, *i.e.*, until March, 1945.

The evidence produced showed the accused's guilt in the commission of all the classes or types of offences charged.

(ii) *Persecution of the Jews*

It was shown that the accused and the police forces under him took active part in the persecution of the Jews in the Netherlands.

The Court made reference to the general Nazi policy of persecuting Jews, as this was established by the International Military Tribunal at Nuremberg. The following passage from the Nuremberg Judgment was taken into account as evidence :

> " The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories. Originally the policy was similar to that which had been in force inside Germany. Jews were required to register, were forced to live in ghettoes, to wear the yellow star, and were used as slave labourers. In the summer of 1941, however, plans were made for the ' final solution ' of the Jewish question in all of Europe. This ' final solution ' meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of Section B4 of the Gestapo, was formed to carry out the policy.
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> " The plan for exterminating the Jews was developed shortly after the attack on the Soviet Union.
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> " . . . Part of the ' final solution ' was the gathering of Jews from all German occupied Europe in concentration camps. Their physical condition was the test of life or death . . . all who were not fit to work were destroyed in gas chambers and their bodies burnt."

It was shown that the accused carried out the above policy in Holland. He issued orders under which Jews were subjected to discriminatory treatment and gradually segregated from the rest of the population, which facilitated their being detected and apprehended at a later date for slave labour and eventual extermination. Jews were ordered to wear a Star of David in public, and were forbidden to take part in public gatherings, to make use of public places for amusement, recreation or information, to visit public parks, cafes and restaurants, to use dining and sleeping cars, to visit theatres, cabarets, variety shows, cinemas, sports clubs, including swimming baths, to remain in or make use of public libraries, reading rooms and museums. A special curfew was introduced for all Jews between the hours of 8 p.m. and 6 a.m. Later orders banned them from railway yards and the use of any public or private means of transport.

These measures were followed by the erection of concentration camps for Jews in various places. They culminated in systematic round-ups of Jews, who were sent to the concentration camps in order to be deported to Germany or Poland, where they were to be used for slave labour or exterminated. Numerous letters from the accused were produced as evidence. In a letter of 10th September, 1942, addressed to Himmler, the accused spoke of the first measures in the following terms :

> " The rounding up of the Jews is making us rack our brains to the uttermost. I will on no account fail to make use of any influence I may have for what is gone is lost. The mixed marriages have been classified up to 15th October, 1942, and so were the munition workers,

diamond cutters and so on, so that with this the great purge can begin in Holland. By that time both the big Jewish camps I have had built will be ready, one in Westerbork near Assen and one in Vught near 's-Hertogenbosch. I shall then be able to introduce 40,000 Jews into the two camps. I am harnessing up everything that can exercise police or assistant police functions, and anything anywhere that looks like belonging legally or illegally to Jewry will be put into both these camps after 15th October, 1942."

Two weeks later, in another letter to Himmler, dated 24th September, 1942, Rauter spoke of about 8,000 Jews who were detained in so-called " relief works camps," and of their relatives. In this connection the accused made the following report :

" On 1st October the relief works camps will be occupied by me at one blow and the same day the relatives outside them will be arrested and taken into the two large newly erected Jewish camps in Westerbork near Assen and Vught near 's-Hertogenbosch. I will try to get hold of 3 trains per week in place of 2. These 30,000 Jews will now be pushed off from 1st October onwards. I hope that by Christmas we shall have got these 30,000 Jews away too so that a total of 50,000 Jews, that is half, will then have been moved from Holland.

" On 15th October Jewry in Holland will be declared outlawed, that means that police action on a large scale will begin. . . . Every Jew found anywhere in Holland will be put in the large camps. As a result no Jew, unless a privileged one, will be seen any longer in Holland. At the same time I will start the announcements according to which Aryans who hide Jews or help them over the border, and who have forged identity papers, will have their property seized, and the perpetrators will be taken to a concentration camp ; all this in order to prevent the flight of the Jews which has started on a large scale."

The grip on the Jews in the Netherlands soon increased by circumscribing the areas in which they were allowed to reside. Those who had not already been apprehended were banned from one province after another and confined to a few areas where they could easily be caught. Thus, for instance, by decrees issued by the accused on 12th February, 1943, 29th March, 1943, and 13th April, 1943, the Jews were forbidden to live in Haarlem and district, and to reside in the provinces of Friesland, Drente, Groningen, Overijsell, Gelderland, Limburg, Northern Brabant, Zeeland, Utrecht, Zuid-Holland and Noord-Holland. The general policy of the accused was to deport the Jews chiefly to Eastern Europe, that is to extermination camps in Poland.

The results achieved were described by Rauter in a report of 2nd March, 1944, where he significantly used the following words :

" The Jewish problem in Holland properly speaking can be considered as solved. Within the next ten days the last full Jews will be taken away from Westerbork camp to the East."

In an earlier account, given to his subordinates, the accused had disclosed the following data :

" Everyone knows that we had about 140,000 full Jews here in Holland, including foreign ones some of whom we cannot get hold of

for international reasons. The question is to send Jewry in its entirety to the East : I can tell you here—and please do not report it outside—that up to date we have sent 50,000 Jews to the East and that there are still 12,000 Jews in the camps. That brings the lot to about 67,000 Jews who have already been eliminated from the Netherlands national life. From April 1st we hope to attain a greater speed in the removal of the Jews, in the sense that we shall then dispatch a train twice a week instead of once, so that we can deport 12,000 per month. We hope to have, within a measurable space of time, no more Jews freely walking the streets in the Netherlands."

The accused stressed in particular the need to apply measures ruthlessly and pitilessly, and used in this respect the following language :

" This is not a nice job, it is a dirty work, but it is a measure which, seen historically, will have great significance. . . . There is no room for tenderness or weakness. The one who does not understand this, or who is full of pity or silly talk about humanism and ideals, is not fit to lead in these times. . . And this is what is going to happen. Not one more Jew will remain in Europe."

One witness, the head of the Netherlands Red Cross department entrusted with establishing the fate of the Jews in Holland, gave the following account : during the occupation about 110,000 Jews were taken away from the Netherlands, of whom about 100,000 were of Dutch nationality. Of this total only about 6,000 returned after the war.

(iii) *Slave Labour*

The accused took also active part in the carrying out of the slave labour policy, in that he used the police forces under him to apprehend and deport Dutch subjects to Germany where they were to be forcibly used as workers in industry or agriculture.

The criminal nature of the Nazi slave labour scheme was established by the International Military Tribunal at Nuremberg. The Tribunal's findings concerning facts relating to that scheme as a whole were taken into account by the Netherlands Special Court as evidence. The following passages were among the references made to the Nuremberg Judgment :

" The German occupation authorities 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. . . .

" During the first two years of the German occupation of France, Belgium, Holland and Norway, however, an attempt was made to obtain the necessary workers on a voluntary basis. . . .

" Committees were set up to encourage recruiting, and a vigorous propaganda campaign was begun to induce workers to volunteer for service in Germany. The propaganda campaign included, for example the promise that a prisoner of war would be returned for every labourer who volunteered to go to Germany. In some cases it was supplemented by withdrawing the ration cards of labourers who refused to go to Germany or by discharging them from their jobs and denying them unemployment benefit or an opportunity to work elsewhere. It was

on the 21st March, 1942, that the defendant Sauckel was appointed Plenipotentiary-General of the Utilisation of Labour(1) . . . Sauckel's instructions . . . were that foreign labour should be recruited on a voluntary basis, but also provided that ' where, however, in the occupied countries the appeal for volunteers does not suffice, obligatory service and drafting must under all circumstances be resorted to." Rules requiring labour service in Germany were published in all the occupied territories. The number of labourers to be supplied was fixed by Sauckel, and the local authorities were instructed to meet these requirements by conscription if necessary. That conscription was the rule rather than the exception. . . .

" The evidence before the Tribunal establishes the fact that the conscription of labour was accomplished in many cases by drastic and violent methods. . . . Man-hunts took place in the streets, at motion picture houses, even at churches and at night in private houses. Houses were sometimes burnt down, and the families taken as hostages. . . . The treatment of the labourers was governed by Sauckel's instructions on the 20th April, 1942, to the effect that : ' All the men must be fed, sheltered and treated in such a way as to exploit them to the highest possible extent, at the lowest conceivable degree of expenditure ' . . .

" The evidence showed that the workers destined for the Reich were sent under guard to Germany, often packed in trains without adequate heat, food, clothing or sanitary facilities. The evidence further showed that the treatment of the labourers in Germany in many cases was brutal and degrading. . . . Punishments of the worst kind were inflicted on the workers. . . . Concentration camp commanders were ordered to work their prisoners to the limits of their physical power."

It is within the scope of the above scheme and treatment that the Netherlands Special Court examined the evidence of the part taken by Rauter in Holland regarding the Nazi slave labour policy.

It was shown that, in the initial stages, Rauter's orders were limited to certain classes of inhabitants. The first of these orders was to the effect that " raids and man-hunts shall be carried out for those persons belonging to the 1924 draft who are now living illegally in the Netherlands." Such inhabitants were to be sent to a concentration camp at Ommen, and deported for slave labour.

Later orders, disclosed in a letter of the accused addressed to the Commander of the Security Police (Befehlshaber der Sicherheits-und Ordnungspolizei) in Holland and dated 15th July, 1943, extended the round-ups to other categories. These included men liable to military service from the classes 1923 and 1924 ; hidden Jews ; students not in possession of an identity card prescribed by the occupying authorities ; Netherlands police officials who had gone " underground." Rauter's instructions to apprehend the above categories of inhabitants for slave labour were couched in the following terms :

" With a view to upholding state authority with regard to the ' Arbeitseinsatz ' (mobilisation of labour) decrees. . . . I order that

(1) Fritz Sauckel was found guilty and sentenced to death for having directed the slave labour policy.

each police battalion carries out one man-hunt per week, the entire battalion being employed, and that further the police Commander devises methods to carry out such raids in trains as part of the man-hunt."

Soon after this, and due to further extensions of such raids, Rauter formed a special " Arbeitseinsatzpolizei " (Police for mobilisation of labour). The Decree relating to it was dated 14th April, 1944, and contained the following provisions :

" (1) In order that the sending of Netherlands labour power to the Reich for Arbeitseinsatz may also be energetically promoted by police intervention an Arbeitseinsatzpolizei (police) is being formed.

" (2) The Arbeitseinsatzpolizei has to find out the breaker of a labour contract, the person refusing to do his labour service, the man who overstays his leave, and also those Netherlands workers who do not answer their call-up for labour service, and to take them to the Labour Exchanges concerned.

" (3) For this purpose the members of this Arbeitseinsatzpolizei may undertake searches of the actual or supposed places of residence of those refusing to work if there are good grounds for supposing that the person being looked for is in the house concerned.

" (4) The Arbeitseinsatzpolizei comes under the Generalkommissar fuer das Sicherheitswesen und Hoehere S.S.-und Polizeifuehrer beim Reichskommissar fuer die besetzten niederlandschen Gebiete (The General Commissioner for Public Safety (Higher S.S. and Police Leader) on the staff of the Reich Commissioner for the occupied Netherlands territories)."[1]

In a letter dated 24th June, 1944, and sent to Kaltenbrunner,[2] the head of the Reich Security Main Office in Berlin (Reichssicherheitshauptamt—commonly designated as R.S.H.A.), Rauter gave the following account of this special police force :

" Meanwhile the control of labour service (Arbeitseinsatzpolizei) is now 400 men strong. The fellows have received a very good training, are absolutely all right ideologically and have become the terror of the men ' underground.'

" That, naturally, there will be a great resistance to the Arbeitseinsatzpolizei is clear. Without draconic measures and without the Arbeitseinsatzpolizei nothing can, naturally, be done. No Netherlanders nowadays answers the Labour Exchanges' call for volunteers. They must all be fetched. The whole situation on the Western front calls for this."

With the worsening of the German position on the Western front in those days of 1944, Rauter's orders became the more wide in scope. In a letter of 9th August, 1944, addressed to Himmler, Rauter referred to a conference

(1) It will be remembered that the above position was held by Rauter himself.

(2) Kaltenbrunner was tried by the International Military Tribunal at Nuremberg and sentenced to death. The R.S.H.A. was the top co-ordinating office of the Gestapo and other Nazi police branches, placed directly under Himmler.

with Seyss-Inquart, the Reich Commissioner for the Netherlands, and reported the following measures :

> "We had an important sitting at the Reich Commissioner's yesterday regarding the total war effort. It was at last resolved that the 18, 19, 20, 21 and 22 year-old Netherlanders must in principle and without exception be seized for the purposes of the mobilisation of labour, in order to be handed over to the Reich."

Evidence was produced to show that, as a result, at least 400,000 Netherlanders were deported to Germany for slave labour. They were mostly transported through a camp in Amersfoort. Between 7th January and 1st September, 1944, alone, 34 transports left for Germany. An estimated 34,000 deportees never returned from Germany.

(iv) *Deportation of Students*

Special measures were taken by Rauter to apprehend Netherlands students whom the authorities regarded as hostile towards Nazi Germany, and to deport them to Germany for slave labour.

In a telegram to Himmler dated 6th February, 1943, Rauter communicated the following :

> " The following measures are being carried out :
>
> (1) . . . .
>
> (2) Since 8 a.m. a large scale action has been going on by my orders in the Amsterdam, Utrecht, Delft and Wageningen Universities with the object of arresting as many students as possible belonging to the reactionary camp and sending them off to Vught camp ;
>
> (3) Early on Monday at least 5,000 sons of the monied classes, especially those not working in any way, will be suddenly arrested, all police forces being used, in the three provinces named above where the main resistance repeatedly appears, and then taken to Vught camp. . . ."

