



Introduction

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Origins and Objectives

This book is concerned with the commercial exploitation of armed conflict. It is about money, war, atrocities and economic actors, about the connections between them, and about responsibility. The key words are ‘connections’ and ‘responsibility’. What sort of legal framework defines these connections and gives rise to criminal responsibility? Which economic actors among individuals, businesses, governments and states are accountable? What is the appropriate forum for accountability? How can the profits of war be recovered and redirected to benefit the victims of war?

The idea for the book was conceived at a conference on ‘The International Criminal Responsibility of War’s Funders and Profiteers’ held at the Chinese University of Hong Kong on 23–24 June 2017 where the above questions were discussed and explored. While it was acknowledged that there was already a growing body of literature covering distinct themes within this broad topic,¹ a comprehensive volume

¹ See, for example, Special Issue on ‘Transnational Business and International Criminal Law’ (2010) 8 *Journal of International Criminal Justice*; J. Kryiakakis, ‘Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare’ (2008) 19 *Criminal Law Forum* 115; J. Kryiakakis, ‘Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge’ (2009) 56 *Netherlands International Law Review* 333; J. Kryiakakis, ‘Justice after War: Economic Actors, Economic Crimes, and the Moral Imperative for Accountability after War’ in L. May and A. T. Forcehimes (eds.) *Morality, Jus Post Bellum, and International Law* (Cambridge University Press, 2012), p. 113; J. Kryiakakis, ‘Corporations Before International Criminal Courts: Implications for the International Criminal Justice Project’ (2017) 30 *Leiden Journal of International Law* 221; J. G. Stewart, ‘The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute’ (2010) 47 *NYU Journal of International Law and Politics* 121; J. G. Stewart, ‘Corporate War Crimes: Prosecuting the Pillage of Natural

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connecting these themes appeared to be lacking. Writing on Mark Kersten's *Justice in Conflict* blog in 2015, Barrie Sander provided an overview of the state of the literature concerning international criminal law and the economic dimension of mass atrocities.² He noted that the economic perspective had long been a 'blind spot' of international criminal law but that this situation was rapidly changing. At the Nuremberg Forum 2017 on 'The Fight against Impunity at a Crossroad', organised by the International Nuremberg Principles Academy, there were calls from participants to further address the responsibility of businesses and financial actors who help to sustain conflict and profit from criminal activity under the cover of war.³ The book is therefore intended to serve as a timely contribution to the literature.

The book's title is not perfectly descriptive, although it captures the essence of the material set out in the nineteen chapters. The use of the word 'international' does not mean that domestic procedures are excluded but rather that the emphasis falls upon responsibility for international crimes and on what participants in international justice might learn from or contribute to domestic systems. Similarly, as the book focuses on the most egregious violations of international norms, it seemed appropriate to include the word 'criminal' in the title even though alternatives to criminal prosecutions are also considered. The

Resources', Open Society Justice Initiative (2011); L. van den Herik, 'Corporations As Future Subjects of the International Criminal Court: An Exploration of the Counterarguments and Consequences', in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (TMC Asser Press, 2010), p. 350; H. van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 *Chinese Journal of International Law* 43; K. Roberts, 'Corporate Liability and Complicity in International Crimes', in S. Jodoin and M. Cordonier Segger (eds.), *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge University Press, 2013), pp. 190–211; M. J. Kelly, *Prosecuting Corporations for Genocide* (Oxford University Press, 2016); L. Bilsky, *The Holocaust, Corporations, and the Law: Unfinished Business* (University of Michigan Press, 2017); International Commission of Jurists, 'Corporate Complicity and Legal Accountability' (2008) www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf; Amnesty International, 'Commerce, Crime and Human Rights: Closing the Prosecution Gaps' (Project, ongoing since 2014) www.commercecrimelawhumanrights.org/about/the-project/.

