

that this view has been approved by the United States Supreme Court in the *Yamashita Case*, when, after an analysis of the structure and contents of the Geneva Convention, it ruled that :

"We think it clear, from the context of these recited provisions, that part 3, and Article 63 which it contains, apply only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war. . . ." ⁽¹⁾

For the trial of prisoners of war for offences committed while in captivity the provisions of Part 3 (Judicial Proceedings) provide safeguards additional to those recognised by the courts acting in the trials reported upon in Volumes V and VI, but no trial has come to the writer's notice in which an allegation based upon Part 3 has led undisputedly to a conviction. ⁽²⁾ In the trial of General Yamashita by a United States Military Commission a breach of the Geneva Prisoners of War Convention has implied by paragraph 89 of the Supplemental Bill of Particulars, which alleged that, during the month of December, 1944, at Manila, the crimes were committed against various prisoners of war, named and unnamed, of "subjecting to trial without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel; denying opportunity to appeal from the sentence pronounced; and executing a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offence charged". The remarks made by the President of the Commission in delivery of its findings did not, however, reveal whether this particular allegation was found to be substantiated. ⁽³⁾

(iii) A number of war crime trials have involved the physical ill-treatment of prisoners of war. ⁽⁴⁾ The Judgment delivered in the *High Command Trial* regarded as declaratory of customary law the provision of Article 4 of the Hague Regulations that "Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They

⁽¹⁾ See Vol. IV, pp. 46-47, 48-49 and 78. Mr. Justice Rutledge's dissenting opinion also touched on this point; see pp. 69-73 of that Volume. The question had already been touched upon in the original trial; see p. 15 of the Volume.

⁽²⁾ The part of the Convention in question comprises Article 60-67.

Article 60 states: "At the commencement of a judicial hearing against a prisoner of war, the detaining Power shall notify the representative of the protecting Power as soon as possible, and in any case before the opening of the hearing. . . ."

Articles 63-66 make the following provisions:

"Article 63. 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 Powers.

"Article 64. Every prisoner of war shall have the right of appeal against any sentence against him in the same manner as persons belonging to the armed forces of the detaining Power.

"Article 65. Sentences pronounced against prisoners of war shall be communicated immediately to the protecting Power.

"Article 66. If sentence of death is passed on a prisoner of war, a communication setting forth in detail the nature and the circumstances of the offence shall be addressed as soon as possible to the representative of the protecting Power for transmission to the Power in whose armed forces the prisoner served.

"The sentence shall not be carried out before the expiration of a period of at least three months from the date of the receipt of this communication by the protecting Power."

⁽³⁾ Vol. IV, pp. 5-6 and 34.

⁽⁴⁾ See for instance Vol. III, p. 67 and Vol. XI, p. 5, 56, 62 and 79.

must be humanely treated . . ." and the provision of Article 2 of the Geneva Convention that prisoners of war "shall at all times be humanely treated and protected particularly against acts of violence, from insults and from public curiosity". ⁽¹⁾

The latter provision received specific application in the trial of Kurt Maelzer, by a United States Military Commission at Florence; here the accused was found guilty on a charge of "exposing prisoners of war . . . in his custody . . . to acts of violence, insults and public curiosity." ⁽²⁾

The Judgment in the *High Command Trial* also regarded as declaratory of customary law that part of Article 3 of the Geneva Convention which provides: "Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex"; that part of Article 46 which states: "All forms of corporal punishment confinement in premises not lighted by daylight and, in general, all forms of cruelty whatsoever, are prohibited." ⁽³⁾ and also the following passage from Article 56: "In no case shall prisoners of war be transferred to penitentiary establishments (prisons, penitentiaries, convict establishments, &c.) in order to undergo disciplinary sentence there." ⁽⁴⁾

(iv) In other trials the allegations made concerned the denial to prisoners of war of the minimum conditions conducive to life and health whose provision is made compulsory by the Geneva Convention. ⁽⁵⁾

Relevant provisions stated to be declaratory of customary international law by the Judgment in the *High Command Trial* were the following Articles from the Geneva Convention:

"Article 4. The detaining Power is required to provide for the maintenance of prisoners of war in its charge.

⁽¹⁾ See Vol. XII, p. 90; and see p. 13, note 4, of the present volume for the effect of such decisions on the part of the Tribunal which conducted the trial.

⁽²⁾ See Vol. XI, pp. 53-55.

⁽³⁾ Article 46 was relied upon among other provisions by Judge Skau in the *Klinge Trial* (see Vol. III, p. 12).

⁽⁴⁾ Vol. XII, pp. 90-91. In the trial of Yoshio Makizawa, a Major of the Japanese Army, held before a United States Military Commission in Shanghai, China, on 9-10 May, 1946, the accused was found guilty of torturing an American prisoner of war in an effort to extract military information. Attempts to extract such information are forbidden by Article 5 of the Geneva Convention of 1929 which provides as follows:

"Every prisoner of war is required to declare, if he is interrogated on the subject, his true names and rank, or his regimental number.

"If he infringes this rule, he exposes himself to a restriction of the privileges accorded to prisoners of his category.

"No pressure shall be exerted on prisoners to obtain information regarding the situation in their armed forces or their country. Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever"

The charge brought in this trial was one of ill-treatment and did not mention that the purpose thereof was the wrongful extraction of information. It is not possible therefore to state definitely whether such extraction of information has been recognized as a separate punishable war crime. The facts of the trial of Erich Killinger and others by a British Military Court at Wuppertal are similar; the charge on which certain accused were found guilty was one of "ill-treatment of British Prisoners of War," while the Prosecution claimed that the purpose of the ill-treatment was the obtaining from such prisoners of information which under the Geneva Convention they were not bound to give. See Vol. III, p. 67. See also p. 105, note 2, of the present volume.

⁽⁵⁾ In the trial of Arno Heering by a British Military Court at Hanover the accused was found guilty of ill-treatment of a British national, the Prosecution having alleged that he failed to provide prisoners under his charge with sufficient food, adequate billets or any medical supplies. See Vol. XI, pp. 79-80.

"Differences of treatment between prisoners are permissible only if such differences are based on the military rank, the state or physical or mental health, the professional abilities, or the sex of those who benefit from them;"

"Article 7. As soon as possible after their capture, prisoners of war shall be evacuated to depots sufficiently removed from the fighting zone for them to be out of danger. . . ."

"Article 9. . . . Prisoners captured in districts which are unhealthy or whose climate is deleterious to persons coming from temperate climates shall be removed as soon as possible to a more favourable climate. . . ."

"No prisoner may at any time be sent to an area where he would be exposed to the fire of the fighting zone, or be employed to render by his presence certain points or areas immune from bombardment";

"Article 10. Prisoners of war shall be lodged in buildings or huts which afford all possible safeguards as regards hygiene and salubrity. . . .";

"Article 11. The food ration of prisoners of war shall be equivalent in quantity and quality to that of the depot troops. . . ."

"Sufficient drinking water shall be supplied to them. . . .";

"Article 12. Clothing, underwear and footwear shall be supplied to prisoners of war by the detaining Power. . . .";

"Article 13. Belligerents shall be required to take all necessary hygienic measures to ensure the cleanliness and salubrity of camps and to prevent epidemics. . . .";

"Article 25. Unless the course of military operations demands it, sick and wounded prisoners of war shall not be transferred if their recovery might be prejudiced by the journey"; and

"Article 29. No prisoner of war may be employed on work for which he is physically unsuited."⁽¹⁾

The Judgment regarded as falling into the same category the provision in Article 6 of the Hague Regulations that ". . . The work [on which the captor State may employ prisoners of war] shall not be excessive."⁽²⁾

In the Judgment delivered in the *Krupp Trial* the following additional relevant provisions of the Geneva Convention were also cited, and it would seem to follow that their breach would constitute a war crime:

"Article 30. The duration of the daily work of prisoners of war including the time of the journey to and from work, shall not be excessive, and shall in no case exceed that permitted for civil workers of the locality employed on the same work. Each prisoner shall be allowed a rest of twenty-four consecutive hours each week, preferably on Sunday."

"Article 32. . . . Conditions of work shall not be rendered more arduous by disciplinary measures."⁽³⁾

⁽¹⁾ This provision was cited also in the Judgment in the *Krupp Trial* (Vol. X, p. 140).
⁽²⁾ Vol. XII, pp. 90-1. A relevant part of Article 2 of the Geneva Convention has also been cited in war crime trials: "Measures of reprisal against them [prisoners of war] are forbidden." (See pp. 177-182).
⁽³⁾ Vol. X, p. 140-1.

The second of the paragraphs quoted above from Article 9 of the Geneva Convention was cited also by Judge Musmanno in the *Milch Trial*.⁽¹⁾ As was said in the Judgment in the *High Command Trial*: "To use prisoners of war as a shield for the troops is contrary to International Law."⁽²⁾

It will be recalled that Kurt Student was charged, *inter alia*, with "the use . . . of British prisoners of war as a screen for the advance of German troops" when tried by a British Military Court at Luneberg.⁽³⁾ Although he was found not to have been responsible for such acts and although the charge also alleged that certain of the prisoners were killed while being used as a shield, there seems little doubt that, if proved, the mere act of forcing prisoners of war to go ahead of advancing enemy troops, thereby acting as a shield to the latter, would itself constitute another type of war crime. Indeed, Article 2 (7) of the French Ordinance of 28th August, 1944, specifically provided that: "Illegal restraint, as specified in the last paragraph of Article 344 of the *Code Pénal*, shall include the employment of prisoners of war or civilians in order to protect the enemy."⁽⁴⁾

(v) *Causing prisoners of war to perform unhealthy or dangerous work* is a clearly recognised war crime.⁽⁵⁾ Article 32 of the Geneva Convention provides that: "It is forbidden to employ prisoners of war on unhealthy or dangerous work. . . .", and the judgment delivered in the *High Command Trial* placed this provision among those which it regarded as being merely declaratory of existing customary law.⁽⁶⁾

This provision has been applied so as to render illegal the use of prisoners of war in work which is dangerous either in itself or because of the locality in which it takes place. The loading of ammunition and mine clearing have been declared to constitute dangerous work, and the use of prisoners of war in the construction of field fortifications or with combat units has also been regarded as criminal.⁽⁷⁾

(vi) There is, however, some little doubt regarding the extent or scope of the war crime of *causing prisoners of war to perform work having a direct connection with the operations of war*.

Article 31 of the Geneva Convention provides that:

"Work done by prisoners of war shall have no direct connection with the operations of war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units. . . ."

⁽¹⁾ Vol. VII, p. 44.

⁽²⁾ See Vol. XII, pp. 104-105.

⁽³⁾ See Vol. IV, pp. 118-124.

⁽⁴⁾ Vol. III, p. 96.

⁽⁵⁾ There is nothing illegal in the mere employment of prisoners of war. Article 27 of the Geneva Convention provides: "Belligerents may employ as workmen prisoners of war who are physically fit, other than officers and persons of equivalent status according to their rank and their ability."

"Nevertheless, if officers or persons of equivalent status ask for suitable work, this shall be found for them as far as possible."

"Non-commissioned officers who are prisoners of war may be compelled to undertake only supervisory work, unless they expressly request remunerative occupation."

⁽⁶⁾ Vol. XII, p. 91.

⁽⁷⁾ See Vol. XII, p. 98.

This Article was specifically applied in the *Milch Trial*,⁽¹⁾ in the trial before a Netherlands Temporary Court Martial of Tanabe Koshiro, when the court decided that the building of ammunition dumps constituted "work connected with the operations of war"⁽²⁾ and in the trial before the International Military Tribunal at Nuremberg.⁽³⁾

In the *I.G. Farben Trial* the Tribunal pointed out that the use of prisoners of war in war operations and in work having a direct relation to such operations was prohibited by the Geneva Convention.⁽⁴⁾ The Judgment delivered in the *Krupp Trial* cited the first paragraph of Article 31 of the Geneva Convention (and Article 6 of the Hague Convention) among a number of Articles from the Hague and Geneva Conventions and said that "practically everyone of the foregoing provisions were violated in the Krupp enterprises".⁽⁵⁾

In the *Flick Trial*, one of the offences found by the Tribunal to have been proved was that of voluntarily employing prisoners of war on work "bearing a direct relation to war operations".⁽⁶⁾ The Tribunal would appear to have found the use of prisoners of war for the production of freight cars to be contrary to the Hague Regulations.⁽⁷⁾

Article 2 (6) of the French Ordinance of 28th August, 1944, should also be quoted at this point:

"Illegal restraint, as specified in paragraphs 1 and 2 of Article 344 of the *Code Pénal*, shall include the employment on war work of prisoners of war or conscripted civilians."⁽⁸⁾

On the other hand the Tribunal acting in the *High Command Trial* did not list Article 31 among those which it regarded as being an expression of existing customary law and held that "in view of the uncertainty of the international law" as to the question of the "use of prisoners of war in the construction of fortifications" (which might not unreasonably have been regarded as work having a direct connection with the operations of war)

⁽¹⁾ See Vol. VII, pp. 43 and 47. The Tribunal relied also upon Article 6 of the Hague Regulations which reads: "The State may employ the labour of prisoners of war, other than officers, according to their rank and capacity. The work shall not be excessive, and shall have no connection with the operations of the war." (Vol. VII, p. 43). Judge Phillips' judgment included the words: "The Tribunal holds as a matter of law that it is illegal to use prisoners of war in armament factories and factories engaged in the manufacture of airplanes for use in war effort." (Vol. VII, p. 47).

⁽²⁾ See Vol. XI, pp. 1-3. The Court relied also upon Article 6 of the Hague Convention.

⁽³⁾ See British Command Paper, Cmd. 6964, p. 59, quoted in Vol. XII, p. 100.

⁽⁴⁾ Vol. X, p. 54. The Tribunal would appear to have agreed however, that there was some doubt as to the extent of application of the prohibition of such use of prisoners of war. Of the employment of prisoners of war, the Tribunal said: "The use of prisoners of war in war operations and in work having a direct relation to such operations was prohibited by the Geneva Convention. Under Count III the defendants are charged with violations of this prohibition. To attempt a general statement in definition or clarification of the term 'direct relation to war operations' would be to enter a field that the writer and students of international law have found highly controversial. We therefore limit our observations to the particular facts presented by this record"; and at an earlier point: "The use of prisoners of war in coal mines in the manner and under the conditions disclosed by this record we find to be a violation of the regulations of the Geneva Convention, and therefore, a war crime."

⁽⁵⁾ Vol. X, pp. 140-1.

⁽⁶⁾ See Vol. IX, p. 53.

⁽⁷⁾ See Vol. IX, pp. 20-21.

⁽⁸⁾ Vol. III, p. 96.

"orders providing for such use from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal on their face. . . ." ⁽¹⁾ It has been conceded in the notes to the *High Command Trial* that "prosecuting staffs have preferred to charge accused with exposing prisoners of war to danger rather than with employing them in work directly connected with operations of war, when the facts of cases could have given reasonable prospects of a conviction on either."⁽²⁾

(vii) In the trial of Tanaka Chuichi and two others by an Australian Military Court,⁽³⁾ the accused was found guilty of ill-treatment of prisoners of war. Prominent among the evidence against the accused was the fact that they cut off the prisoners' hair and beards and forced a prisoner to smoke. Since the prisoners were Sikhs, such acts were a violation of their religious feelings. In this trial therefore, an *infringement of the religious rights of prisoners of war* was apparently punished but since the Court did not deliver a reasoned judgment it cannot be stated definitely that such infringements of the religious rights of prisoners of war were regarded as separate punishable war crimes.⁽⁴⁾

⁽¹⁾ See Vol. XII, pp. 97-98.

⁽²⁾ Vol. XII, p. 101. An act in some ways similar to causing prisoners of war to perform work having a direct connection with the operations of war is that of interrogating them regarding the situation of their own armed forces or their country. In the Trial of Eric Killinger and four others by a British Military Court, Wuppertal, 26th November-3rd December, 1945, the Prosecutor rested his case on the Geneva Prisoners of War Convention of 1929 and in particular Articles 2 and 5. Article 5 reads as follows:

"Article 5. Every prisoner of war is required to declare, if he is interrogated on the subject, his true names and rank, or his regimental number. If he infringes this rule, he exposes himself to a restriction of the privileges accorded to prisoners of his category."

"No pressure shall be exerted on prisoners to obtain information regarding the situation of their armed forces or their country. Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever."

"If, by reason of his physical or mental condition, a prisoner is incapable of stating his identity, he shall be handed over to the Medical Service."

There is no indication whether the court regarded a mere breach of this article as constituting a war crime but it is interesting to note that one of the Defence Counsel made three submissions regarding the scope of the Convention, to which the court expressed its agreement. The first was that under the Geneva Convention interrogation as such was not unlawful. The second was that to obtain information by a trick was not unlawful, under the same Convention. The third point was that to interrogate a wounded prisoner was not in itself unlawful unless it could be proved that that interrogation amounted to what could be described as physical or mental ill-treatment. (Vol. III, pp. 67-68). It thus appears that if a breach of the Article is criminal, it is only so when some form of pressure has been found to have been exerted on prisoners to obtain information regarding the situation of their forces or country.

⁽³⁾ See Vol. XI, pp. 62-63.

⁽⁴⁾ Article 18 of the Hague Convention and Article 16, first paragraph, of the Geneva Prisoners of War Convention protect other aspects of the religious rights of prisoners of war:

"Article 18. Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of their own Church, on the sole condition that they comply with the police regulations issued by the military authorities."

"Article 16. Prisoners of war shall be permitted complete freedom in the performance of their religious duties, including attendance at the services of their faith, on the sole condition that they comply with the routine and police regulations prescribed by the military authorities."

(viii) The balance of judicial authority seems to indicate that the mere act of *handing over prisoners of war to the S.D.* within his command territory made a German commander who did so guilty of a war crime, irrespective of the actual fate of the prisoners.⁽¹⁾ The Judgment delivered in the *High Command Trial* ruled however that it was legal for German field commands to transfer prisoners of war to the *Reich* and that "thereafter their control of such prisoners terminated."⁽²⁾

2. OFFENCES AGAINST THE SICK AND WOUNDED

Special provision is made for the protection of the sick and wounded by the Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Of this Convention, Articles 1 and 2 were quoted in the Prosecution in the trial of Kurt Meyer.⁽³⁾ They provide as follows :

Article 1 :

"Officers and soldiers and other persons officially attached to the armed forces who are wounded or sick shall be respected and protected in all circumstances ; they shall be treated with humanity and cared for medically without distinction of nationality, by the belligerent in whose power they may be.

"Nevertheless, the belligerent who is compelled to abandon wounded or sick to the enemy, shall, as far as military exigencies permit, leave with them a portion of his medical personnel and material to help with their treatment ;" and

Article 2 :

"Except as regards the treatment to be provided for them in virtue of the preceding article, the wounded and sick of an army who fall into the hands of the enemy shall be prisoners of war, and the general provisions of international law concerning prisoners of war shall be applicable to them.

"Belligerents shall, however, be free to prescribe, for the benefit of wounded or sick prisoners, such arrangements as they may think fit beyond the limits of the existing obligations."

It is not possible, however, to say whether, in finding the accused guilty on certain charges the Canadian Military Court which tried him applied these specific provisions.

The infrequency with which the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field has been relied upon in war crime trials may be due to the fact that most actual situations

⁽¹⁾ Relevant authorities on this question are examined in Vol. XII, pp. 102-4.

⁽²⁾ Vol. XII, p.102.

⁽³⁾ See Vol. IV, pp. 97-112.

which have arisen to which it would apply have also been provided for by the Prisoners of War Convention, on which Prosecuting Staffs have preferred to rely.⁽¹⁾

3. OFFENCES AGAINST SURVIVORS OF SUNKEN SHIPS

After a naval engagement, both belligerents must, as far as military interests permit, take steps to search for the shipwrecked, wounded and sick, and to protect them.⁽²⁾ Some few violations of this rule have come before Allied courts in recent years.

In the *Peleus Trial* certain accused were found guilty of being concerned in the killing of members of the crew of a sunken steamship by firing and throwing grenades at them while on rafts.⁽³⁾ In the trial of von Ruchteschell by a British Military Court at Hamburg, the accused was found guilty of, *inter alia*, sinking an enemy merchant vessel without making any provision for the safety of the survivors ; the finding of guilty on this, the fourth charge, was confirmed.⁽⁴⁾ In the trial of Karl-Heinz Moehle a British Military Court found that the mere giving of an order that subordinate U-Boat commanders were to destroy ships and their crews was a war crime.⁽⁵⁾

Clearly, no operational necessity could excuse the outright killing of survivors, and, of the three trials referred to above, the second is the most interesting since it shows the limits beyond which an accused could not plead that "military interests" necessitated a neglect to look after survivors.⁽⁶⁾ It illustrates the limits of the scope of the rule expressed by the Judge Advocate acting in the *Moehle Trial* when he said : "I think we all concede that the real important duty of the submarine commander is to ensure the safety of his own ship, and if it is a question of saving life or saving his ship, then clearly he must save his ship."⁽⁷⁾

⁽¹⁾ Rare also is the application of the provisions of the Wounded and Sick Convention relating to medical personnel. Provision is made for the safeguarding of the personal security of medical personnel by Arts. 6 and 9 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, which provide as follows :

Article 6 :

"Mobile medical formations, that is to say, those which are intended to accompany armies in the field, and the fixed establishments of the medical service shall be respected and protected by the belligerents."

Article 9 :

"The personnel engaged exclusively in the collection, transport and treatment of the wounded and sick, and in the administration of medical formations and establishments, and chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war.

"Soldiers specially trained to be employed, in case of necessity, as auxiliary nurses or stretcher-bearers for the collection, transport and treatment of the wounded and sick, and furnished with a proof of identity, shall enjoy the same treatment as the permanent medical personnel if they are taken prisoners while carrying out these functions."

It will be noted that medical personnel are not to be treated as prisoners of war on capture, but are presumably to receive a high standard of treatment.

Kurt Student was charged with being responsible for, *inter alia*, bombing of a hospital and the use of medical personnel to shield his troops but the British Military Court which tried him found him not guilty on these charges (see Vol. IV, pp. 118 and 120).

⁽²⁾ This duty is elaborated upon in Vol. IX, pp. 78 and 88.

⁽³⁾ See Vol. I, pp. 2 and 13.