In reply to this, Himmler answered by cable the same day :

> " Have received your telegram of 6.2.1943. Agree to points 1, 2 and 3. You can hardly proceed sharply or vigorously enough."

The evidence showed that on 5th May, 1943, there were 14,571 students on the rolls of Netherlands Universities, out of whom 2,274 had signed a declaration of loyalty to the German authorities. On 6th February, 1943, about 1,800 students were arrested, and this was followed by further arrests of several thousand students who had not signed the declaration of loyalty.

All those arrested were sent to Germany for slave labour. A number of them died from the treatment endured in labour training camps (Arbeitserziehungslagern).

(v) *Pillage and Confiscation of Property*

Extensive pillage and confiscation of Netherlands public and private property was effected under Rauter's orders. It was shown that this took place as a result of general instructions issued by Hitler and transmitted to

German authorities in Holland by Goering. A Decree dated 14th August, 1943, and signed " Goering " contained the following instructions :

> " In consequence of the enemy's terror attacks on the civil population in Reich territory the Fuehrer has made the following decision :
>
> In future enemy public and private property in the occupied territories is to be ruthlessly drawn upon for the replacement of property such as house furnishings, furniture, domestic utensils, linen, clothing, etc., destroyed by enemy terror attacks. Giving effect to this decision I order that :
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> (1) the Reich Commissioner for the Occupied Netherlands Territories, the Militaerbefehlshaber (Military Commander in occupied territory) of Belgium and Northern France, and the Militaerbefehlshaber of France are immediately to seize and confiscate house furnishings, furniture, domestic utensils, clothing of all sorts, etc., to the greatest possible extent, leaving behind only what is strictly necessary ;
>
> (2) the seizure and confiscation are to take place as rapidly as possible and in such a way that it is possible at any time to collect the articles and take them off to the Reich territory concerned."

Further specific orders were sent by Goering to the authorities in the Netherlands. They contained the following instructions :

> " I ask you to have this order carried out ruthlessly, especially in the occupied Netherlands Territories. It is unendurable that thousands of German compatriots are imposing the greatest restrictions on themselves and making heavy sacrifices in order to provide these people who, through enemy terror attacks, have lost house furnishings, furniture, domestic articles, upper and underclothing, etc., with at least those household objects most necessary for life, while the population of the occupied enemy territory is not made to feel in any way the effect of the enemy terror attacks on Reich-territory. The attitude of the Dutch population in connection with this is especially striking, in a way unknown in any other occupied territory, in that it shows its malicious joy at the results of the terror attacks on Reich territory in a spiteful and unconcealed fashion."

The evidence showed that the accused took part more particularly in the confiscation of wireless sets. By Decree of 13th May, 1943, Rauter prescribed the following measures :

> " With a view to the maintenance of public order and safety . . . I hereby decree :
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> " *Article* 1
>
> (I) All wireless sets, accessories and parts, in the occupied Netherlands territories are declared confiscated as from this moment.
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> " *Article* 2
>
> Unless otherwise determined by the Higher S.S. and Police Leader the confiscated wireless sets, accessories and parts, are to be handed in by the owner to the competent local police authority who will call

in the co-operation of the P.T.T. (post, telephone and telegraph) for this purpose. Place and time of handing in will be made known by the police authority within ten days of the publication of this decree by means of a notification in the daily press or in the way generally used in the locality."

As a result a very large number of wireless sets was confiscated. In a letter to Himmler of 25th July, 1943, the accused gave the following account :

" Up to now, 735,000 radios have been handed in. Large quantities have still to come in in the Amsterdam, Hague and Rotterdam municipalities so that it can be confidently reckoned that 800,000 radios will have been handed in by 15th August.

" In addition to this there are another 100,000 sets which have been released and which may remain with the owners, so that 900,000 apparatus will have been seized. There are still 200,000 sets missing and in order to round these up I have ordered a razzia (raid) to be held once a week by each police battalion who will cordon off country places and groups of houses in towns. . . ."

(vi) *Persecution of Relatives*

Rauter introduced a series of measures which were intended to act as a means of intimidation or revenge, and which affected innocent inhabitants on account of acts committed by other inhabitants. One of these measures consisted in arresting and confining to concentration camps those relatives of members of the Netherlands police forces who had left their duty with a view to avoiding carrying out German orders or for the purpose of taking part in the Netherlands resistance movement.

In a letter to Himmler, dated 10th August, 1943, the accused reported the following :

" I have just decreed that the relatives and parents of ' Marechaussee ' and other police officers who disappear, going ' underground ' and taking their pistols and ammunition with them, are to be arrested. It is only in this way that I can check the process."

The order was transmitted by the General Directorate of Police in the following terms :

" I wish hereby to inform you that the Hoehere S.S. and Polizeifuehrer, S.S. Obergruppenfuehrer und General der Polizei Rauter, has decided the following in principle :

(1) Whenever Netherlands police officers, whether belonging to the State or Municipal police, leave the service of their own accord, either dressed in uniform and having firearms with them or out of uniform and not in the possession of firearms, the Sicherheitspolizei must immediately take the nearest relatives of the police officer concerned into custody. These will be taken to a concentration camp."

Many relatives of such police officers were interned in concentration camps, and numbers of them treated as hostages.

(vii) *Imposition of Collective Penalties*

Another measure of intimidation or revenge consisted in imposing fines on whole communitities for acts committed by unknown individuals.

One of the cases in point took place because, during the night of 27th-28th February, 1942, a German military telephone cable at Alkmaar was cut and destroyed by unknown perpetrators. The following was communicated on behalf of Rauter to the burgomaster (mayor) of Alkmaar :

> " During the night of 27th-28th February, 1942, a German Wehrmacht cable in your municipality was cut through by persons unknown.
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> " On account of this act of sabotage the General Commissioner for Public Safety has as a measure of repression ordered that the cable in question shall at once be guarded, this to last provisionally for six weeks and has further imposed a fine of 50,000 guilders."

As testified by the burgomaster at the trial, the fine was paid and the guard duty provided as threats of more serious penalties were made by Rauter's police officers.

Two earlier cases took place in the following circumstances :

During the night of the 5th-6th January, 1942, German military telephone cables in the municipality of Zandvoort were cut and damaged. A fine of 20,000 guilders was imposed upon all inhabitants of the community and a watch ordered for a period of four weeks. As in the first instance, the fine was paid and the watch provided.

In May, 1941, a flag parade on one or more German warships was disturbed by someone on the shore who whistled with his fingers imitating a German whistle signal. A fine of 20,000 guilders was imposed upon and paid by the municipality of Maasslais, which was concerned in the case.

(viii) *Measures undertaken in " Reprisals " (Indiscriminate Arrests and Detentions, Killing of Hostages)*

Various measures were undertaken by Rauter as a direct " reprisal " against innocent inhabitants for acts of violence committed against members of the German occupying authorities by unknown persons. These measures took the shape of indiscriminate arrests and detentions and of the killing of hostages. In some instances both measures were undertaken at the same time.

The cases proved before the Court were the following :

On 30th January, 1943, a non-commissioned officer of the German Wehrmacht (army) was shot down in Haarlem. The author was not discovered. In accordance with orders of the Army Commander (Wehrmachtbefehlshaber) in the Netherlands, General F. Christiansen, that 10 hostages should be shot for every German soldier killed, Rauter's men shot 10 Jews from Haarlem and the surroundings, and interned in a concentration camp a large number of inhabitants. The case was reported by Rauter in an announcement published in the Netherlands press on 2nd February, 1943 in the following terms :

> " As a reprisal for one German soldier treacherously murdered . . . 10 hostages coming from Jewish communist circles in Haarlem and its surroundings have been shot to-day. In addition a fairly large number

of communist agitators in the same district have been sent to a concentration camp."

It was established that of the 10 hostages, 7 came from people arrested in Haarlem and neighbouring municipalities, whereas three came from Velsen where they had been arrested on another occasion several weeks before. Over 100 persons were sent to the concentration camp concerned. Both measures were undertaken in consultation between Rauter and General Christiansen.

The second case was described by Rauter himself in a public announcement dated 5th January, 1944. The announcement read as follows :

" The Higher S.S. and Police Leader announces :

During the evening of 3rd January, 1944, a murderous assault was made in Leiden on the head of the Labour Exchange there, Gerardus Willem Diederix. Diederix was badly wounded on the public highway by a pistol shot fired from behind. This is undoubtedly a crime for political motives. As a punitive measure the time when it is no longer permissible to be out of doors in Leiden has till further notice been set back to 9 p.m. and the closing time for public buildings to 8 p.m. In addition some fifty inhabitants of the Leiden municipality have been arrested who, in view of their political sympathies, must be regarded as approving this cowardly assault. Three persons resisted arrest, alternatively, tried to escape, and were shot during the attempt. It is probable that two people who could not be recognised in the darkness were the authors of the assault."

The whole operation was carried out on Rauter's orders and by his men.

The third case took place in the following circumstances :

On the evening of 10th January, 1944, near Kamplust Hotel in Soest, two members of the resistance movement who were transporting police uniforms were arrested by Dutch S.S. men stationed in that place. Both these persons managed to run away in the darkness and escaped. The same night the S.S. made inquiries at several addresses in Soest. Early in the morning of 11th January, 1944, two S.S. men forced three cyclists riding along the Vinkenweg in Soest to stop. A shooting affray took place between the cyclists in question and the S.S. men, one of the S.S. being badly wounded by a shot in the chest. The cyclists managed to escape. As a reprisal a razzia was held in Soest on the evening of 14th January by the S.D. from Amsterdam. Fifty persons were arrested and five were shot as hostages. The case was reported by Rauter to Himmler on 11th January, 1944, with particulars concerning yet another case of the same kind :

" A few days ago a Police Oberleutnant [Captain], a member of the Germanic-S.S., was shot down from his bicycle. The same day I had 50 of the principal inciters in Groningen and district arrested. During this 5 of these inciters were shot when resisting and trying to escape. This measure has had a marvellous effect. Next day an N.S.B. Arbeitsamtleiter (head of the Labour Exchange) in Leiden was shot from behind in the street in the dark. An operation was performed and the bullet removed from a kidney ; there is no longer danger for his life. In this case also I had 50 inciters arrested of whom 3 were shot while trying to escape."

The fourth case took place on 16th April, 1944, in Baverwijk and Velsen. Attempts were made on the lives of two members of the Netherlands quisling police. Both localities were surrounded and cordoned off by Rauter's police. Machine-guns were erected at various places and all houses were searched. 480 men between the ages of 18 and 25 were seized and interned in the concentration camp at Amersfoort. 300 were later sent to Germany.

The part taken by Rauter in this and similar cases was illustrated by a written communication of his to the burgomaster of Beverwijk of 30th June, 1943 :

> " The arrest of 480 young men of the ages of 18 to 25 is a reprisal action with regard to Beverwijk municipality, the intention being to prevent further attempts from being started. . . . For that reason it had to reach as wide a circle of persons as possible, a great number of whom I am quite convinced are innocent. The 400 who remain and who are in Amersfoort camp are going to Germany and will there be set to do enclosed work under decent conditions for the Arbeitseinsatz.
>
> " I have to stick to these measures because it must be made quite clear to all Dutch municipalities that in similar cases I shall answer in the same way, and it is only in this fashion and by such measures that I can frighten the circle of those who act thus and who, at least outwardly, assert that they are acting in the national interests."

Rauter's initiative in carrying out the above measures, within the general Nazi policy of taking acts of revenge against the civilian population of occupied countries, was shown in the case of his differences with the chief of staff of the Army Commander, General Wuehlisch. In a long report to Himmler of 13th January, 1944, he complained of Wuehlisch's opposition to having hostages put to death without prior investigation being made as to the identity of the perpetrators. Wuehlisch also made attempts to remove cases involving members of the Wehrmacht from Rauter's hands. The accused's report contained the following passages :

> " These last two days I have twice talked at length with the Wehrmachtsbefehlhaber Chief of Staff, Generalleutnant Wuehlisch, about the atonement to be made for the attack on the Wehrmacht man in Almelo. Von Wuehlisch won't go along with me . . . and demands that a closer connection with the perpetrator must at all events be produced. To this I answered that the official police inquiry had been wound up and that, further, there was no prospect of catching the author through the police. I suggested having shot 10 out of the 50 inciters whom I had had arrested the same night in Almelo and district, as I was afraid that if nothing happened the number of attacks on members of the Wehrmacht would rise. I pointed to the Amersfoort case. To this Von Wuehlisch answered that this happened to be a Dutchman. He is as sticky as dough and just won't collaborate!
>
> " He then asserted that satisfaction for the S.S. man was a matter for the Wehrmacht and not for the Higher S.S. and Police Leader, as the Waffen-S.S. belonged to the Wehrmacht. I countered this by saying that the Waffen-S.S. are special disposal troops which, via the Reichsfuehrer S.S., come directly under the Fuehrer and that only the active divisions are attached to the Army and with it the Wehrmacht."

Rauter received the following reply by telegram from Himmler :

" Letter 13th received. No need to worry about the Chief of Staff. I order you to carry out reprisal and anti-terrorist measures in the sharpest way. To neglect such measures would be the only official crime which you could commit in these cases. Complaints only do you honour."

After this Rauter felt authorised to act without restrictions so that cases of putting to death of hostages increased in number. The following three public announcements made by the accused were recorded :

" The Hoehere S.S. und Polizeifuehrer Nordwest announces :

As a result of the cowardly attempt for political reasons on the life of the Attorney General, Dr. J. Feitsma, the following persons were summarily shot on 7th February, 1945, as a retaliatory measure :

(1) J. Smuling, Freemason and member of the Supreme Court,

(2) Dr. W. J. H. Dons, vice-president of the District Court in this place,

(3) Dr. J. H. Hulsmann, Judge of the Criminal Court in this place,

(4) J. Bak, communist leader and leader of a resistance organisation,

(5) C. W. Ittmann, communist medical practitioner ; all of Amsterdam."