² B. Sander, 'Addressing the Economic Dimensions of Mass Atrocities: International Criminal Law's Business or Blind Spot?', *Justice in Conflict* blog (8 June 2015) <https://justiceinconflict.org/2015/06/08/addressing-the-economic-dimensions-of-mass-atrocities-international-criminal-laws-business-or-blind-spot/>.

³ Information about the conference is available at: www.nurembergacademy.org/events/nuremberg-forum-2017/.

crimes under consideration are not limited to those defined as war crimes under international humanitarian law but include the range of atrocities typically associated with armed conflicts, such as crimes against humanity and genocide and the underlying acts that may constitute those crimes. The reference to 'war' deliberately harks back to the idea expressed at Nuremberg that aggression is the 'supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.⁴ While this may now be regarded as an outdated notion, there is little doubt that a situation of armed conflict creates the conditions for unchecked exploitative economic activity that may contribute towards war crimes, crimes against humanity and genocide. Indeed, the United Nations Secretary-General observed in 2002 that the 'commercial exploitation of conflict' was having an increasing detrimental impact on the protection of civilians.⁵ This trend has continued despite the UN's efforts to bring more attention to the problem. The expression 'war's funders' covers the full gamut of economic actors who help to finance the activities of warring factions, from bankers to businesspersons to crowd-funders to donors. The term 'profiteer' potentially has a very broad scope; during World War I, even profiting from the demand for war poetry attracted criticism.⁶ However, in the current context the term is restricted to economic actors who derive a financial benefit from their contribution to conduct that is, or becomes, associated with international crimes, and who stand correspondingly to have their illegally acquired assets confiscated, whether or not they themselves are prosecuted.

War's Funders and Profiteers

At both a governmental and a private business level, the trade in arms, natural resources and sometimes art and cultural heritage, coupled with pure economic gifts, sponsorship and loans, helps to provide the financial fuel to sustain conflict. In war's economic substructure, politicians, financiers and industrialists authorise and profit from forced and slave labour, while commanders direct troops to engage in rampant looting of villages and cities often on behalf of superiors. Women and children who

⁴ Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, Vol. 1, 1947, p. 186.

⁵ Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, S/2002/1300, 26 November 2002, para. 58.

⁶ S. Featherstone, *War Poetry: An Introductory Reader* (Routledge, 1995), p. 38.

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are rendered homeless and vulnerable become the victims of trafficking into sexual slavery by opportunists or increasingly by terrorist groups. Meanwhile, banks and legitimate businesses collapse and black markets flourish.

Despite this classic depiction of the consequences of warfare, accountability for economic participation in international crimes remains underdeveloped. At the time of the post-World War II trials, the Allies considered it to be important to prosecute the economic and financial leaders of Germany and Japan for their involvement in military aggression and, at least in respect of the European theatre, to hold the so-called 'great industrialists' responsible for crimes such as forced labour, looting and spoliation to the same degree as politicians, diplomats and uniformed personnel.⁷ However, more recent prosecutions at the international level have almost entirely overlooked the economic aspect. A possible exception is the case of the former Liberian president Charles Taylor. Taylor was convicted by the Special Court for Sierra Leone (SCSL) for aiding and abetting international crimes committed during the conflict in Sierra Leone through the provision of arms and ammunition, military personnel, operational support and monetary donations.⁸ These forms of support were all found to have been connected to Taylor's personal involvement in the illicit diamond trade.

The International Criminal Court (ICC) Office of the Prosecutor (OTP) produced a policy paper in 2003 in which it indicated that an important area of investigation would involve 'financial links with crimes', such as the purchase of arms used in the commission of atrocities, and called on national investigative authorities to share information on financial transactions which might be essential to the ICC's investigations.⁹ By the same token, the policy paper envisioned that prosecutions by national courts, with evidential assistance from the ICC, would 'be a key deterrent to the commission of future crimes, if

⁷ See e.g. J. A. Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109 *Columbia Law Review* 1094, 1104–1112.