⁽⁴⁾ See Vol. IX, pp. 82, 85 and 86.

⁽⁵⁾ See Vol. IX, pp. 75, 78 and 80.

⁽⁶⁾ The relevant circumstances are set out in Vol. IX, p. 85.

⁽⁷⁾ Vol. IX, p. 78.

4. THE KILLING WITHOUT TRIAL OF CAPTURED SPIES

Articles 29 and 30 of the Hague Convention makes the following provisions relating to captured spies :

Article 29 :

"A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

"Accordingly soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army for the purpose of obtaining information are not considered spies. Similarly, the following are not considered spies : Soldiers and civilians entrusted with the delivery of despatches intended either for their own army or for the enemy's army, and carrying out their mission openly. To this class likewise belong persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory."

Article 30 :

"A spy taken in the act shall not be punished without previous trial."

In very few trials was it admitted by the Prosecution or the Court that the victim of a killing might have been a spy, but it has sometimes been stressed that, even if he was a spy, his killing *without trial* was a war crime.

In the *Almelo Trial* the defence claimed that a British victim who had been found in hiding and in Dutch clothes was a spy and that his being shot was therefore legal. The Judge Advocate acting in this British trial advised the court, however, that it was not relevant whether or not the circumstances under which the Pilot Officer had been apprehended gave rise to the suspicion that he was engaged in espionage against Germany, and that it was decisive whether the accused honestly believed that the victim had been tried according to law and that they further believed that in shooting him they were carrying out a lawful execution.⁽¹⁾

In the trial of Werner Rohde and others by a British Military Court at Wuppertal, the defence claimed that the victims whose killing was the subject of the charge had been executed as spies. In reply to these arguments, the Prosecutor admitted that, while the victims' mission was not connected with espionage, they might nevertheless, on the least favourable interpretation, be possibly classified as spies. Had they had a trial by a competent court and subsequently been lawfully executed by shooting this case would never have been brought. The Defence, however, had not shown that there was any trial. The Judge Advocate said that the Court might choose to regard as spies "persons sent by aircraft for the purpose of maintaining communications". He went on, however, to say that, if the victims had been obviously spies, their being such might have been a mitigating circumstance which the accused could possibly plead, but the doubt which existed on the point made it all the more clear that they should have been given a trial.

⁽¹⁾ See Vol. I, pp. 43-44.

The Judge Advocate, after reviewing the evidence on the point, concluded that he could see no proof that a trial in any real sense was held. A separate issue was whether or not the accused actually regarded the execution as being a judicial one ; the Judge Advocate thought it legally sound to plead that the accused did so, if it could be proved in fact.⁽¹⁾ Here again, therefore, the main stress was placed on the question of a prior trial, as it was also in the trial of Karl Buck and others by a British Military Court at Wuppertal.⁽²⁾

5. OFFENCES COMMITTED DURING ACTUAL COMBAT

(i) Those rules of international law which relate to the actual conduct of hostilities have only infrequently been made the basis of war crime trial proceedings.⁽³⁾ Such provisions include Articles 22 and 24-28, and most of Article 23, of the Hague Regulations (Articles 22-28 are the contents of Chapter I, *Means of Injuring the Enemy, Sieges and Bombardments*, of Section II, *Of Hostilities*, of the Regulations).

Otto Skorzeny and others were accused of participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing on and killing members of the armed forces of the United States, but they were all acquitted by the United States Military Government Court which tried them, possibly on the facts appearing in the evidence.⁽⁴⁾

In the trial of S.S. Brigadeführer Kurt Meyer, held by a Canadian Military Court at Aurich from 10th-28th December, 1945, it was alleged, *inter alia*, that the accused, in violation of the laws and usages of war, during the fighting in 1943-44, in Belgium and France, "incited and counselled troops under his command to deny quarter to allied troops", and this was one of the charges on which Meyer was found guilty. Nevertheless, it is doubtful whether such offences should be classified as offences against the members of armed forces or offences against prisoners of war. They are specifically prohibited by Article 23 (d) of the Hague Convention which provides :

Article 23 :

"In addition to the prohibitions provided by special Conventions, it is particularly forbidden :

"(d) To declare that no quarter will be given."⁽⁵⁾

In the *Ruchteschell Trial*, the accused was found guilty on, among others, a charge of continuing to fire on a British merchant vessel after the latter had indicated surrender.⁽⁶⁾

As the Prosecutor acting in that trial admitted, the question of the legality of attacks made on various merchant ships by the accused before their surrender did not arise in the proceedings taken against him.⁽⁷⁾ Furthermore, in the *Peleus Trial*, the Prosecution preferred not to charge an illegal sinking of the steamship. Here the accused were charged with :

"Committing a war crime in that you in the Atlantic Ocean on the night of 13th/14th March, 1944, when Captain and members of the crew of Unterseeboot 852 which had sunk the steamship 'Peleus' in

⁽¹⁾ See Vol. V, pp. 55-58.

⁽²⁾ See Vol. V, p. 44. Compare Vol. XI, p. 73.

⁽³⁾ Compare Vol. X, pp. 48-49.

⁽⁴⁾ See Vol. IX, pp. 90-3.

⁽⁵⁾ Vol. IV, pp. 98, 100 and 108.

⁽⁶⁾ See Vol. IX, pp. 83, 83-4, 86 and 89.

⁽⁷⁾ See Vol. IX, pp. 86-7.

violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, Allied nations, by firing and throwing grenades at them."

It was submitted on behalf of the Defence that the charge might be read in two different ways, according to which the phrase "in violation of the laws and usages of war" could qualify either the word "sunk" or the word "concerned", and what followed it.

The first interpretation would mean that the steamship "Peless" was sunk in violation of the laws and usages of war. The second construction would mean that the killing of members of the crew was in violation of the laws and usages of war.

It was made clear at the outset by the Prosecution that the phrase "in violation of the laws and usages of war" qualified the words that follow it, and not the words that precede it, or in other words, that the prisoners were accused of having violated the laws and usages of war not by *sinking* the merchantman, but by *firing and throwing grenades* on the *survivors* of the sunken ship.⁽¹⁾

(ii) No records of trials in which allegations were made of the illegal conduct of air warfare have been brought to the notice of the United Nations War Crimes Commission, and since the indiscriminate bombing of Allied cities by the German air force was not made the subject of a charge against any of the major German war criminals, the judgment of the Nuremberg International Military Tribunal did not contain any ruling as to the limits of legal air warfare.⁽²⁾ It should be added however that the "deliberate bombardment of undefended places" is declared a war crime by the Australian, Netherlands and Chinese laws; so too is the use of poison gases.⁽³⁾

In dealing with a defence plea, however, the Tribunal acting in the *Einsatzgruppen Trial* made some incidental remarks regarding aerial bombardment:

"Then it was submitted that the defendants must be exonerated from the charge of killing civilian populations since every Allied nation brought about the death of non-combatants through the instrumentality of bombing. Any person, who, without cause, strikes another may not later complain if the other in repelling the attack uses sufficient force to overcome the original adversary. That is fundamental law between nations as well.

"It has already been adjudicated by a competent tribunal that Germany under its Nazi rulers started an aggressive war. The bombing of Berlin, Dresden, Hamburg, Cologne and other German cities followed the bombing of London, Coventry, Rotterdam, Warsaw and other Allied cities; the bombing of German cities succeeded, in point of time, the acts discussed here. But even if it were German cities without Germans having bombed Allied cities, there still is no parallelism between an act of legitimate warfare, namely the bombing of a city, with

⁽¹⁾ See Vol. I, p. 2. The interesting decision of the International Military Tribunal not to assess Doenitz's sentence on the ground of his breaches of the international law of submarine warfare is quoted in Vol. IX, pp. 79-80.

⁽²⁾ The United Nations War Crimes Commission, in its production of lists of persons against whom a *prima facie* case of having committed a war crime had been established, consistently rejected cases alleging illegitimate bombardment, if on the evidence before the Commission on the bombed places contained military objectives, and listed only such persons as were held responsible for having intentionally bombed places containing no military objectives.

⁽³⁾ See Vol. V, p. 95; Vol. XI, p. 94 and Vol. XIV, p. 154.

a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory.

"A city is bombed for tactical purposes: communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. *The civilians are not individualised.* The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women and children and shooting them.

"It was argued in behalf of the defendants that there was no normal distinction between shooting civilians with rifles and killing them by means of atomic bombs. There is no doubt that the invention of the atomic bomb, when used, was not aimed at non-combatants. Like any other aerial bomb employed during the war, it was dropped to overcome military resistance.

"Thus, as grave a military action as is an air bombardment, whether with the usual bombs or by atomic bomb, the one and only purpose of the bombing is to effect the surrender of the bombed nation. The people of that nation, through their representatives, may surrender and, with the surrender, the bombing ceases, the killing is ended. Furthermore, *a city is assured of not being bombed by the law-abiding belligerent if it is declared an open city.* With the Jews it was entirely different. Even if the nation surrendered they still were killed as individuals."⁽¹⁾

(iii) Rulings relating to certain offences which are analogous to war crimes and which may be regarded as offences committed during the course of hostilities have been made during Allied trials of ex-enemies accused of having punished Allied persons on the grounds that they committed such offences. Thus in the trial of Sergeant-Major Shigeru Ohashi and Six Others by an Australian Military Court, Rabaul, 20th-23rd March, 1946, the Judge Advocate advised the court that:

"By the laws and usages of war inhabitants of occupied territories have not only certain rights but owe certain duties to the occupant, who may punish any violation of those duties.

"Certain acts if committed by such inhabitants are punishable by the enemy as war crimes.

"Amongst such acts are:

(a) Illegitimate hostilities in arms committed by individuals who are not members of the armed forces;

(b) Espionage and war treason.

"The deceased would, being civilian inhabitants of an occupied territory, be guilty of the war crime known as War Rebellion if they rose in arms against the occupant.

"War treason includes such acts by private individuals as damage to war material or conspiracy against the armed forces or against members of them."

⁽¹⁾ Italics inserted.

After stating that the allegations of the accused that the deceased had been guilty of acts of hostility against the Japanese armed forces had not been rebutted and were entitled to be believed, the Judge Advocate continued:

"Their actions rendered the deceased liable to punishment as war criminals.

"Charges of war crimes may be dealt with by military courts or such courts as the belligerent concerned may direct.

"In every case there must be a trial before punishment and the utmost care must be taken to confine the punishment to the actual offender.

"All war crimes are liable to be punished by death."⁽¹⁾

Similarly in the trial of Captain Eikichi Kato, by an Australian Military Court, Rabaul, 7th May, 1946, the Judge Advocate drew the court's attention to the provisions of international law regarding espionage and war treason as described in two paragraphs in Chapter XIV of the Australian *Manual of Military Law*:

"158. It is lawful to employ spies and secret agents, and even to gain over by bribery or other means enemy soldiers or private enemy subjects. Yet the fact that these methods are lawful does not prevent the punishment, under certain conditions, of the individuals who are engaged in procuring intelligence in other than an open manner as combatants. Custom admits their punishment by death, although a more lenient penalty may be inflicted.

"159. The offence is punishable whether or not the individuals succeed in obtaining the information and conveying it to the enemy."

The Judge Advocate also made reference to Articles 29 and 30 of the Hague Convention relating to spies and their right to a trial.⁽²⁾

The Tribunal acting in the *Hostages Trial*, whose words regarding legal and illegal combatants have already been quoted⁽³⁾ said: "We think the rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal. Fighting is legitimate only for the combatant personnel of a country."⁽⁴⁾ A war crime may, however, be committed against illegal combatants insofar as they may be killed or otherwise punished without a fair trial.⁽⁵⁾

Similarly the Tribunal which conducted the *Justice Trial* conceded that "in territory under belligerent occupation the military authorities of the occupant may, under the laws and customs of war, punish local residents who engage in Fifth Column activities hostile to the occupant", but stated that this rule would not justify punishment by death of Poles who attempted to escape from the Reich in order to join the Allied forces.⁽⁶⁾

⁽¹⁾ See Vol. V, pp. 27-30. See also p. 35 of that Volume.

⁽²⁾ Vol. V, pp. 37-38. Regarding the Articles cited see p. 108.

⁽³⁾ See pp. 80-82.

⁽⁴⁾ Vol. VIII, p. 58.

⁽⁵⁾ See pp. 113 and 161-166.

⁽⁶⁾ See Vol. VI, pp. 53 and 93-4.

It should be added here that the Norwegian Supreme Court in the *Klinge Trial* and certain Netherlands Courts have stated that acts of resistance on the part of inhabitants of occupied territory (like espionage), while they can legally be punished by the occupant, may yet be at the same time in some sense not contrary to international law; see Vol. III, pp. 21-2 and Vol. XIV, pp. 127-129 and 135-137.

6. OFFENCES AGAINST INHABITANTS OF OCCUPIED TERRITORIES

The protection afforded by international law to inhabitants of occupied territories derives largely from the Regulations attached to the Hague Convention No. IV of 1907 and from the rules of customary law of which these Regulations are a codification.⁽¹⁾ The relevant Articles of the Hague Regulations are Articles 42-56, which fall under the heading: *Section III—Military Authority over the Territory of the Hostile State*. Of these, Article 50 is quoted on page 179 and Articles 43 and 46 provide as follows:

Article 43:

"The authority of the power of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country."

Article 46:

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

"Private property may not be confiscated."⁽²⁾

(i) The *unwarranted killing of inhabitants of occupied territories* is a war crime and has often been made the subject of war crimes proceedings.⁽³⁾

(ii) It is open to a person accused of killing a civilian inhabitant to plead that the execution was in fact a legal killing; this plea is dealt with elsewhere.⁽⁴⁾ Just as there is possibly a substantive offence of the denial of a fair trial to a prisoner of war⁽⁵⁾, however, so also is it arguable that the *denial of a fair trial to inhabitants of occupied territories* has been recognised separate war crime or crime against humanity. Here also it is felt that the courts would require the same evidence to prove the perpetration of the positive offence, assuming it to be recognised, as they would regard as vitiating a plea that the killing was a legal one.⁽⁶⁾ Illegal combatants⁽⁷⁾ may be executed on capture, but only after a fair trial.⁽⁸⁾

⁽¹⁾ See pp. 12-13.

⁽²⁾ Of this provision the parts protecting life and property have been directly enforced in war crime trials. Family honour and rights have been only indirectly protected, in that the violation of family rights have not been explicitly made the subject of a charge.

Many of the offences for which war criminals have been condemned have, however, constituted violations of family rights. Examples are provided by the splitting up of families for purposes of deportation to slave labour, and in the operation of the *Nacht und Nebel Plan* as the Tribunal which conducted the *Justice Trial* pointed out (see Vol. VI, pp. 56 and 57).

In the Trial of Heinrich Gerike and seven others before a British Military Court at Brunswick from 20th March to 3rd April, 1946 (the *Velpke Children's Home Case*), the prosecution relied upon Art. 46. In this case, various accused were found guilty of being "concerned in the killing by wilful neglect of a number of children, Polish nationals." It was shown that they were implicated in the establishment and running of a home to which Polish female workers in a district of Germany were forced to send their children, the object being to free the parents for forced labour for the benefit of the German economy. Many of the children died through neglect. (See Vol. VII, pp. 76-81).

As to the protection of religious rights, see pp. 123-124.

⁽³⁾ See for example Vol. I, pp. 36, 47, 93 and 103; Vol. II, p. 4; Vol. III, pp. 40 and 76; Vol. IV, p. 4; Vol. V, pp. 25, 37 and 42; Vol. VI, pp. 3 and 111; Vol. VII, p. 17; Vol. VIII, pp. 1, 9, 15, 22 and 34; and Vol. XIII, p. 112 and 126. Concerning the shooting of escaping civilian prisoners, see Vol. XIII, pp. 119-21.

⁽⁴⁾ See pp. 161-166.

⁽⁵⁾ See p. 99.

⁽⁶⁾ This point is discussed in Vol. VI, pp. 102-103.

⁽⁷⁾ See pp. 111-112.

⁽⁸⁾ See Vol. V, p. 28, 35 and 52. In the trial of Susuki Motosuki, a Netherlands Temporary Court Martial found a Japanese responsible for the illegal killing of certain Indonesians without an adequate trial even though the victims had in fact committed punishable offences. See Vol. XIII, pp. 129-30.

(iii) The ill-treatment of inhabitants of occupied territories is also a recognised war crime, and there have been many trials in which this offence has been charged.⁽¹⁾

(iv) A special type of ill-treatment which has received attention in Volume VII of these Reports, and which has been the fate of many concentration camp inmates, is *subjection to illegal experiments*.⁽²⁾ It may safely be said that subjection to experiments is *prima facie* ill-treatment and requires justification.

The trial in which the judges came nearest to laying down the conditions under which experiments could be regarded as legal was the trial of Erhard Milch by a United States Military Tribunal in Nuremberg. While finding Milch himself not guilty under Count Two, the Tribunal expressed certain opinions as to the characteristics of legal and illegal medical experiments.

The judgment of the Tribunal indicated that the *corpus delicti*, as far as Count Two of the Indictment was concerned, would be established if it were shown that low-pressure and freezing experiments were carried on which were "of a character to inflict torture and death on the subjects."⁽³⁾ In finding that the *corpus delicti* had been proved the Tribunal pointed out (i) that the experiments were carried out "under the specious guise of science" and that under the specific guidance of Dr. Rascher, the air pressure was reduced to a point which no flier would ever be required to undergo;⁽⁴⁾ and (ii) that there was no credible evidence that the subjects of the experiments were "habitual criminals who had been sentenced to death."⁽⁵⁾

From Judge Musmanno's remarks⁽⁶⁾ it seems that, in his opinion, the experiments would not be legal unless they were performed upon prisoners actually condemned to death previously by a court with authority to declare "that the execution would be accomplished by means of a low-pressure chamber", by a court which actually did so declare, and "after bona fide proof that the subject had committed murder or any other legally recognised capital offence"; and even then only if the experiments were painless and were of scientific value. Judge Musmanno made it clear that "political prisoners marked for extermination" would not fall within the category of persons found to have committed a "legally recognised capital offence".

Allegations of responsibility for illegal experiments were made also in the *Trial of Karl Brandt and Others* (The *Doctor's Trial*) and in the *Trial of Oswald Pohl and Others*, each held also before United States Military Tribunals. As has been shown in the notes to the *Milch Trial*,⁽⁷⁾ however, the judgment in the *Pohl Trial*, which was delivered after those in the *Milch*

⁽¹⁾ See for instance Vol. II, p. 4; Vol. III, pp. 1, 12 and 15; Vol. XIII, pp. 71, 105, 121 and 131.

⁽²⁾ This offence has been committed against prisoners of war (see for instance a reference to such acts in Vol. VII, p. 51) but the victims have mainly been civilians of occupied territories or German nationals. (In the case of the latter, the offence punished might constitute a crime against humanity but not a war crime.)

⁽³⁾ See Vol. VII, p. 35.

⁽⁴⁾ See Vol. VII, p. 36.

⁽⁵⁾ See Vol. VII, p. 36.

⁽⁶⁾ See Vol. VII, p. 45.

⁽⁷⁾ See Vol. VII, pp. 49-53.

Trial and Doctors' Trial, did not expand upon the legal aspects of the conducting of medical experiments and, while the judgment delivered in the *Doctors' Trial* elaborated "ten principles" which were introduced as being based on "moral, ethical and legal concepts", the Tribunal did not differentiate between those legally necessary and those not, either in enumerating them or in setting out its reasons for finding, on the evidence, that they "were much more frequently honoured in their breach than in their observance".⁽¹⁾ In another passage, however, the Tribunal may be thought to have had legal concepts only in mind:

⁽¹⁾ The Judgment delivered in the *Doctors' Trial* includes the passages mentioned in the text under a heading: *Permissible Medical Experiments*:

"The great weight of the evidence before us is to the effect that certain types of medical experiments on human beings, when kept within reasonably well defined bounds, conform to the ethics of the medical profession generally. The protagonists of the practice of human experimentation justify their views on the basis that such experiments yield results for the good of society that are unobtainable by other methods or means of study. All agree, however, that certain basic principles must be observed in order to satisfy moral, ethical and legal concepts:

"1. The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

"The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

"2. The experiment should be such as to yield fruitful results for the good of society, unobtainable by other methods or means of study, and not random and unnecessary in nature.

"3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiments.

"4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

"5. No experiment should be conducted where there is an *a priori* reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.

"6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

"7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.

"8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.

"9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.

"10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

"Of the ten principles which have been enumerated our judicial concern, of course, is with those requirements which are purely legal in nature—or which at least are so closely and clearly related to matters legal that they assist us in determining criminal culpability and punishment. To go beyond that point would lead us into a field that would be beyond our sphere of competence. . . ." (Vol. VII, pp. 49-50.)

"In every single instance appearing in the record, subjects were used who did not consent to the experiments; indeed, as to some of the experiments, it is not even contended by the defendants that the subjects occupied the status of volunteers. In no case was the experimental subject at liberty of his own free choice to withdraw from any experiment. In many cases experiments were performed by unqualified persons; were conducted at random for no adequate scientific reason, and under revolting physical conditions. All of the experiments were conducted with unnecessary suffering and injury and but very little, if any, precautions were taken to protect or safeguard the human subjects from the possibilities of injury, disability, or death. In every one of the experiments the subjects experienced extreme pain or torture, and in most of them they suffered permanent injury, mutilation, or death, either as a direct result of the experiments or because of lack of adequate follow-up care.

"Obviously all of these experiments involving brutalities, tortures, disabling injury and death were performed in complete disregard of international conventions, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilised nations, and Control Council Law No. 10. Manifestly human experiments under such conditions are contrary to 'the principles of the laws of nations as they result from the usages established among civilised peoples, from the laws of humanity, and from the dictates of public conscience'."

The conducting of numerous illegal experiments at Auschwitz Concentration Camp was proved in the trial of Rudolf Hoess by the Supreme National Tribunal of Poland, but the Tribunal did not lay down any general principles according to which the legality under international law of experiments was to be determined.⁽¹⁾

Again, the subjecting of inmates to inhuman experiments figured among the facts proved in the *Dachau Concentration Camp Case*,⁽²⁾ but the trial does not indicate what could be regarded as legal experiment.

