CASE No. 89

TRIAL OF WILLY ZUEHLKE

BY THE NETHERLANDS SPECIAL COURT IN AMSTERDAM
(JUDGMENT DELIVERED ON 3RD AUGUST, 1948)
AND THE
NETHERLANDS SPECIAL COURT OF CASSATION
(JUDGMENT DELIVERED ON 6TH DECEMBER, 1948)

Legal Basis of War Crimes and Crimes Against Humanity—Illegal Detention as a Crime against Humanity—Denial of Spiritual Assistance a Criminal Offence—Plea of Superior Orders in Netherlands Law—Membership of Criminal Organisations in Netherlands Law.

A. OUTLINE OF THE PROCEEDINGS

The accused, Willy Zuehlke, a former German prison warder, was a member of the Waffen-S.S. during the war 1939-1945, and served as such in the German Security Police (Sicherheitsdienst, commonly known as S.D.). In the early stages of the occupation of Holland he was assigned the duty to guard persons detained in the prisons at Havenstraat and Weteringschans. He was there in command of the guards, and remained in office from the beginning of 1941 until September, 1944.

The accused was tried by the Special Court in Amsterdam, found guilty of several offences and sentenced to seven years' imprisonment, with extenuating circumstances.

Both the accused and the Prosecutor appealed to the Special Court of Cassation, which pronounced a judgment of its own. The guilt of the accused was confirmed and his sentence reduced to five years' imprisonment.

I. PROCEEDINGS BEFORE THE FIRST COURT

1. *The Charges*

The charges against the accused included two types of offences : complicity in illegal detentions and ill-treatment of the prisoners.

Under one count charges were made in respect of prisoners of the Jewish race. The accused was charged with having " co-operated in the German policy of humiliation and persecution of the Jews " in that he had :

(*a*) Intentionally " assisted in the illegal detention " of a number of Jews by " keeping and guarding them in illegal detention."

(*b*) Ill-treated Jewish prisoners by " striking them with the hand, fist or any other object suitable for striking," and by kicking them

" violently with a shod foot," whereby prisoners " were caused pain and some of them injured " ; and also by compelling Jewish prisoners to clean prison corridors with a tooth-brush and thereafter " emptying buckets of water over them."

Under a second count the accused was charged with similar offences against the prisoners irrespective of their race or religion. The part taken by the accused from this wider aspect was described as " co-operation in the maintenance of a policy of terrorism and brutality against defenceless arrestees." The charges included physical ill-treatment of the same nature as in the case of the Jews, and also, as a specific offence, denial of " spiritual aid," that is of the attendance of a priest, in the instance of prisoners sentenced to death prior to their execution.

All offences charged were described as having been committed "contrary to the laws and customs of war and to humanity." The accused was held guilty both as actual perpetrator and as a superior who had " permitted the German guards under his command " to commit similar acts.

Finally, the prosecution included, as a separate punishable circumstance, the fact that the accused was a member of " criminal organisations," the Waffen-S.S. and the Sicherheitsdienst (S.D.).

2. *Facts and Evidence*

The acts charged were substantiated by the testimony of eye-witnesses, who had themselves been prisoners under the accused's guard or who had served as guards under the accused. Their testimony contained the following facts :

On many occasions the accused beat Jewish prisoners with his hands or feet, or with objects such as keys, rubber truncheons and the like. He beat them on the face or the head. Jewish prisoners were ill-treated by him in a far more brutal manner than the other prisoners.

Evidence was also produced to the effect that the offices of a priest had been denied to prisoners sentenced to death.

3. *The Case for the Prosecution*

The prosecutor asked that the accused be found guilty under the terms of Art. 102 of the Netherlands Penal Code. This Article covers acts of persons " who in time of war lend assistance to the enemy or prejudice the State with respect to the enemy," and carries, in the absence of special circumstances specified in the Article, a maximum penalty of imprisonment for fifteen years. The Prosecutor's plea was made with regard to lesser punishments prescribed for the offence of illegal detention (Art. 282 of the Penal Code) and ill-treatment (Art. 300 of the same code.) In the absence of more serious consequences for the prisoner, such as severe bodily injury or death, illegal detention is punishable by a maximum of seven years and six months' imprisonment. Similarly, ill-treatment unaccompanied by serious consequences for the victim is punishable by a maximum of two years' imprisonment. No such serious consequences would apply in the accused's case.