The second announcement read :

" The Higher S.S. and Police Leader and General Commissioner for Public Safety announces :

" On account of the cowardly political murder in Rotterdam on 15.7.44 of Mr. van Daalen, departmental head of the Municipal Registration Office, a number of terrorists and saboteurs already in custody were summarily shot on 17.7.44."

The third announcement read :

" During the evening of 27.11.44 armed terrorists attacked the farmer J. Huisman on his farm and shot down the latter's son Henry, accusing him of supporting the German Wehrmacht. H. Huisman was severely wounded. As a result of this a number of arrested terrorists and saboteurs were summarily executed on the evening of 28.11.44 ; these were : [there follow 10 names.]"

The accused made partial admission of guilt. He acknowledged that " sometimes " innocent persons were shot by his orders as a " reprisal " for murders or murderous assaults on members of the German occupying authorities, and that this took place in the cases at Haarlem and Soest reported above. He admitted that decisions were made every time by him, the Reich Commissioner, Seyss-Inquart, and the Army Commander, General Christiansen, shortly after the murder or assault. He also admitted that the expression used in public announcements and other documents " shot while attempting to escape " often meant that the vicitim was deliberately shot without an attempt to escape being made.

Further admissions of the accused disclosed that in July, 1944, Hitler had suspended the jurisdiction of occupation courts in criminal cases, and that

the German security police was entrusted with imposing punishments without trial. A number of inhabitants were always kept in custody as " Todeskandidaten " (death candidates). These were publicly executed in retaliation for offences committed against the occupying authorities.

In 1943 the killing of innocent inhabitants in " reprisals " took the shape of a systematically organised action, and was given the code name of " Operation Silbertanne " (Silver Fir). This " operation " was decided upon and devised by the accused at a conference held with the head of the so-called Germanic (Netherlands) S.S., Feldmeyer. Testimonies given by former members of the German Security Police and other police branches under Rauter in the Netherlands provided details. The following account was given by Goerg Haas, former Sipo (Sicherheitspolizei) and S.D. (Sicherungsdienst) head of the local police station (Aussendienstelleleiter) at Groningen :

> " The actions were to be carried out by the S.D. in close co-operation with the Germanic S.S. Orders would be given by B.d.S.(1). The main idea was that everywhere where assaults on members of the N.S.B.(2) or other National-Socialists took place there should be a counter-action. This was intended purely as a reprisal. Everything concerned with the matter must of course be kept strictly secret. For that reason the name ' Silbertanne ' was given to everything connected with this business, this name being used particularly in telephone conversations.
>
> " The following directives were also given :
>
> " If an act of terrorism had taken place anywhere the leader of the S.D. Aussendienststelle concerned, this for the North was me, would report this to the B.d.S. The answer from the B.d.S. would come back by telephone or teleprinter. This would be ' Silbertanne ' with a number, this meaning the number of people who were to be shot. . . . In the course of time I reported several cases of local terrorism to the B.d.S. I then received an answer the above way.
>
> " The rule was that for one person shot dead by terrorists three were to be disposed of by ' Silbertanne ' . . . The names of the persons to be shot were not mentioned by the B.d.S. The leader of the Aussendienststelle concerned had to see to this himself. . . . One further thing I can say in this connection is that Feldmeyer(3) was with me once and spoke to me about ' Silbertanne.' He said then that the General Commissioner for Public Order and Safety had given orders that ' Silbertanne ' should automatically operate after each act of terrorism, that is already before the order from the B.d.S. to this effect would come. I said to Feldmeyer however that I was only going to proceed to measures of that sort if the order were given by the B.d.S."

Witness E. Naumann, who held the rank of General of the Police and was " Befehlshaber der Sicherheitspolizei (Sipo) und des Sicherungsdienstes (S.D.)," testified that it was Rauter who gave the orders for the carrying

(1) Befehlshaber der Sicherheitspolizei (Commander of the Security Police) placed under Rauter.

(2) Quisling National-Socialist Movement in the Netherlands.

(3) Head of the Netherlands SS.

out of operation " Silbertanne," and confirmed that the latter was put into effect by the Sipo and S.D. and the Netherlands S.S.

The accused admitted the above facts and acknowledged the killing of 45 Dutchmen as a result of operation " Silbertanne."

3. *The Defence*

The accused introduced pleas on several questions of law, as well as on some questions of fact.

He challenged the jurisdiction of the Court on two grounds. First, he claimed a trial by an international court, submitting that, according to certain provisions of the Netherlands Law, the jurisdiction of Dutch courts were limited by exceptions recognised in international law. Such an exception would appear in his case as he could be held answerable only on the basis of the laws and customs of war, which fell within the scope of international jurisdiction. Alternatively, the accused invoked the right to be tried as a prisoner of war, under the rules of the Geneva Convention relative to the Treatment of Prisoners of War, of 1929. This inferred the jurisdiction of a military tribunal competent to try officers of the accused's rank, that is the Netherlands Supreme Military Court.

Pleas were also made in regard to certain principles of substantive law.

One of the pleas concerned the general principle of penal law that no act is punishable unless provided against by express rules preceding its commission (*Nullum crimen, nulla poena sine lege*). The accused's contention was that acts with which he was charged were made punishable in the Netherlands by means of *ex post facto* legislation enacted on 10th July, 1947,[1] so that they were not punishable prior to that date.

Another plea concerned the instruments of surrender of 15th May, 1940, by which the Netherlands forces had capitulated to the German invaders. It was contended that these instruments had imposed upon the Dutch population the duty to refrain from committing acts of violence and thereby resisting the occupying authorities. It was also contended that for the same reason a similar obligation lay upon the Netherlands Government in exile, who had no right to organise such a resistance and incite the Dutch population to take part in it, as, in effect, it did. By acting in this manner, both the Netherlands Government and the Dutch population had violated the laws and customs of war and had thereby relieved the accused of the obligation to abide by such laws and rules, and consequently authorised him to take reprisals.

On questions of fact the following circumstances were submitted :

Regarding the deportation of Jews to the East, the accused had no knowledge of the fact awaiting them at their destination, namely of the fact that they would be ill-treated or exterminated.

The deportation of Dutch students to Germany was done out of military necessity, as these students belonged to classes liable to be called up by the Dutch resistance movement and a landing of the Allies in the Netherlands was feared at the time.

As regards the total range of the offences charged, responsibility was denied on the grounds that authority to make decisions for their commission did

[1] See pp. 112-113 below.

not belong to the accused, but to other persons or agencies. The plea of superior orders was invoked in this connection.

4. *Findings and Sentence*

The accused's pleas were dismissed for reasons recorded in the Notes of this Report. He was found guilty on all the seven counts of the indictment, as recorded in the beginning of this Report, that is of acts containing, in the opinion of the Court and according to Netherlands law, the elements of kidnapping, extortion, larceny, illegal deprivation of liberty resulting in some cases in death, homicide and murder, and constituting under the rules of international law, ill-treatment, deportation for slave labour, murder and plunder of private property.

The Court passed a sentence of death.

III. PROCEEDINGS OF THE SPECIAL COURT OF CASSATION

1. *The Accused's Appeal*

Appeal against the Judgment of the Special Court at the Hague was made only by the accused. It was submitted to the Special Court of Cassation, within the terms of its appellate jurisdiction over trials of war criminals.[1]

The accused challenged the first Court's judgment on different legal grounds simultaneously, which included some of the pleas previously submitted to the first court.

(i) *Jurisdiction of Netherlands Courts*

The plea that Netherlands Courts, both of first instance and appellate, lacked jurisdiction to try the accused was repeated on the same grounds as was done before the first Court. Art. 13 (A) of the Netherlands General Provisions Law was invoked, according to which :

> " The competency of the judge and the feasibility of legal judgments and of authentic instruments are limited by the exceptions recognised in international law."

A similar rule is contained in Art. 8 of the Netherlands Penal Code, which was also referred to by the accused.

It was submitted that such an exception was present in the case tried, on the grounds that jurisdiction over violations of the laws and customs of war belonged to international and not municipal courts of law. It was further submitted that even if this were not the case, the accused was entitled to be tried under the terms of Arts. 45, 46 and 63 of the Geneva Convention relative to the Treatment of Prisoners of War. This, in view of his rank, would give the accused the right to be tried by the Netherlands Supreme Military Court, and not by the two Special Courts which became involved in the case.

(ii) *Right to Reprisals*

The plea was also repeated that the accused was relieved of the obligation of abiding by the laws and customs of war, and was, as a consequence,

[1] See pp. 111-112 below.

entitled to take reprisals. The following two arguments were re-stated in the following terms :

(*a*) The Netherlands Government in exile, both by means of the wireless and by sending weapons, had from London systematically incited the Dutch population to resistance against the German occupying authorities, and the population had answered these incitements both individually and as a whole, in violation of the terms of capitulation of 15th May, 1940 ;

(*b*) The population of the occupied territory, in violation of the laws and customs of war, had refused to bear quietly the burden of the occupation and in every possible manner had rebelled against the German authorities.

For these reasons the German Reich, and the accused as its executive organ, were entitled to commit the acts charged.

(iii) *Wrongful application of rules of substantive and procedural law*

The accused appealed against the findings concerning the legal nature of the offences described in the first charge, *i.e.*, the treatment of the Jews. On this count the first Court had found the accused guilty of acts containing, according to Netherlands law, the elements of " kidnapping and homicide." The first offence (kidnapping) covered cases of deportations, outside Holland, whereas the second offence (homicide) was meant to cover cases in which Jews were killed in consequence of deportations. The accused's appeal was that he had been prosecuted for " the arrest of the Jews as part of their deportation," and not for the deportations themselves. His claim, in this connection, was that from the Court's findings on points of fact it could not be deduced which facts were taken by the Court as proving his guilt of " kidnapping[1] and homicide."

The accused raised also a number of objections with reference to Netherlands rules of procedure affecting the form and contents of indictments and judgments. He complained that both the writ containing the charges and the judgment of the first Court contained inadequate and insufficient statements regarding the facts. In the judgment this made it impossible to ascertain which acts or facts were declared proved and which were not, and in particular whether he had been found guilty of having committed the alleged offence in person or only through his subordinates.

(iv) *Wrongful imposition of Penalty*

Finally, the accused appealed against the death penalty. He invoked provisions of Netherlands penal law according to which the sentence should correspond to the nature and gravity of the crime, and the circumstances attached to the person of the perpetrator and the facts of the crime. The accused's contention was that, in view of the circumstances, the sentence was utterly disproportionate and that the first Court had neglected to consider his pleas affecting the issue of the penalty. These were the pleas

[1] " Kidnapping " is provided against by Art. 278 of the Netherlands Penal Code, which runs as follows : " He who conveys someone over the borders of the Realm in Europe with the intent to place him illegally in the power of another, or to place him in a helpless situation, shall be guilty of kidnapping and shall be punished with imprisonment not exceeding 12 years."

that he had acted in self-defence and out of necessity, and also pursuant to " statutory provisions, " that is to rules in force in the Netherlands during the occupation.(1)

2. *Findings and Sentence*

The Special Court of Cassation passed judgment, quashing and revising the judgment of the first Court in regard to findings concerning the legal nature of the offences of which the accused was found guilty, and confirming it in every other respect, with only one exception of substance.

The revisions were of a technical nature and were made with a view to making the findings correspond more adequately to the definitions governing the punishment of war criminals in Netherlands law. So, for instance, adjustments were made as to the elements of acts punishable under Netherlands law and constituting war crimes and crimes against humanity as punishable under rules of international law.(2) An additional statement was made which specified which of the acts punishable under Netherlands law constituted war crimes, and which crimes against humanity.

All the pleas of the defendant were rejected and the accused's guilt and death penalty were confirmed. The reasons concerning the rejection of the most important pleas will be found later in the Notes on the Case. Only one revision was made regarding acts of which the accused was found guilty. The accused was not found personally responsible for the death of the persons deported by him, but only of deportations and acts incidental to them, such as illegal arrests and detentions.

The findings of the Special Court of Cassation relating to the imposition of penalty and the severity of the punishment actually imposed, deserve attention. They read as follows :

> " When trying war crimes and other crimes treated on the same footing and committed by persons of enemy nationality, the task of the Netherlands judicature is not confined to the punishment of infringements of Netherlands justice, but has rather the object of giving expression to the sense of justice of the community of Nations, which sense has been most deeply shocked by such crimes.
>
> " The Nations united in the war against the Axis Powers have repeatedly declared the necessity of trying war criminals and their intentions to this effect found their embodiment in the Declaration of Moscow of 30th October, 1943, with reference to German cruelties in

(1) The relevant Netherlands provisions for necessity and self-defence are the following : Art. 40 of the Penal Code : " He is not punishable who commits an act to which he was urged by absolute necessity." Art. 41 of the Penal Code : " He is not punishable who commits an act impelled by the necessary defence of his own or another's body, chastity or property against immediate, unlawful assault. The transgression of the limits of necessary defence is not punishable if it was the immediate result of a violent emotion caused by the assault." The plea concerning " statutory provisions " is covered by the Penal Code and the Military Penal Code. Art. 42 of the Penal Code reads : " He is not punishable who commits an act in carrying out a statutory provision." Art. 38 of the Military Penal Code provides : " He is not punishable who in time of war and within the limits of his competency, commits an act allowed by provisions of the Rules of War, or whose punishment would conflict with a pact in force between the Netherlands and the Power with which the Netherlands is at war, or with a provision prescribed as a result of such pact."