Nevertheless, the judgments in the *Milch Trial* and in the *Doctors' Trial* go some way towards elaborating the nature of such experiments as may constitute war crimes or crimes against humanity. It may also be noted that the relevant Counts contained in the Indictment in the *Doctors' Trial* and in the *Milch Trial* charged, *inter alia*, responsibility for "plans and enterprises involving medical experiments without the subjects consent" (Italics inserted), and that the analogous wording in the Indictment in the *Pohl Trial* was: "The murders, torture and ill-treatment charged were

⁽¹⁾ See Vol. VII, pp. 14-16 and 24-26. The following facts concerning these experiments which were proved in evidence may, however, be repeated here:

"Experiments were always carried out under compulsion and in many cases physical violence was used. They were often performed by unqualified doctors and in appalling conditions. They did not serve any scientific purpose. They were performed with unnecessary suffering and injury and without proper protection against the risks of disability or death. The subjects experienced extreme pain and torture, and permanent injury or death followed in many cases. The doctors and the personnel performing experiments did not show any care or give any assistance to persons frequently seriously ill in consequence of the experiments."

⁽²⁾ See Vol. XI, p. 6.

carried out by the defendants by divers methods, including . . . medical, surgical, and biological experimentation on *involuntary* human subjects". (Italics inserted.)

Furthermore, Article II of the Chinese War Crimes Law of 24th October, 1946, makes a definite provision on a related point:

"A person who commits an offence which falls under any one of the following categories shall be considered a war criminal. . . . Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as . . . forcing people to consume or be inoculated with poison, or destroying their power of procreation."⁽¹⁾

(v) A further recognised war crime is the *deportation of inhabitants of occupied territories*.⁽²⁾ Judge Phillips, in his concurring opinion in the *Milch Trial*, made some interesting remarks on deportation of civilians as a war crime or crime against humanity, and based his views upon, *inter alia*, Article 52 of the Hague Regulations and Article II (1) of Control Council Law No. 10.⁽³⁾ He pointed out that: "International Law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime".

These conditions he enunciated as follows: "If the transfer is carried out without a legal title, as in the case where people are deported from a country occupied by an invader while the occupied enemy still has an army in the field and is still resisting, the deportation is contrary to international law. The rationale of this rule lies in the supposition that the occupying power has temporarily prevented the rightful sovereign from exercising its power over its citizens. Articles 43, 46, 49, 52, 55 and 56, Hague Regulations, which limit the rights of the belligerent occupant, do not expressly specify as crime the deportation of civilians from an occupied territory. Article 52 states the following provisions and conditions under which services may be demanded from the inhabitants of occupied countries.

1. They must be for the needs of the army of occupation.
2. They must be in proportion to the resources of the country.
3. They must be of such a nature as not to involve the inhabitants in the obligation to take part in military operations against their own country.

"In so far as this section limits the conscription of labour to that required for the needs of the army of occupation, it is manifestly clear that the use of labour from occupied territories outside of the area of occupation is forbidden by the Hague Regulation.

"The second condition under which deportation becomes a crime occurs when the purpose of the displacement is illegal, such as deportation for the purpose of compelling the deportees to manufacture weapons

⁽¹⁾ Vol. XIV, p. 153.

⁽²⁾ On this point see Vol. VII, pp. 53-58 and 75. The offence was proved in the *Greiser Trial*, but the Polish Supreme National Tribunal does not appear to have analysed at any length the law on this particular point; see Vol. XIII, p. 112.

⁽³⁾ *Ibid*, pp. 45-47; and see pp. 55-56 of that Volume.

for use against their homeland or to be assimilated in the working economy of the occupying country. The defence as contained in this case is that persons were deported from France into Germany legally and for a lawful purpose by contending that such deportations were authorised by agreements and contracts between Nazi and Vichy French authorities. The Tribunal holds that this defence is both technically and substantially deficient. The Tribunal takes judicial notice of the fact that after the capitulation of France and the subsequent occupation of French territory by the German army that a puppet government was established in France and located at Vichy. This government was established at the instance of the German army and was controlled by its officials according to the dictates and demands of the occupying army and that in a contract made by the German Reich with such a government as was established in France amounted to in truth and in fact a contract that on its face was null and void. The Vichy Government, until the Allies regained control of the French Republic, amounted to no more than a tool of the German Reich. It will be borne in mind that at no time during the Vichy régime a Peace Treaty had been signed between the French Republic and the German Reich but merely a cessation of hostilities and an armistice prevailed, and that French resistance had at no time ceased and that France at all times still had an army in the field resisting the German Reich.

"The third and final condition under which deportation becomes illegal occurs whenever generally recognised standards of decency and humanity are disregarded. This flows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner. A close study of the pertinent parts of Control Council Law No. 10 strengthens the conclusions of the foregoing statements that deportation of the population is criminal whenever there is no title in the deporting authority or whenever the purpose of the displacement is illegal or whenever the deportation is characterised by inhumane or illegal methods."

The judgment then continued :

"Article II (1) (c) of Control Council Law No. 10 specifies certain crimes against humanity. Among those is listed the deportation of any civilian population. The general language of this subsection as applied to deportation indicates that Control Council Law No. 10 has unconditionally contended as a crime against humanity every instance of the deportation of civilians. Article II (1) (b) names deportation to slave labour as a war crime. Article II (1) (c) states that the enslavement of any civilian population is a crime against humanity. Thus Law No. 10 treats as separate crimes and different types of crime 'deportation of slave labour' and 'enslavement'. The Tribunal holds that the deportation, the transportation, the retention, the unlawful use and the inhumane treatment of civilian populations by an occupying Power are crimes against humanity."

This statement was adopted by the Military Tribunal which conducted the *Krupp Trial*.⁽¹⁾

⁽¹⁾ Vol. X, pp. 144-5. Compare Vol. XII, pp. 92-3.

While in practice cases of alleged deportation and "slave labour" have usually arisen for treatment together, for deportation to become a war crime or a crime against humanity it need not have enslavement as its object. This conclusion appears to have been accepted by the Tribunal acting in the *Milch Trial*⁽¹⁾ and is certainly established by a study of certain French, Australian, Chinese and Yugoslav provisions relating to the trial of war criminals.

Thus, the French Ordinance of 28th August, 1944, concerning the suppression of war crimes, provides, in its Article 2 (5) that :

"(5) Illegal restraint, as specified in Articles 341, 342 and 343 of the *Code Pénal*, shall include forced labour of civilians and deportation for any reason whatever of any detained or interned person against whom no sentence which is in accordance with the laws and customs of war has been pronounced."⁽²⁾

The definition of "war crime" under Australian Law also includes "deportation of civilians,"⁽³⁾ as did the list of war crimes drawn up by the Responsibilities Commission of the Paris Peace Conference in 1919, on which the Australian catalogue of war crimes was based. According to Article II of the Chinese War Crimes Law of 24th October, 1946, the term "war criminal" includes "Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as (a) killing, starving, massacring, enslaving, or mass deportation of its nationals" ; while Article 3 (3) of the Yugoslav War Crimes Law of 25th August, 1945, provides, *inter alia*, that "forced deportation or removal to concentration camps" by enemy nationals are war crimes. The jurisdictional provisions of most of the instruments governing United States Military Commissions state that "deportation to slave labour or for any other purpose of civilian population of or in occupied territory" or "deportation to slave labour or for any other illegal purpose" of such persons, shall be regarded as war crimes.⁽⁴⁾

In the trial of Robert Wagner and others by a French Military Tribunal, in which Wagner was found guilty of, *inter alia*, being responsible for the deportation of Frenchmen to Germany, the Article 2 (5), quoted above, of the French Ordinance of 28th August, 1944, was among the provisions applied by the Tribunal.⁽⁵⁾

(vi) Conversely, *putting civilians to forced labour* may in certain circumstances be a war crime. The French provision just quoted makes "forced labour of civilians" a war crime,⁽⁶⁾ and the Chinese provision also mentions

⁽¹⁾ See Vol. VII, pp. 46-47 and 54.

⁽²⁾ See Vol. III, p. 96. This provision among others was enforced in the *Wagner Trial* (see Vol. III, p. 52).

⁽³⁾ See Vol. V, p. 95.

⁽⁴⁾ See Vol. XIV, p. 153 ; p. 208 of the present volume ; and Vol. III, pp. 106-107.

⁽⁵⁾ See Vol. III, pp. 34-35, 51 and 52.

⁽⁶⁾ Compare also Article 2(6) of the Ordinance, quoted on p. 104.

"enslaving" as such a crime, while the matter is covered in greater detail by Article 52 of the Hague Convention insofar as it deals with "requisitions in services":

"Requisitions in kind and services shall not be demanded from local authorities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation to taking part in military operations against their own country.

"Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

"Contributions in kind shall as far as possible be paid for in ready money; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible."

The Tribunal which conducted the *Krupp Trial* found that this Article had been violated by the employment of deportees in armament production in the Krupp enterprise,⁽¹⁾ and in the *Milch Trial*, Judge Musmanno found that it had been violated by the Nazi programme for the forcible recruitment of foreign workers for employment in German industry.⁽²⁾ The same question arose in the *Flick*, and *I.G. Farben Trials* but the Tribunals acting in these cases did not enter into any detailed analysis of the relevant law.⁽³⁾ In the Judgment delivered in the *High Command Trial* it was said that "it is apparent that the compulsory labour of the civilian population for the purpose of carrying out military operations against their own country is illegal."⁽⁴⁾

It may be added that the Nuremberg International Military Tribunal also ruled that "The laws relating to forced labour by the inhabitants of occupied territories are found in Article 52 of the Hague Convention".⁽⁵⁾ The Judgment, after quoting the Article, continues: "The policy of the German occupation authorities was in flagrant violation of the terms of this convention," and the account which it gave to illustrate this finding indicates that it interpreted widely the words "taking part in military operations against their own country" so as to include any work for the German war effort, including "German industry and agriculture", and not merely "work on German fortifications and military installations": all of the foregoing types of labour are mentioned in the Judgment.⁽⁶⁾

The crime of enslavement may be committed without any ingredient of ill-treatment. The Judgment delivered in the trial of *Oswald Pohl and others* by a United States Military Tribunal in Nuremberg, 13th January-3rd November, 1947, contains the following passage:

"Slavery may exist even without torture. Slaves may be well fed and well clothed and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation and beating and other barbarous acts, but the admitted fact

⁽¹⁾ See Vol. X, p. 167.

⁽²⁾ Vol. VII, p. 43.

⁽³⁾ See Vol. IX, pp. 52-4 and Vol. X, p. 53.

⁽⁴⁾ See Vol. XII, pp. 92-93.

⁽⁵⁾ British Command Paper Cmd. 6964, p. 56.

⁽⁶⁾ *Ibid.*, pp. 57-60. This point is dealt with at greater length in Chapter IX of the *History of the United Nations War Crimes Commission*, London, 1948, pp. 227-229.

of slavery . . . compulsory uncompensated labour . . . would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery."⁽¹⁾

(vii) *Enforced prostitution* was punished as a war crime in the trial before a Netherlands Temporary Court-Martial in Batavia of Washio Awochi.⁽²⁾ It is also punishable under the Australian and Chinese laws.⁽³⁾

(viii) Under the Australian⁽⁴⁾ and Chinese⁽⁵⁾ war crimes laws, to mention two that refer to wrongful internment of civilians specifically, it is internment "under inhuman conditions" that is described as a war crime. While *false imprisonment* alone seems to have been comparatively rarely charged,⁽⁶⁾ there seems to be no reason for not regarding it as illegal under some conditions merely to imprison civilians from occupied territories. The opinion of the Tribunal which conducted the *Justice Trial* declared the taking away of "Nacht und Nebel" prisoners to be illegal, but as the Tribunal pointed out, the "Nacht und Nebel" scheme involved deportation, internment under inhuman conditions, torture and starvation, in addition to the inhumane treatment of friends and relatives.⁽⁷⁾

A Netherlands provision declaring criminal "indiscriminate mass arrests", however, was enforced in the trial of Shigeki Motomura and others at Macassar⁽⁸⁾ while the following French provision, Article 341 of the *Code Pénal*, was enforced in several French trials, including the *Wagner Trial*.⁽⁹⁾

"Those who, without order of the proper authorities and excepting cases in which the law prescribes the seizure of accused persons, arrest, detain or restrain any persons, shall be punished with a term of hard labour."

Illegal detention, as such, was punished by Netherlands courts in the *Rauter and Zuehlke Trials*.⁽¹⁰⁾

(ix) Certain types of *denunciation to the occupying authorities* of inhabitants of an occupied territory have been declared criminal by a French Ordinance of 31st January, 1944, concerning the Suppression of Acts of Denunciation, which would possibly cover such acts on the part of alleged war criminals.⁽¹¹⁾

(x) The main judicial authority reported in this series on the war crime of *illegal recruiting into armed forces* is the trial of Robert Wagner and others by a French Military Tribunal.⁽¹²⁾

(xi) The same is true of the war crime of *incitement of civilians to take up arms against their own country*.⁽¹³⁾ It may be added that in the trial by a

⁽¹⁾ Vol. IX, p. 53.

⁽²⁾ See Vol. XIII, pp. 122 and 124-125.

⁽³⁾ See Vol. V, p. 95 and Vol. XIV, p. 154.

⁽⁴⁾ Vol. V, p. 95.

⁽⁵⁾ Vol. XIV, p. 154.

⁽⁶⁾ In the *Belsen Trial*, the Judge Advocate stressed that the Prosecution did not ask the Court to consider whether the taking of Allied nationals to Auschwitz was right or wrong. The true charge was one of ill-treatment and killing. (Vol. II, p. 117).

⁽⁷⁾ See Vol. VI, pp. 56-57 and 59-60.

⁽⁸⁾ See Vol. XIII, pp. 142-143.

⁽⁹⁾ See Vol. VII, pp. 68-69 and Vol. III, pp. 40-41 and 52. Compare Art. 2(5) of the Ordinance of 28th August, 1944, quoted on p. 119.

⁽¹⁰⁾ See Vol. XIV, pp. 89, 107, 109 and 145.

⁽¹¹⁾ See Vol. VII, p. 72. The question of denunciation is further discussed in Vol. VII, pp. 71-72 and 74-75, and Vol. XI, pp. 95-96.

⁽¹²⁾ See Vol. III, pp. 23-55, especially pp. 40-41 and 52.

⁽¹³⁾ *Ibid.*, pp. 40-41 and 51.

British Military Court at Hamburg of Karl Rath and Otto Schutz, 14th-22nd January, 1948⁽¹⁾ on a charge of being concerned in the unlawful execution of certain Luxembourg nationals, the Judge Advocate advised the Court that a German order purporting to conscript Luxembourg nationals was illegal under international law.

(xii) The offence of *genocide*⁽²⁾ has received a detailed treatment in the notes to the *Greifelt Trial*⁽³⁾, held before a United States Military Tribunal, and to the *Goeth and Hoess Trials*, held before the Polish Supreme National Tribunal.⁽⁴⁾

The Judgment of the Tribunals which conducted these trials did not in fact use the term "genocide" (the United States and Polish Prosecutions, however, did so)⁽⁵⁾ but the term has received judicial recognition from the Tribunal which conducted the *Justice Trial*, in whose judgment it is used to signify a type of crime against humanity which may be committed either by enemy nationals against enemy nationals⁽⁶⁾ or by enemy nationals against Allied nationals.⁽⁷⁾ The Tribunal quoted with approval a resolution of the United Nations General Assembly which defined Genocide as "a denial of the right of existence of entire human groups as homicide is a denial of the right to live of individual human beings."⁽⁸⁾

In its judgment in the *Greiser Trial*, the Supreme National Tribunal of Poland stated in a summary way that certain groups of crimes had been committed against the Polish population, including the following of which the words italicised are of particular significance in this connection.

(a) *Illegal creation of an exceptional legal status for the Poles* in respect of their rights of property, employment, education, use of their national language, and in respect of the special penal code enforced against them;

(b) *Repression, genocidal in character, of the religion of the local population* by mass murder and incarceration in concentration camps of Polish priests, including bishops; *by restriction of religious practices to the minimum*; and by destruction of churches, cemeteries and the property of the Church;

(c) *Equally genocidal attacks on Polish culture and learning*;

(f) *Debasement of the dignity of the nation* (degradation of the Poles to citizens of a lower class, *Schutzbefohlene*, in accordance with the distinction drawn between German "masters" and Polish "servants");

"The accused," said the Tribunal, "ordered, countenanced and facilitated, as is shown by the evidence, criminal attempts on the life, health and property of thousands of Polish inhabitants of the 'occupied' part of Poland in question, and at the same time was concerned in

⁽¹⁾ Not previously treated in these volumes.

⁽²⁾ See also p. 138.

⁽³⁾ See Vol. XIII, pp. 36-42.

⁽⁴⁾ See Vol. VII, pp. 7-9 and 24-26.

⁽⁵⁾ See Vol. VII, p. 7 and Vol. XIII, p. 37. Genocide was also charged as such in the *Einsatzgruppen Trial*.

⁽⁶⁾ See Vol. VI, pp. 32, 75 and 99.

⁽⁷⁾ See Vol. VI, pp. 48, 75 and 99.

⁽⁸⁾ See Vol. VI, p. 48.

bringing about in that territory the general totalitarian genocidal attack on the rights of the small and medium nations to exist, and to have an identity and culture of their own."⁽¹⁾

(xiii) A category of war crime which is older established, in the matter of recognition as such, than genocide, although apparently narrower in scope,⁽²⁾ is that of *denationalisation*, and here some of the findings of the Tribunal in the *Greifelt Trial* are of interest.⁽³⁾ Apart from finding various accused guilty of crimes such as forced evacuation, plunder of property and enslavement, which are dealt with as war crimes elsewhere in this volume, and of such offences as kidnapping and forced abortion which as unjustifiable invasions of personal integrity were clearly war crimes, the Tribunal found certain of the accused guilty of a separate crime of "forced Germanization". The substance of what the Tribunal regarded as constituting this offence may be judged from a study of a summary of the relevant evidence which was derived from the judgment of the Tribunal.⁽⁴⁾

It may be added that under the Australian and Netherlands War Crimes Law the expression "war crime" includes "attempts to denationalise the inhabitants of occupied territory",⁽⁵⁾ and that Article III of the Chinese War Crimes Law of 24th October, 1946, includes within the definition of "war crime" "scheming to enslave the inhabitants of occupied territory or to deprive them of their status and rights as nationals of the occupied country". In a sense the entire paragraph 3 of Article II of the Chinese law is relevant here:

"Article II. A person who commits an offence which falls under any one of the following categories shall be considered a war criminal . . .

"3. Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as (a) killing, starving, massacring, enslaving, or mass deportation of its nationals, (b) stupefying the mind and controlling the thought of its nationals, (c) distributing, spreading, or forcing people to consume, narcotic drugs or forcing them to cultivate plants for making such drugs, (d) forcing people to consume or be inoculated with poison, or destroy their power of procreation, or oppressing and tyrannising them under racial or religious pretext, or treating them inhumanly".⁽⁶⁾

(xiv) Some recognition has been given to *invasion of the religious rights of inhabitants of occupied territories* as an offence under international criminal law.⁽⁷⁾ In the trial of Willy Zuehlke, the Netherlands Special Court of Cassation held that "This Court . . . is of the opinion that the refusal to

⁽¹⁾ Vol. XIII, pp. 112 and 114. See further the Indictment in the trial (Vol. XIII, pp. 71-74) whose charges the Tribunal found to have been substantiated (p. 105 of Vol. XIII).

⁽²⁾ See Vol. VII, pp. 7-9 and Vol. XIII, p. 42.

⁽³⁾ Vol. XIII, pp. 28-36.

⁽⁴⁾ See Vol. XIII, pp. 17-24.

⁽⁵⁾ Vol. V, p. 95 and Vol. XI, p. 94.

⁽⁶⁾ Vol. XIV, pp. 152-153.

⁽⁷⁾ It will be recalled (see p. 113) that Art. 46 of the Hague Regulations protects, *inter alia*, "religious convictions and worship".

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."⁽¹⁾

"Forced conversion to another faith" is declared criminal by Article 3 (3) of the Yugoslav War Crimes Law of 25th August, 1945, and Article II (3) of the Chinese War Crimes Law of 24th October, 1946, states that :

"A person who commits an offence which falls under any one of the following categories shall be considered a war criminal . . . Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as . . . oppressing and tyrannising them under racial or religious pretext."⁽²⁾

The Polish Supreme National Tribunal has regarded "repression, genocidal in character, of the religion of the local population" by, *inter alia*, the restriction of religious practices to a minimum, as representing an offence under international law.⁽³⁾

(xv) The punishable criminality of a *wholesale substitution of existing courts of law* in an occupied territory by courts set up by the occupying power (as distinct from the possible actual harm done to the population by substituted courts when in operation) is a debatable point. The Tribunal in the *High Command Trial* apparently felt that it did not constitute a distinct crime; the Tribunal held that the populace were not entitled even to a court-martial system provided that their treatment was just. Speaking of that part of the Barbarossa order which dispensed with court-martial jurisdiction over the civilian population of occupied territory, the Tribunal said: "court-martial jurisdiction of civilians is not considered under international law as inherent right of a civilian population and is not an inherent prerogative of a military commander. The obligation towards civilian populations concerns their fair treatment."⁽⁴⁾

On the other hand such substitution of courts may clearly be in some circumstances contrary to Article 43 of the Hague Regulations which provides :

"Article 43. The authority of the legitimate power having, in fact, passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety while respecting, unless absolutely prevented, the law enforced in the country."

The judgment delivered in the *Justice Trial*⁽⁵⁾ includes the statement that : "The undisputed evidence in this case shows that Germany violated during the recent war every principle of the law of military occupation. Not only

⁽¹⁾ Vol. XIV, pp. 152-153.

⁽²⁾ Vol. XIV, p. 146.

⁽³⁾ See p. 122.

⁽⁴⁾ Vol. XII, p. 82.

⁽⁵⁾ The indictment in this trial had claimed that "extraordinary irregular courts, superimposed upon the regular court system", were used by the accused to suppress opposition in occupied territories to the Nazi régime." (Vol. VI, p. 96).

under NN proceedings but in all occupations she immediately, upon occupation of invaded areas and territories, set aside the laws and courts of the occupied territories. She abolished the courts of the occupied lands and set up courts manned by members of the Nazi totalitarian régime and system."