4. *The Defence*

The accused pleaded that he had acted upon superior orders and under duress. His contention was that, as a member of the Waffen-S.S., he could not do otherwise than discharge his duties in accordance with orders and methods concerning the custody of prisoners applied by his unit.

5. *Findings and Sentence*

The accused was found guilty on both counts, that is of taking part in the persecution of Jews by illegally detaining and ill-treating them and of taking part in systematic " terrorism and brutality " by ill-treating prisoners altogether. The above offences were described as war crimes and/or crimes against humanity, as defined in Art. 6 (*b*) and (*c*) of the Nuremberg Charter, which constituted at the same time, under Netherlands municipal law, the crime of illegal detention punishable by Art. 282 of the Penal Code, and the crime of ill-treatment punishable under Art. 300 of the same Code.

The Court could not agree with the prosecution that the offences charged fell within the terms of Art. 102 of the Penal Code. If the latter were to be applied it would mean that the defendant, being an enemy, would have " lent assistance " to himself, and this was not the type of case covered by Art. 102(1).

The Court could also not agree that punishment could be imposed for the accused's membership of criminal organisations. The reason given was that the Netherlands metropolitan law had not provided for the punishment of such members and that there was consequently no legal basis for conviction on this ground. In addition, such membership did not add to or substract anything from the criminal nature of the acts committed by the accused against the prisoners.

The accused was acquitted of the specific charge that he was guilty of ill-treating prisoners by denying spiritual assistance to those condemned to death. The Court came to the conclusion that it had not been proved that such denial was contrary to the laws and customs of war. In addition, no evidence was to hand that it was the accused's duty to forward requests for spiritual assistance to the authorities concerned, or that such requests would have succeeded in view of the existing regulations.

The accused was sentenced to 7 years' imprisonment with extenuating circumstances. The circumstances taken into account were that the arrests followed by detentions " did not originate with the accused " and that the latter had " stupidly allowed himself to be carried along with the criminal stream of German terrorism, rather than acted with intent on his own initiative." It was also found that the ill-treatment inflicted was not of a " very serious nature " and that, by ill-treating prisoners, the accused had acted " rather on account of his rough nature than driven by the desire to attack his victims."

(1) The relevant passage of this Article reads as follows : " He who in time of war intentionally lends assistance to the enemy or prejudices the State with respect to the enemy, shall be punished with imprisonment not exceeding fifteen years."

II. PROCEEDINGS BEFORE THE SPECIAL COURT OF CASSATION

1. *Appeal of the Prosecution*

The Prosecutor appealed on two grounds.

While not raising again the issue as to the applicability of Art. 102 of the Netherlands Penal Code, he complained that the punishment imposed under the combined effect of Arts. 282 and 300 of the Penal Code did not correspond to " the gravity of the criminal actions committed by the accused," so that severer penalty should be imposed.

Objection was also raised in regard to the decision of the first court concerning the accused's membership of criminal organisations. The Court had established the fact that the accused belonged to organisations declared criminal by the International Military Tribunal at Nuremberg,(1) and was wrong in holding the view that such membership was not punishable within the jurisdiction of Netherlands Courts. According to Art. 10 of the Nuremberg Charter members of organisations declared criminal by the Nuremberg Tribunal were liable to prosecution by the " competent national authority,"(2) which included Netherlands officers competent for the prosecution of war crimes. Membership of a criminal organisation was in itself a war crime, and therefore fell within the jurisdiction of and was punishable by Netherlands courts.

2. *The Accused's Appeal*

The accused appealed on the following grounds :

That, as was admitted by the first Court itself, the illegal detention of prisoners under the accused's guard had not originated from the accused, but from other German authorities. The fact of having been in charge of the prisoners as a guard could not be regarded as complicity in their being illegally detained.