(2) See comments on Art. 27 (A) of the Netherlands Extraordinary Penal Law Decree of 22nd December, 1943, pp. 112-113 below.

occupied Europe, according to which Declaration the German officers and men and members of the Nazi party who were responsible for, or by giving their permission participated in, cruelties or crimes, should be sent back to the countries where their horrible deeds were carried out in order that they could be tried and punished in accordance with the laws of those liberated countries and of the free Governments which were to be established there.

" This Realm associated itself with the said Declaration, accepted the competency and obligation in international law arising from it, and enacted the necessary statutory provisions in the matter.

" The international elements which . . . characterise the nature of the intervention of the Supreme Netherlands Authority [Parliament] in the punishment of war criminals, must also determine the judgment which this Court, administering the law in the name of that authority, is called to deliver.

" With particular regard to the imposition of the punishment, the above considerations must be allowed to be felt in the sense that the gravity of the acts committed and the proportionate punishment of them must be decided according to an objective standard. . . .

" This Court, taking all this as true, can come to no other conclusion than that of the Special Court and is of the opinion that on correct grounds, with which this Court associates itself, the first court imposed the gravest penalty on appellant.

" Indeed the acts charged against appellant and declared proved . . . betray such a reprehensible mentality, bereft indeed of every conception of right or morality, and to such an extent did they bring with them serious results for innumerable victims of the reign of terror exercised by appellant, that the latter can alone pay with his life for his conduct.

" This Court will also accept that appellant allowed himself to be guided by his zeal for the promotion of the interests of his country and the furthering of a German victory, using all the resources at his command to this end.

" However, this provides no grounds for excuse or reasons for mitigation of punishment for the appellant, as feelings of patriotism can never signify a licence to conduct a war with criminal means, condemned indeed by international law, nor to apply inhumane measures of terrorism to the populations of occupied territories.

" Together with the Special Court, this Court considers as exceptionally serious the appellant's actions against the Jewish portion of the Netherlands nation, and also the measures with regard to the ' Arbeitseinsatz ' including under this term the deportation of students —this in connection with the unspeakable misery which was brought as a result to countless victims and their families, and in particular considers with extreme gravity the appellant's share in the killing of innocent persons.

" The appellant may be presumed to possess sufficient discrimination so as to have been clearly aware that such cowardly and furtively committed acts can never fall within the limits set to the exercise of an occupant's powers.

" During the hearing of his case the appellant, while asserting his innocence, has stated that he recognised the right of the Netherlands nation to retaliation, and that to this end he placed himself at the disposal of the Netherlands Government.

" Such a statement must be denied any practical significance for the very reason that it was made with the assumption that the Netherlands Government would be competent and prepared to victimise an innocent person for the suffering caused to its subjects during the war, a train of thought which is not in accordance with the conviction of what is right in this land, nor with the moral conceptions of the Netherlands nation.

" By the said statement, however, the appellant has given evidence that he also has a lively understanding of the frightful results of the German administration during the occupation, so that this Court, now that the appellant has been found guilty on account of his important share in that administration's misdeeds . . . finds in the said statements a confirmation of its opinion that no lighter punishment than that imposed by the Special Court could suffice."

B. NOTES ON THE CASE

1. THE COURTS

The Special Court in the Hague was one of five courts in the first instance which were instituted in Holland for the trial of, among other offenders, war criminals, under the terms of two decrees of 22nd December, 1943 (Statute Book of the Kingdom of Netherlands No. D.62 and D.63), and of a third decree of 12th June, 1945 (Statute Book No. F.91) as amended by a decree of 27th June, 1947 (Statute Book No. H.206). The Court was composed of three judges, one of whom was a military judge, as required by the above decrees. The proceedings were held under the rules contained in the said decrees, and substantive law applied as prescribed in the Extraordinary Penal Law Decree of 22nd December, 1943 (Statute Book No. D.61), as amended on 10th July, 1947.

The Special Court of Cassation was likewise instituted by the above decrees as a special court of appeal in trials held for offences provided against by the Extraordinary Penal Law Decree No. D.61 of 1943, which includes the trial of war criminals under the terms of a law of 10th July, 1947. This law amended the Extraordinary Penal Law Decree D.61 by adding to it a new Article 27 (A), which made express provision for the trial of persons guilty of war crimes or crimes against humanity, as defined in the Charter of the International Military Tribunal at Nuremberg of 8th August, 1945. The amendment contained also precise directives as to how the penalties were to be imposed under the rule and provisions of Netherlands municipal law.

The judgment of the Special Court of Cassation was pronounced in accordance with a provision prescribing that, where appeal is made for " wrongful application or violation of the law," that is for faulty application of rules of substantive law,(1) the Special Court of Cassation passes its own

(1) In Netherlands law wrongful application of the rules of procedure constitutes a separate category of appelate cases. Wrongful application of rules of substantive law comprises the imposition of inadequate penalties.

judgment, instead of quashing the judgment of the first court and directing a new trial.(1)

2. THE JURISDICTION OF NETHERLANDS COURTS OVER WAR CRIMES

Both the Special Court at the Hague and the Special Court of Cassation rejected the pleas with which the accused had challenged their jurisdiction, and gave detailed reasons for their concurring decisions. In doing so they examined, among other questions, the relevance of the Geneva Convention relative to the Treatment of Prisoners of War, 1929, as invoked by the accused. They based their findings on general principles of international law in their relationship to Netherlands municipal law, and on specific rules of the latter which regulate their competence in the field of war crime trials. The views expressed with regard to international law are illustrative of principles generally accepted by the community of nations, and according to which implementation of the laws and customs of war falls within the purview of municipal jurisdiction in the same manner as that of many other rules of international law. The opinion of the Special Court of Cassation in respect of the applicability of the Prisoners of War Convention, 1929, may be regarded as one of the best authoritative pronouncements on the subject.

(i) *Jurisdiction under Art.* 27 (A) *of Extraordinary Penal Law Decree*

Competence over trials of war criminals was conferred upon Netherlands courts of law by Art. 27 (A) of the Extraordinary Penal Law Decree No. D.61 of 22nd December, 1943. Art. 27 (A) was introduced by a law of 10th July, 1947, as a result of developments on the subject of war crime trials by Dutch courts which are recorded elsewhere.(2) This Article, besides placing war crimes within the purview of the Netherlands national courts' jurisdiction, lays down the rules of substantive law under which war criminals are liable to punishment by Dutch Courts. It reads as follows :

> " 1. He who during the time of the present war(3) and while in the forces or service of the enemy State is guilty of a war crime or any crime against humanity as defined in Art. 6 under (*b*) or (*c*) of the Charter belonging to the London Agreement of 8th August, 1945, promulgated in Our Decree of 4th January, 1946 (Statute Book No. G.5) shall, if such crime contains at the same time the elements of an act punishable according to Netherlands law, receive the punishment laid down for such act.
>
> " 2. If such crime does not at the same time contain the elements of an act punishable according to the Netherlands law, the perpetrator shall receive the punishment laid down by Netherlands law for the act with which it shows the greatest similarity.
>
> " 3. Any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment as laid down in paragraphs 1 and 2 (above)."

(1) An account of the jurisdiction of Netherlands Courts in war crime trials, as well as of the Extraordinary Penal Law Decree No. D.61 of 22nd December, 1943, as amended on 10th July, 1947, will be found in the *Annex* to Volume XI of this series.

(2) See *Annex* to Volume XI of this series, pp. 89-91.

(3) *i.e.*, the Second World War, 1939-1945.

It will be noticed that, by making punishable war crimes and crimes against humanity as defined in the Nuremberg Charter, the above provision placed the laws and customs of war, as contained or evidenced in the Charter, within the direct competence of Netherlands Courts. Reference to this effect of Art. 27 (A) was made by both Courts in the trial under review, in addition to other considerations.

(ii) *Findings of the Courts*

It will be remembered that the accused had invoked Art. 13 (A) of the Netherlands General Provisions Law and Art. 8 of the Netherlands Penal Code, according to which the jurisdiction of Netherlands Courts is limited by " exceptions recognised in international law."

The Court in the first instance rejected the plea on the following grounds :([1])

> " The greatest diversity of opinion reigns among writers on international law with regard to the question as to whether soldiers in enemy territory are subject to the penal laws prevailing there, so that there can be no mention of an exception recognised by international law.
>
> " The Netherlands legislator has deemed it necessary to enact provisions by the Law of 10th July, 1947([2]) in order to remove doubts as to the possibility of putting on trial those who, while serving with or under the enemy, have been guilty of war crimes or crimes against humanity. The judiciary in the Netherlands is not allowed to test the law for its intrinsic value and is also under the obligation to apply it without comment, but furthermore there is no need to put the legitimacy of the said law in doubt as there is no rule of international law forbidding a belligerent State, either during or after hostilities, to punish war criminals who are in its power.
>
> " It might perhaps be commendable that an international court should exist which could be charged with the trial of war criminals, but such international justice has not yet advanced so far. It is for this reason that, after the first World War, the victors laid the duty of trying their criminals on the vanquished themselves, but nothing much came out of this.([3]) In these circumstances law and justice are better served now that the victors have themselves taken in hand the trial of the serious crimes committed by the Germans during the present war than if these crimes were to be left unpunished.([4]) Moreover, the guarantees offered by Netherlands law to every accused person in order that he may be in a position to defend himself, remain fully unaffected."

([1]) For the sake of easier reading, the texts quoted from the Judgment of the First Court and the Court of Cassation have been reproduced by deleting the words " Considering that " with which every new sentence or paragraph of the reasons given by Netherlands Courts is commenced.

([2]) The law which introduced Art. 27 (A) of the Extraordinary Penal Law Decree No. D.61 previously quoted.

([3]) This is a reference to the trials held in 1920 by the German Supreme Court in Leipzig against war criminals originally wanted by Allied courts under the terms of the Treaty of Versailles. It is generally agreed that in these trials serious offenders escaped either with acquittals or minor punishments.

([4]) On the issue of the legal basis of the jurisdiction of the Courts of the victor over war criminals of the vanquished Power, see H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, British Year Book of International Law, 1944, pp. 60-63.

The Special Court of Cassation concurred with the above views and gave the following additional reasons :

> " Since the first World War the development of international law has consistently moved in the direction of personal penal responsibility of perpetrators of war crimes and of their being tried either by an International Court of Law or by the courts of the injured belligerent State, this on the basis of the experience that many a belligerent State, and especially Germany, proved to be insufficiently inclined to live up to its international obligations towards its opponent with regard to the punishment of members of its own forces who had violated the rules of war to the prejudice of the opponent.
>
> " Under these circumstances, the Kingdom of the Netherlands has, internationally, legal competence over enemy war criminals, as has also been assumed in the Declaration of Moscow of 30th October, 1943, attention also being directed to the Preamble of the London Agreement of 8th August, 1945, with its appended Charter.
>
> " With the enactment of the Law of 10th July, 1947 (Statute Book No. H.233) no doubt can longer exist of the legal competency of the Netherlands judge to exercise this international jurisdiction of the Realm over enemy war criminals within the scope of the Netherlands justice, nor of the legal basis on which the exercise of this jurisdiction takes place."

The Moscow Declaration, which was signed on 30th October, 1943, by Great Britain, the U.S.A. and the U.S.S.R. and to which reference was made above, provided that, without prejudice to major war criminals who were to be given international trials, other war criminals were to be " sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those liberated countries." This principle was repeated in the Preamble to the London Agreement of 8th August, 1945, which provided for the trial of the " Major War Criminals of the European Axis." It was confirmed in Art. 6 of the said Agreement which said that " nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals."

3. THE PRISONERS OF WAR CONVENTION, 1929, AND THE TRIAL OF WAR CRIMINALS

The accused's plea that he was entitled to be tried as a prisoner of war under the rules of the Geneva Convention, was rejected by the first Court for the following reasons :

> " The Geneva Convention . . . provides in Art. 63 that a sentence on a prisoner of war can only be pronounced by the same courts and in accordance with the same procedure as with regard to persons belonging to the forces of the detaining Power. . . . This does not, as Counsel has argued, carry with it that the accused ought to have been tried by the [Netherlands] Supreme Military Court, as in accordance with the decree on the Special Court . . . the dealing with offences committed in territory occupied by the enemy does not belong to the competence

of military courts but to that of the Special Court in the composition of which the military element is represented.

"The accused's further appeal to Art. 46, para. 1, of the said Convention which provides that no punishments may be imposed other than those prescribed for the same acts with regard to soldiers belonging to the National [Netherlands] armies, and to Art. 8 of the Rules of Landwarfare, fails because Art. 27 (A) of the Extraordinary Penal Law Decree, with the violation of which the accused is charged, equally applies to all who, while in the forces or service of the enemy, have been guilty of any war crime or crime against humanity, so that this Article also applies to a Netherlands soldier who would have violated it."

The Court took also into consideration the accused's appeal to Art. 62 of the Geneva Convention, with reference to which he claimed that he had not had the benefit of a Counsel of his own choice. The first Court rejected this plea on the grounds that it was the accused himself who, on 18th January, 1947, requested the Court to assign him a counsel, that he had had this Counsel's assistance at the trial, and that at no time of the trial had he objected to the Counsel assigned.

In this manner the first Court's reasons for rejecting the plea concerning the jurisdiction of the Court envisaged by the Geneva Convention, were based on two main arguments. First, that offences committed in Netherlands territory during the occupation did not come within the competence of Netherlands military courts, but belonged to that of Special Courts, so that the accused could not be tried by the Netherlands Supreme Military Court as could otherwise be the case according to the Geneva Convention. Secondly, that punishment for offences covered by Art. 27 (A) of the Netherlands Extraordinary Penal Law Decree, with which the accused was charged, was equally applicable to Netherlands soldiers who were in the enemy forces or service, so that the accused had the benefit of the same jurisdiction as that existing for Netherlands military personnel, in accordance with the principle lying at the root of Art. 63 of the Geneva Convention.