⁸ *Prosecutor v. Taylor*, SCSL-03-01-T, Judgment, Trial Chamber, 18 May 2012.

⁹ ICC Office of the Prosecutor, 'Paper on some policy issues before the Office of the Prosecutor', September 2003, pp. 2–3, www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf. See further R. Gallmetzer, 'Prosecuting Persons Doing Business with Armed Groups in Conflict Areas: The Strategy of the Office of the Prosecutor of the International Criminal Court' (2010) 8 *Journal of International Criminal Justice* 947, describing the ICC-OTP's network of national law enforcement agencies and other specialized organizations and institutions (LEN).

they can curb the source of funding'.¹⁰ The approach of the ICC-OTP reflected the idea that those who provide the finance for the commission of international crimes, and thereby the means and incentives, should be tried either alongside the direct perpetrators or by national courts. The deterrent aspect may be viewed as particularly compelling in respect of business actors who are perceived as 'rational' and risk-conscious, ostensibly driven not by politics or ideology but purely by profit, the pursuit of which may not be worthwhile if there is the prospect of a criminal penalty.

There has been little indication since 2003 that the ICC is following through on this policy, except to a limited extent in the *Bemba* case, which included the charge of pillage of civilian property.¹¹ In its 2016 policy paper on 'case selection and prioritisation', the OTP adjusted the emphasis somewhat as it concerned the link between economic factors and international crimes and referred to the economic *impact* of such crimes on 'affected communities'.¹² In this context the OTP stated that it 'will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the

¹⁰ ICC Office of the Prosecutor, 'Paper on some policy issues before the Office of the Prosecutor', September 2003, p. 3, www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

¹¹ ICC-01/05-01/08A, *Situation in the Central African Republic, Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras. 314–340, confirming the charge of pillaging villages and towns as a war crime under article 8(2)(e)(v) of the ICC Statute. Bemba was acquitted of all charges on appeal: ICC-01/05-01/08A, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', 8 June 2018. The ICC has also commenced proceedings relating to the Kivu provinces in the Democratic Republic of the Congo where UN reports suggest that the conflict has been fuelled by the illegal trade in natural resources, but the charges in these cases have similarly included pillage of civilian property. See e.g. ICC-01/04-01/12, *Prosecutor v. Sylvestre Mudacumura*, Decision on the Prosecutor's Application under Article 58, 13 July 2012. See also UN Security Council, S/2008/773, Final Report of the Group of Experts on the Democratic Republic of the Congo, 12 December 2008, alleging that the *Forces démocratiques de libération du Rwanda* (FDLR) raised funds principally through the illegal trade of mineral resources such as cassiterite, gold, coltan and wolframite; UN Security Council, S/2003/1027, Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of DR Congo, 23 October 2003, stating at para. 68 that the 'international community now has a deeper understanding of the illicit exploitation of natural resources in the Democratic Republic of the Congo, including the role of companies and business people involved'.

¹² ICC Office of the Prosecutor, 'Policy paper on case selection and prioritisation', 15 September 2016, para. 41, www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

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destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land'.¹³ This is different from a distinct policy to pursue economic actors but suggests that the ICC will place emphasis on the role of corporations in acts such as 'landgrabbing'. Landgrabbing involves the illegal taking of land from its inhabitants, usually by a government, and often 'through violence and intimidation, to make way for mining, timber or agricultural plantations' and in certain circumstances may amount to a crime against humanity.¹⁴

In its most recent 'Strategic Plan', issued in 2019, the ICC-OTP indicated that it would review its investigative strategies and methods in collaboration with national partners, focusing especially on the area of financial investigations.¹⁵ In the event, notwithstanding the ICC-OTP's expressed interest in working with national authorities to encourage the latter to take up the baton of addressing the economic aspects of international crimes, to date prosecutions at the domestic level have been infrequent. Indeed, due to investigative challenges and capacity, domestic systems may opt to focus in this context on, for example, financial crimes, tax evasion, corruption, terrorist financing and the violation of national legislation implementing arms embargoes rather than war crimes and crimes against humanity.¹⁶

Important domestic precedents were nonetheless set by the Dutch cases against Frans van Anraat, a businessman found guilty of complicity in war crimes through his role in the delivery of thousands of tonnes of a chemical precursor used in the production of mustard gas to Saddam Hussein's regime in Iraq, and Guus Kouwenhoven, a timber-merchant

¹³ Ibid.