That the punishment was too severe and did not correspond with the gravity of the offences committed.(3)

3. *The Court's Findings and Sentence*

With respect to the prosecution's appeal the Court concurred with the first Court that the provisions of Netherlands Law applied by it were correctly implemented as to the nature of the offences, and that there was no room for applying Art. 102 of the Penal Code.

It dismissed the plea concerning membership of criminal organisations on the grounds that, in the case tried, such membership was only " a circum-

(1) Both the Waffen S.S. and the Sicherheitsdienst, of which the accused was a member, were declared criminal organisations by the Nuremberg International Tribunals. See *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, H.M. Stationery Office, 1948, pp. 313-315.

(2) Art. 10 of the Nuremberg Charter provides as follows : " In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned."

(3) The accused appealed also on the ground that he could not be held responsible on account of his having been an official of the German State. The Netherlands law provides for increase of the penalty wherever the perpetrator of a war crime is an " official." This is an issue of no particular interest from the viewpoint of international law, and is, therefore, not dealt with in this Report.

stance under which the other acts were committed." There was, therefore, no basis for adjudication on this point as a separate offence.(1)

The accused was found guilty of the offences as established by the first Court, but in view of the mitigating circumstances and the nature of the offences, his sentence was reduced from 7 to 5 years' imprisonment.

B. NOTES ON THE CASE

1. CRIMINAL NATURE OF VIOLATIONS OF THE LAWS OF WAR AND ITS LEGAL BASIS

In its findings concerning the criminal nature of the acts committed by the accused, the first Court entered into the question of the legal basis on account of which such acts were punishable. On this occasion it gave reasons with which the Court of Cassation, whilst concurring with the first Court as to the fact that the acts concerned were criminal, could not agree.

The first Court came to the conclusion that the acts committed were contrary to the laws and customs of war for the following reasons :

(1) The war between Germany and the Netherlands was " an international crime " on the part of Germany. For this reason " everything done by the Germans as members of the occupying authorities, except

(1) The Court's conclusion was that, for the above reason, solution of " the questions of law raised thereby cannot be obtained in this case." As the Court of Cassation had thus remained silent on the subject, it is appropriate to make the following comments. Art. 10 of the Nuremberg Charter treats membership of an organisation declared criminal by the International Military Tribunal at Nuremberg as a separate offence. For this reason it is possible to hold the view advocated by the Netherlands prosecutor that, on this ground, it is a war crime in itself. The question, however, as to the jurisdiction of national courts over this particular crime is a separate issue. When in 1946-1947 the Netherlands Special Court of Cassation had considered the question of the jurisdiction of Netherlands Courts over war crimes, it came to the conclusion that, although Netherlands Courts were, generally speaking, competent to implement rules of international law, they could not do so without express municipal provisions to this effect. The Court took the view that, in the specific field of war crimes, such provisions were not present, and recommended the enactment of appropriate legislation. This was done on 10th July, 1947, as a consequence of which the concepts of war crimes and crimes against humanity were formally made part of Netherlands municipal law as they were defined in Art. 6 (*b*) and (*c*) of the Nuremberg Charter. In these definitions membership of criminal organisations is not specifically mentioned for the obvious reason that it was given separate treatment in Art. 10 of the Charter. As the Netherlands law had, strictly speaking, confined itself to the definitions of the above Art. 6, the opinion of the first Court that an explicit municipal provision was lacking, has also some grounds. On the other hand, however, the said definitions are not limited to the specific instances there enumerated, so that this leaves room for the inclusion of membership of criminal organisations under the concept of war crimes. The matter is one of legal interpretation and, from the viewpoint of Netherlands law, it lends itself to either solution. Finally, there is also the issue of the competence of Netherlands prosecuting officers to open proceedings in this field. Art. 10 of the Nuremberg Charter gives the right to prosecution to the " competent national authority of any *Signatory* " of the London Agreement of 8th August, 1945, by which the Nuremberg Charter was brought to life. The Netherlands was not a signatory, but only an " adherent " to the said Agreement and Charter. Some other adhering Powers met this point by making express provision for the punishment of membership of criminal organisations and treating it at the same time as a municipal law offence punishable independently of the Nuremberg Charter and of the proceedings of the Nuremberg Tribunal. Such course was taken, for instance, by France, Czechoslovakia and Poland. This course was not followed up by the Netherlands. For the history and substance of the Netherlands law, see *Annex* to Vol. XI of this series, pp. 89-91, and Notes in the trial of Hans Rauter, pp. 111-113 above. On the issue of the punishment of members of criminal organisations by competent courts, see *History of the United Nations War Crimes Commission, and the Development of the Laws of War*, London, H.M. Stationery Office, 1948, Chapter XI, especially pp. 303 *et seq.*