The Tribunal immediately went on to say, however, that "these laws of occupation were cruel and extreme beyond belief, and were enforced by the Nazi courts in a cruel and ruthless manner against the inhabitants of the occupied territories, resulting in grave outrages against humanity, against human rights and morality and religion, and against international law, and against the law as declared by Control Council Law No. 10, by authority of which this court exercises its jurisdiction in the instant case. The evidence adduced herein provides undeniable and positive proof of the ill-treatment of the subjugated peoples by the Nazi Ministry of Justice and prosecutors to such an extent that jurists as well as civilians of civilised nations who respect human rights and human personality and dignity can hardly believe that the Nazi judicial system could possibly have been so cruel and ruthless in its treatment of the population of occupied areas and territories."⁽¹⁾

The enforcement of such laws as that of 4th December, 1941, against the Poles and Jews, so clearly exceeded what was demanded by the needs of "public order and safety" that the Tribunal was not called upon to analyse Article 43 of the Hague Convention any more than it was Article 23 (h),⁽²⁾ and the Tribunal did not in fact rely so much upon a claim that German courts were illegally set up in occupied territories as upon the illegality under international law of the law which they applied and upon the many departures from "fundamental principles of human justice recognised by civilised peoples and incorporated in the preamble of Hague Convention IV of 1907" which occurred during trials held before such courts.⁽³⁾

(xvi) On *offences against property*⁽⁴⁾ in occupied territories the principal judicial authorities are those treated in Volumes IX and X of these Reports,

⁽¹⁾ Vol. VI, p. 59. Apart from Article 43 the Tribunal, in summing up the provisions violated by the Nacht und Nebel scheme and the persecution of the Jews and Poles, quoted Art. 23(h) of the Regulations which, however, related to a slightly different question from that under discussion above :

"Art. 23(h) . . . It is expressly forbidden to declare abolished, suspended or inadmissible in a court of law the rights and actions of the hostile party." (Vol. VI, pp. 59 and 63).

This provision refers, not to substitution of existing courts, but the deprivation of rights of access to courts. The Netherlands special Court of Cassation delivering judgment in the *Rauter Trial* stated that its scope was limited to the bringing of civil claims. See Vol. XIV, p. 120. Compare p. 144 of that volume.

⁽²⁾ As to the precise significance of Art. 43 there is also, in fact, a difference of opinion. See a further discussion on the point in Vol. VI, pp. 94-6.

⁽³⁾ See Vol. VI, pp. 96-104.

⁽⁴⁾ A study of the judgments delivered in the *Flick, I. G. Farben and Krupp Trials* has revealed that the terminology relating to war crimes committed against property rights could profitably undergo some further development. See Vol. IX, pp. 40 and 43, and Vol. X, p. 160.

which include the *Flick*, *I.G. Farben* and *Krupp Trials*. The main conclusions derived from a study of the reports contained in these two volumes are briefly the following:⁽¹⁾

(a) In the numerous attempts which have been made at defining the precise limits of the war crime of pillage, plunder or spoilation, stress has been placed on one or both of the following two possible aspects of the offence:

(i) that private property rights were infringed;

(ii) that the ultimate outcome of the alleged offences was that the economy of the occupied territory was injured and/or that of the occupying State benefitted.

In so far as *private property* is concerned it seems sounder to base a definition of a war crime involved upon the first aspect, namely the infringement of the property rights of individual inhabitants of the occupied territory. The gist of the matter appears in the words which occur in the *Krupp Judgment*:

"Article 46 (of the Hague Regulations) stipulates that 'private property . . . must be respected'. However, if, for example, a factory is being taken over in a manner which prevents the rightful owner from using it and depriving him from lawfully exercising his prerogative as owner, it cannot be said that his property 'is respected' under Article 46 as it must be."⁽²⁾

It would appear that, at least in the view of the Tribunals which conducted the *Flick Trial*, and the *I.G. Farben Trial*,⁽³⁾ provided a sufficient infringement of private property rights has been proved to bring the offence within the terms of the Hague Regulation,⁽⁴⁾ the more public effects of the act are not necessary to constitute the crime.⁽⁵⁾ There is also *some* authority for saying that, conversely, if no illegal breach of private property rights has occurred no war crime can be said to have been committed, irrespective of the effects of the act upon the general economy of the occupied territory of the enemy State. Thus, the Tribunal before which the *I.G. Farben Trial* was held could not "deduce from Article 46 through 55 of the Hague Regulations any principle of the breadth of application" of the claim of the Prosecution in that case that "the crime of spoilation is a 'crime against the country concerned in that it disrupts the economy, alienates its industry from

⁽¹⁾ In their words concerning the law as to plunder and spoilation, the Tribunals whose judgments are relevant in this connection concentrated their attention upon the detailed provisions made in Arts. 46 *et seq.* of the Hague Convention No. IV of 1907 and upon the attitude taken by the International Military Tribunal to these provisions. For completeness, it should be added that Control Council Law No. 10 in its Article II includes under the definition of war crimes, the "plunder of public and private property." This provision was binding on the Military Tribunals which conducted the *Flick*, *I. G. Farben* and *Krupp Trials*.

⁽²⁾ Vol. X, p. 137.

⁽³⁾ See Vol. X, pp. 160-2.

⁽⁴⁾ The Prosecution in the *Krupp Trial* was probably correct in claiming that violation of Art. 46 of the Hague Regulations "need not reach the status of confiscation. Interference with any of the normal incidents of enjoyment of quiet occupancy and use, we submit, is forbidden. Such incidents include, *inter alia*, the right to personal possession, control of the purpose for which the property is to be used, disposition of such property, and the right to the enjoyment of the income derived from the property."

⁽⁵⁾ Except perhaps in relation to the punishment awarded.

its inherent purpose, makes it subservient to the interest of the occupying power, and interferes with the natural connection between the spoiled industry and the local economy. As far as this aspect is concerned, the consent of the owner or owners, or their representatives, even if genuine, does not affect the criminal character of the act." The Tribunal added that the provisions of the Hague Convention regarding private property "relate to plunder, confiscation, and requisition which, in turn, imply action in relation to property committed against the will and without the consent of the owner. We look in vain for any provision in the Hague Regulations which would justify the broad assertion that private citizens of the nation of the military occupant may not enter into agreements respecting property in occupied territories when consent of the owner, is, in fact, freely given."⁽¹⁾

In the *Krupp Trial Judgment*, it may be thought that rather more stress was placed on the second possible approach⁽²⁾ to war crimes committed against property rights. Here it was stated that "Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner". The Tribunal added later:

"Spoilation of private property, then, is forbidden under two aspects; firstly, the individual private owner of property must not be deprived of it; secondly, the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort—always with the proviso that there are exemptions from this rule which are strictly limited to the needs of the army of occupation in so far as such needs do not exceed the economic strength of the occupied territory."⁽³⁾

(b) As is stated in the Judgments delivered in the *I.G. Farben* and *Krupp Trials*, however, some invasions of private property rights are permissible under the law relating to occupied territories. It was stated in the Judgment on the latter trial that Article 43 of the Hague Regulations "permits the occupying power to expropriate either public or private property in order to preserve and maintain public order and safety."⁽⁴⁾ Articles 52 and 53 of the Regulations make further inroads into the principle of the inviolability of private property;⁽⁵⁾ and the

⁽¹⁾ See Vol. X, p. 46.

⁽²⁾ See p. 126.

⁽³⁾ See Vol. X, p. 162-3.

It could be argued that the words "must not be taken over by that occupant" cannot include within their scope agreements between private individuals freely arrived at, that the Tribunal tacitly excluded from its meaning transfers of property effected by such agreements, and that, while the public effects of war crimes committed against property are highly significant, there is no crime at all (if the property is private property) unless a private property right has been infringed in violation of Art. 46 of the Hague Regulations.

The question of the two possible approaches to offences against property rights is dealt with further in Vol. X, pp. 160-3.

⁽⁴⁾ See Vol. X, p. 135.

⁽⁵⁾ See Vol. IX, p. 22 and Vol. X, pp. 135 and 137. It is worth repeating that in the opinion of the International Military Tribunal the general effect of the relevant provisions of the Hague Convention is that "the economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear."

possible effect, in legalising the destruction or seizure of property, of "imperative necessity for the conduct of military operations" was also mentioned in a treatment of Article 23 (g) of the Regulations.⁽¹⁾

The parts of the Hague Regulations referred to read as follows:

"Article 23. . . . it is particularly forbidden . . .

"(g) To destroy or seize enemy property, unless such destruction or seizure be imperatively demanded by the necessities of war";

"Article 43. The authority of the power of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country";

"Article 52. Requisitions in kind and services shall not be demanded from local authorities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligations of taking part in military operations against their own country.

"Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

"Contributions in kind shall as far as possible be paid for in ready money; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible"; and

"Article 53. An army of occupation shall only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots or arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

"Except in cases governed by naval law, all appliances adapted for the transmission of news, or for the transport of persons or goods, whether on land, at sea, or in the air, depots of arms, and, in general, all kinds of war material may be seized, even if they belong to private individuals, but they must be restored at the conclusion of peace, and indemnities must be paid for them."

The Judgment of the Netherlands Special Court of Cassation in the Appeal of the Chief Prosecutor of the Special Court in 's-Hertogenbosch against the acquittal by the latter Court of Abraham Robert Esau⁽²⁾ included an interpretation of Article 53 quoted above:

"Neither the text nor the history of Art. 53, para. 2, gives ground for the proposition that the concept 'munitions de guerre' should be extended far beyond its normal bounds to materials and apparatus such as drilling-machines, turning-lathes, bulbs (lamps), valves and gold and even to other objects which—however important they may be for the technical scientific investigator—certainly do not

⁽¹⁾ See Vol. X, pp. 136-7. see also p. 134. In the *I.G. Farben* Judgment it was simply said that Arts. 46, 47, 52, 53 and 55 of the Regulations "admit of exceptions of expropriation, use, and requisition, all of which are subject to well-defined limitations set forth in the Articles." (Vol. X, pp. 44).

⁽²⁾ Not previously treated in these Volumes.

stand in such close connection with warfare that they must be considered as being among the limitative articles enumerated in Article 531, para. 2, and thus to be excepted from the inviolability of private property in a war on land."

The *Krupp Trial* Judgment, moreover, laid down that the laws and usages of war do not authorise "the taking away by a military occupant of live stock for the maintenance of his own industries at home or for the support of the civil population of his country⁽¹⁾"; moreover the requisitions and services contemplated by Article 52 "must refer to the needs of the Army of Occupation", whereas "It has never been contended that the Krupp firm belonged to the Army of Occupation."

The rules of international law regarding illegal requisitioning of private property, which were crystallised in Article 52 of the Hague Regulations, were applied by a French Military Tribunal in the Trial of Philippe Rust; the accused was found guilty of having requisitioned vehicles (and men) without paying or delivering receipts in lieu of immediate payment.⁽²⁾

(c) Property offences recognised by modern international law are not, however, limited to offences against physical tangible possessions or to open robbery in the old sense of pillage, but include the acquisition of intangible property and the securing of ownership, use or control of all kinds of property by many ways other than by open violence.⁽³⁾

(d) It has been said that proof that consent was "obtained by threats, intimidation, pressure or by exploiting the position and power of the military occupant under circumstances indicating that the owner is being induced to part with his property against his will" would make a transfer illegal under international law.⁽⁴⁾ The possible means of coercion were further elaborated in the *I.G. Farben* Judgment when it was said that in the many instances "in which Farben dealt directly with the private owners, there was the ever present threat of forceful seizure of the property by the Reich or other similar measures, such, for example, as withholding licences, raw materials, the threat of uncertain drastic treatment in peace-treaty negotiations or other effective means of bending the will of the owners. The power of the military occupant was the ever present threat in these transactions, and was clearly an important, if not a decisive factor".⁽⁵⁾

(e) If property has been acquired without the consent of the owner, the proof of having paid consideration is no defence.⁽⁶⁾

Neither will the fact that the reality of a transaction was hidden behind a pseudo legal façade afford a defence.⁽⁷⁾

⁽¹⁾ See Vol. X, pp. 135-6.

⁽²⁾ See Vol. IX, pp. 71-4. The question dealt with in Section (ii) above is set out rather more fully in Vol. X, pp. 163-4.

⁽³⁾ See Vol. X, pp. 164-165 for details on this point. The question to what extent it is necessary that an accused be shown to have intended to acquire the property in question permanently is also discussed in Vol. X, p. 165.

⁽⁴⁾ See Vol. X, p. 47.

⁽⁵⁾ See Vol. X, p. 50.

⁽⁶⁾ See Vol. X, pp. 44 and 51.

⁽⁷⁾ This point is illustrated in Vol. X, p. 165-6, and by the French cases dealing with "abuse of confidence" treated in Vol. IX, p. 43.

(f) One French trial reported in Vol. VIII and two in Vol. IX dealt with wanton destruction of inhabited buildings and the theft of personal property, offences which are war crimes of the more traditional type.⁽¹⁾

(g) If wrongful interference with property rights has been shown, it is not necessary to prove that the alleged wrongdoer was involved in the original wrongful appropriation.⁽²⁾

(h) In dealing with *public property*, the United States Military Tribunals have relied upon Article 55 of the Hague Regulations according to which the occupying power has only a right of usufruct over such property, and that only for the duration of the occupation.⁽³⁾

"Article 55: The occupying State shall be regarded only as administrator and usufructuary of public buildings, landed property, forests and agricultural undertakings belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of such properties, and administer them in accordance with the rules of usufruct."

In a French trial already reported upon in Vol. IX⁽⁴⁾ application was made of the rule of international law forbidding the destruction of public monuments which received expression in Article 56 (and through it, Article 46) of the Hague Regulations. Article 56 provides as follows:

"Article 56: The property of local authorities, as well as that of institutions dedicated to public worship, charity, education and to science and art, even when State property, shall be treated as private property."

"Any seizure or destruction of, or wilful damage to, institutions of this character, historic monuments and works of science and art, is forbidden, and should be made the subject of legal proceedings."

(i) Two provisions are relevant here which make it a war crime to debase the currency of an occupied territory.⁽⁵⁾ Article III of the Chinese Law of 24th October, 1946, declares to be war crimes, not only "confiscation of property", "indiscriminate destruction of property", "robbing" and "unlawful extortion or demanding contributions or requisitions", but also "depreciating the value of currency or issuing unlawful currency notes."⁽⁶⁾ So also "debasement of the currency and issue of spurious currency" is declared a war crime in the Australian Instrument of Appointment of the Board of Inquiry appointed on 3rd September, 1945.⁽⁷⁾ Similar provisions are made in the French and Netherlands East Indies War Crimes laws.⁽⁸⁾

⁽¹⁾ See Vol. VIII, pp. 29-31 and Vol. IX, p. 43.

⁽²⁾ Statements or findings of the Tribunals which conducted the *Flick, I. G. Farben and Krupp Trials* are set out in Vol. X, p. 166, as the basis for arriving at this conclusion.

⁽³⁾ See Vol. IX, pp. 22, 24 and 41-2, and Vol. X, p. 50.

⁽⁴⁾ See Vol. IX, pp. 42-3 and 67-8.

⁽⁵⁾ Such debasement is an attack on the economy of the occupied country, but, as the property of no particular individual is involved, these two provisions are not relevant to the issue set out in section (i) above.

⁽⁶⁾ See Vol. XIV, p. 154.

⁽⁷⁾ See Vol. V, p. . . "Economic exploitation of the Polish population and of economic resources" was proved in the *Greiser Trial* but the Polish Supreme National Tribunal did not analyse at any length the law on this point. (See Vol. XIII, p. 112).

⁽⁸⁾ See Vol. III, p. 96 and Vol. XI, p. 94.

(xvii) *Other offences.* An examination of the French,⁽¹⁾ Australian,⁽²⁾ Polish,⁽³⁾ Netherlands⁽⁴⁾ and Chinese⁽⁵⁾ Laws on war crimes will reveal that they not only provide against a number of offences whose punishment has been illustrated by trials reported in these volumes, but also define certain crimes which have not been charged before the courts in trials so reported, including some not mentioned elsewhere in this present volume. It has not been thought necessary to quote here all of the provisions relating to offences of the latter type, since the texts may be examined in full in the earlier volumes, but it may be added that they include usurpation of sovereignty during military occupation, which is declared a crime by the Australian, Netherlands and Chinese laws.⁽⁶⁾

7. SOME EXCEPTIONAL CATEGORIES OF WAR CRIMES

All or nearly all of the categories of crimes so far enumerated may be regarded as offences committed in violation of the rights of various types of persons. There are, however, also some war crimes which in essence do not necessarily so violate human rights. These may be grouped as follows:

(i) *Offences committed in breach of surrender terms*

An example of the punishment of such offences is provided by the *Scuttled U-Boat Case*, where an accused was found guilty of sinking U-Boats in violation of a German Instrument of Surrender, signed on 4th May, 1945.⁽⁷⁾

A parallel trial was that of Kapitänleutnant Ehrenrich Stever by a British Military Court at Hamburg, 17th-18th July, 1946.⁽⁸⁾ Here the accused was found guilty of "Committing a war crime in that he in the Atlantic Ocean off Portugal on or about 2nd June, 1945, when commander of U-Boat U.1277 after the German Command had surrendered all naval ships to the Allied Forces, in violation of the laws and usages of war, scuttled U-Boat U.1277." The sentence of five years' imprisonment was confirmed.

A trial related to this in some respects was that of Eisentraeger and others, by a United States Military Commission at Shanghai,⁽⁹⁾ in which a number of German accused were found guilty of knowingly, wilfully and unlawfully violating the unconditional German surrender "by engaging in and continuing military activity against the United States and its allies, to wit by furnishing, ordering, authorising, permitting and failing to stop the furnishing of and assistance, information, advice, intelligence, propaganda and material to the Japanese armed forces and agencies, thereby by such acts of treachery assisting Japan in waging war against the United States of America in violation of the laws and customs of war".

⁽¹⁾ See Vol. III, p. 95-96.

⁽²⁾ See Vol. V, pp. 95-96.

⁽³⁾ See Vol. VII, pp. 84-86.

⁽⁴⁾ See Vol. XI, pp. 92-97.

⁽⁵⁾ See Vol. XIV, pp. 153-154.

⁽⁶⁾ Compare a reference to Article 45 of the Hague Regulations in Vol. VI, p. 93.

⁽⁷⁾ See Vol. I, pp. 67-70.

⁽⁸⁾ Not previously treated in these volumes.

⁽⁹⁾ See Vol. XIV, pp. 8-22, especially pp. 16-22.

Two Netherlands trials of Japanese accused are also of interest in this connection. On 7th May, 1947, Mizuo Katsuno was sentenced to eighteen years' imprisonment by a Temporary Court Martial in Medan, Netherlands East Indies,⁽¹⁾ having found him guilty of the war crime: "Commission of hostilities contrary to the terms of an armistice". The Court found, *inter alia*, that:

"It is a matter of general knowledge that an armistice was concluded in 1945 between the Allied and Japanese armies in accordance with which all hostilities by the Japanese army had to be stopped, which is further confirmed by the copy of the agreement concluded at Singapore on 12th September, 1945, between the Supreme Allied Commander, South East Asia and the authorised representative of the Supreme Commander, Japanese Expeditionary Forces, Southern Regions, which has been read out at the sitting . . .

"Helping, in contravention of the terms of an armistice, with the construction of fortifications and joining an organisation fighting the lawful Netherlands East Indies Government, thereby committing hostilities, is named by the legislator in Article 1, sub-section 39, of the 'Definition of War Crimes Decree' as an example of acts which constitute a violation of the laws or customs of war, so that it is not necessary to go separately into which laws or customs of war have been violated . . .

"The war which broke out in 1941 between the Kingdom of the Netherlands and the Japanese Empire is not yet at an end, so that that which has been charged was committed in time of war by a subject of an enemy power thereby constituting a war crime . . .

"The continuation of hostilities after an armistice has been concluded between the belligerents is so contrary to good faith and so hinders the restoration of normal conditions that a sharp punishment is rightly called for, but the strengthening of the armed bands roaming the interior by adding to them a specialist trained soldier has particularly serious consequences in the circumstances reigning at the present time so that a very heavy sentence ought to be imposed."

Minoru Hatada and two others were sentenced to death by a Temporary Court Martial at Macassar⁽¹⁾ having been found guilty of "commission of hostilities contrary to the terms of the surrender of Kokio dated 2nd September, 1945". They were shown to have participated in the operations of Indonesian rebels after the Japanese surrender. The Court held, *inter alia*, that "by the above actions the accused have violated Article 35 of the Rules of Land Warfare 1907, seeing that they frustrated the surrender of Kokio, dated 2nd September, 1945, whereby the defeated enemy power Japan—whose subjects the accused are—surrendered unconditionally to the Allied forces". The Article referred to provides that:

"Article 35. Capitulations agreed upon between the contracting parties must take into account the rules of military honour.

"Once settled, they must be scrupulously observed by both parties."

⁽¹⁾ Trial not previously treated in these Reports.

(ii) *The Giving of Unexecuted Orders*

A study of relevant parts of the Judgments delivered in the *High Command Trial*, the *Hostages Trial* and the trial held by the International Military Tribunal in Nuremberg, and of the trials of August Schmidt, Moehle and Falkenhorst before British Military Courts, has revealed that an accused may be found guilty of having made or transmitted an illegal order which was not carried out, if he knew that it was illegal or if it was obviously illegal.⁽¹⁾

The illegality of the mere giving of an unlawful order would appear to have been recognised even under conventional international law, since Article 23 (d) of the Hague Convention lays down that: "It is particularly forbidden . . . to declare that no quarter will be given". It will be recalled that Brigadeführer Kurt Meyer was found guilty on charges including one which said that he "in violation of the laws and usages of war, incited and counselled troops under his command to deny quarter to Allied troops."⁽²⁾ Charges 1 and 7 of the charges on which Falkenhorst was found guilty was similar.⁽³⁾

Again, in a trial before a British Military Court at Hamburg, 29th November, 1946,⁽⁴⁾ Hans Wickman was found guilty of "committing a war crime . . . in that he . . . in violation of the laws and usages of war gave orders to [his] platoon that no prisoners were to be taken and that any prisoners taken were to be shot". Directions to give no quarter are declared illegal by the Australian and Netherlands War Crimes laws.⁽⁵⁾

(iii) *The Abuse of Red Cross Protection*

In the trial by a United States Intermediate Military Government Court, Heinz Hagendorf was sentenced to six months' imprisonment on a charge of having "wrongfully used the Red Cross emblem in a combat zone by firing a weapon at American soldiers from an enemy ambulance displaying such emblem."⁽⁶⁾

Liability for the improper use of Red Cross insignia is covered by an express provision of the Hague Regulations respecting the Laws and Customs of War on Land, appended to the IVth Hague Convention of 1907. Article 23 (f) of the Hague Regulations provides that "it is particularly forbidden" to "make improper use of a flag of truce, of the national flag, or of the military insignia, and uniform of the enemy, as well as of the distinctive signs of the Geneva Convention".⁽⁷⁾ The latter is a reference to the Convention for the Amelioration of the Conditions of Soldiers wounded in Armies in the Field of 1864, revised in 1906 and more recently in 1929.