The Special Court of Cassation, while concurring with the decision of the first Court as to the rejection of the plea, gave other reasons which, as has previously been stressed, may be regarded as one of the best authoritative pronouncements on the subject. The Court drew a clear line between the offences justiciable under the terms of the Geneva Convention and entailing the implementation of its relevant Articles (45, 46 and 63), on the one hand, and the violations of laws and customs of war entailing war crimes jurisdiction, on the other hand. After having referred to the texts of Arts. 45, para. 1, 46, para. 1, and 63 of the Geneva Convention,[1] the Court stated the following :

"It can already be deduced from the place of the . . . Articles within the general body of that Convention, that . . . Art. 63, as one of the provisions relating to the penal prosecution of prisoners of war,

[1] Art. 45, para. 1, reads : "Prisoners of War shall be subject to the laws, regulations, and orders in force in the armed forces of the detaining Power." Art. 46, para. 1, reads : "Prisoners of War shall not be subjected by the military authorities or the tribunals of the detaining Power to penalties other than those which are prescribed for similar acts by members of the national forces." Art. 63 reads : "A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

aims at cases where the latter have committed offences against the authorities of the State in whose power they find themselves in a more serious manner than by a single breach of discipline, this in violation of the rules referred to in . . . Art. 45 and valid for that State's own armed forces, or [at cases] where prisoners of war had committed during their captivity any other crime for which a penal prosecution comes into consideration."

In support of this view the Court made detailed references to rules which had preceded, in draft or final form, the provisions of the Geneva Convention :

" This limited explanation of the aforesaid Article 63, which excludes the latter being applied to war crimes committed by enemy military personnel *before*(1) becoming prisoners of war, finds confirmation in the history of this subject and especially in the history of its origin, as well as in the later application of the 1929 Convention with the complete agreement of the Red Cross Conferences themselves.

" Indeed Articles 31 and 32 of the Russian proposal to the Brussels Conference of 1874, from which arose Article 28 of the Draft International Declaration relative to the Laws and Customs of War(2) drawn up by that Conference, were exclusively aimed at offences by prisoners of war ' committed during their captivity,' and at conspiracies on their part made ' with a view to [commit] a general escape ' or ' against the authorities located in the place of their internment,' and were in no way aimed at deciding anything about war crimes committed by the parties concerned before their captivity as prisoners of war, a category of crimes by the commission of which, according to old established conceptions, such military personnel had already lost the protection to which they have a right in virtue of the prisoners of war law.

" No other opinion was expressed when, during the First Hague Peace Conference, the said Art. 28 was consolidated with Art. 23 of the Draft Declaration of 1874 and became Art. 8 of the Rules of Land Warfare of 1899, which in its turn was incorporated unaltered in the Rules of Land Warfare of 1907.

" This same train of thought was resumed when in 1921 the first Draft was made of the present Prisoners of War Convention, in which appeared Art. 5, reading as follows :

" The prisoner shall have the benefit of the common law of the detaining State, but he must at the same time, abide by its rules ; for all offences committed he shall be subjected to the civil and military laws in force in the country where he is interned. . . .

" This same limitation finds again expression in Art. 49 of the ' Preliminary Draft ' of 1929, the first paragraph of which provided that ' belligerents shall ensure that the competent authorities exercise the greatest leniency in considering the question whether an offence committed by a prisoner of war should be punished by disciplinary or by

(1) Italics are inserted.

(2) References to documents, rules and opinions quoted by the Court were made in French, from texts written in the same language. These are translated in English from the texts quoted for the sake of the reader, and do not bear any official character.

judicial measures,'—a provision from which arose Art. 52 now in force."(1)

Finally, the Special Court of Cassation made reference to the views expressed by the Red Cross International Committee in connection with the Conference of Experts held in Geneva in April, 1947, on the subject of the laws and customs of war. The Court referred to the " Preliminary Documentation supplied by the Red Cross International Committee "(2) and distributed to the Experts, where the following statement was made (p. 146) :

" *Offences committed before capture*

The text of Art. 45 and the discussions which took place about it at the diplomatic conference of 1929 show that the authors of the Convention envisaged only the offences committed during the period of captivity. The Convention contains no provision concerning offences committed prior to captivity."

The Court also referred to the opinion expressed by the Conference of Experts itself, and quoted the following passage from the Report of the Conference :

" So far as war crimes are concerned it was submitted that in accordance with a principle of customary international law, the origin of which goes far back in history, a soldier captured and found guilty of a war crime could no longer enjoy the benefit of the protection ensured by the Convention. He who, while in battle, violates the elementary rules of the laws of war could not invoke the benefit of the Convention for his protection once he has been made prisoner. Most delegations seem to have agreed to this viewpoint."

The Special Court of Cassation reached the following conclusion and decision :

" Under these circumstances the principle of the London Agreement of 8th August, 1945, with its appended Charter and the practice of surrendering for trial to the Governments of those countries where they committed their crimes soldiers accused of war crimes who had been made prisoners of war, this in agreement with the Declaration of Moscow of 30th October, 1943, is in no way contrary to the Prisoners of War Convention of 1929.

" Both the International Military Tribunal at Nuremberg and the various Allied Military and other Courts without exception recognise this same point of view.

" Therefore the position taken by the appellant that under the terms of Art. 63 of the Prisoners of War Convention of 1929 he should be tried by the [Netherlands] Supreme Military Court must be rejected as incorrect, and in connection with this the question as to whether appellant should be considered a prisoner of war in the sense of the said Convention needs no answering.

" Therefore this Court will neither go into the question as to whether the Special Court [in the first instance] had rejected the appellant's

(1) Art. 52 of the Geneva Convention, 1929, which reads as Art. 49 of the Preliminary Draft quoted above.

(2) Published in French, under the title *Documentation préliminaire fournie par le Comité International de la Croix Rouge*, Geneva, 1947.

appeal to Art. 46 of the said Convention on good grounds, for as appears from the above this provision could only be applicable if appellant was tried for crimes committed during captivity as a prisoner of war."

In this manner the above findings bring in the foreground the decisive factor or element for determining the type of cases in which the Geneva Convention is applicable to prisoners of war in the field discussed. The latter applies only in regard to offences committed during the period of captivity. Therefore its rules are not attached to the status of " prisoner of war " taken in itself, but only insofar as a prisoner of war has been guilty of offences incidental to his captivity. From this it follows that a prisoner of war guilty of war crimes which, by virtue of the very nature of the circumstances involved in such cases were committed prior to captivity, can derive no benefit of the status acquired as a consequence of his capture with regard to offences which he had committed prior to having been taken prisoner. He is then regarded as any other alleged war criminal and, in spite of his status of prisoner of war, tried under the rules in force for persons prosecuted for war crimes.

4. THE RULE " NULLA POENA SINE LEGE "

In the course of the proceedings before the first Court the accused had pleaded that, in addition to the lack of jurisdiction of the Netherlands courts as claimed by him, he could be neither tried nor punished for the following two reasons :

(*a*) At the time of the alleged crimes there was no law according to which those who had violated the laws and customs of war could be punished by a foreign State.

(*b*) In the Netherlands the acts charged were made punishable for the first time by Art. 27 (A) of the Extraordinary Penal Law Decree, that is after the alleged crimes were committed.

The accused contended that for these reasons the trial was held under the terms of retrospective legislation, in violation of the general principle, explicitly recognised in Netherlands law, that no act could be punished without the existence of prior rules concerning both the offence and the penalty (*Nullum crimen, nulla poena sine lege*).

This plea was considered and rejected by both Courts.

The provision invoked by the accused from the Netherlands Law was Art. 1 of the Penal Code, which reads as follows :

" No act is punishable except in virtue of a legal provision which has preceded that act. Should there be a change in the legislation after the date on which the crime was committed, the provision most favourable to the accused shall then be applied."

The effect of this provision was suspended in the sphere of war crimes and the other offences justiciable under the terms of the Extraordinary Penal Law Decree No. D.61 of 22nd December, 1943. This was done by Art. 3 of the said Decree :

" For the operation of this Decree the rule laid down in Art. 1 of the Penal Code is irrelevant."

The first court made express reference to this exception but did not wish to confine itself to this argument. It stressed at the same time that the rules under which violations of the laws and customs of war were punishable in international and Netherlands law did not constitute a new legislation, but only a statement of pre-existing laws. The court entered first into the question of the legal basis for suspending the effect of the rule " Nullum crimen, nulle poena sine lege " :

> " The question can be put as to whether the [Netherlands] legislator was competent to make Art. 1 of the Penal Code inapplicable as far as the trial of war criminals is concerned, especially as Art. 23 (*h*) of the Rules of Land Warfare forbids that the rights and claims of the opponent's subjects be declared invalid, suspended or inadmissible.(1) This Article, however, only forbids a discriminatory treatment of enemy subjects and its object is not to bring about changes in the legislation which, as is the case in the present instance with the suspension of Art. 1 of the Penal Code, apply equally to its own subjects and to those of the enemy country. Moreover, it is generally accepted that the rules concerning war crimes and appearing in the Charter belonging to the London Agreement of 8th August, 1945, do not form a new law, but only a formulation of international law which already existed before the war and was prescribed in Conventions and especially in the Rules of Land Warfare, and which were therefore already made punishable in the . . . [Netherlands] Military Penal Code."

The findings of the Special Court of Cassation were entirely centred on this latter feature, that acts for which the accused was tried were punishable under rules which preceded their commission :

> " Indeed the Hague Convention of 1907 relative to the Laws and Customs of War on Land . . . lays certain restrictions on the belligerent parties in their conduct towards each other and towards the population of the occupied territory, expressly forbids certain actions in it and at the same time . . . provides in the Preamble that ' in cases not covered by the rules adopted . . . the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience.' Each deliberate transgression of these internationally established rules of warfare constitutes an international crime, and the appellant wrongly asserts that the criminal character of such actions has only now, afterwards, been provided. In doing so he loses sight of the fact that for a long time such transgressions have been known all over the world as ' oorlogs*misdrijven*,' ' *crimes* de guerre,' ' war *crimes*,' ' kriegs*verbrechen*,' etc., while even before the Second World War the imposition of punishment for such acts took place in several countries, among them Germany.
>
> " The appellant has also incorrectly asserted that Art. 27 (A) of the Extraordinary Penal Law Decree has introduced a new ' crime against

(1) Article 23 (h) of the Hague Regulations provides as follows :

" In addition to the prohibitions provided by special conventions, it is particularly forbidden . . . (h) to declare abolished, suspended or inadmissible the right of the subjects of the hostile party to institute legal proceedings."

humanity' ; indeed this was in so many words subjected by the said Preamble to the ' laws of humanity,'

" From what appears above it follows that neither Art. 27 (A) of the Extraordinary Penal Law Decree nor Art. 6 of the Charter of London to which the said Netherlands provision of law refers, had, as the result of an altered conception with regard to the unlawfullness thereof, declared after the event to be a crime an act thus far permitted ; . . . these provisions have only further defined the jurisdiction as well as the limits of penal liability and the imposition of punishment in respect of acts which already before [their commission] were not permitted by international law and were regarded as crimes.

" The appeal which has further been made by the appellant in this connection to Art. 23 (*h*) of the Rules of Land Warfare, misinterprets this provision, as the said Article . . . can only have a bearing on civil claims.

" In so far as the appellant considers punishment unlawful because his actions, although illegal and criminal, lacked a legal sanction provided against them precisely outlined and previously prescribed, his objection also fails.

" The principle that no act is punishable except in virtue of a legal penal provision which had preceded it, has as its object the creation of a guarantee of legal security and individual liberty, which legal interests would be endangered if acts about which doubts could exist as to their deserving punishment were to be considered punishable after the event.

" This principle, however, bears no absolute character, in the sense that its operation may be affected by that of other principles with the recognition of which equally important interests of justice are concerned.

" These latter interests do not tolerate that extremely serious violations of the generally accepted principles of international law, the criminal . . . character of which was already established beyond doubt at the time they were committed, should not be considered punishable on the sole ground that a previous threat of punishment was lacking. It is for this reason that neither the London Charter of 1945 nor the Judgment of the International Military Tribunal [at Nuremberg] in the case of the Major German War Criminals have accepted this plea which is contrary to the international concept of justice, and which has since been also rejected by the Netherlands legislator, as appears from Art. 27 (A) of the Extraordinary Penal Law Decree."

It will be noticed that the findings of the Court of Cassation include two separate issues on the subject. The first concerns the existence of rules according to which the acts charged against the accused constituted criminal offences at the time of or prior to their commission. The second relates to the punishment attached to such offences. In continental law this last issue is of particular importance as penalties for criminal offences are provided for by statutory law in express terms and with the designation of the specific penalty or penalties attached to each offence, as a rule in terms of the maxima and/or minima punishments. The main argument of the Court on this point was that, at least in the field of international criminal law as related to war crimes and crimes against humanity, express provision for the type

and severity of punishment was not an essential pre-requisite. Decisive was the fact that, in view of its seriousness, the offence was deserving of punishment under all standards of criminal justice of civilised nations.(1)

The above findings are in accord with those made by the International Military Tribunal at Nuremberg in the case against the major Nazi war criminals. In its Judgment the Tribunal made in the first place a statement on the nature and scope of the principle " Nullum crimen, nulla poena sine lege." It determined that the latter was " a principle of justice " and could not therefore result in consequences contrary to the aims pursued by criminal justice, one of which was that it would be unjust not to punish serious offenders for technical deficiencies, if any, of the existing law. This is what the Tribunal said in this respect :

> " In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defence of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes ; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts."