that which occurred in the normal exercise of the law," was "illegitimate."

(2) Detaining and guarding civilians on account of their race or religion, as well as ill-treating defenceless civilians "were not military operations" and could not, therefore, be justified by the "necessities of war." In virtue of Art. 43 of the Hague Regulations the occupant was, as a rule, under the obligation to respect the laws in force in occupied Holland, and this meant that it was bound to respect the Netherlands Constitution which, in its Art. 4, guarantees protection to persons and property. In virtue of Art. 23 (*h*) of the Hague Regulations, the occupant was not entitled to suspend the right of the Netherlands population to such protection.

(3) The acts committed were contrary to the laws of humanity, as the latter imposed the duty to "grant aid and protection to the defenceless and needy," whereas the accused's conduct could not be reconciled with this principle.

The Court of Cassation dissented from the first Court's opinion that all acts committed by the Germans against the Netherlands civilian population were criminal because of the war of aggression launched and waged by Germany against Holland. It agreed that the said war was an international crime, and added that on account of this fact the Netherlands "would have been authorised to answer" the aggression "with reprisals, even with regard to the normal operation of the laws of war on land, sea and in the air."(1) However, said the Court, "it is going too far to regard as war crimes all acts committed against the Netherlands or Netherlanders by the German forces and other organs during the war, solely on the grounds of the illegal nature of the war launched by the then German Reich." Such acts might be criminal even if the war itself were lawful.

The Court of Cassation dissented also from the reasons given by the first Court under (2) above, and in this connection came to the following conclusions :

The first Court's opinion that the acts committed were criminal because they did not form part of military operations and were thus not justified by the necessities of war, was based upon the erroneous view that the substance of the laws of war was to permit certain acts, whereas it was the opposite which was true : they prohibit certain acts. For this reason the question as to whether or not an act constituted a "military operation" was not decisive for determining whether it represented a war crime or a crime against humanity. This was to be established as an issue in itself in the sense of Art. 6 (*b*) and (*c*) of the Nuremberg Charter.

It was also "not reasonable" to make reference to Art. 43 of the Hague Regulations, in conjunction with the Netherlands Constitution. The Court did not elaborate on this point, but presumably meant that the criminal nature of the acts concerned did not depend on whether they were committed in violation of municipal law, either altered or suspended or not, but on whether they were contrary to the laws and customs of war taken in themselves. On the other hand, the Court explicitly dismissed the argument

(1) On the attitude of the Netherlands Courts towards the issue of reprisals in time of war, see *Trial of Hans Rauter*, pp. 129-137 above.

based on Art. 23 (*h*) of the Hague Regulations, on the grounds that it was meant only to protect rights at civil law and therefore did not apply in this case.

Finally, the Court of Cassation also disagreed with the reason given under (3) above. An act was not a war crime or a crime against humanity because it violated the "moral rule that the defenceless and needy may claim protection and help." It was so on account of its unlawful nature under the laws and customs of war as expressed in Art. 6 (*b*) and (*c*) of the Nuremberg Charter.

Subject to these particular differences of opinion the Court of Cassation agreed with the first Court's findings that the acts tried constituted war crimes and/or crimes against humanity and were punishable under the provisions of the Netherlands law applied by the first Court.