⁽¹⁾ See Vol. XII, pp. 118-23 where these authorities are reviewed.

⁽²⁾ See Vol. IV, pp. 98 and 108.

⁽³⁾ See Vol. XI, pp. 18, 23 and 29-30.

⁽⁴⁾ Not previously treated in these volumes.

⁽⁵⁾ See Vol. V, p. 96 and Vol. XI, p. 94.

⁽⁶⁾ See Vol. XIII, pp. 146-148.

⁽⁷⁾ Italics inserted.

(iv) *Offences Committed against Dead Bodies*

Cannibalism and other offences committed against dead bodies have been punished as war crimes. Examples of their prosecution are provided by the trial of Max Schmid by a United States Military Government Court at Dachau, and by other trials mentioned in the notes to the report on that case which has appeared in Volume XIII. Also in the notes to the report are quoted relevant Articles contained in the Geneva Convention of 1929 for the Amelioration of the Conditions of the Wounded and Sick of Armies in the Field.⁽¹⁾

C. CRIMES AGAINST HUMANITY

The commission of crimes against humanity has been charged in a number of trials reported upon in these volumes and in this sphere the United States Military Tribunals have applied Article II, paragraph 1, of Control Council Law No. 10 which provides that :

"Each of the following acts is recognised as a crime : . . .

(c) Crimes against Humanity : Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated."

Of the trials referred to above the most important from the point of view of the definition of the scope of the concept of crimes against humanity have been the *Justice Trial*⁽²⁾ and the *Flick Trial*⁽³⁾. The law laid down in these trials and in some others reported upon may be summarised as follows :

(i) In the first place it is clear that war crimes may also constitute crimes against humanity ; the same offences may amount to both types of crime. If war crimes are shown to have been committed in a widespread, systematic manner, on political, racial or religious grounds, they may amount also to crimes against humanity.⁽⁴⁾

(ii) On the other hand, not all types of acts which could constitute war crimes could also constitute crimes against humanity, and the dividing line between the acts which could constitute both and acts which, in their nature, could only be war crimes is not always easy to draw, in the absence of relevant judicial pronouncements covering certain types of offences. That crimes against humanity are not limited to offences against inhabitants of occupied territories is shown by a pronouncement made in the Judgment delivered in the *High Command Trial*, that the plan of the German Government "to inspire the German population to murder Allied fliers by lynch law or mob justice" was a crime against humanity.⁽⁵⁾ In the *Flick Trial*, however, it was laid

⁽¹⁾ See Vol. XIII, pp. 151-152.

⁽²⁾ See Vol. VI, pp. 78-83.

⁽³⁾ See Vol. IX, pp. 44-52.

⁽⁴⁾ See Vol. VI, p. 79.

⁽⁵⁾ See Vol. XII, p. 71 note 2. Contrast however the fact that in the *Justice Trial*, whereas the indictment charged the taking part in Hitler's programme of inciting the German civilian population to murder Allied airmen forced down within the Reich as both a war crime and a crime against humanity, the Judgment, in dealing with Klemm's responsibility in this connection, spoke only of such participation as being in violation of the laws of war (Vol. VI, p. 81).

down that offences against industrial property could not constitute crimes against humanity.⁽¹⁾ This ruling was adopted by the Tribunal acting in the *I.G. Farben Trial*,⁽²⁾ while a quotation from the Judgment delivered in the *Einsatzgruppen Trial* which has been quoted in Volume IX of this series⁽³⁾ indicates that the Tribunal acting in that trial regarded crimes against humanity as being offences such as "murder, torture, enslavement" and infringements of "freedom of opinion . . . the moral or physical integrity of the family . . . or the dignity of the human being".

The Judgment in the *Flick Trial* declared that "a distinction could be made between industrial property and the dwellings, household furnishings, and food supplies of a persecuted people",⁽⁴⁾ and thus left open the question whether such offences against personal property as would amount to an assault upon the *health and life* of a human being (such as the burning of his house or depriving him of his food supply or his paid employment) would not constitute a crime against humanity. Certain passages from the Judgment of the Nuremberg International Military Tribunal treating certain offences against property as crimes against humanity⁽⁵⁾ could refer to acts of economic deprivation of this more personal type.

It may readily be doubted whether certain other categories of war crimes could ever constitute crimes against humanity, even if the other attributes of crimes against humanity (reviewed below) are displayed. Thus, it does not seem possible that war crimes in which there is no violation of human rights⁽⁶⁾ could possibly be regarded as crimes against humanity.⁽⁷⁾ In the absence of relevant judicial pronouncements, then, it is not possible to state in every instance whether a type of act which could constitute a war crime could also amount to a crime against humanity.

(iii) In the second place, it is established that the possible victims of crimes against humanity form a wider group than the possible victims of war crimes. The latter category comprises broadly speaking the nationals of armed forces of belligerent countries or inhabitants of territories occupied after conquest (other than enemy nationals) against whom offences are committed by enemy nationals as long as peace has not been declared. Crimes against humanity on the other hand could have included also offences committed by German nationals against other German nationals or any stateless person, and apparently also against nationals of Hungary and Rumania.⁽⁸⁾

(iv) Isolated offences do not constitute crimes against humanity.⁽⁹⁾

⁽¹⁾ See Vol. IX, pp. 48-51.

⁽²⁾ See Vol. X, pp. 41-42 and 64.

⁽³⁾ See Vol. IX, pp. 49-50.

⁽⁴⁾ See Vol. IX, p. 26.

⁽⁵⁾ Quoted in Vol. IX, pp. 50-1.

⁽⁶⁾ See pp. 131-4.

⁽⁷⁾ This remark assumes crimes against humanity to be restricted to offences against human rights. If on the other hand they are taken to include all offences that grossly offend the human conscience it may be that atrocities against dead bodies could be regarded as crimes against humanity.

⁽⁸⁾ See pp. 87-8, Vol. IX, pp. 51-2 and Vol. XIII, pp. 133-135.

⁽⁹⁾ See Vol. VI, pp. 79-80 and Vol. IX, p. 51, and compare Vol. XIII, pp. 135-136.

(v) Apparently, the proof of systematic governmental organisation of the acts alleged is a necessary element of crimes against humanity.⁽¹⁾

(vi) According to the judgment delivered in the *Justice Trial*, if the offences are not "Atrocities and offences", as defined in Law No. 10, and committed against civilian populations, but amount to persecutions, they must be persecutions *on political, racial or religious grounds*.⁽²⁾

(vii) According to the judgment delivered in the *Flick Trial*, the omission from Law No. 10 of the Allied Control Council of the words "in execution of or in connection with any crime within the jurisdiction of the Tribunal"⁽³⁾ did not serve to extend the scope of that law to cover crimes against humanity occurring before 1st September, 1939; the Tribunal's main argument was that the Charter of the International Military Tribunal, which had been made an integral part of Law No. 10⁽⁴⁾, had been interpreted by the latter tribunal in such a way that crimes against humanity committed before the above-mentioned date were excluded from the scope of the Charter.⁽⁵⁾

The principle laid down in the *Flick Trial*, had been left undecided by the Tribunal conducting the *Justice Trial* (Tribunal III) which, in its exposition on the question of crimes against humanity, on this point did not go beyond saying:

"The evidence to be later reviewed established that certain inhuman acts charged in Count 3 of the Indictment were committed in execution of, or in connection with, aggressive war and were, therefore, crimes against humanity even under the provisions of the IMT Charter, but it must be noted that C.C. Law 10 differs materially from the Charter. The latter defines crimes against humanity as

⁽¹⁾ See Vol. VI, pp. 79-80 and Vol. IX, p. 51.

⁽²⁾ See Vol. VI, pp. 79-80 and 80-83.

⁽³⁾ Article 6(c) of the Charter of the International Military Tribunal makes the following definition: "Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." (Italics inserted.)

⁽⁴⁾ Article I of Law No. 10 provides: "The Moscow Declaration of 30th October, 1943, 'Concerning Responsibility of Hitlerites for Committed Atrocities' and the London Agreement of 8th August, 1945, 'Concerning Prosecution and Punishment of Major War Criminals of the European Axis' are made integral parts of this Law."

⁽⁵⁾ The statement of the International Military Tribunal on this point runs as follows: "With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and in so far as the inhumane act charged in the Indictment and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity." (British Command Paper, Cmd. 6964, p. 65.) (See Vol. IX, pp. 44-5.)

inhumane acts, etc., committed '... in execution of, or in connection with, any crime within the jurisdiction of the tribunal ...', whereas in C.C. Law 10 the words last quoted are deliberately omitted from the definition."⁽¹⁾

On the other hand, the Judgment in the *Einsatzgruppen Trial* conducted by Tribunal II, included the following explicit declaration:

"The International Military Tribunal, operating under the London Charter, declared that the Charter's provisions limited the Tribunal to consider only those crimes against humanity which were committed in the execution of or in connection with crimes against peace and war crimes. The Allied Control Council, in its Law No. 10, removed this limitation so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law.

"As this law is not limited to offences committed during war, it is also not restricted as to nationality of the accused or of the victim, or to the place where committed."

In estimating the relative authoritative nature of the decision on this question reached in the *Flick Trial* and in the *Einsatzgruppen Trial*, it should be remembered that since the Indictment in the latter charged crimes against humanity committed "between May, 1941 and July, 1943" the dictum quoted from the judgment delivered therein was not necessary to the decisions reached.⁽²⁾ In the *Flick Trial*, on the other hand, Count 3 charged the commission of crimes against humanity between January, 1936 and April, 1945.⁽³⁾ and the Tribunal had to come to a decision as to the criminality of four actual transactions which were completed before 1st September, 1939.⁽⁴⁾

The Tribunal which conducted the *Flick Trial* appears to have been on sounder ground when it said that "crimes committed before the war and having no connection therewith were not in contemplation"⁽⁵⁾ than when it declared that "In the I.M.T. trial the tribunal declined to take jurisdiction of crimes against humanity occurring before 1st September, 1939". This latter phrase does not seem to represent the complete picture, as may be gathered from an examination of the relevant passage from the Judgment of the International Military Tribunal quoted above.⁽⁶⁾ Indeed the International Military Tribunal

⁽¹⁾ Vol. VI, pp. 40-41 and 83. The attitude to this point of the Tribunal which conducted the *Justice Trial* is further set out in Vol. IX, p. 46. The Tribunal left open the question whether it would have considered evidence of offences committed before 1939 had they been charged in Counts 2, 3 and 4.

⁽²⁾ Similarly in the *Justice Trial* the crimes against humanity charged in Count Three were said to have been committed "between September, 1939 and April, 1945"; See Vol. VI, p. 4.

⁽³⁾ See Vol. IX, p. 4.

⁽⁴⁾ See Vol. IX, p. 25.

⁽⁵⁾ See Vol. IX, p. 26. (Italics inserted.)

⁽⁶⁾ See p. 136 note 5. It has been pointed out that the International Military Tribunal "recognised some crimes committed prior to 1st September, 1939 as crimes against humanity in cases where their connection with the crime against peace was established. Although in theory it remains irrelevant whether a crime against humanity was committed before or during the war, in practice it is difficult to establish a connection between what is alleged to be a crime against humanity and a crime within the jurisdiction of the Tribunal, if the act was committed before the war. . . ." (Egon Schwelb, in *British Year Book of International Law*, 1946, pp. 204-205). (Italics inserted). For a further elaboration of the learned writer's views on this point, see Vol. IX, p. 47-8.

could hardly have decided that no crime against humanity could possibly have been committed before the war, because Article 6 (c) of the Charter includes the words "before or during the war" which govern at least the first part of that provision.⁽¹⁾

The Tribunal which conducted the *High Command Trial* may be thought to have agreed with the attitude taken to this point by the Tribunal acting in the *Flick Trial*; the former pointed out that: "All the acts relied upon as constituting crimes against humanity in this case occurred during and in connection with the war".⁽²⁾

(viii) The crime of *genocide*, which received recognition by the Tribunal which conducted the *Justice Trial*,⁽³⁾ bears similarity to certain types of crimes against humanity but also certain dissimilarities; these have been discussed in previous volumes of this series, and the outcome seems to be that, while the two concepts may overlap, genocide is different from crimes against humanity in that, to prove it, no connection with war need be shown,⁽⁴⁾ and, on the other hand, genocide is aimed against groups, whereas crimes against humanity do not necessarily involve offences against or persecutions of groups. The inference may be justified that deeds are crimes against humanity within the meaning of Law No. 10 if the political, racial or religious background of the wronged person is the main reason for the wrong done to him, and if the wrong done to him as an individual is done as part of a policy or trend directed against persons of his political, racial or religious background; but that it is not necessary that the wronged person belong to an organised or well-defined group.⁽⁵⁾

D. CRIMES AGAINST PEACE

Apart from the judgments delivered in the two trials held before the International Military Tribunals at Nuremberg and Tokyo, the judicial authorities concerning crimes against peace are the judgments in the *I.G. Farben*,⁽⁶⁾ *Krupp*,⁽⁷⁾ *High Command*,⁽⁸⁾ *Greiser*⁽⁹⁾ and *Takashi Sakai*⁽¹⁰⁾ Trials, together with the trial of Weizsäcker and others before a United States Military Tribunal, 1st November, 1947-15th April, 1949, in which the judgment was delivered too late to enable a report on that trial to be included in this series.⁽¹¹⁾

⁽¹⁾ See p. 136, note 3.

⁽²⁾ For certain relevant Chinese provisions relating to what may possibly be regarded as crimes against humanity, see Vol. XIV, p. 156.

⁽³⁾ See p. 122.

⁽⁴⁾ See Vol. XIII, p. 41.

⁽⁵⁾ See Vol. VI, p. 83, note 3.

⁽⁶⁾ See Vol. X, pp. 30-40.

⁽⁷⁾ See Vol. X, pp. 102-130.

⁽⁸⁾ See Vol. XII, pp. 65-71.

⁽⁹⁾ See Vol. XIII, pp. 108-10.

⁽¹⁰⁾ See Vol. XIV, pp. 1-7.

⁽¹¹⁾ Occasionally the judgment delivered in a trial in which aggressive war is not charged contains a reference to the waging of such a war, but it is not always clear whether the Tribunal is seeking to show that there is a legal conclusion to be drawn from the fact that the war referred to was aggressive in nature. This is true of the judgment in the *Justice Trial*. "For the accomplishment of the ends of aggressive war, the elimination of political opposition and the extermination of Jews in all of Europe," says the judgment, "it was deemed necessary to harness the Ministry of Justice and the entire court system for the enforcement of the penal laws in accordance with National Socialist ideology." Similar reference in the judgment to aggressive war are contained in passages quoted in Vol. VI, pp. 62 and 73.

The enactments relevant to the trials mentioned have already been quoted or mentioned in these pages: Article II 1 (a) of Law No. 10,⁽¹⁾ and the relevant provisions of Polish⁽²⁾ and Chinese⁽³⁾ Law. It should be added that, while no trials before Danish or Greek Courts or before United States Military Commissions in the Pacific Theatre of Operations in which crimes against peace have been alleged have been reported to the United Nations War Crimes Commission, such courts are in fact empowered to try such crimes.⁽⁴⁾

The following paragraphs numbered (i)-(ix) attempt to analyse the law relating to crimes against peace (including in the meaning of that term "planning, preparation, initiation or waging a war of aggression" and "participating in a common plan or conspiracy for the accomplishment of any of the foregoing", to use the language of Article II 1 (a) of Law No. 10) as that law has been developed in the trials by United States Military Tribunals in Nuremberg which were bound by Law No. 10. The Polish and Chinese decisions are next referred to, and finally some remarks regarding the legal effects of the fact that a crime against peace has been committed are set out.

(i) Deeming it necessary "to give a brief consideration to the nature and characteristics of war", the Tribunal which conducted the *High Command Trial* said:

"We need not attempt a definition that is all inclusive and all exclusive. It is sufficient to say that war is the exerting of violence by one state or politically organised body against another. In other words, it is the implementation of a political policy by means of violence. Wars are contests by force between political units but the policy that brings about their initiation is made and the actual waging of them is done by individuals. What we have said thus far is equally as applicable to a just as to an unjust war, to the initiation of an aggressive and, therefore, criminal war as to the waging of defensive and, therefore, legitimate war against criminal aggression. The point we stress is that war activity is the implementation of a predetermined national policy.

"Likewise, an invasion of one state by another is the implementation of the national policy of the invading state by force even though the invaded state, due to fear or a sense of the futility of resistance in the face of superior force, adopts a policy of non-resistance and thus prevents the occurrence of any actual combat. . . .

"The initiation of war or an invasion is a unilateral operation. When war is formally declared or the first shot is fired the initiation of the war has ended and from then on there is a waging of war between the two adversaries."⁽⁵⁾

(ii) Not all wars are illegal; nor is rearmament *per se* illegal:

"Furthermore, we must not confuse idealistic objectives with realities. The world has not arrived at a state of civilisation such that it can dispense with fleets, armies, and air forces, nor has it arrived at a point where it can safely outlaw war under any and all circumstances and

⁽¹⁾ See p. 42.

⁽²⁾ See p. 35; and Vol. VII, pp. 90-91.

⁽³⁾ See p. 36; and Vol. XIV, p. 153.

⁽⁴⁾ See pp. 33 and 36 of the present Volume and Vol. III, p. 106.

⁽⁵⁾ Vol. XII, pp. 66 and 67.

situations. Inasmuch as all war cannot be considered outlawed then armed forces are lawful instrumentalities of state, which have internationally legitimate functions. An unlawful war of aggression connotes of necessity a lawful war of defence against aggression. There is no general criterion under International Common Law for determining the extent to which a nation may arm and prepare for war. As long as there is no aggressive intent, there is no evil inherent in a nation making itself militarily strong. An example is Switzerland which for her geographical extent, her population and resources is proportionally stronger militarily than many nations of the world. She uses her military strength to implement a national policy that seeks peace and to maintain her borders against aggression."⁽¹⁾

As was remarked in the *I.G. Farben and Krupp Trials* :

"The I.M.T. stated that, 'Rearmament of itself is not criminal under the Charter.'"⁽²⁾

(iii) The characteristics of illegal warfare are left rather undefined :

"Whether a war be lawful or aggressive and therefore unlawful under International Law, is and can be determined only from a consideration of the factors that entered into its initiation. In the intent and purpose for which it is planned, prepared, initiated and waged is to be found its lawfulness or unlawfulness. . . .

"By the Kellog-Briand Pact the sixth-three signatory nations including Germany, renounced war as an instrument of *National Policy*. If this, as we believe it is, is evidence of a sufficient crystallisation of world opinion to authorise a judicial finding that there exist Crimes against Peace under International Common Law, we cannot find that law to extend further than such evidence indicates. The nations that entered into the Kellog-Briand Pact considered it imperative that existing international relationships should not be changed by force. In the preamble they state that they are :

'... persuaded that the time has come when . . . all changes in their relationships with one another should be sought only by pacific means.'

"This is a declaration that from that time forward each of the signatory nations should be deemed to possess and to have the right to exercise all the privileges and powers of a sovereign nation within the limitations of International Law, free from all interference by force on the part of any other nation. As a corollary to this, the changing or attempting to change the international relationships by force of arms is an act of aggression and if the aggression results in war, the war is an aggressive war. It is, therefore, aggressive war that is renounced by the pact. It is aggressive war that is criminal under International Law.

"The crime denounced by the law is the use of war as an instrument of national policy."⁽³⁾

⁽¹⁾ Vol. XII, p. 68.

⁽²⁾ Vol. X, pp. 36, 106 and 122. The Tribunals were careful to make clear, furthermore, that they were not called upon or empowered to make new law on the question of crimes against peace ; see Vol. X, pp. 31 and 121 and Vol. XII, p. 67.

⁽³⁾ Vol. XII, pp. 67 and 70.

Elsewhere the Tribunal acting in the *High Command Trial* quoted the section of the Judgment of the Nuremberg International Military Tribunal which is headed "Violations of International Treaties".⁽¹⁾ Here the latter court, having pointed out that "The Charter defines as a crime the planning or waging of war that is a war of aggression or a war in violation of international treaties,"⁽²⁾ refers to violations by Germany of the most important of these treaties that were in fact broken by that State.⁽³⁾

Comparatively little judicial attention has, however, been paid to that part of Article II 1 (a) of Law No. 10 which, like Article 6 (a) of the Charter of the Nuremberg International Military Tribunal, declares criminal, "planning, preparation, initiation or waging of . . . a war in violation of international treaties, agreements or assurances."⁽⁴⁾ although the Supreme National Tribunal of Poland may be taken to have regarded conspiracy to commit breaches of Article 104 of the Treaty of Versailles and of the Polish Danzig Agreement of 9th November, 1920, and other agreements, and breach of the non-aggression pact signed in Berlin on 26th January, 1934, between Poland and Germany, as constituting part of ex-Gauleiter Greiser's guilt under the charge of crimes against peace⁽⁵⁾.

The Judgment of the Tokyo International Military Tribunal recognises five separate crimes as crimes against peace :

"Under the heading of 'Crimes against Peace' the Charter names five separate crimes. These are planning, preparation, initiation and waging aggressive war or a war in violation of international law, treaties, agreements, or assurances ; to these four is added the further crime of participation in a common plan or conspiracy for the accomplishment of any of the foregoing. The indictment was based upon the Charter and all the above crimes were charged in addition to further charges founded upon other provisions of the Charter."