As previously reported, in connection with the Netherlands Courts' findings on the severity of the punishment imposed upon Rauter, similar considerations were made regarding the accused's knowledge of the criminal nature of the acts tried at the time of their commission.(2)

The Nuremberg Tribunal then considered the issue of the existence of rules making the offences charged punishable prior to their having been perpetrated, and came to similar conclusions as the two Netherlands Courts. It lay stress on the fact that acts prohibited by international treaties or conventions needed not be " named crimes " in the relevant texts to constitute criminal offences. Neither was it indispensible that such treaties or conventions should contain express provision as to the penalties to be imposed. Both issues were guided by general principles of criminal law. With reference to the Kellog-Briand (Paris) Pact of 1928, which prohibited recourse to war for the solution of international controversies and which the Tribunal regarded as declaratory of the criminal nature of aggressive wars, the Tribunal made the following authoritative statement on the general issue of the criminal nature of violations of laws and customs of war, as provided against in international treaties and conventions :

> " But it is argued that the Pact [Kellog-Briand] does not enact that such wars are crimes, or set up courts to try those who make such wars.

(1) Compare the *Klinge Trial* in Vol. III, pp. 1-14.

(2) See p. 110 above.

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. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of States which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."

In the light of the foregoing findings it follows that, in the case of Rauter, the plea concerning the maxim " Nullum crimen, nulla poena sine lege " was rejected on the grounds that the offences committed by him were punishable under rules in force at the time of the offences, and therefore preceding the acts tried in accordance with the maxim invoked by the accused.

A word or two should, however, be added in regard to the Netherlands provision which, as previously explained, suspended the effect of the maxim discussed in the field of war crimes and of the other offences punishable under the Netherlands Extraordinary Penal Law Decree of 22nd December, 1943. The said provision should be understood within the meaning stressed by both the Netherlands Special Court of Cassation and the International Military Tribunal at Nuremberg. This means that, fundamentally, the suspension of the maxim does not result in the punishment of an act which was not criminal and punishable at the time of its commission. The suspension rather relates to the technical insufficiencies of the written law, in particular in countries, such as Holland, where criminal matters are solely or chiefly governed by rules of Statutory Law. Its effect then is only to enable trial and punishment where either or both would seem to be barred for lack of texts containing systematically arranged provisions as to crime and punishment in each given type of acts liable to punishment.

An indication as to such an effect in Netherlands law of the suspension of the maxim discussed, is given in the attitude of the Special Court of Cassation prior to the enactment of Art. 27 (A) of the Extraordinary Penal

Law Decree of 22nd December, 1943. As explained elsewhere,(1) at that time the Court denied jurisdiction over war crimes to the Netherlands courts in the first instance for lack of municipal provision placing such offences explicitly within the scope of their competence. It did so in spite of the suspension of the maxim effected by Art. 3 of the Extraordinary Penal Law Decree, which, if understood otherwise than explained above, could have been interpreted so as to make punishable any act not provided against by the then existing Netherlands laws. Another indication is given by the very introduction of Art. 27 (A), without which the Special Court of Cassation did not feel that war crime trials could be held by Netherlands courts even with the maxim " Nullum crimen " suspended. Art. 27 (A), while giving jurisdiction to the courts to apply laws and customs of war relative to war crimes and crimes against humanity, provided that punishment was to be imposed in accordance with existing provisions of the Netherlands Penal Code. This implied the principle contained in the maxim " Nullum crimen " that as regards both the offences and the penalties, the relevant rules were to be and were in fact pre-existent to the acts tried.(2)

5. PERMISSIBILITY OF " REPRISALS "

The major issue of substantive law in the trial under review was that of the permissibility of reprisals.

Granted the Netherlands Courts' competence to try him, and granted also that the trial was not held on the basis of *ex post facto* rules of law, the accused's main defence was that he was relieved of the duty to abide by the laws and customs of war governing the conduct of the occupying Power towards inhabitants of occupied territory, and was, as a consequence, entitled to take reprisals. The accused's defence was that all acts undertaken by him against the Netherlands civilian population were committed as justified reprisals for acts of violence perpetrated by the same population against members of the German occupying authorities.

The arguments of the accused raised several legal issues of importance in regard to his defence, which were intimately connected with, but nevertheless additional and in a sense preliminary to the question as to whether and to what extent the accused was entitled to and did resort to justified reprisals. These issues concerned the effect of an act of surrender, as evidenced in the Netherlands instrument of capitulation of May, 1940, upon the inhabitants and the Government of an occupied country in their relationship with the authorities of the occupying Power. This in turn raised the problem as to whether and, if so, in what circumstances, the civilian population of an occupied territory is entitled to resist the occupant by resorting to acts of violence against him.

It is after due consideration of these issues that the courts approached the problem of justified and unjustified, lawful and unlawful reprisals. Their jurisprudence on this subject is welcome as the question of reprisals is one of great difficulty in international law. As already reported elsewhere,(3) and as stressed by Lord Wright, no complete " law of reprisals "

(1) See *Annex* to Vol. XI, pp. 89-90.

(2) Regarding the plea of *nullum crimen, nulla poena sine lege*, see also Vol. IX, pp. 32-9.

(3) See Vol. VIII of this series, pp. 27-8.

in time of war has yet developed. The limitations of reprisals in time of war are still not well defined, and regarding the applicable rules, one has chiefly to rely on the opinion of learned publicists and on judicial precedents of a differing nature. The Netherlands courts gave, on the occasion of this trial, important views on the subject which will, undoubtedly, contribute to the gradual elimination of the existing uncertainty and difficulties.

(i) *Effect of an Act of Surrender (Capitulation)*

The accused's plea in respect of the Instrument of Capitulation of the Netherlands Forces of 15th May, 1940, was, it will be recalled, that it imposed obligations upon the Netherlands civilian population to refrain from any hostile act against the German occupying authorities, and also upon the Netherlands Government to refrain from orders, or instructions in violation of this obligation. The main argument used in this respect was that the said Instruments were in the nature of a Treaty and had therefore a binding effect upon the Netherlands Government and its subjects.

The above Instrument, officially known as " Conditions for the Surrender of the Netherlands Forces " (Bedingungen für die Uebergabe der Niederländischen Wehrmacht), was signed by the Netherlands Commander-in-Chief of the Combined Army and Navy, General Winkelman. It contained among others, the following provision (Article 5) :

> " An order is to be issued(1) to the administration of towns and communes that every hostile action against the German Army, its members and establishments must be refrained from and that absolute peace and order must be maintained. It must be pointed out that actions to the contrary will be severely punished according to German law."

Recognition was made of a fact which was to be used by the Courts in their findings, that not the entire Netherlands territory was as yet occupied at the time of the surrender :

> " German troops will not occupy that part of Netherlands territory not yet occupied by them."

It was also acknowledged that the settlement was not final, and that this was to be reached only by means of further negotiations.

Provision was made that the " occupation was to be assisted by the Netherlands authorities in every way." The above Instrument was accompanied by two additional documents known as " Points of Negotiations " (Verhandlungspunkte) and " Appended Protocol " (Zusatzprotokoll) which were signed on behalf of the Netherlands Commander-in-Chief. The first contained a clause according to which all Netherlands police forces were to be " retained in service."

The first Court made the following findings in regard to the accused's plea as related to the above documents :

> " The Court does not share the view of Counsel and the accused that from this it follows that it was the duty of the Netherlands Government in London to refrain from inciting the population in the Netherlands to resist the enemy.

(1) By the Netherlands authorities.

" According to international law a capitulation treaty is a pact between commanders of belligerent forces for the surrender of certain troops or certain parts of the country, towns or fortresses, and as such must be scrupulously fulfilled ; the commander who concludes such a pact cannot, however, be considered empowered to bind his government to a permanent cession of territory, to a cessation of hostilities in territories which do not come under his command or, in general, to provisions of a political nature ; such provisions are binding in a capitulation treaty *only if they are ratified by the governments of both belligerents.*(1)

" . . . The pacts to which the defence appeals are purely a capitulation treaty with an agreement for further regulations as to how the same is to be carried out, . . . which pacts had no political implication and therefore also *laid no obligations on the Netherlands Government or on the population of the occupied territory.*(1) The Court is strengthened in this conviction by the circumstance that no appeal was ever made to these pacts from the German side during the occupation to demonstrate that the Government in London was acting unlawfully, and these pacts were never made public or accompanied by an admonition to the Netherlands population to keep calm, which in the circumstances the occupying Power would never have failed to do had it been of the opinion that these pacts contained the implication which the defence now wishes to attribute to them.

" These pacts were strictly adhered to on the Netherlands side, in particular Article 5, in which it was laid down that an order was to be given to the Netherlands population that it must refrain from hostile acts and keep absolute peace, was carried out.

" On these various grounds the Court also considers that the Netherlands Government in London *was justified in inciting to resistance*(1) in this country, and it cannot be reproached for having had arms dropped for this purpose on occupied Netherlands territory from aeroplanes, which formed part of the allied war operations against Germany for which the Netherlands Government does not bear the sole responsibility."

The Special Court of Cassation concurred with the above views in the following terms :

" The Capitulation contains not a single provision which lays obligations on the Netherlands population with regard to the occupant or which would oblige the Netherlands government to anything more than to acknowledge this happening as a lawful capitulation.

" . . . At 4.50 p.m. on 14th May, 1940, without a previous agreement with the invading enemy, the [Netherlands] Commander-in-Chief of the Land and Sea forces [General Winkelman] gave the order to the commanders of the forces in this country to lay down their arms.

" . . . In this meeting [with German representatives] held on 15th May, 1940, there could be no question of negotiations over a capitulation pact to be concluded, and the Commander-in-Chief could then also receive orders from the enemy only in connection with the situation

(1) Italics are inserted.

which had arisen, and at the most could possibly protest against unlawful regulations, as in fact he did do with regard to certain provisions.

" The signing of the so-called ' Bedingungen für die Uebergabe der Niederländischen Wehrmacht ' by the Commander-in-Chief, and similarly *a fortiori* the signing of the two documents following on this, respectively named ' Verhandlungspunkte ' and ' Zusatzprotokoll,' by the commanders under him, *did not thus bear the character of a pact with the enemy forces, but are simply to be considered as a proof of the receiving of orders given them.*(1)

" These and subsequent orders were only legally valid insofar as they related to that part of the Kingdom of the Netherlands brought by the enemy under his power and those Netherlands forces present in that part, with the exception for a short time of Zeeland, and in so far as they were of a military nature.

" As is apparent from the contents of the documents mentioned above the proposition is also particularly incorrect that the so-called capitulation pact was concluded by General Winkelman in his capacity as exceptional bearer of the Netherlands governmental authority in the occupied territory, and that his further measures for the putting into execution of the German orders were generally binding rules for the Netherlands population.

" Therefore there can be no talk of violation of a pact, and this also, as appellant has argued, by other authorities than those which concluded it, and at the most there could possibly be a question of non-compliance with enemy military orders by the Commander-in-Chief.

" . . . In particular, in accordance with Article 5 of the ' Bedingungen ' he [the Commander-in-Chief] had an order given to the municipal authorities and to the population to refrain from any hostile action against the German army, its members and institutions, and to remain unconditionally quiet—in which spirit also H.M. Queen Wilhelmina addressed herself immediately to the Netherlands population—and in accordance with Article 1 of the ' Bedingungen ' the Commander-in-Chief did his duty in handing in weapons and ammunition by the Netherlands forces.

" With the carrying-out of these and other orders contained in the ' Bedingungen ' and its appended documents the immediate results of the capitulation were effected, and henceforth the occupied Netherlands territory came by rights under the régime of the military occupation described in Section III of the Rules of Land Warfare.

" Even if, as the appellant has shown he desired, the orders given by the German commander to the Netherlands forces after their capitulation were to be extended still further by considering the Netherlands Government as bound for the whole of the future duration of the war by obligations analogous to those laid by the enemy on the Commander-in-Chief, exclusively in that capacity, with temporary effect for the transition of a state of war into that of a military occupation,

(1) Italics are inserted. By using the term " pact " in this context the Court presumab meant " Treaty " binding as between States.

the appellant's ground for complaint would still not hold good in any respect.

" Even in a trend of thought of that sort such a permanent lack of freedom would presuppose the occupier himself living up to his obligations in accordance with the Rules of Land Warfare, an assumption which in no way applies to the German conduct of the war and of the occupation, as will be further explained hereunder when discussing appellant's appeal to reprisals."

(ii) *Right to Resistance of Inhabitants of Occupied Territory*

In close connection with the conclusions reached on the subject of the effect of the Surrender in 1940, the first Court came to the further conclusion that the Netherlands civilian population was under no legal obligation to obey the orders of the occupant and, as a consequence, to refrain from acts of violence against him. Resistance to the enemy during the occupation could be " a permissible weapon." While recognising such a right, the Court stressed, however, that if no violation of a legal obligation were involved, acts of violence nevertheless gave the occupant the right to answer resistance by retributive action, *i.e.*, by the imposition of penalties which would not conflict with the laws and customs of war. This implied in the first place that punishment would affect only a person proved guilty of an act of violence, and in no case innocent people. The instance chosen by the Court to illustrate the issue was that of espionage.

The Court's findings on the subject were expressed in the following terms :

" The Court will grant the accused that, viewed from the German standpoint the resistance in the Netherlands to the occupying Power could be considered as unlawful because the illegal fighters in the Netherlands did not fulfil the requirements concerning legal fighting forces as prescribed by the Rules of Land Warfare,(1) and the accused was therefore justified in acting against this resistance.

" To avoid any misunderstanding the Court here wishes to add that from the Netherlands point of view this matter can be considered differently, because the occupying Power only exercises a factual and not a legitimate authority,(2) so that the population of the occupied territory is in general neither ethically nor juridically obliged to obey it as such ; it follows from this that resistance to the enemy in the occupied territory can be a permissible weapon ; there is no contradiction in this because such cases appear more than once in the Rules of War, especially in the case of espionage which is considered as a lawful weapon, while at the same time the belligerent party, which gets hold of a spy belonging to its opponent, has the right to punish such spy, even with death."