¹⁴ A. Simms, 'Unprecedented Case Filed at International Criminal Court Proposes Land Grabbing in Cambodia as a Crime Against Humanity', *Huffington Post, The Blog* (7 October 2014) www.huffingtonpost.co.uk/andrew-simms/land-grabbing_b_5938500.html?guccounter=1. See further on a communication brought before the ICC-OTP concerning alleged land grabbing in Cambodia: Global Diligence, Communication Under Article 15 of the Rome Statute of the International Criminal Court, 'The Commission of Crimes Against Humanity in Cambodia, July 2002–present' (summary), 7 October 2014, www.fidh.org/IMG/pdf/executive_summary-2.pdf. For further documentation see Global Diligence, 'ICC Cambodian Case Study', at www.globaldiligence.com/about-us/icc-cambodian-case-study/.

¹⁵ ICC Office of the Prosecutor, Strategic Plan 2019–2021, 17 July 2019, para. 16.

¹⁶ In 2004, Samih Ossaïly and Aziz Nassour were convicted of money-laundering, arms trafficking, dealing in conflict diamonds and belonging to a criminal organization by the Belgian courts, applying the Belgian Criminal Code, in respect of allegations of trading in diamonds and weapons in Sierra Leone and Liberia. See Gallmetzer (n. 9 above), footnote 6.

similarly convicted of complicity in war crimes by providing financial assistance to Charles Taylor's regime during the Liberian civil war.¹⁷ Prior to his death in custody, Michel Desaeleer was accused before the Belgian courts of pillage and enslavement by virtue of his participation in the illicit diamond trade in Sierra Leone.¹⁸ The proceedings in France against LafargeHolcim constitute the most notable recent development. The Lafarge case concerns the activities of a multinational cement firm accused of paying millions of euros to terrorist groups such as the Islamic State through intermediaries in order to keep its factory open in Syria.¹⁹ In an unprecedented development, the company itself has been charged with both complicity in crimes against humanity and financing terrorism.²⁰ The case is conceptually significant in that it not only combines charges of international crimes and terrorism offences but also suggests that a company may become an accomplice to crimes against humanity by financing terrorism and failing to ensure the security of its employees.

Overview of Chapters

Part I of the book is entitled 'Financiers and Profiteers after World War II: Legal and Political Perspectives'. The Nuremberg trials of industrialists and

¹⁷ *Public Prosecutor v. Frans Cornelis Adrianus van Anraat*, BA4676, Court of Appeal of The Hague, The Netherlands, Judgment dated 9 May 2007, www.internationalcrimesdatabase.org/Case/168; *The Public Prosecutor v. Guus Kouwenhoven*, 's-Hertogenbosch Court of Appeal, The Netherlands, Ruling of the three judge panel at the Court of Appeal in 's-Hertogenbosch, 21 April 2017, L.2, www.internationalcrimesdatabase.org/Case/3308.

¹⁸ See Civitas Maxima Press Release, 'Michel Desaeleer Dies in Custody in Belgium', 29 September 2016, claiming 'it would have been the first trial in history to deal with international crimes allegedly committed in furtherance of natural resource trade', www.civitas-maxima.org/sites/default/files/docs/2017-01/Civitas_Maxima_Press_Release_2016_09_29.pdf.