The Tribunal added, however :

"A conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime. Thereafter, in furtherance of the conspiracy, follows planning and preparing for such war. Those who participate at this stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plan and prepare for its fulfilment they become conspirators. For this reason, as all the accused are charged with the conspiracies, we do not consider it necessary in respect of those we may find guilty of conspiracy to enter convictions also for planning and preparing. In other words, although we do not question the validity of the charges we do not think it necessary in respect of any defendants who may be found guilty of conspiracy to take into consideration nor to enter convictions upon counts 6 to 17 inclusive.

⁽¹⁾ See British Command Paper, Cmd. 6964, pp. 36-38.

⁽²⁾ Italics inserted.

⁽³⁾ Vol. XII, p. 62.

⁽⁴⁾ See p. 42. The Nuremberg International Military Tribunal found it unnecessary to discuss at any length whether the aggressive wars found to have been proved were also wars in violation of international treaties, agreements or assurances (British Command Paper, Cmd. 6469, p. 36).

⁽⁵⁾ See Vol. XIII, pp. 70-71, 74-77 and 108-110.

"A similar position arises in connection with the counts of initiating and waging aggressive war. Although initiating aggressive war in some circumstances may have another meaning, in the Indictment before us it is given the meaning of commencing the hostilities. In this sense it involves the actual waging of the aggressive war. After such a war has been initiated or has been commenced by some offenders others may participate in such circumstances as to become guilty of waging the war. This consideration, however, affords no reason for registering convictions on the counts of initiating as well as of waging aggressive war. We propose, therefore, to abstain from consideration of Counts 18 to 26 inclusive."⁽¹⁾

Finally it should be added that in the Chinese trial mentioned on page 138, the Tribunal, in finding the accused guilty of a crime against peace, stressed that he had taken part in a war in violation of certain specified international agreements.⁽²⁾

(iv) The essentials of criminality in this sphere are knowledge and participation. After reviewing the findings of the International Military Tribunal as to Kaltenbrunner, Frank, Frick, Streicher, Funk, Schacht, Doenitz, von Schirach, Sauckel, von Papen, Speer, Fritzsche and Bormann, the Tribunal which conducted the *I.G. Farben Trial* said:

"From the foregoing it appears that the I.M.T. approached a finding of guilty of any defendant under the charges of participation in a common plan or conspiracy or planning and waging aggressive war with great caution. It made findings of guilty under Counts I and II only where the evidence of both knowledge and active participation was conclusive. No defendant was convicted under the charge of participating in the common plan or conspiracy unless he was, as was the defendant Hess, in such close relationship with Hitler that he must have been informed of Hitler's aggressive plans and took action to carry them out or attended at least one of the four secret meetings at which Hitler disclosed his plans for aggressive war. The I.M.T. Judgment lists these meetings as having taken place on 5th November, 1937, 23rd May, 1939, 22nd August, 1939, and 23rd November, 1939."⁽³⁾

The necessity for knowledge and participation was repeated elsewhere,⁽⁴⁾ but it is added in the *Krupp Trial* Judgment that:

"In finding Hess guilty on the aggressive war Count and on the conspiracy Count, the International Military Tribunal clearly indicated that in its opinion a defendant could be found guilty even if he had not attended one of the four meetings referred to above. Likewise, we do not hold that a defendant cannot be found guilty unless he attended one of the meetings."⁽⁵⁾

⁽¹⁾ Official transcript of the Judgment, pp. 32-33.

⁽²⁾ See Vol. XIV, pp. 6-7.

⁽³⁾ See Vol. X, pp. 31-34. The finding as to Speer was given particular attention, the importance of the precedent seeming to be that: "He was the official head of the whole industrial programme for the production of armaments. It would be unprecedented to hold that the activities of private citizens in the production of armament constituted waging of war when those of the official supervising those activities did not constitute that offence." (See Vol. X, p. 106-107 and 125-127).

⁽⁴⁾ See Vol. X, pp. 35, 36, 106, 123, 125 and 128-129.

⁽⁵⁾ Vol. X, p. 106; and see pp. 122-123 of that Volume.

The requisite knowledge must be of plans for specific invasions or wars of aggression:

"The International Military Tribunal required proof that each defendant had actual knowledge of the plans for at least one of the invasions or wars of aggression, in order to find him guilty."⁽¹⁾

Judge Anderson emphasised that:

"The requisite knowledge, I think, can be shown either by direct or circumstantial evidence but in any case it must be knowledge of facts and circumstances which would enable the particular individual to determine not only that there was a concrete plan to initiate and wage war, but that the contemplated conflict would be a war of aggression and hence criminal. Such knowledge being shown, it must be further established that the accused participated in the plan with the felonious intent to aid in the accomplishment of the criminal objective. In the individual crime of aggressive war or conspiracy to that end as contrasted to the international delinquency of a state in resorting to hostilities, the individual intention is of major importance."⁽²⁾

Judge Wilkins also stressed that the requisite knowledge must include knowledge that the envisaged warfare would be criminal in character:

"To establish the requisite criminal intent, it seems necessary to show knowledge that the military power would be used in a manner which, in the words of the Kellogg Pact, includes war as an 'instrument of policy'."⁽³⁾

The judgment delivered in the *High Command Trial* ruled that, in certain circumstances, *inaction* could make an accused liable, as well as "active participation":

"We are of the opinion that as in ordinary criminal cases, so in the crime denominated aggressive war, the same elements must all be present to constitute criminality. There first must be actual knowledge that an aggressive war is intended and that if launched it will be an aggressive war. But mere knowledge is not sufficient to make participation even by high-ranking military officers in the war criminal. It requires in addition that the possessor of such knowledge, after he acquires it shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it. If he then does the former, he becomes criminally responsible; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy.

"If a defendant did not know that the planning and preparation for invasions and wars in which he was involved were concrete plans and preparations for aggressive wars and for wars otherwise in violation of international laws and treaties, then he cannot be guilty of an offence. If, however, after the policy to initiate and wage aggressive wars was formulated, a defendant came into possession of knowledge that the

⁽¹⁾ Vol. X, p. 106.

⁽²⁾ Vol. X, p. 123.

⁽³⁾ See Vol. X, pp. 128-129.

invasions and wars to be waged were aggressive and unlawful, then *he will be criminally responsible if he, being on the policy level, could have influenced such policy and failed to do so.*"⁽¹⁾

(v) It was stressed that no rule of law excluded either business men or military men from liability for crimes against peace if the essentials of criminality are present :

"We do not hold that industrialists as such, could not under any circumstances be found guilty upon such charges."⁽²⁾

"The prosecution does contend, and we think the contention sound, that the defendants are not relieved of responsibility for action which would be criminal in one who held no military position, simply by reason of their military positions. This is the clear holding of the Judgment of the I.M.T., and is so provided in Control Council Law No. 10, Article II, Sec. 4a."⁽³⁾

Military men appeared among those found guilty of crimes against peace by the International Military Tribunal for the Far East.

Further, of the accused Oshima who was found guilty of conspiracy to wage aggressive war, that Tribunal said :

"Oshima was one of the principal conspirators and consistently supported and promoted the aims of the main conspiracy.

"He took no part in the direction of the war in China or the Pacific War and at no time held any post involving duties or responsibility in respect of prisoners.

"Oshima's special defence is that in connection with his activities in Germany he is protected by diplomatic immunity and is exempt from prosecution. Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the Courts of the State to which an Ambassador is accredited. In any event, this immunity has no relation to Crimes against international law charged before a tribunal having jurisdiction. The tribunal rejects this special defence."⁽⁴⁾

(vi) Of the types of person who could be held guilty of crimes against peace, the *I.G. Farben* Judgment said :

"The London Agreement is entitled an agreement 'for the prosecution and punishment of the major war criminals of the European Axis.' There is nothing in that agreement or in the attached Charter to indicate that the words 'waging a war of aggression', as used in Article II (a) of the latter, were intended to apply to any and all persons who aided, supported, or contributed to the carrying on of an aggressive war ; and it may be added that the persons indicted and tried before the I.M.T. may fairly be classified as 'major war criminals' in so far as their activities were concerned. Consistent with the express purpose of the London Agreement to reach the 'major war criminals', the Judgment of the I.M.T. declared that 'mass punishments should be avoided.'

⁽¹⁾ Vol. XII, pp. 68-69. (Italics inserted).

⁽²⁾ See Vol. X, p. 105.

⁽³⁾ Vol. XII, p. 66.

⁽⁴⁾ Official transcript of the judgment, p. 1189.

"To depart from the concept that only *major war criminals*—that is, those persons in the political, military, and industrial fields, for example, who were *responsible for the formulation and execution of policies*—may be held liable for waging wars of aggression would lead far afield. Under such circumstances there could be no practical limitation on criminal responsibility that would not include, on principle, the private soldier on the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces, or the housewife who conserved fats for the making of munitions. Under such a construction the entire manpower of Germany could, at the uncontrolled discretion of the indicting authorities, be held to answer for waging wars of aggression. That would, indeed, result in the possibility of mass punishments. . . .

"The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. It is, of course, unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilt to which the corollary of mass punishment is the logical result, for which there is no precedent in international law and no justification in human relations. We cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or, if it starts right, when it turns wrong. We would not require the citizen, at the risk of becoming a criminal under the rules of international justice, to decide that his country has become an aggressor and that he must lay aside his patriotism, the loyalty to his homeland, and the defence of his own fireside at the risk of being adjudged guilty of crimes against peace on the one hand, or of becoming a traitor to his country on the other, if he makes an erroneous decision based upon facts of which he had but vague knowledge. To require this of him would be to assign to him a task of decision which the leading statesmen of the world and the learned men of international law have been unable to perform in their search for a precise definition of aggression."⁽¹⁾

The *Krupp Trial* Judgment stated :

"Whatever may be the view of experts in the field of criminology, in the eyes of law-makers and laymen the object of punishment is to deter others from crime. In this particular instance, I apprehend, the object sought to be accomplished by making aggressive war a crime was to deter those *capable of initiating that type of war* from doing so. The language used in the Pact is to the effect that the signatories renounced war as a *matter of national policy*. Considered in the light of the complexity of the whole problem, the usage and custom which led to the Treaty and the object sought to be accomplished, it seems to me to be a reasonable view that the language used necessarily implies that only those *responsible for a policy* leading to initiation and waging

⁽¹⁾ See Vol. X, pp. 37-39. (Italics inserted).

of aggressive war and those privy to such a policy together with those who, with a criminal intent actively conduct the hostilities or collaborate therein, are criminally liable in the event of war in violation of the Pact; for, if the threat of punishment deters these, there will be no war and the object of the law will have been accomplished. Upon the other hand, if the threat to the policy-makers, leaders and their collaborators proves of no avail, is it reasonable to conclude that the law contemplates that the threat of post-war punishment by a court exercising criminal jurisdiction held out to the mass of the people will prove effective? To answer this in the affirmative, it seems to me, would be to ignore everyday experience and indulge in purely theoretical rather than practical thought.

"Moreover, to extend criminal liability beyond the leaders and policy-makers and their privies to private citizens called upon to aid the war effort necessarily embodies the concept of mass punishment . . ."⁽¹⁾

The Tribunal which conducted the *High Command Trial* found that no accused could be held guilty of crimes against peace unless he was in a position to influence state policy; no other type of "major war criminal" could apparently fall within the Tribunal's ruling:

"As we have pointed out, war whether it be lawful or unlawful is the implementation of a national policy. If the policy under which it is initiated is criminal in its intent and purpose it is so because the individuals at the policy-making level had a criminal intent and purpose in determining the policy. If war is the means by which the criminal objective is to be attained then the waging of the war is but an implementation of the policy, and the criminality which attaches to the waging of an aggressive war should be confined to those who participate in it at the policy level.

"This does not mean that the Tribunal subscribes to the contention made in this trial that since Hitler was the Dictator of the Third Reich and that he was supreme in both the civil and military fields he alone must bear criminal responsibility for political and military policies. No matter how absolute his authority, Hitler alone could not formulate a policy of aggressive war and alone implement that policy by preparing, planning, and waging such a war. Somewhere between the Dictator and Supreme Commander of the Military Forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it. Control Council Law No. 10 does not definitely draw such a line. It points out in Sec. 2 of Article II certain fact situations and established relations that are or may be sufficient to constitute guilt and sets forth certain categories of activity that do not establish immunity from criminality. Since there has been no other prosecution under Control Council Law No. 10 with defendants in the same category as those in this case, no such definite line has been judicially drawn. This Tribunal is not required to fix a general rule but only to determine the guilt or innocence of the present defendants . . .

"If and as long as a member of the armed forces does not participate in the preparation, planning, initiating or waging of aggressive war on

⁽¹⁾ See Vol. X, pp. 127-128. (Italics, apart from the second set thereof, are inserted.)

a policy level, his war activities do not fall under the definition of Crimes against Peace. It is not a person's rank or status, but his power to shape or influence the policy of his State, which is the relevant issue for determining his criminality under the charge of Crimes against Peace.

"International Law condemns those who, due to their actual power to shape and influence the policy of their nation, prepare for, or lead their country into or in an aggressive war. But we do not find that, at the present stage of development, International Law declares as criminals those below that level who, in the execution of this war policy, act as the instruments of the policy-makers. . . .

"Those who commit the crime are those who participate at the policy-making level in planning, preparing, or in initiating war. After war is initiated, and is being waged, the policy question then involved becomes one of extending, continuing or discontinuing the war. The crime at this stage likewise must be committed at the policy-making level.

"The making of a national policy is essentially political, though it may require, and of necessity does require, if war is to be one element of that policy, a consideration of matters military as well as matters political. . . .

"The acts of Commanders and Staff Officers below the policy level, in planning campaigns, preparing means for carrying them out, moving against a country on orders and fighting a war after it has been instituted, do not constitute the planning, preparation, initiation and waging of war or the initiation of invasion that International Law denounces as criminal."⁽¹⁾

The International Military Tribunal for the Far East may be thought to have followed the same line of thought. Two passages from its judgment should be quoted in this connection:

"[Muto, Akira] was a soldier and prior to holding the important post of Chief of the Military Affairs Bureau of the Ministry of War he held no appointment which involved the *making of high policy*. Further, there is no evidence that in this earlier period he, alone or with others, tried to affect the making of high policy.

"When he became Chief of the Military Affairs Bureau he joined the conspiracy. Concurrently with this post he held a multiplicity of other posts from September, 1939 to April, 1942. During this period planning, preparing and waging wars of aggression on the part of the conspirators was at its height. He played the part of a principal in all these activities."

[Of Sato, Kenryo:] "It was thus not until 1941 that Sato attained a position which by itself enabled him to influence the making of policy, and no evidence has been adduced that prior to that date he had indulged in plotting to influence the *making of policy*. The crucial question is whether by that date he had become aware that Japan's designs were criminal, for thereafter he furthered the development and execution of these designs so far as he was able."⁽²⁾

⁽¹⁾ Vol. XII, pp. 67, 69 and 70.

⁽²⁾ Official transcript of the Judgment, pp. 1185 and 1190-1. (Italics inserted.)

(vii) The specific crime of *conspiracy* to plan, prepare, initiate or wage a war of aggression has been discussed above as part of the crime against peace. In particular, it should be noted that the *dicta* concerning knowledge and participation refer to conspiracy as well as the offence of planning, preparing, initiating and waging aggressive war. The Tribunal in the *I.G. Farben Trial* repeated that: "In order to be participants in a common plan or conspiracy, it is elementary that the accused must know of the plan or conspiracy." The Tribunal also stated:

"It is appropriate here to quote from the I.M.T. Judgment:

"The Prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan." (Vol. I, p. 225, I.M.T. Judgment.) "(1)

After quoting the same passage from the Judgment of the International Military Tribunal, the Tribunal acting in the *Krupp Trial* pointed out that: "Applying this rule, the I.M.T. held proof of actual knowledge of the concrete plans of the Nazi government to wage aggressive war to be essential to a conviction under the conspiracy Count. . . . Whether it be called the 'Nazi conspiracy', the 'Krupp conspiracy', or by some other name, to be a crime under Control Council Law No. 10 or the London Charter, a conspiracy must meet at least three requirements: (1) There must be a concrete plan participated in by two or more persons; (2) the plan must not only have a criminal purpose but that purpose must be clearly outlined; and (3) the plan must not be too far removed from the time of decision and of action." (2)

A relevant paragraph from the Judgment of the Tokyo International Military Tribunal dealing with conspiracy to wage wars of aggression runs as follows:

"The conspiracy existed for and its execution occupied a period of many years. Not all of the conspirators were parties to it at the beginning, and some of those who were parties to it had ceased to be active in its execution before the end. All of those who at any time were parties to the criminal conspiracy or who at any time with guilty knowledge played a part in its execution are guilty of the charge contained in Count I." (3)

(viii) In view of the language of Law No. 10, Article II 1 (a)—"planning, preparation, initiation or waging", the question presents itself whether the mere planning of a war of aggression would itself be criminal. It seems (4)

(1) Vol. X, p. 40, and also 31.

(2) Vol. X, pp. 110 and 113.

(3) Official Transcript, pp. 1142-3.

(4) See Vol. X, pp. 119, 121 and 125.

that such an act would not be criminal unless it amounted to the crime of conspiracy discussed above, and that this would necessitate proof of action, in common with others, which involved conspiring to initiate or wage specific wars of aggression. It was on this ground, among others, that the Prosecution's theory of a separate "Krupp conspiracy" was dismissed. (1)

(ix) On the facts before them, the Military Tribunals held all accused charged of crimes against peace to be not guilty of such offences, on the grounds either of lack of knowledge or lack of ability to influence policy. (2)

(x) In the Trial of Takashi Sakai by a Chinese War Crimes Military Tribunal at Nanking, the accused was found guilty of, *inter alia*, a crime against peace in that he participated in a war of aggression, (3) and Artur Greiser was also found guilty of, *inter alia*, crimes against peace, in his trial before the Supreme National Tribunal of Poland. (4) Neither the Chinese nor the Polish Courts, however, examined in their judgments the question of how closely an accused must be shown to have been to the planning and waging of aggressive war before he can be held responsible for crimes against peace. The Supreme National Tribunal made it clear, however, that Greiser had acted as an instrument of Hitler and not as one who had any part in the laying down of policy, and its judgment indicates why he was chosen to be such an instrument of Hitler's will. (5)

(xi) Some other important aspects of crimes against peace have been noted in these volumes. Each shows whether the fact that such crimes have been committed alters a certain legal situation:

(a) In the *Milch Trial* the Tribunal expressed certain conclusions regarding what amounted to a plea of superior orders. (6) It seems fair to summarize the decision of the Tribunal by saying that it rejected the plea on the grounds that the superior orders relied upon related to the waging of a war of aggression and involved the commission of "ruthless acts of persecution and terrorism", and that the defendant must have known that the orders were in these ways illegal. This finding is interesting in that it represents the only instance reported in these volumes in which the illegal nature of aggressive war has been related to the principle that the plea of superior orders can only be effective if the orders were legal or if the accused was not aware, and could not reasonably be expected to be aware, of their illegality. (7)

(b) On the other hand, it was laid down in the *Hostages Trial* that "International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of

(1) See Vol. X, pp. 107-109 and 110-120.

(2) See Vol. X, pp. 34-35, 36-37, 38-39, 40, 123-124, 127 and 129 and Vol. XII, p. 70.

(3) See Vol. XIV, pp. 4-7.

(4) See Vol. XIII, pp. 104-5 and 108-9.

(5) See Vol. XIII, pp. 104-5.

(6) See Vol. VII, pp. 40-2.

(7) See pp. 157-158.

this subject."⁽¹⁾ The Supreme National Tribunal of Poland, in the *Greiser Trial* declared that the occupation of Poland by the Reich was a "criminal invasion" and was not, therefore an occupation in the true sense of the word. The Tribunal did not, however, elaborate upon the legal consequences of this finding.⁽²⁾

(c) The Tribunal acting in the *High Command Trial* rejected a Prosecution argument that an accused could never plead military necessity in the course of a criminal war.⁽³⁾

(d) In the *Trial of Willy Zuehlke*, the Netherlands Special Court of Cassation dissented from the opinion of the Court of first instance 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 was agreed that the said war was an international crime and added that on account of this fact the Netherlands "would have been authorized 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." The Court stated, however, that: "it is going too far to regard as war crimes all acts committed against the Netherlands or Netherlands 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."⁽⁴⁾

E. MEMBERSHIP OF CRIMINAL ORGANIZATIONS

(i) The question of membership of criminal organizations has received treatment at several points in these Volumes⁽⁵⁾. Three aspects of the problem are discussed elsewhere in this present volume: the relation of membership to the crime of conspiracy,⁽⁶⁾ the fact that, in respect of the question whether any organization must be deemed to have been criminal, the findings of the Nuremberg International Military Tribunal are binding upon the United States Military Tribunals which function under Ordinance No 7, and have also been followed in trials before United States Military Government Courts,⁽⁷⁾ and the question of the punishment to be meted out to those found guilty of membership.⁽⁸⁾

(ii) The Charter of the International Military Tribunal did not define a "group" or "organization." The matter is left to the appreciation of the Tribunal as a question of fact.

(iii) The criminal acts for which a group or organization may be declared criminal are apparently those covered by the Charter in its Article 6, i.e. crimes against peace, war crimes and crimes against humanity. The

⁽¹⁾ See Vol. VIII, pp. 59-60. Compare Vol. VI, p. 52 and Vol. XIV, pp. 127-129, where similar opinions on the part of the Tribunal acting in the *Rauter Trial*, and of certain other Netherlands Courts are set out.

⁽²⁾ See Vol. XIII, p. 110. Compare a similar statement in Vol. XIV, p. 46.

⁽³⁾ See Vol. XII, pp. 124-125.

⁽⁴⁾ Vol. XIV, pp. 143-145.

⁽⁵⁾ See Vol. VI, pp. 65-72 and 77; Vol. VII, pp. 5-7, 18-24 and 86-7, Vol. IX, pp. 28-9; Vol. X, pp. 57-61; and (especially) Vol. XIII, pp. 42-67.

⁽⁶⁾ See pp. 3 and 98-99.

⁽⁷⁾ See p. 17-18.

⁽⁸⁾ See p. 201-202.