Art. 29 of the Hague Regulations contains a description of who is considered to be a spy, and Art. 30 provides that no spy can be punished without proper trial.

(1) This is a reference to Arts. 1 and 2 of the Hague Regulations, according to which the status of belligerent is recognised to irregular combatants under certain conditions two of which are essential : that they carry their arms openly, and that they respect the laws and customs of war.

(2) This is a reference to Art. 43 of the Hague Regulations, according to which the occupying Power exercises only a *de facto* authority in occupied territory.

It should be noted that similar conclusions were drawn by other Netherlands courts on the occasion of other trials. In the trial of Friedrich C. Christiansen,(1) senior commanding officer of the German Army in occupied Holland (Wehrmachtsbefehlshaber), the defence included the argument that the offences with which the accused was charged, had been committed in reply to acts of " illegitimate " resistance committed by the inhabitants in violation of their alleged obligations to refrain from inimical conduct towards the occupant. The Court denied the existence of " illegitimate " resistance, on the grounds that, insofar as international law regulated the way in which a war and an occupation must be conducted once a war had started, the law makes no distinction between a lawful or an unlawful war, or between legitimate or illegitimate occupation. Both lead to the same consequences as to the laws to be observed for the duration of the war between belligerents and between occupant and occupied. As a consequence there was neither a distinction to be drawn between " legitimate " and " illegitimate " resistance. The inhabitants were in any case under no obligation to refrain from " attacks on the army of occupation," so that the occupant could never derive from such attacks the right to act in violation of the laws and customs of war. What he could and was entitled to do is to impose penalties upon those who were guilty under the terms of occupational laws and regulations, in accordance with rules of international law. The Court referred also to the case of spies.

The relevant parts of the findings in the above trial read as follows :

> " The Court wishes . . . to let it be known as its considered judgment that it does not subscribe to the arguments on the grounds of which counsel considers the resistance committed in the present case to be illegal.
>
> " Counsel has certainly advanced that it is a rule of International Common Law that the civilian population must refrain from attacks on the army of occupation, but the Court denies that such a rule would exist in the sense that the civilian population would be violating a duty in law towards the occupant by acts of resistance such as occurred here.
>
> " As long as International Law, when regulating the way a war and an occupation should be conducted, does not discriminate between a legitimate and an illegitimate occupation, a rule of that sort would be unthinkable.
>
> " If such a rule does exist its only meaning is that the civilian population, if it considers itself justified in committing acts of resistance, must know that, in general, counter-measures within the limits set by international law may be taken against them with impunity. . . .
>
> " The above explanation of the alleged rule is in complete agreement with the rules of international law concerning espionage, according to which a belligerent violates no right of the opposing party by making use of espionage, while on the other hand espionage may be countered with impunity by the opposing party, who may inflict the severest penalties on the spies themselves."

(1) Judgment of the Special Court in Arnhem, pronounced on 12th August, 1948.

It thus appears that, according to the Netherlands Courts, the relationship between an occupying Power and inhabitants of an occupied territory is guided by the following rules or principles :

Inhabitants of occupied territory are expected to maintain a peaceful attitude towards the occupant. This, however, is not in the nature of a legal obligation and does not, in law, prevent inhabitants from resorting to hostile acts towards the occupant. The main legal consequence of this situation is that, where inhabitants commit hostile acts, the occupant is not relieved from the duty to abide by the laws and customs of war governing its conduct towards the inhabitants. Therefore, he may not commit acts of arbitrary revenge against them. Breaches of peaceful occupation on the part of the inhabitants entitle the occupant to take proper steps against the offenders, in accordance with the laws and customs of war. These require that the offenders should be given fair trial, with full protection of their right to defence, and that no excessive punishment should be imposed, having regard to the nature of the offence and the degree of the accused's guilt.

In connection with the Netherlands Courts' findings on this subject, it should be noted that one of the Court laid stress on a special type of cases. It referred to cases where the inhabitants had committed acts of violence *in self-defence* of similar acts being committed by the occupant against them. In such cases, said the Court, the acts resorted to by the inhabitants were " a justifiable defence which the occupant may not punish or answer by reprisals."(1)

(iii) *Legitimate and Illegitimate Reprisals*

The question what are legitimate and illegitimate reprisals is, as previously stressed, one of difficulty in international law.

In the theory concerning reprisals in time of peace it is generally agreed that the latter are permitted as a means of enforcing international law. They are one of the two main expressions of self-help on the part of States, the second being war waged in defence of a State's right violated by another State. As such they are an answer to international delinquency and, in time of peace, they constitute a mode of compulsive settlement of disputes wherever negotiations or other amicable means of settlement have failed. The emergence of international bodies, such as the League of Nations and the United Nations, has caused some authoritative writers to raise the issue as to whether, after the acceptance by Governments of obligations regarding the pacific settlement of international disputes, States are still entitled to make use of compulsive means of settlement between themselves, including reprisals. The opinion has been expressed that " so long as the renunciation of the right of war," as one of the two major means of compulsive settlement(2) " is not accompanied by an obligation to submit

(1) Judgment of the Special Court at Arnhem, in the case against Friedrich Christiansen, delivered on 12th August, 1948.

(2) In contradistinction to a war of aggression, which is an international crime, wars resorted to in self-help of the violation of a State's right are not illegal. With the exception of self-defence to a military aggression, their permissibility in other cases has, however, been affected by the Charter of the United Nations. See on this point, Hans Kelsen, *Collective Security and Collective Self-Defence under the Charter of the United Nations*, American Journal of International Law, 1948, Vol. 42, No. 4, pp. 783-796.

disputes to obligatory judicial settlement, and so long as there is no agency enforcing compliance with that obligation and with the judicial decision given in pursuance thereof, *reprisals*, at least of a non-forcible character, *must be recognised as a means of enforcing international law.*(1)

Similar conclusions, though for other reasons, were made in regard to reprisals in time of war. It was stressed that " reprisals between belligerents cannot be dispensed with, for the effect of their use or the fear of their being used cannot be denied.(2)"

The above considerations are illustrative of the fact that international law recognises reprisals, admittedly within certain conditions and limitations, and thus opens the further issue as to what is to be regarded as lawful and what as unlawful reprisals.

We are concerned here with this issue only as it arises in time of war. It is then confined to cases where one belligerent violates or is alleged to have violated the rules of warfare and the other belligerent retaliates in order to bring about a cessation of the existing or alleged violations. The problem with which one is then faced consists in that, as was judiciously observed, " a war crime does not necessarily cease to be such for the reason that it is committed under the guise of reprisals," but that, on the other hand, " as a rule, an act committed in pursuance of reprisals, as limited by International Law, cannot properly be treated as a war crime."(3) The problem consists in determining the scope and nature of acts which the retaliating party is deemed entitled to undertake.

In their findings the Netherlands Courts acknowledged the existence of legitimate reprisals in time of war, and thereby the need to distinguish them from acts constituting abusive or illegitimate reprisals. The findings were made with particular regard to the killing of hostages and other innocent members of the Netherlands civilian population.

The Special Court in the first instance made the following preliminary observations :

> " It is a fact generally accepted that a belligerent has the right to take reprisals as a requital for unlawful acts of war committed by the opponent.
>
> " There exists a doubt over the question as to whether a collective fine may be imposed and innocent citizens killed by way of reprisal."

The Court then laid stress on the fact that " Germany is the only country in modern times which has proceeded with the killing of innocent citizens in occupied territory for the purpose of maintaining peace and order . . . in a manner contrary to the most elementary conceptions of humanity and justice." Reference was made to the Judgment delivered by a United States Military Tribunal at Nuremberg in the trial of Wilhelm List and others,(4) and it was stated that the Netherlands Court " associated itself " with that Judgment.

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(1) See Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition (Revised), p. 118. Italics are inserted.

(2) See Oppenheim-Lauterpacht, *op. cit.*, Section 247, p. 446.

(3) H. Lauterpacht, " The Law of Nations and the Punishment of War Crimes," *British Year Book of International Law*, 1944, p. 76.

(4) See Vol. VIII of this series, pp. 34-92, where considerations on the issue of reprisals are also to be found.

The latter was of the opinion that the killing of hostages was permissible only in exceptional cases, and in this connection made findings as to when such killings were prohibited and thereby constituted criminal acts. These findings included the opinion that it was unlawful to kill hostages if the actual perpetrators of the offence which gave rise to the taking of hostages were or could be found. This was also the case wherever such killings were excessive with regard to the original offence.(1) Reference was also made to the conditions required for reprisals in general by the British and American military regulations. These admit reprisals only as a measure of last resort which may never be taken for revenge but only as a means of inducing the enemy to desist from unlawful practices of warfare. They also require as a condition that the actual perpetrators of the original offence could not be found, and that there is due proportion between the acts undertaken in reprisals and the original offence.

On the grounds of the above principles, the Court found that in Rauter's case the alleged reprisals were all unlawful and for this reason criminal. It was found that the accused never made attempts to apprehend the actual perpetrators of the offences concerned, and killed hostages as a measure of revenge or intimidation. It was also found that by killing several hostages at a time for the death of one member of the German authorities, he had committed excessive reprisals in violation of the rule requiring due proportion.

The issue of reprisals was to be given an entirely different treatment by the Netherlands Special Court of Cassation. It enunciated a rule which excludes without exception the killing of hostages for offences committed by inhabitants of an occupied territory. These findings are of great importance and are therefore reported in detail.

The Special Court of Cassation approached the issue of reprisals from the general aspect of the parties legally involved in it, and came to the conclusion that these were and could be only the belligerent *States* themselves. Actual instances of reprisals taken by persons in the State's service, *i.e.*, State organs such as military or police officers, had no legal status of their own, but were derived from the legal position of the matter as between the States involved. This opinion was based upon the traditional principle that States were the primary subjects of international law, and that, consequently, in the sphere of reprisals they were the only subjects of the rights and duties involved.(2) The Court expressed its views in the following terms :

> " The aim of the defence is to argue that acts which, considered in themselves, are denounced by international law, can lose their unlawful

(1) For more details on the views of the American Tribunal concerned, particularly regarding the exceptional circumstances in which it is, in its opinion, permissible to kill hostages or other innocent persons, see *Trial of Wilhelm List*, Vol. VIII of this series, pp. 34-92.

(2) The above principle is without prejudice to the fact that, apart from States, individuals may also be subjects of international law. The whole field of war crimes and related offences, *i.e.*, crimes against humanity and crimes against peace, is governed by the principle of individual penal responsibility, and is thus based upon the premise that duties which international law imposes by prohibiting acts contrary to the laws and customs of war, are duties the subjects of which are individuals and not abstract entities, such as the State. The Court's findings do not go beyond the point, nor would anything in them warrant a different conclusion, that the right to legitimate reprisals does not belong to individuals, but only to the State, and that conversely violations giving rise to such a right can only be those committed by a State, and not by irresponsible individuals.

character on the grounds that they find their justification in the commission of acts which, according to international law, are unlawful and are committed by the opponent.

" However, in this defence appellant has not sufficiently distinguished between two types of cases which must be sharply differentiated.

" In the proper sense one can speak of reprisals only when a State resorts, by means of its organs, to measures at variance with International Law, on account of the fact that its *opponent*—in this case the State with which it is at war—had begun, by means of one or more of its organs, to commit acts contrary to International Law, quite irrespective of the question as to what organ this may have been, Government or legislator, Commander of the Fleet, Commander of Land Forces, or of the Air Force, diplomat or colonial governor.

" The measures which the appellant describes . . . as ' reprisals '(1) bear an entirely different character, they are indeed retaliatory measures taken in time of war by the occupant of enemy territory as a retaliation not of unlawful acts *of the State*(2) with which he is at war, but of hostile acts *of the population*(2) of the territory in question or *of individual members*(2) thereof, which, in accordance with the rights of occupation, he is not bound to suffer.

" Both types of ' reprisals ' have this in common, that the right to take genuine(3) reprisals as well as the alleged competence to take so-called ' reprisals ' may in principle belong only to the *State* which applies them, so that for a military commander the plea of the right to reprisals can only be a derived and not a proper personal defence, in the sense that this defence . . . is admissible only when the State in whose service the commander acted, was justified by objective standards of international law to take counter-measures, while if this were not the case the commander could possibly make a further plea only in regard to the exemption of—even if unlawful—orders, in which case the defence is to be dealt with as part of the general defence . . . derived from official [superior] orders."

The position thus taken by the Court was that the issue as to whether there was room for legitimate reprisals or whether acts undertaken to this end were unlawful, depended on whether the alleged initial violation was an act of the State, as represented by its organs, and not of individuals who were not or could not be regarded as acting in the State's name. It is from this position that the Court had concluded that the responsibility of State organs was subordinated to that of the State itself, and that in the circumstances the defence was always " a derived and not a personal defence." The success of any such defence depended primarily on the question whether the organ's State was, in view of the conduct of the other State and those representing it, justified in resorting to measures in the nature of reprisals through the organs involved. If the defendant had undertaken such measures on his own initiative, but within his sphere of competence, he had

(1) The Court used the French term " représailles," which is here substituted by the English term of the same meaning.

(2) Italics are inserted.

(3) The term is used in the sense of lawful or legitimate reprisals.

thereby acted on behalf of his State and committed the latter's responsibility. If he had acted upon instructions the position as regards the State's responsibility was the same, and then the only possible defence was that of superior orders. In such case his personal guilt would be considered on the grounds of circumstances such as whether or not he knew or could have known of the illegal nature of the orders, or whether or not his acts were, in spite of such knowledge, undertaken under duress and therefore under pressure of necessity. In the case tried, both Courts came to the conclusion that there was no grounds for admitting such a plea, including that the accused, as alleged by him, had acted out of necessity, in self defence or under duress. It was established that he had on many occasions taken the initiative, and it was held that, in view of his high position and other personal circumstances, he was or must have been aware of the criminal nature of his acts and of the instructions under which he had acted, and was never subjected to any pressure on the part of his superiors.