¹⁹ 'Lafarge Charged with Complicity in Syria Crimes Against Humanity', *The Guardian* (28 June 2018) www.theguardian.com/world/2018/jun/28/lafarge-charged-with-complicity-in-syria-crimes-against-humanity.

²⁰ Alexandru Tofan, 'The Lafarge Affair: A First Step towards Corporate Criminal Liability for Complicity in Crimes against Humanity', *Doing Business Right Blog*, Asser Institute (2 October 2018) www.asser.nl/DoingBusinessRight/Blog/post/the-lafarge-affair-a-first-step-towards-corporate-criminal-liability-for-complicity-in-crimes-against-humanity-by-alexandru-tofan; 'Lafarge in Syria: Accusations of Complicity in War Crimes and Crimes Against Humanity', European Center for Constitutional and Human Rights (ECCHR), Case Report (November 2016); 'Landmark Decision: Company Lafarge Indicted – Complicity in Crimes Against Humanity Included', ECCHR Press Release (28 June 2018).

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other economic actors have retained their importance as precedents and there is a wealth of historical material in this area that is still being studied and interpreted.²¹ The first two chapters take national perspectives as a starting point – Soviet and Norwegian – and analyse the extent to which the respective approaches influenced or were influenced by ideas then under discussion amongst the victorious Allied powers. For its part, the third chapter introduces an economic framing of the landscape of international criminal justice as it has emerged, offering what might be termed a political economy of international criminal courts and tribunals. More specifically, in Chapter 1, **Kirsten Sellars** uncovers the origins of the concept of ‘economic crimes against peace’ in Soviet political and legal thought as the basis for prosecuting both the leading Axis ‘instigators’ of the war (the politicians and generals) and the ‘aiders and abettors’ (the financiers and industrialists) who were eventually charged with crimes against humanity. In Chapter 2, **Hans Otto Frøland** considers the reasons for the neglect of the evidence of exploitation of foreign forced labour in the Norwegian legal settlement and trials after World War II in the face of the international legal developments at Nuremberg. In Chapter 3, **Mark Kielsingard** examines the economic factors that influence the selection of situations for investigation and prosecution in modern-day international courts and tribunals. He suggests that economic interests are key to understanding the political motivations in this area of international decision-making while arguing, in addition, that these interests are more in evidence in relation to UN-established tribunals than the ICC.

Part II is entitled ‘Arms Fairs and “Flying Money”: The Circulation of Weapons, Art and Cash in Conflict Zones’; this part seeks to establish the practical context for the book. The concept of ‘flying money’ can be traced to ninth-century China, where the tea traders performed a function not dissimilar to that of modern-day central bankers. As trade flourished, the inconvenience of transferring bags full of copper coins over large distances became apparent. The coins were replaced by paper bills of credit known as ‘flying money’ because of their tendency to

²¹ On the Pacific Theatre, see e.g. Z. D. Kaufman, ‘Transitional Justice for Tōjō’s Japan: The United States Role in the Establishment of the International Military Tribunal for the Far East and other Transitional Justice Mechanisms for Japan after World War II’, (2013) 27 *Emory International Law Review* 755, discussing the Allied desire to prosecute ‘economic officials’ and the Russian dissatisfaction with the neglect of the Japanese *zaibatsu*. Several trials held in Singapore dealt with the ill-treatment and deaths of prisoners of war and civilians who worked as labourers on projects such as the infamous Burma–Siam Railway. See information at: www.singaporewarcrimetrials.com/case-summaries#forced-labour.

blow away. This metaphor provides a helpful visual image of the movement of sources of finance in and out of conflict zones, often across international borders; it likewise points to the challenge of gathering evidence insofar as the proceeds of the trade in arms, cultural property and other commodities are often untraceable. This evidence must in turn be sufficient to meet the high legal standard for connecting economic actors to international crimes through modes of liability such as aiding and abetting.