International Military Tribunal would appear to have made this clear in the statement in which it stated that mere membership of criminal organizations was not *per se* criminal in nature:

"Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations."⁽¹⁾

(iv) Various of the judgments delivered by the United States Military Tribunals have included rulings as to whether the groups to which various accused belonged were to be regarded as being part of organizations declared criminal by the International Military Tribunal and as to whether "sponsoring" membership was sufficient for criminality⁽²⁾, but as stated in the Introduction to the present volume, it is felt that such findings as to individual groups and organizations are of less importance to the development of international law than the underlying basic legal principle.⁽³⁾

(v) The International Military Tribunal did not specify who was to bear the onus of proof regarding the test of personal guilt, when an alleged member is brought to trial, but the wording used by the Tribunal in respect of each of the organizations it declared criminal tends to indicate that it regarded the burden as resting on the prosecution. It would appear that two alternative courses were open to the competent courts. The first would be to hold the view that the declaration made by the Nuremberg Tribunal creates a presumption of guilt against every member, and that consequently all the prosecution is required to do is to establish that the accused was a member of the organization. In this case it was to be presumed, until proof to the contrary was established by the defendant, that he knew of the criminal purposes or acts of the organization or that, if he did not join the organization on a voluntary basis, he was personally implicated in the commission of crimes. The second course would be to hold the view that no presumption of individual guilt derives from the declaration of the Nuremberg Tribunal, and that consequently, the prosecution is called to prove not only that the accused was a member of the organization declared criminal, but also that he knew the relevant facts or (if an involuntary member) that he was personally implicated in the commission of crimes. It would appear that, by omitting to give an explicit answer on the issue of the burden of proof, the Nuremberg Tribunal in fact delegated this task to the competent courts and shunned interfering with their jurisdiction beyond the point mentioned in the Judgment.⁽⁴⁾ In the event the courts have in many cases explicitly ruled that the burden of proof remains on the prosecution.⁽⁵⁾ At times, however, they have on first sight appeared to take a

⁽¹⁾ British Command Paper, Cmd. 6964, p. 67. (Italics inserted).

⁽²⁾ See Vol. VI, p. 77 and Vol. X, pp. 59-61.

⁽³⁾ See pp. 3 and 98-99.

⁽⁴⁾ See Vol. XIII, pp. 51-2.

⁽⁵⁾ See Vol. X, p. 59 and Vol. XIII, pp. 58-60 and 62.

different view, as when the Tribunal which conducted the *Justice Trial* held that no man with Joel's intimate contacts with the Reich Security Main Office, the S.S. and the S.D. and the Gestapo "could possibly have retained membership of the second and third mentioned organizations without knowledge of their criminal character."⁽¹⁾ The crimes of the Leadership Corps of the Nazi Party, ruled the Tribunal at another point in its Judgment, were of such wide scope and were so intimately connected with the activities of the Gauleitung that "it would be impossible for a man of the defendant's [Oeschey's] intelligence not to have known of the commission of these crimes, at least in part if not entirely."⁽²⁾ Finally, of Altstötter's guilt under Count Four, the Tribunal said, *inter alia*: "that the activities of the S.S. and the crimes which it committed as pointed out by the Judgment of the International Military Tribunal above quoted are of so wide a scope that no person of the defendant's intelligence, and one who had achieved the rank of Oberführer in the S.S., could have been unaware of its illegal activities, particularly a member of the organization from 1937 until the surrender. According to his own statement, he joined the S.S. with misgivings, not only on religious grounds but also because of practices of the police as to protective custody in concentration camps. . . He was a member of the S.S. at the time of the pogroms in November, 1938, 'Crystal Week', in which the International Military Tribunal found the S.S. to have had an important part. Surely whether or not he took a part in such activities or approved of them, he must have known of that part which was played by an organization of which he was an officer."⁽³⁾ These extracts from its Judgment are sufficient to show that the Tribunal was willing, in suitable instances, to assume knowledge on the part of defendants of the criminal purposes of the organizations referred to, though it should be added that Altstötter for instance was not found guilty on the basis of presumed knowledge alone.⁽⁴⁾

Speaking in rather a similar vein, the Tribunal which conducted the *Flick Trial* said:

"Relying upon the I.M.T. findings above quoted the Prosecution took the position that it devolved upon Steinbrinck to show that he remained a member without knowledge of such criminal activities. As we have stated in the beginning, the burden was all the time upon the Prosecution. But in the face of the declaration of I.M.T. that such knowledge was widespread we cannot believe that a man of Steinbrinck's intelligence and means of acquiring information could have remained wholly ignorant of the character of the S.S. under the administration of Himmler."⁽⁵⁾

It is clear however that the Tribunals are here not reversing the burden of proof in the sense described above, but are treating *other facts than the mere fact of membership*, such as the accused's rank and duties, as creating a

⁽¹⁾ See Vol. VI, p. 76 (Italics inserted).

⁽²⁾ See Vol. VI, p. 68 (Italics inserted).

⁽³⁾ See Vol. VI, pp. 71 and 72 (Italics inserted).

⁽⁴⁾ See Vol. VI, pp. 71-72.

⁽⁵⁾ Vol. IX, p. 29. (Italics inserted).

presumption of knowledge. As was said by the Tribunal which conducted the *I.G. Farben Trial*, "Proof of the requisite knowledge need not, of course be direct, but may be inferred from circumstances duly established."⁽¹⁾

(vi) In Volume VII of these Reports, it has been submitted⁽²⁾ that since the ratification of the London Agreement by Poland, whenever a person is tried on a charge of membership in a group or organization the criminal character of which was under the examination of the Nuremberg Tribunal, the Polish Courts are in law bound by the findings of the Tribunal and cannot re-examine the question of the criminal character of the organization dealt with in the Judgment.

On the other hand, it is clear from the law as laid down in paragraph 2 of Article 4 of the Polish War Crimes Decree of 1944 that Polish Courts are not bound by the fact that certain other groups or organizations have not been indicted and adjudicated as criminal within the meaning of the Charter of the International Military Tribunal. In these cases the Polish Court may declare such groups or organizations to be criminal within the Polish jurisdiction. Accordingly, in practice the Polish courts have declared to be criminal some other Nazi groups or organizations which displayed particular zeal in occupied Poland, such as the leadership of the German civil administration in the so-called General Government, members of the concentration camp staff at Auschwitz, and officials of the administration of the Lodz ghetto.⁽³⁾

The fact that the Polish legislation on membership of criminal organizations is based upon the principle of joint responsibility for acts done in pursuance of a criminal common design (as, it has been submitted,⁽⁴⁾ is the approach taken by the Judgment of the International Military Tribunal), seems to be proved by the wording of paragraph 2 of Article 4 of the above-mentioned Decree:

"Paragraph 2. A Criminal organization in the meaning of paragraph 1 is a group or organization:

(a) which has as its aims the commission of crimes against peace, war crimes or crimes against humanity; or

(b) which while having a different aim, tries to attain it through the commission of crimes mentioned under (a)."⁽⁵⁾

It is also significant that in a Polish trial referred to in the notes to the *Hoess Trial* it was held that the inmates of Auschwitz concentration camp could only be held responsible for their personal deeds as they were not members of the criminal organization as it is understood by the Nuremberg Judgment, namely, they were not bound together by a common aim which was the commission of crimes against humanity.⁽⁶⁾

⁽¹⁾ Vol. X, p. 59.

⁽²⁾ See Vol. VII, pp. 86-7 and pp. 20-1 of that Volume, paragraphs (1), (2), (5) and (7).

⁽³⁾ See Vol. VII, pp. 20-4 and Vol. XIV, pp. 40-8. The requirement of knowledge of the criminal aims and methods of the organization question will be found to have been repeatedly stressed.

⁽⁴⁾ See pp. 98-9.

⁽⁵⁾ Vol. VII, pp. 86-7.

⁽⁶⁾ Vol. VII, p. 21. Compare Vol. XIV, p. 45. Regarding the attitude of the Polish Supreme National Tribunal to membership of criminal organizations, see also Vol. XIII, pp. 107-8.

(vii) Finally it should be remarked that Article 10 of the Netherlands East Indies Statute Book Decree No. 45 of 1946 contains a special rule regarding responsibility of a group of individuals involved in the commission of war crimes. It reads as follows :

" 1. If a war crime is committed within the framework of the activities of a group of persons in such a way that the crime can be ascribed to that group as a whole, the crime shall be considered to have been committed by that group, and criminal proceedings taken against and sentences passed on all members of that group.

" 2. No penalty shall be imposed on the member for whom it is proved that he had taken no part in the commission of the war crime."

This provision may have been applied in the trial of Shigeki Motomura and others at Macassar ; the court did not, however, discuss the legal implications thereof.⁽¹⁾ The Netherlands Metropolitan laws contain no provisions applicable to membership of criminal organisations.⁽²⁾

⁽¹⁾ See Vol. XIII, pp. 138-42. The provision is further discussed in Vol. XI, pp. 101-2.

⁽²⁾ See Vol. XIV, pp. 141 and 142-3.

VII

DEFENCE PLEAS

(i) The pages which follow deal with those pleas on which courts, or Judge Advocates acting with British or Commonwealth Courts, have expressed opinions in trials reported in these volumes, and which are of the most importance from the point of view of international law. Pleas and arguments either explicitly or implicitly based solely upon provisions of municipal law have not been included here, but examples may be found from time to time in the series,⁽¹⁾ particularly pleas to the jurisdiction of the court.⁽²⁾

(ii) As already indicated, the pleas treated here have all been decided or passed upon by courts or Judge Advocates in actual trials, but not all have been recognised by the courts as valid. Further, not all of those which have been recognised as valid have been regarded as constituting a complete defence in the sense that they take away completely an accused's guilt ; in particular the plea of superior orders has generally been regarded as constituting, if anything, a mitigating circumstance which may be considered in assessing sentence. The way in which each plea is to be classified along the above-mentioned lines will become clear from the treatment which follows.

(iii) Before proceeding, one matter of definition should be dealt with. It is necessary to describe at the outset what is usually regarded as first the plea of superior orders, second the plea of duress (sometimes called the plea of coercion) and thirdly the plea of military necessity. This process of definition is made necessary by the fact that the same names are not always given to the same alleged sets of facts, and the term " necessity " has from time to time been applied to one or other of all three.⁽³⁾

A study of war crime trials reveals that, among others, three pleas of a related character have been put forward by the Defence in such trials :

⁽¹⁾ See for instance Vol. I, pp. 23-4, 73, 74, 75, 76-8 and 78-9 ; Vol. III, pp. 2, 36, 38, 42-5 and 45-9 ; Vol. IV, pp. 7-11, 13-15, 15-16, 38-41, 44-6, 49-50, 63-9, 73-4, 75 ; Vol. XI, pp. 8, 9, 53-4 and 132-3 ; and Vol. XIII, pp. 110, 117 and 132.

The subject-matter of many of the pleas described or commented upon on the pages here referred to was procedural ; some aspects of war crimes procedure are dealt with on pp. 918-199. Pleas which claim that the courts of one state which conducted trials on the territory of another state did so without the latter's consent do not challenge the general right of courts under international law to try war criminals, and so appear to form a separate category. The question depends upon whether the latter state can be said to have given its consent. See Vol. I, p. 42 ; Vol. V, pp. 8-10 and Vol. XIV, pp. 15-16.

⁽²⁾ The possibility of pleas to the jurisdiction of British, Canadian and Australian war crime courts has been ruled out by the enactments under which they operate (Vol. I, p. 106, Vol. IV, p. 126 and Vol. V, p. 99).

⁽³⁾ For an example of the application of the word " necessity " to a set of facts usually connected with the plea of superior orders, see Vol. X, p. 174.

(a) The argument that the accused acted under orders, which he had the duty to obey, when he committed the acts alleged against him. Sometimes this plea is augmented by the claim that certain consequences would ultimately have followed from disobedience, such as the execution of the person refusing to obey and/or the taking of reprisal action against his family. This may be called the *plea of superior orders*.

(b) The argument that, in committing the acts complained of, the accused acted under an immediate threat to himself. This may be called the *plea of duress*.

(c) The argument that a military action carried out by a group of military personnel was justified by the general circumstances of battle. This may be called the *plea of military necessity*.

It is not always easy to distinguish one plea from another and the same argument put forward in court may contain elements of more than one. Nevertheless, the fact that there is a difference between the first and second for instance may be taken to have been recognised by the Tribunal which conducted the *Einsatzgruppen Trial*, in that it applied one test of the knowledge of the illegality of an order in cases where the plea of superior orders is put forward and a different test when the plea of duress is added. The Tribunal said that: "To plead superior orders one must show an excusable ignorance of their illegality", yet it went on:

"But it is stated that in military law *even if the subordinate realises that the act he is called upon to perform is a crime*, he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes duress. Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to put a lethal lever.

"Nor need the peril be that imminent in order to escape punishment."⁽¹⁾

Further, an examination of the treatment given by the Tribunals which conducted the *Flick*, *I.G. Farben* and *Krupp Trials*, to the "defence of necessity", suggests that they regarded an argument based on necessity, if substantiated, as constituting a complete defence and not simply a mitigating circumstance. This was particularly clear in the Judgment in the *Flick Trial*, where the Tribunal, referring to Article II (4) (b) of Control Council Law No. 10 ("the fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation"), said: "In our opinion it is not intended that these provisions are to be employed to deprive a defendant of the defence of necessity under such circumstances as obtain in this case with respect to defendants Steinbrinck, Burkart, Kaletsch and Terberger."⁽²⁾

⁽¹⁾ Vol. VIII, p. 91. (Italics inserted).

⁽²⁾ See Vol. IX, p. 19. The classification of defences attempted in the text above represents a slight condensation of pages 174-5 of Vol. VIII.

The Judgment delivered in the *I.G. Farben Trial* also made clear the distinction between the legal effects of the successful pleading of, respectively, the plea of superior orders and the plea of duress:

"Thus the I.M.T. recognised that while an order emanating from a superior officer or from the government is not, of itself, a justification for the violation of an international law (though it may be considered in mitigation), nevertheless, such an order is a complete defence where it is given under such circumstances as to afford the one receiving it no other moral choice than to comply therewith."⁽¹⁾

In the discussion which appears in these present pages of the attitude of the courts to these three pleas, attention has been paid, where necessary to avoid confusion, to the sets of alleged facts to which the courts referred rather than to the names which the courts gave to the pleas; thus, for instance, remarks which a court made on the "defence of necessity" are quoted in the section on superior orders when the context shows that the court is actually discussing what is usually known as the defence of superior orders.

1. THE PLEA OF SUPERIOR ORDERS⁽²⁾

(i) The plea of superior orders has been raised by the Defence in war crime trials more frequently than any other. The most common form of the plea consists in the argument that the accused was ordered to commit the offence by a military superior and that under military discipline orders must be obeyed. A closely related argument is that which claims that had the accused not obeyed he would have been shot or otherwise punished; it is sometimes also maintained in court that reprisals would have been taken against his family. A variation is to be found in the argument of Counsel for Dr. Klein, one of the accused in the *Belsen Trial*; ⁽³⁾ Counsel claimed that if a British soldier refused to obey an order he would face a court-martial, where he would be able to contest the lawfulness of the order, whereas Dr. Klein had no such protection.

Not unnaturally, then, the plea has received treatment or reference on many previous occasions in the pages of these volumes.⁽⁴⁾

(ii) It has often been said that an accused is entitled under international law to obey commands which are lawful or which he could not reasonably be expected to know were unlawful. The question, however, arises whether these commands must be lawful under municipal law or under international law; as will be seen,⁽⁵⁾ the legality under municipal law of the accused's acts does not free him from liability to punishment if those acts constitute war crimes, and it seems to follow that the plea of having acted upon orders which were legal under municipal law must also fail to constitute a defence. On the other hand, if the order is legal under international law, it is difficult

⁽¹⁾ Vol. X, p. 54.

⁽²⁾ See also p. 155.

⁽³⁾ See Vol. II, p. 79.

⁽⁴⁾ See especially Vol. V, pp. 13-22, Vol. VII, p. 65, Vol. VIII, pp. 90-2 and Vol. X, pp. 174-6; and see also Vol. XI, pp. 24-5, 46-50, 77-8, and Vol. XIII, pp. 68-9.

⁽⁵⁾ See pp. 161-2.

to show how an act committed in obedience to it could be illegal under that system.⁽¹⁾ If the act were thus legal in itself, there would be no need for an accused to have recourse to the defence of superior orders. The true test in practice is whether an order, *illegal* under international law, on which an accused has acted was or must be presumed to have been known to him to be so illegal, or was obviously so illegal ("illegal on its face" to use the term employed by the Tribunal in the *High Command Trial*) or should have been recognised by him as being so illegal. The *general upshot* of a large number of decisions, and of the advice of Judge Advocates to British or Commonwealth courts,⁽²⁾ is that, if the order comes within one or more of these categories, then the accused cannot rely upon the plea of superior orders.

The Judgment delivered in the *Einsatzgruppen Trial* underlined certain other essentials. It was said that: "If one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order. It would not be an adequate excuse, for example, if a subordinate, under orders, killed a person known to be innocent, because by not obeying it he would himself risk a few days of confinement. Nor if one acts under duress, may he without culpability, commit the illegal act once the duress ceases."

Further, "the doer may not plead innocence to a criminal act ordered by his superiors if he is in accord with the principle and intent of the superior... In order successfully to plead the defence of Superior Orders the opposition of the doer must be constant. It is not enough that he mentally rebel at the time the order is received. If at any time after receiving the order he acquiesces in its illegal character, the defence of Superior Orders is closed to him."⁽³⁾

Before this treatment of the circumstances in which the plea may be effectively put forward is closed, it should be added that, while the plea in its typical form relates to military orders given to military personnel, it may also in suitable circumstances be pleaded by civilians who acted under orders.⁽⁴⁾

(iii) As to the effectiveness of the plea when put forward in circumstances which, in accordance with the rules just laid down, make it permissible to plead superior orders, the general attitude of the courts and the rule expressed in numerous municipal and international law enactments, including the Charter of the International Military Tribunal and Law No. 10, has been that, while obedience to superior orders does not constitute a defence upon

⁽¹⁾ Unless the act constituted an illegal *means* of fulfilling a legal order. This, however, is not the situation in which the plea is in fact usually put forward.

⁽²⁾ See Vol. V, pp. 14-19 and the cross-references there set out, Vol. VII, p. 65, Vol. VIII, p. 50 and p. 91, Vol. XI, pp. 98-100; Vol. XII, p. 74; Vol. XIII, pp. 114-17 and 144-5 and Vol. XIV, pp. 146-151. These rules have not invariably been followed; compare the acquittal of Luger in the *Wagner Trial*; this accused knew of the illegality of the orders which he obeyed. (See Vol. V, p. 16).

⁽³⁾ Vol. VIII, pp. 90-1.

⁽⁴⁾ As it was by Luger, a Public Prosecutor who acted on the orders of Gauleiter Wagner. (See Vol. III, pp. 54-5).

For a discussion of the question of superior orders thought to be in pursuance of legitimate reprisals, See Vol. VIII, pp. 7-8 and Vol. XI, pp. 25-7.

which an accused can rely with certainty of being completely protected thereby, it may at the discretion of the court be treated as a factor which justifies mitigation of punishment.⁽¹⁾

In the trial of Gozawa Sadaichi and others at Singapore, 21st January-4th February, 1946,⁽²⁾ a British Military Court in passing sentences addressed the following language to two of the accused:

"Chiba Masami, your participation in the horrible scene which has been described in this Court is undoubted. But it would be unjust to deal with you on the same footing as your superior officers. The sentence of the Court, subject to confirmation, is that you be kept in prison for the term of seven years.

"Tanno Shozo: Yabi Jinichiro, the Court considers that your brutality was carried out under the orders of your superior officers. But you were not unwilling brutes, nor unversed in brutality. The sentence of the Court, therefore, subject to confirmation, is that you be kept in prison for the term of three years."

The Tribunal acting in the *High Command Trial* dealt with, *inter alia*, the position of a commanding officer who knows that men under his command are committing violations of International Law in pursuance of orders from *his superiors* passed down independently of him. While admitting the difficulty of his position, the Tribunal held that "by doing nothing he cannot wash his hands of international responsibility. His only defence lies in the fact that the order was from a superior which Control Council Law No. 10 declares constitutes only a mitigating circumstance."⁽³⁾ This is

⁽¹⁾ See Vol. V, pp. 13, 17 and 19-22; Vol. VI, p. 117; Vol. VII, pp. 10 and 88; Vol. VIII, pp. 16, 20-21, 50, 52, 90 and 91-92. For an exceptional case, a type of order which the Tribunal in the *High Command Trial* regarded as being capable of giving rise to a complete defence, see Vol. XII, p. 98.

It is clear that the circumstances of each case will determine the *extent* of mitigation which the court will recognise. In this connection it may be permissible to summarise three of the possible criteria for determining the circumstances in which the plea of superior orders might be effective which were touched upon by counsel in the *Masuda Trial* and which are set out more fully on pages 18-19 of Vol. V:

(a) The degree of military discipline governing the accused at the time of the commission of the alleged offence.

(b) The relative positions in the military hierarchy of the person who gave and the person who received the order.

(c) The military situation at the time when the alleged offence was committed.

These suggested criteria demonstrate an awareness of the heavy pressure under which an accused may be acting in obeying an order, and the fact that in some circumstances a subordinate would have less opportunity to consider the legality of an order than in others. It is difficult, however, to say precisely how far such criteria as the three set out above are followed by Courts. The International Military Tribunal at Nuremberg, commenting in its Judgment on Art. 8 of its Charter apparently had the same consideration in mind when it said: "The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible." (British Command Paper, Cmd. 6964, p. 42).

In the Judgment in the *Milch Trial*, there seems to be a recognition that, whatever the effectiveness of the plea of superior orders, such effectiveness would be greater in conditions of war-time than during time of peace. (See Vol. VII, p. 65).

⁽²⁾ Not previously considered in these Volumes.

⁽³⁾ See Vol. XII, pp. 74-5.

interesting as a rare example of the application of this provision to afford some protection to a person other than that to whom the order was addressed.

2. THE PLEA THAT AN ACT WAS LEGAL OR EVEN OBLIGATORY UNDER MUNICIPAL LAW

The general attitude taken by the courts and by the war crimes legislation of various countries⁽¹⁾ to this plea has been much the same as that taken towards the plea of superior orders. The plea does not constitute a complete defence to a charge but may be admitted as a circumstance justifying mitigation of sentence.