From the above preliminary and fundamental distinction the Court moved one step further and considered the issue as it presented itself in the specific instance of Germany and the Netherlands during the war of 1939-1945. It described the circumstances which, in theory, would have entitled Germany to resort to reprisals, and acknowledged that the object of reprisals, given the circumstances, could have included the Netherlands population. Its findings on this subject were made in the following terms :

> " The Court will . . . confine itself here to the question as to how far the former German Reich, as occupant of Netherlands territory, was entitled, in accordance with International Law, to take measures which are unlawful in themselves, but which could possibly be justified by a previous wrong done from the Netherlands side.
>
> " With regard to the right of the then German Reich to take *genuine* reprisals against the population of the Netherlands territory occupied by it, if the Netherlands could in fact be charged with any previous offence under International Law against the then German State, the latter . . . would be justified in striking against the population . . . by taking counter-measures, as is . . . recognised in the official explanation contained in the Rolin Report of 1899 concerning Art. 50 of the Rules of Land Warfare, which in 1907 remained unchanged on this point, and in which it was expressly stated that the said Article was enacted without prejudice to the question of reprisals, being a subject distinct from that of the " mesures de répression " [measures of repression] covered by the said Article.(1)
>
> " The objects against which genuine reprisals can be directed by an injured State on account of a previously committed offence under International Law by another State, need not be identical with those [objects] which were affected by the original wrong, and therefore the genuine reprisals, provided they are taken within certain limits and provided attention is paid to a certain proportion, can in principle be directed against all objects which in the given circumstances come into

(1) This is a reference to Art. 50 of the Hague Regulations, which prohibits the use of collective penalties and to which more consideration was to be given by the Court, as reported later. The Rolin Report is evidence that the drafters of Art. 50 had deliberately left open the question of reprisals proper, *i.e.*, of legitimate reprisals, as distinct from " measures of repression " disposed of in Art. 50.

consideration to this end, whether these be the land, sea or air forces of the enemy, other organs of his, his territory, merchant navy or property, his subjects wherever they may be, or the latter's property.

" Among the limits referred to, the prohibition should especially be mentioned of taking reprisals against prisoners of war, as this was expressly prohibited by Art. 2 of 1929 Convention relating to this matter(1).

The Court then entered into the question as to what was the nature of the specific relations that developed between Germany and Holland on account of the war. It reached the conclusion that no wrong had at any time originated from the Netherlands, but on the contrary from Germany, and that the latter had consequently never acquired the right to take reprisals against the Netherlands and its population. These findings were as follows :

" The appeal to this, in principle recognised, right of a belligerent State to take reprisals, provided they are of a permissible nature—eventually also against the population of occupied territory—cannot be of any avail to the defendant, as there was no previous international offence committed by the Netherlands against the then German Reich, so that the Reich mentioned had absolutely no right to take genuine reprisals.

" It is indeed generally known all over the world and also convincingly established by the International Military Tribunal in Nuremberg . . . that the former German Reich unleashed against the Kingdom of the Netherlands, as it did against various other States in Europe, an unlawful war of aggression, and by so doing began on its part to violate International Law, an international offence which in itself the Kingdom of the Netherlands was already justified in answering by taking reprisals against the aggressor.

" The then German Reich made its guilt even greater by making use, in the course of its military operations during the few days in May, 1940, of treacherous means prohibited by the rules of war, such as in seizing by surprise important strategical objects—bridges,—. . . by means of misuse of Netherlands uniforms, contrary to Art. 23 (*f*) of the Rules of Land Warfare ; by means of Netherlands traitors in its service who were instructed how to achieve this result ; and by the bombing of a city—Rotterdam—before the expiration of a regular ultimatum."

" After the military operations proper the then German Reich continued consistently with the commission of new violations of International Law, by, among other acts, withdrawing recognition to the lawful head of the Netherlands State ; setting up in this country a civil administration which was made independent of a military commander ; carrying out systematic Nazification of the Netherlands ; increasingly persecuting Jewish Netherlanders ; compelling Dutch workers [to take part] in the German war effort and industries ; and many other measures prohibited by International Law.

" Thus the Kingdom of the Netherlands far from being by law liable to endure reprisals from the German side, would have, on the contrary

(1) Geneva Convention relative to the Treatment of Prisoners of War.

been justified on all these grounds to take measures of reprisal against the then German Reich of its own right, against which reprisals, permitted by International Law, no counter-reprisals from the German side would have been allowed."

Having come to the above conclusions, and reached the point according to which the accused, as representing the Reich, could derive no legal title from his State to resort to legitimate reprisals, the Court approached, as a separate issue, the question of those acts which the accused had undertaken in retaliation to acts committed by individual Dutch subjects. In view of its findings concerning legitimate reprisals, the Court classified all such acts as " so-called," that is illegitimate " reprisals." It declared that such " so-called reprisals " were subject to the rule contained in Art. 50 of the Hague Regulations, and from this it derived the principle that in no case could such measures affect innocent people. It confirmed the views expressed by the first Court, that by committing hostile acts against the occupant, the inhabitants violated no legal obligation, but that at the same time the actual offenders were liable to suffer adequate penalties on the part of the occupant, imposed within the limits set by International Law. These findings were made in the following terms :

" With regard to retaliatory measures, indicated above as ' so-called reprisals,' of an occupant against hostile acts committed by the population of the occupied territory, this Court wishes here to postulate that, leaving aside the question as to how far the inhabitants of occupied territory, having regard to the risk for their own compatriots, should refrain from acting contrary to the regulations of the enemy in order to prevent retaliatory measures against the remaining population, there can be no question of a duty in law on the part of individual civilians to obedience towards the enemy.

" Unlike the genuine reprisals dealt with above, which the Hague Peace Conferences did not wish to prejudice and which they left unsettled, the ' so-called reprisals ' being retaliatory measures against inhabitants of occupied territory on account of punishable acts by other inhabitants, have certainly found a ruling, namely in Article 50, final part, of the 1907 Rules.

" This Article expressly forbids the imposition of collective penalties, of a financial or other nature, against the population in the matter of individual acts for which they could not be considered jointly and severally responsible.(1)

" From the history of this Article's coming into being it appears that the original aim was nothing more than to restrain as narrowly as possible the occupant from imposing fines on the population as a ' mesure de répression ' in answer to reprehensible or hostile acts by individuals ;

" These retaliatory measures are not regarded as prohibited only in cases of joint responsibility of the population itself. They are therefore *never permitted against innocent persons.*(2) The Conference, later

(1) Art. 50 reads : No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.

(2) Italics are inserted.

expressly declared that this provision originally drafted only for fines, was applicable to all other collective penalties (Rolin Report of 1899 on Article 50).

"The basic idea of this Article is apparently that an occupant of foreign territory—no more indeed than the lawful sovereign or the occupant in his own territory—may not take steps against the innocent for deeds of others.

"In fact such a behaviour, both in the home country as well as in occupied territory, is contrary to all principles of justice and is incompatible with an international convention, in the Preamble of which it is expressly laid down that in the cases not included in the Rules appended to it the inhabitants . . . remain under the protection and governance of the principles of the laws of nations, derived from the usages established among civilised peoples, from the laws of humanity and from the dictates of the public conscience."(1)

The major point in the above detailed findings is the way in which the Court had treated the question as to where the original wrong lay. It took the view that a violation of international law could and had in fact been committed on the occasion of the opening of hostilities between the belligerent Powers concerned. In the solution adopted by the Court this included the issue as to which of the two Powers was guilty of a war of aggression against the other. This opinion was based upon the recent developments of International Law on the subject of aggressive wars. Since the enactment of the Nuremberg and Far Eastern Charters, and the judgments pronounced in the trials of major war criminals held by the International Military Tribunals at Nuremberg and Tokyo, it is an established rule that wars of aggression constitute an international crime, and that those responsible are liable to penal proceedings and sanctions. This position furnished the grounds for the opinion that the launching and waging of a war of aggression against the Netherlands—which is also an established fact,(2)—was an illegal act which, on the one hand entitled the Netherlands State to resort to acts of retaliation, and on the other hand, deprived Germany and persons in its service of the right to answer this by what was alleged to constitute legitimate reprisals.

It will be recalled that the Court referred also to violations incidental to the aggression and affecting rules of a proper conduct of military operations. It also made a strong point of the conduct of the occupant towards the inhabitants during the occupation, and thus strengthened the attitude taken on the subject of the initial wrong done by the enemy by launching a war of aggression. The violations mentioned in regard to the opening of hostilities concerned treacherous means of warfare, whereas those referred to in regard to the period of occupation included the improper establishment of civil administration, attempts at Nazifying the occupied territory, persecutions of the Jews, and the seizure and deportation of inhabitants to slave labour. These breaches of international law were referred to with a view to showing

(1) Quoted from the preamble to the IVth Hague Convention concerning the Laws and Customs of War on Land, 1907. The "appended Rules" referred to by the Court are those of the Hague Regulations respecting the above laws and customs.

(2) See *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, H.M. Stationery Office, London, 1946, pp. 30-31.

that, even regardless of the criminal nature of a war of aggression, the invader and occupant behaved so as to originate violations of the laws and customs of war, and thus, for this reason, lost legal title to claim legitimate reprisals. The fact that such violations were committed by German official organs implicated the German State and created, in this instance as well, a wrong committed by the State at war with the Netherlands.

The premise that reprisals implicate States and not individuals was at the root of the findings made in regard to acts committed against the occupant by the Netherlands population. It will be recalled that the Court had stressed, in this respect, that the defendant had acted in retaliation " not against unlawful acts of the *State* with which it was at war, but against hostile acts of the population of the territory in question, or against *individual members* thereof."(1) The feature implied in the above finding is that the population bears no portion whatever of the State's attributes and can therefore never be assimilated to individuals in the State's service. As a consequence, when committing hostile acts against the occupant, members of the population acted on their own behalf without committing the Netherlands State. This in turn deprived the accused of the pre-requisite that, in order to be entitled to take reprisals, he should have been faced with violations committed by the opposing State itself.

It is from the above theory that the Court drew the logical consequences as to the nature and limitations of the alleged reprisals taken against the Dutch population, and in this connection of the nature and limitations of the hostile acts committed by the same population against the occupant. With reference to the last point, as previously seen, the Court of Cassation concurred with the views of the first court that, by committing such acts, the population did not violate a legal obligation, but that at the same time the individuals concerned were liable to punishment by the occupant. It is the scope of this right to punish acts of individual members of the civilian population that the Court approached with particular care.

The preliminary answer given on this issue was that, as the occupant had no right to resort to reprisals, he could not strike at individuals who had nothing to do with the offences committed, and consequently was not entitled to retaliate against hostages or other innocent persons. This implied the general rule that, wherever the occupant is not entitled to legitimate reprisals, his powers to impose punishment are strictly confined to the actual offenders. In the Court's opinion this rule derived from Art. 50 of the Hague Regulations which forbids the imposition of " collective penalties " of any kind, " pecuniary or otherwise," upon the population wherever it cannot be regarded as " collectively responsible " for acts of individuals. The Court was of the opinion that, as appeared also in the light of the history of Art. 50, the latter implied that collective penalties were in any event to affect only guilty persons as the provision dealt with groups of persons collectively " responsible." This left out of the picture innocent persons, and as a result so-called hostages as well.

It should be observed that one of the main consequences of the above findings is the emergence of a general rule regarding the issue of the killing of hostages. The rule which emerges is that offences committed by members

(1) See p. 132 above.

of the *civilian population* of an occupied territory can *in no case* entitle the occupying Power to kill hostages. All it is entitled to do is to punish the actual offenders, if it can lay its hands on them. The importance of this rule lies in that the killing of hostages, as practised by the Germans since 1870-1871, and in particular during the first and second World Wars, had invariably taken place as a retaliation to hostile acts of the civilian population.

This rule is in accord with the views expressed by classical writers, such as Grotius and Vattel, who refer to the practice of killing hostages as contrary to the laws of nature(1) and as a " barbarian cruelty."(2) It is also in full agreement with the most recent documents of international law. Art. 6 (*b*) of the Nuremberg Charter of 8th August, 1945, explicitly includes in its definition of war crimes the " killing of hostages." This was done without any qualifications and as evidence of the present state of international law, so that, according to the said definition, the killing of hostages is a war crime in any circumstances and does not allow for exceptions of any kind. It may further be observed that, such as it is, the definition of the Nuremberg Charter should be regarded as a mere expression of the general principle contained in the Preamble of the IVth Hague Convention of 1907 and referred to by the Court of Cassation. This principle was expressed in the following terms :

> " Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the *inhabitants* and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the *usages established among civilised peoples*, from *the laws of humanity*, and from the *dictates of the public conscience*.(3)

There is no doubt that the killing of innocent individuals is, in Vattel's words, a " barbarian cruelty," and that, as such, it is contrary to the usages of civilised peoples, to the laws of humanity and to the dictates of the public conscience. The rule of Art. 6 (*b*) of the Nuremberg Charter can, therefore, be understood only as an explicit expression of the above principle in the specific matter of the killing of hostages.

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(1) Grotius, *De Jure Belli ac Pacis, Libri Tres*, Translation, Vol. II, edited by J. B. Scott, Clarendon Press, 1925, pp. 742-743.

(2) Vattel, *Droit des Gens*, London, 1758, I., Liv. II, Chapter XVI, p. 459.

(3) Italics are inserted.