2. ILLEGAL DETENTION A CRIME AGAINST HUMANITY

The findings of both Courts show that they had found the accused guilty of complicity in illegal detentions, in so far as this applied to prisoners of the Jewish race.

The relevant passages of the first Court's findings were in the following terms :

> "The Court has been convinced and considers legally proved that the accused . . . contrary to the laws and customs of war, . . . :
>
> 1. Co-operated in the German policy of humiliation and persecution of the Jews . . . by :
>
> (*a*) Intentionally assisting in the illegal detention of a number of persons of the Jewish race in that he intentionally kept them illegally confined in the said prisons and guarded them . . ."

The Court of Cassation specified that this fell under the notion of "other inhumane acts committed against any civilian population" before or during the war, as prescribed in the definition of crimes against humanity in Art. 6 (*c*) of the Nuremberg Charter, and as applicable in Netherlands law according to Art. 27 (A) of the Netherlands Extraordinary Penal Law Decree of 22nd December, 1945.(1)

It thus appears that, in this trial, illegal detention was treated as an "inhumane act" on the grounds that it constituted at the same time a case of persecutions on racial or religious grounds, which in itself belongs also to the concept of crimes against humanity as defined in the said Art. 6 (*c*).

The conviction of the accused is an instance of a case in which persons whose part in illegal detentions are purely instrumental are none the less held responsible as accomplices.

3. DENIAL OF SPIRITUAL ASSISTANCE A CRIMINAL OFFENCE

When considering the charge that the accused was guilty of denying the services of a priest to prisoners condemned to death, the first Court came to the conclusion that it had "not been proved" that the accused's refusal was "contrary to the laws and customs of war or to [the laws] of humanity."

(1) See *Annex* to Vol. XI of this series, pp. 90-92.

The reason given by the Court was that no evidence was to hand to show that it was " the accused's duty to forward requests for spiritual assistance " to the competent authorities, nor that such requests " would not have been rejected in advance on the basis of the existing regulations."

The Court of Cassation acknowledged that it was within the first Court's powers to decide that the accused could not be held personally responsible on the above grounds, but it made it clear that, in its opinion, denial of spiritual assistance constituted a punishable offence. Its views were expressed in the following terms :

> " This Court . . . is of the opinion that the refusal to allow spiritual assistance to someone under sentence of death does . . . in itself definitely constitute a crime, both a war crime and a crime against humanity. However, in the present case the Special Court has passed judgment on grounds which are of a *de facto* nature and for which therefore it remains responsible, that in the given circumstances it was not appellant Zuehlke's duty to further requests for spiritual assistance."

4. PLEA OF SUPERIOR ORDERS IN NETHERLANDS LAW

Unlike the course taken by most countries affected by war crimes during the war 1939-1945, in Netherlands metropolitan special war crimes legislation(1) no specific provision was inserted as to the effect of the plea of superior orders on the personal penal liability of the actual perpetrator of a war crime. The Netherlands common penal law contains a general provision,—Art. 43 of the Penal Code—according to which a subordinate is, in principle, not punishable if the offence was committed in execution of an " official order given him by the competent authority." He is, however, liable to punishment if the official order was given " without competence." But even then, his liability is removed if he had considered " in all good faith " that the order was given " competently," and if his obedience to the order was " within his province as a subordinate."

As reported elsewhere,(2) when the enactment of metropolitan Netherlands war crimes laws was under study, the Special Court of Cassation recommended the adoption of the rule contained in Art. 8 of the Nuremberg Charter. This provided the following :

> " The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

The starting point of the above rule was thus the opposite of the principle expressed in Art. 43 of the Netherlands Penal Code : according to it the subordinate is penally responsible in spite of the orders, and may obtain only mitigation of the punishment according to the merits of the case. Under Art. 43 the subordinate is, on the contrary, not penally responsible, and may be held guilty only in exceptional cases.

When the provisions relating to war crimes were enacted, the above recommendation was not followed up and the rule of Art. 8 of the Nurem-

(1) Besides the legislation in force in Metropolitan Holland, a separate set of rules is in force in the Netherlands East Indies. See *Annex* to Vol. XI of this series.