The chapters in Part II delve into the relevant practical, legal and evidentiary issues against the background of specific country or thematic contexts. In Chapter 4, **William Wiley** and **Nina Jørgensen** provide an overview of investigations of economic actors in the Syrian conflict conducted by the Commission for International Justice and Accountability (CIJA). Additionally, this chapter considers some of the legal and investigative challenges arising, especially in terms of establishing the linkage between financial transactions and international crimes within the legal framework for aiding and abetting liability adopted at Nuremberg, which has been developed further in more recent proceedings. **Marina Lostal** addresses the topical issue of the trafficking of cultural property in Chapter 5. She explains how this illicit trade has become a threat to international security with the emergence of terrorist groups such as the Islamic State (IS), calling into question the effectiveness of the current regulatory framework. In Chapter 6, **Tomas Hamilton** addresses the role of the ICC as a potential front-runner in developing the elements of criminal accountability in respect of arms traders – a uniquely important category of persons who contribute the physical means for the commission of crimes but who often do not share the criminal intentions of the perpetrators. In this context, he offers an interpretation of the phrase ‘knowingly contributing to the commission or attempted commission of a crime by a group acting with a common purpose’ pursuant to Article 25(3)(d)(ii) of the Rome Statute.

Part III is entitled ‘Developing the Available Law: Economic War Crimes and Crimes against Humanity’. The phrase ‘economic war crimes’ was in current usage around the time of the Nuremberg proceedings, but it lacks a distinctive definition and has not become a term of art. For example, the case against members of the Roehling Enterprises heard by the General Tribunal of the Military Government of the French Zone of Occupation in Germany pursuant to Control Council Law No.10 was described as involving ‘war crimes of an economic

nature'.²² The Tribunal found that in his various roles, especially as Plenipotentiary General and Reich Commissioner for the iron industry of the Departments Moselle and Meurthe-et-Moselle in France, Hermann Roechling was effectively 'dictator for iron and steel in Germany and the occupied countries'.²³ The Superior Court overturned Roechling's conviction for crimes against peace but upheld the verdict in respect of the 'economic war crimes' including systematic looting, forced labour and spoliation.²⁴ In addition to these established categories, candidates for inclusion in the list of acts that may be construed as 'economic war crimes' are the illegal exploitation of natural resources and human trafficking. In Chapter 7, **Eve La Haye** provides a concise introduction to pillage in international humanitarian law, explaining the customary nature of pillage as a war crime and comparing pillage with the related concepts of 'plunder', 'exploitation', 'spoliation', 'looting' and 'sacking'. She goes on to examine the scope and essential elements of the crime of pillage in armed conflict. In Chapter 8, **James Stewart** takes up a theme from the ICC's Policy Paper of 2016, framing the practice of landgrabbing as a displacement crime to be interpreted with reference to the International Criminal Tribunal for the Former Yugoslavia's extensive jurisprudence on deportation and forced transfer. In Chapter 9, **Michael Ramsden** considers the developing international legal framework through which human traffickers might be held criminally responsible, noting the relationship with transnational organised crime but focusing in particular on the explicit inclusion of human trafficking as a form of enslavement under the ICC Statute.

Part IV is entitled 'Where Should the Buck Stop? The Legal Framework for Economic Aiders and Abettors'; it is concerned with modes of liability, especially aiding and abetting as applied in both international and domestic prosecutions. The SCSL is to date the only international tribunal since Nuremberg to try an 'economic actor' (although Charles Taylor was much more than that). Chapter 10 by **Nina Jørgensen** considers the lessons that may be learned from the SCSL's handling of modes of liability in the *Taylor* case and touches on the findings and recommendations of the Liberian Truth and Reconciliation Commission concerning the role of economic actors and economic activities in

²² *Commissioner v. Roechling et al.*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, October 1946–April 1949, Vol. XIV, Appendix B, p. 1066.

²³ *Ibid.*, p. 1079.

²⁴ *Ibid.*, p. 1098.