(2) See *Annex* to Vol. XI, pp. 98-100.

berg Charter was not adopted. This made it uncertain as to what was the position created in Dutch municipal law in regard to war crimes committed upon superior orders. There were, among others, two possible interpretations. The omission of a rule similar to that of Art. 8 of the Nuremberg Charter, could have meant that the rule of Art. 43 of the Penal Code was applicable to war crimes in addition to common law offences and, as a rule, had the effect of relieving from penal responsibility the perpetrator acting pursuant to superior orders. Another possible interpretation was that, in the specific instance of war crimes, the rule of Art. 43 was elastic enough to achieve the same ends as those secured under the Nuremberg Charter. Art. 43 made the subordinate punishable if the orders were issued " without competence " and if the subordinate could not be regarded as having followed the orders " in all good faith " as to their " competency." This made it possible to hold the view that no authority or superior was competent to issue criminal orders, and that consequently every such order was given " without competence."

The Zuehlke trial furnished an occasion to Netherlands Courts, including the Court of Cassation, to make known their views on the subject. They ultimately offered a third solution, according to which neither Art. 8 of the Nuremberg Charter nor Art. 43 of the Netherlands Penal Code were binding upon them, but the issue is treated with regard to certain minimum standards of justice which bring about results similar to those expressed in the Charter.

The first Court expressed the opinion that Art. 8 of the Nuremberg Charter, invoked by the prosecution, was not applicable because it did not, as the Court saw it, express a general rule of International Law and could not therefore be implemented as such by Netherlands Courts. The Court's view was that it constituted a special rule limited to the case of the major war criminals with whom the Charter was solely concerned, and consequently did not apply in the case of other, " minor " war criminals, such as the ones tried by Netherlands and other national courts. In this connection the Court took the view that the " exonerating effect " of a superior order was still valid in the sphere of " minor " war criminals and that therefore the accused had a formal legal basis to plead on those grounds. The Court expressed its opinion in the following terms :

> " The accused has pleaded that official orders were given him by his superiors.
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> " The chief Prosecutor does not consider this plea to be admissible, himself referring to Art. 8 of the Charter whereby an official order was declared to be non-exculpatory.
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> " This provision, however, . . . has no direct application in the present case, but could apply indirectly if it were to be regarded as a rule concerning a special instance of an express general rule of international criminal law.
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> " It is the opinion of the Court that this is not so, and it cannot be understood why the exonerating effect of an official order, which is recognised in one form or another in practically all national legislations, should not be valid in the sphere of international criminal law.
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> " It must be assumed that its operation has been excluded with regard to the ' major ' criminals, because they were considered *a priori* to have

wanted to take part in the criminal system of Germany and were, therefore, made individually responsible for the crimes they committed in this system.

" Consequently the accused has grounds for his plea."

While recognising in this fashion and for the above reasons the accused's right to plead not guilty on the grounds of superior orders, the first Court came to the conclusion that, in his case, the plea could not exonerate him from the charges. It based its findings in this respect on the opinion that subordinates were under the obligation not to carry out orders relating to " actions forbidden by international law," and that ignorance of the relevant rules did not " carry with it exclusion from penal liability " of the subordinates. The Court was also of the opinion that custody of persons detained on account of their race or religion, as well as ill-treatment of prisoners, did not belong to the " sphere of military subordination " ; that the accused must have had " knowledge " of this ; and that he was answerable also under German law, according to which subordinates who knew of the criminal nature of the acts ordered remain penally responsible. These views were expressed in the following terms :

" The Court rejects this plea. Indeed . . . there was no need for him [the accused] in the given circumstances to carry out such orders.

" An order to commit actions forbidden by international law may not be carried out, and a mistaken idea as to the validity or existence of such prohibitive provisions does not carry with it exclusion from penal liability.

" The detention in prison of persons who were incarcerated on the grounds of their origin, or the ill-treatment and humiliation of prisoners, does not belong to the sphere of military subordination.

" The accused, who was not only a prison warder by occupation but had also been trained as a non-commissioned officer, must have known this.

" The accused is also punishable according to provisions in force in Germany, which provide that in spite of an official order a subordinate remains criminally responsible if he knows that the order in question aims at the commission of a punishable act."

The Special Court took much the same course, but furnished a more elaborate legal basis for its findings. It discarded Art. 8 of the Nuremberg Charter for the same reason as the first Court, and also Art. 43 of the Netherlands Penal Code. It laid great stress on the relevance of the German law in the accused's specific case, by taking the view that the responsibility of the accused could best be judged in the light of the latter's hierarchical position under the law of his own country. It was held that this was permissible on condition that the German law in this field met the minimum requirements of justice as recognised by civilised nations, and it was found that this was the case with the German rules concerned. It is on this basis that the Court of Cassation reached the same conclusions as the first Court as to the accused's guilt. Its opinion was expressed in the following terms :

" According to Netherlands law the accused has the right to invoke the plea of official orders as a basis for exoneration from penal liability.

" This right could be limited or excluded only by the presence of a higher rule of law, and in the absence of a rule of international customary law in force during the Second World War, alone Art. 8 of the [Nuremberg] Charter can be taken into consideration in this case.

" This Article, however, does not contain anything before which the Netherlands law . . . should give way.

" As appears from the context of the text [of Art. 8] it relates only to the major war criminals for the trial of whom the International Military Tribunal [at Nuremberg] had been set up, and not to the other war criminals, such as is the appellant himself.

" The said Art. 8 is also not the expression of a principle of international law of wide purport, to be applied to all war criminals without exception.

" All the same, as the Special Court [in the first instance] rightly observes, this provision finds its justification in the exceptional case of the major war criminals within the scope of the German criminal policy.

" The judge is therefore called upon to test appellant Zuehlke's plea of official orders under the written and unwritten Netherlands law in force, according to which the trial of the so-called ' localised ' crimes committed by ' minor ' war criminals takes place pursuant to the Moscow Declaration of 30th October, 1943.(1)

" Art. 43 of the [Netherlands] Penal Code, which is also applicable to military men, does not come into consideration for direct application.

" The judgment of this Court is indeed . . . that an appeal to the above Article is justified only if the authority of the superior giving the order to the subordinate obeying it is based upon Netherlands law or an international rule of law binding upon Netherlands law.

" With the reserve mentioned below, this Court gives its preference to a test under the German law, rather than by an analogous application of Art. 43 of the Penal Code.

" Indeed reason requires that penal consequences of hierarchical subordination be judged according to the official framework within which the accused was placed, provided that his national law answers at least the minimum requirements which can be expected of a civilised nation.

" International law, upon which the trial of war criminals eventually rests, does not permit account to be taken if the accused's national law is below this standard.

" The German law in force during the Second World War did, however, satisfy on this point the minimum requirements.

" Art. 47 of the ' Militärstrafgesetzbuch ' [German Military Penal Code] of 1872, which was promulgated again—and on this point remained unaltered—by a Decree of the ' Ministerrat für die Reichsverteidigung ' [German Ministerial Council for the Defence of the Reich] of 10th October, 1940, . . . reads as follows :

(1) On the text and effect of the Moscow Declaration on the above point, see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, 1948, H.M. Stationery Office, pp. 107-108.

'1. If a penal provision is violated in the execution of an official order, the superior giving the order is alone responsible. Nevertheless the subordinate who obeys is liable to punishment as an accomplice :

(1) If he has exceeded the given order ;

(2) If he knew that the superior's order concerned an act aimed at the commission of a common or a military crime or offence.

'2. If the guilt is small on the part of the subordinate, his punishment can be dispensed with.'

" From this it follows that an order given in the circumstances described in para. 1 under (2) above, does not exclude the unlawfulness of the subordinate's action."

The Court then made reference to authoritative German writers and to judgments rendered by German courts, which both concurred with the Court's conclusion. The Court ended its findings by considering the accused's position in the light of the extent to which he was compelled to act under superior orders, that is with regard to the presence or absence of duress :

" If during the Second World War the doctrine 'Befehl ist Befehl' (orders are orders) was sometimes carried out by the German forces to the extreme of its logical consequences for obviously criminal purposes, no longer compatible with the human dignity of the subordinates, there was no legal basis to do so, and an appeal to duress on the part of the subordinate concerned can at the most be admitted if actual requirements concerning such duress were present.

" The appellant Zuehlke's plea of duress . . . is rejected on the sufficient grounds that it does not appear that any pressure was brought to bear upon him.

" When applying the German law the judge enjoys sufficient discretion to measure the extent of independence left in the face of superior orders according to the importance of the position held by the subordinate concerned.

" With his rank of non-commissioned officer and his position of prison guard only a slight degree of freedom of action can be ascribed to appellant.

" Within this framework some of the grounds on which the Special Court [in the first instance] rejected the appellant's plea of superior orders remain in any case in force.

" Therefore the Special Court has correctly decided that, as the acts with which appellant was charged and which were declared proved, were punishable, so was the appellant himself as their perpetrator punishable, since no grounds for exoneration from punishment have appeared with regard to him."

Apart from the manner in which the plea of superior orders was treated and applied in this trial, the main point of interest from the viewpoint of international law is the attitude taken towards the validity of the principle expressed in Art. 8 of the Nuremberg Charter.

This attitude was that the latter could not be regarded, at least for the time being, as a general rule of international law. This would seem to conflict with the development which took place on the occasion of and after the Second World War, and which was apparent at the time of the trial under review. The position is that, in addition to the Nuremberg Charter, other authoritative documents on the present state of international law, as well as rules of a representative number of nations, have followed the lines of the above Art. 8. Such was the case with the Far Eastern Charter, enacted for the trial of the Japanese major war criminals, and with Law No. 10 of the Allied Control Council for Germany which applies to all categories of war criminals other than those belonging to the class of " major " criminals. Such is also the case with the municipal laws or military manuals issued for the guidance of military personnel of Great Britian, United States, France, China, Canada, Norway, Czechoslovakia, Poland,(1) and even the Netherlands East Indies.(2) This development is evidence that, in the present stage of the advancement of international law as generally understood and as applied by individual nations, the above principle concerning the effect of superior orders upon penal liability for war crimes represents the wider consensus of opinion.(3)

The trial under review illustrates that the differences existing between the principles expressed respectively in Art. 43 of the Netherlands Penal Code and Art. 8 of the Nuremberg Charter, are more of a theoretical than of a practical nature. The former is based upon the principle that, *as a rule*, the subordinate is not guilty when acting upon superior orders he is pledged to obey. The latter is based upon the opposite principle that, again *as a rule*, superior orders do not relieve the subordinate from penal liability and that consequently he is, *as a rule*, liable to punishment as if he had acted without orders. Both, however, operate with exceptions which, in the instance of the Netherlands Penal Code and the German Military Penal Code, bring about practical results similar to those contained in the principle of the Nuremberg Charter. Conversely, the latter makes possible mitigation of punishment which may and in practice do result in freeing the accused from penal responsibility. Whatever the principle chosen as a starting point, the outcome is that cases are tried according to their merits and that justice is done with similar results under either of them.

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(1) For the state of the relevant rules prior to this development see H. Lauterpacht, " The Law of Nations and the Punishment of War Crimes," *British Year Book of International Law*, pp. 69-73. For the rules now in force see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, 1948, H.M. Stationery Office, pp. 280-286.

(2) See *Annex* to Vol. XI of this series, pp. 98-99.

(3) The accounts of the Netherlands law in the above mentioned *History of the United Nations War Crimes Commission and the Development of the Laws of War*, pp. 285-286, and in the *Annex* to Vol. XI of this series, pp. 98-100, were given at the time when the Netherlands Courts had not yet expressed opinion on the subject. They should therefore be understood in the light of the position as it arises from the trial under review.