The defence that the accused's acts were justified in their own municipal law received consideration in the *Belsen Trial*, but was rejected by the Military Court which tried the case.⁽²⁾ Again, the Judgment of the Military Tribunal before which the *Justice Trial* was conducted pointed out that: "The defendants contend that they should not be found guilty because they acted within the authority and by the command of the German laws and decrees." After quoting the provisions of Control Council Law No. 10 as to the plea of superior orders,⁽³⁾ and also the provision therein for the punishment of crimes against humanity whether or not in violation of the domestic laws of the country where perpetrated, however, the Judgment went on to point out that: "The very essence of the prosecution case is that the laws, the Hitler decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defence to the charge."⁽⁴⁾

Defining "crimes against humanity", Control Council Law No. 10 deems to be criminal:

"... Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, *whether or not in violation of the domestic laws of the country where perpetrated.*"⁽⁵⁾

The importance of the words italicised was stressed by the Tribunal which conducted the *Justice Trial*.⁽⁶⁾

⁽¹⁾ See Vol. V, pp. 22-4; and see Vol. VII, p. 65; Vol. XI, p. 50 and Vol. XIV, p. 69.

⁽²⁾ See Vol. II, pp. 70-5, 107-8 and 148.

⁽³⁾ Art. II, 4(b):

"The fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."

⁽⁴⁾ Vol. VI, pp. 48-9.

⁽⁵⁾ Italics inserted. The words italicised appeared also in the definition of crimes against humanity in the Charter of the Nuremberg International Military Tribunal.

⁽⁶⁾ See Vol. VI, pp. 39-40, 48-49 and 75. Compare a comment on p. 78 of that volume.

It was, however, the view of the Tribunal conducting the *Greifelt Trial* "that euthanasia, when carried out *under state legislation* against citizens of the state only does not constitute a crime against humanity."⁽¹⁾

It may be added that the Tribunal acting in the *Justice Trial* was unable to regard as constituting crimes against humanity the enforcement in Germany against Germans and during time of war, of laws providing the death penalty for habitual criminality, looting and undermining military morale.⁽²⁾

3. THE PLEA OF HAVING ACTED IN AN OFFICIAL CAPACITY

A defence that an accused was head of a State has not been pleaded in trials such as those reported upon in these volumes, since no such person has been brought before the courts which have conducted these trials. Nevertheless it is worth noting that the similar circumstance that an accused in committing offences was acting in an official or judicial capacity has not been regarded as constituting a defence.⁽³⁾

Sometimes it has been expressly laid down in municipal enactments that an accused's official position does not excuse him. Thus, the Chinese Law of 24th October, 1946, governing the Trial of War Criminals provides in its Article VIII that the fact that the crimes were committed as a result of official duty or in pursuance of governmental policy shall not exonerate war criminals.⁽⁴⁾ Again, Article 4 of the Law of 2nd August, 1947, of the Grand Duchy of Luxembourg on the Suppression of War Crimes lays down that: "In no instances can the application of the laws mentioned in Article 1 be set aside under the pretext that the authors or co-authors of, or the accomplices in, the offences set out therein acted in the capacity of an official, a soldier, or an agent in the service of the enemy. . . ."

Similarly, Control Council Law No. 10 in its Article II, 4 (a) provides:

"The official position of any person, whether as Head of State or as responsible official in a Government Department does not free him from responsibility for a crime or entitle him to mitigation of punishment."⁽⁵⁾

4. THE PLEA THAT THE ALLEGED OFFENCE WAS CARRIED OUT AS A JUDICIAL ACT

It has sometimes been pleaded that a victim of an alleged war crime, sometimes a prisoner of war and sometimes an inhabitant of occupied territory, had himself engaged in an act of espionage or a war crime and was punished in accordance with international law for having committed these offences. This plea has been allowed to prevail if it has been shown that the victim was accorded a fair trial. Just as in municipal law systems a hanging or imprisonment following upon a legal sentence pronounced in court does not involve the hangman or prison warder in subsequent criminal proceedings

⁽¹⁾ See Vol. XIII, pp. 33-34. Regarding the special characteristics of crimes against humanity, see pp. 134-138.

⁽²⁾ See Vol. VI, pp. 51-52.

⁽³⁾ See, for instance, Vol. VI, pp. 50 and 60-61, and Vol. XIII, p. 117.

⁽⁴⁾ Vol. XIV, p. 157.

⁽⁵⁾ Substantially the same provision was made by Art. 7 of the Charter of the International Military Tribunal.

The fact that an accused enjoyed diplomatic immunity at the time of his offence apparently constitutes no defence to a war crime charge; see p. 22 of XIV and p. 144 of this present Volume.

so under international law the proof that a prisoner of war or a civilian inhabitant of an occupied territory has been executed or otherwise punished only after proceedings possessing the characteristics of a fair trial will constitute a defence to a charge of war criminality brought against persons involved in the inflicting of that punishment, such as a prosecutor, a judge, a prison warder or an executioner.

The type of facts which would tend to show that an accused had violated a victim's right to a fair trial have been analysed in Volumes V and VI of these Reports.⁽¹⁾ which include reports upon twelve relevant United States, British, Australian and Norwegian trials, including the *Justice Trial*, reported in Volume VI. The discussion of this question on pages 73-77 of Volume V includes references to the *Wagner Trial* before a French Permanent Military Tribunal which was reported in Volume III and which is also significant in this connection.

It should be added that, in Volume V, the victims of the crimes proved were captured military personnel or inhabitants of occupied territories, and the crimes therefore all constituted war crimes. The *Justice Trial*, however, involved allegations of crimes against humanity as well as of war crimes, according partly to the nationality of the victims, but the differences between the two types of crimes, as defined by the Tribunal, lay in aspects other than that now under discussion. There is nothing to indicate that the Tribunal, in judging whether proceedings constituted a fair trial so as to be a defence against charges of crimes against humanity, applied different tests from those applied when war crimes were alleged.

It will be recalled that such victims of the offences charged in the trials reported upon in Volume V as were inhabitants of occupied territories had been charged and found guilty by the Japanese occupying forces of war crimes. As had already been stated, however,⁽²⁾ there can be no doubt that inhabitants of occupied territories are entitled to at least the same degree of protection under international law when accused of committing any other kind of offence. Many of the equivalent victims of offences charged in the *Justice Trial* had certainly not been charged with offences which would have constituted war crimes even if the charges had been well founded; a charge of "race defilement", for instance, could in no instance have represented an allegation of the committing of a war crime. Yet the Tribunal made no distinction between the victims according to the offences charged against them, when elaborating the ways in which these persons had been denied their right to a fair trial, and this suggests that the inhabitants of occupied territories have indeed the same rights during proceedings taken against them, whatever the offence charged.

A study of the attitude taken in the Judgment in the *Justice Trial* to the evidence concerning applications of certain specific German laws which had been made by certain accused in pronouncing sentences,⁽³⁾ reveals that the Tribunal, in deciding whether the acts of the accused constituted a participation in war crimes or in racial or political persecutions amounting to crimes against humanity, was willing:

⁽¹⁾ See Vol. V, pp. 73-77 and Vol. VI, pp. 96-104.

⁽²⁾ See Vol. V, p. 73, note 3.

⁽³⁾ See Vol. VI, pp. 98-100.

(i) to disregard the question whether or not the acts were legal under German law;⁽¹⁾

(ii) to regard the enforcement of certain laws as in fact constituting such participation;

(iii) to look upon a violation of the principle *non bis in idem* as evidence of guilt;

(iv) (apparently) to deem it further evidence of guilt that a forced manipulation of German laws was made so as to "legalise" a more severe sentence than would have been allowed otherwise under German Law.

Attention may now be turned to the significant data concerning the departures made during the actual conduct of trials from elementary principles of justice.

In the notes to most of the reports in Volume V, an attempt has been made to set out the facts which the Courts may have regarded as constituting evidence of the denial of a fair trial, and, where possible, the circumstances which an examination of the judgments of the Courts in relation to the charges made has shown the Courts to have definitely regarded as incriminating. These circumstances and facts were recapitulated on pages 74-7 of the Volume, where the relevant cross-references are supplied.

The following circumstances were definitely held by a Court to be incriminating:

(i) that captured airmen were tried "on false and fraudulent charges" and "upon false and fraudulent evidence";

(ii) that the accused airmen were not afforded the right to a Defence Counsel.

(iii) that the accused airmen were not given the right to have an interpretation into their own language of the trial proceedings;

(iv) that the accused fliers were not allowed an opportunity to defend themselves.

In this connection it should be noted that the judgment of the Supreme Court in the Yamashita Trial stated that: "Independently of the notice requirements of the Geneva Convention, it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defence."⁽²⁾

It may also be remarked that among the principles laid down as the essentials of a fair trial by the Judge Advocate in the trial of Shigeru Ohashi by an Australian Military Court, appeared the following: "[The accused] should have full opportunity to give his own version of the case and produce evidence to support it."⁽³⁾

⁽¹⁾ Compare pp. 160-1.

⁽²⁾ See Vol. IV, p. 49.

⁽³⁾ See Vol. V, p. 30. Claims were put forward, unsuccessfully, by various accused that a discussion between officers as to the merits of a case based upon the result of previous interrogations, would constitute a trial; see Vol. V, p. 38 and note 3, and p. 57 and note 1.

The following facts, indicating in the view of the Prosecution a denial of a fair trial, have been admitted in evidence in the trial of war criminals and may have been taken into account by the Allied Courts in deciding on their verdicts and sentences :

(i) accused prisoners of war were not told that they were being tried.

It will be recalled that the Judge Advocate acting in the Australian trial of Shigeru Ohashi and others, in the course of summarising the essential elements of a fair trial, said that "The accused should know the exact nature of the charge preferred against him."

(ii) accused prisoners of war were not shown the documents which were used as evidence against them.

Here again it is relevant to quote the words of the Judge Advocate referred to above : "The accused should know what is alleged against him by way of evidence."

(iii) the trials of accused prisoners of war and civilians from occupied territories occupied a space of time which may have been thought too brief to allow of an adequate investigation of the facts, particularly in view of the need for proper interpretation of the proceedings.

The Judge Advocate whose words have just been quoted stated, further, that : "The Court should satisfy itself that the accused is guilty before awarding punishment . . .", but there must be "consideration by a tribunal . . . who will endeavour to judge the accused fairly upon the evidence . . . honestly endeavouring to discard any preconceived belief in the guilt of the accused or any prejudice against him."

The Judge Advocate's final rule was that : "The punishment should not be one which outrages the sentiments of humanity", and this advice should be compared with the decision of the French Permanent Military Tribunal in Strasbourg in finding Ex-Gauleiter Wagner and two others guilty of complicity in the murder of Theodore Witz ; the act which was deemed to constitute murder was the passing on this young Alsatian of the death sentence (which was carried out) for the illegal possession of a gun of a very old type.⁽¹⁾

When the case of Hauptsturmführer Oscar Hans came before the Supreme Court of Norway in August, 1947.⁽²⁾ Judge Holmboe stated that it was not correct to say that international law laid down that an occupation power had no right to undertake the execution of citizens of an occupied country except according to sentence by an appropriate court ; international law did not seem to go beyond the requirement that no execution should take place before proper investigation of the case and a decision passed by an authority legally vested with appropriate powers.⁽³⁾ This point was not expanded upon, however, since the decision of the Supreme Court rested on other grounds.

The notes to the *Justice Trial* in Volume VI also include some tentative conclusions on the attitude of the Tribunal which tried Altstötter and others regarding the nature of those aspects of purported trial proceedings which may be used as proof of the offence of denial of a fair trial or as evidence in

⁽¹⁾ See Vol. III, pp. 30-31 and 40-42.

⁽²⁾ See Vol. V, pp. 82-93.

⁽³⁾ See Vol. V, p. 91.

rebutting the defence that execution or other injury was done in pursuance of a judicial sentence.⁽¹⁾ These aspects, which are in addition to those set out above⁽²⁾, may be summarised as follows :

(i) the right of accused persons to know the charge against them, and this a reasonable time before the opening of trial, was denied ;

(ii) the right of accused to the full aid of counsel of their own choice was denied, and sometimes no counsel at all was allowed to defend the accused ;

(iii) the right to be tried by an unprejudiced judge was denied to accused persons ;

(iv) the right of accused to give or introduce evidence was wholly or partly denied ;

(v) the right of accused to know the evidence against them was denied ;

(vi) the general right to a hearing adequate for a full investigation of a case was denied.

In addition it is at least possible that the Tribunal regarded the persistent denial of clemency as a further incriminating factor.

A comparison of these points with the similar catalogue taken from Volume V and reproduced previously reveals a striking uniformity in the attitude of different courts to the characteristics of a fair trial under international law or conversely to those characteristics which would brand purported judicial proceedings as a denial of a fair trial.⁽³⁾ The denial of one of the rights enumerated above would not necessarily amount to the denial of a fair trial, however, and the courts have had to decide in each instance whether a sufficient number of the rights which they have regarded as forming part of the general right to a fair trial were sufficiently violated to warrant the conclusion either that the offence of denial of a fair trial had been committed (if it is to be recognised as a separate offence⁽⁴⁾), or that the defence claim that a killing or other injury was justified by the holding of a previous fair trial had been disproved.

⁽¹⁾ See Vol. IV, pp. 101-4, where the relevant cross-references are supplied.

⁽²⁾ See top of p. 163, points ii, iii and iv.

⁽³⁾ It can fairly be said that a body of rules is emerging or has emerged in this branch of international law. The analyses contained in these pages of the characteristics just mentioned have, it should be noted, been based on one or more of the following :

(i) The actual findings of the United States Military Commissions in trials reported upon in Vol. V ;

(ii) The advice of the Judge Advocate in the Australian trials reported in the same volume. This source is less authoritative than the last ; nevertheless while the Judge Advocate's advice need not have been taken by the court, such advice (as in British and Canadian trials) carries great weight ;

(iii) The evidence which was at any rate admitted by the courts conducting trials reported on in Vol. V, and which may have been taken into account by the courts in deciding on their verdicts and sentences ; and

(iv) Passages from the Judgment in the *Justice Trial*.

Due to the construction of this last Judgment it is not always possible to state with certainty what the Tribunal regarded as criminal and what merely as evidence of knowledge, intent or motive. Again, the other three sources set out above are not all of equal authoritativeness. Nevertheless, it must be recognised that even the first, namely the findings of courts upon certain charges, are not of more than persuasive authority, and it is submitted that the analysis that has been attempted of the nature of the denial of a fair trial, even though based on such differing categories of authority, is not without interest in the building up of a jurisprudence of war crimes law.

⁽⁴⁾ See pp. 99 and 113.

The truth of this statement was in effect underlined by the Judgment of the Norwegian Supreme Court in the *Latza Trial*.⁽¹⁾ The Supreme Court, while holding that proof of a fair trial was necessary before killings of Allied victims such as were alleged could be regarded as legal, was content to define the concept of a fair trial in very broad terms. The accused person must be given an opportunity to defend himself and present counter-evidence, and if a death sentence was based on manifestly insufficient evidence it was clearly contrary to the basic principles of justice as expressed in the Preamble to Hague Convention No. IV of 1907. The decisive point was whether trials had fulfilled those minimum demands which were to be regarded as indispensable for a proper trial, primarily whether an independent and impartial tribunal had reached its decisions after a thorough investigation of the guilt of the accused, or whether the outcome had been determined beforehand by directives given to the court. Judge Berger held that, even if taken all together, the following facts did not decisively prove the denial of a fair trial: that the charges made against the accused before the *Standgericht* had not been put down in writing beforehand, that the accused had not been assisted by a counsel for the defence, that the evidence presented and accepted had been of an indirect nature only, that the proceedings had taken a short time and were of a summary character, and that the confirmation by the "*Gerichtsherr*" seemed to have been procured and prepared in a very superficial way. Judge Berger stressed that the *Lagmannsrett* had established that the *Standgericht* went through each and every charge with the accused and that they were given full opportunity to explain themselves. It also appeared from the judgment of the *Lagmannsrett* that the accused before the *Standgericht* had partly admitted charges brought against them. This procedure might have been considered to be sufficient by the judges of the *Standgericht*, and Judge Berger did not feel entitled to say that the *Standgericht* had made an illegal use of their discretionary powers.

The Supreme Court may be thought to have taken a view of the denial of a fair trial which was more favourable to persons accused of such denial than the view taken by some other authorities, as described earlier in these pages.

5. THE PLEA OF NULLUM CRIMEN SINE LEGE, NULLA POENA SINE LEGE

(i) The plea has often been put forward in war crime trials that an accused may not be punished if at the time of his acts there was no law describing his acts as crimes and laying down a punishment therefor, but this argument has usually been rejected on the ground that at the time of the alleged offence the acts of the accused did in fact constitute punishable violations of international law. Of particular interest are the statements by the Tribunals which conducted the *Justice*, *Hostages*, *Flick*, *I.G. Farben*, *High Command* and the *Einsatzgruppen Trials* that Control Council Law No. 10 did not constitute *ex post facto* legislation and the arguments which they produced in that connection.⁽²⁾ Similarly the International Military Tribunal declared that the Charter under which it operated was "an expression of international law at the time of its creation".⁽³⁾

⁽¹⁾ See Vol. XIV, pp. 84-85.

⁽²⁾ See Vol. IX, pp. 32-5, Vol. X, p. 43 and Vol. XII, p. 64.

⁽³⁾ See British Command Paper Cmd. 6964, p. 38. Compare also Vol. X, p. 131, Vol. XII, pp. 60-2 and Vol. XIII, pp. 109-10.

(ii) The judgment delivered in the *High Command Trial* also stressed that, if a rule of international law had declared a certain act to be illegal, the mere fact that, at the time of an infringement of that rule, there had been no court with jurisdiction over such an offence did not entitle an accused to object to being tried before such a court later:

"There is no doubt of the criminality of the acts with which the defendants are charged. They are based on violations of International Law well recognised and existing at the time of their commission. True no court had been set up for the trial of violations of International Law. A state having enacted a criminal law may set up one or any number of courts and vest each with jurisdiction to try an offender against its internal laws. Even after the crime is charged to have been committed we know of no principle of justice that would give the defendant a vested right to a trial only in an existing forum. In the exercise of its sovereignty the State has the right to set up a Tribunal at any time it sees fit and confer jurisdiction on it to try violators of its criminal laws. The only obligation a sovereign State owes to the violator of one of its laws is to give him a fair trial in a forum where he may have counsel to represent him—where he may produce witnesses in his behalf and where he may speak in his own defence. Similarly, a defendant charged with a violation of International Law is in no sense done an injustice if he is accorded the same rights and privileges. The defendants in this case have been accorded those rights and privileges."⁽¹⁾

(iii) Perhaps of wider significance than these findings that specific texts escape the operation of the maxim under discussion is the authoritatively held opinion that the latter does not in any case apply to war crime proceedings since here international law, not municipal law, is applied. In the *Peleus Trial* this was recognised; there the Judge Advocate advised the court that the maxim *nulla poena sine lege* and the principle that is expressed therein had nothing whatever to do with the case. It referred only to the municipal or domestic law of a particular State and the court should not be embarrassed by it in its considerations.⁽²⁾

The Tribunal which conducted the *Justice Trial* stated:

"Under written constitutions the *ex post facto* rule condemns statutes which define as criminal acts committed before the law was passed, but the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, although the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional States, could be applied to a treaty, a custom, or a common

⁽¹⁾ Vol. XII, pp. 62-3.

⁽²⁾ Vol. I, p. 12.

law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth."⁽¹⁾

The extent to which the Tribunal did regard the rule as applicable in international law may be judged from the following words from its judgment:

"As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organised system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught. Whether it be considered codification or substantive legislation, no person who knowingly committed the acts made punishable by C.C. Law 10 can assert that he did not know that he would be brought to account for his acts. Notice of intent to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the governments of the States at war with Germany. Not only were the defendants warned of swift retribution by the express declaration of the Allies at Moscow of 30th October, 1934. Long prior to the Second World War the principle of personal responsibility had been recognised."⁽²⁾

The Nuremberg International Military Tribunal also regarded the rule as being a rule of justice on which reliance could not be placed by defendants who did not come to court, so to speak, "with clean hands":

"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 these who in defiance 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."⁽³⁾

This statement, together with several others, was quoted by the Tribunal acting in the *Justice Trial*.⁽⁴⁾

⁽¹⁾ Vol. VI, p. 41.

⁽²⁾ *Ibid.*, pp. 43-44.

⁽³⁾ British Command Paper, Cmd. 6964, p. 39. (Italics inserted.) The Tokyo International Military Tribunal declared its concurrence with this view (official transcript of Judgment, p. 26).

⁽⁴⁾ Vol. VI, pp. 41-43. The weight of authorities could have been further augmented. Other learned authorities writing to the same effect are quoted in Vol. IX, pp. 36-9.

The Judgment in the *Krupp Trial* tacitly recognised that novel situations must necessarily cause the courts to make legal decisions which in effect amount to the creation of new law. In speaking of the "defence of necessity," the Judgment said:

"As the prosecution says, most of the cases where this defence has been under consideration involved such situations as two shipwrecked persons endeavouring to support themselves on a floating object large enough to support only one; the throwing of passengers out of an overloaded lifeboat; or the participation in crime under the immediate and present threat of death or great bodily harm. So far as we have been able to ascertain with the limited facilities at hand, the application to a factual situation such as that presented in the Nuremberg Trials of industrialists is novel."⁽¹⁾

The Netherlands Special Court of Cassation, in the *Rauter Trial*, stated its view on the maxim *nulla poena sine lege* in these terms:

"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 doubt 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 Article 27 (a) of the Extraordinary Penal Law Decree."⁽²⁾

A dissenting note was struck in the Judgment delivered in the *Hostages Trial*:

"It is a fundamental principle of criminal jurisprudence that one may not be charged with crime for the doing of an act which was not a crime at the time of its commission. We think it could be said with justification that Article 23 (h) of the Hague Regulations of 1907 operates as a bar to retroactive action in criminal matters. In any event, we are of the opinion that a victorious nation may not lawfully enact legislation defining a new crime and make it effective as to acts previously occurring which were not at the time unlawful. It therefore becomes the duty of a Tribunal trying a case charging a crime under the provisions of Control

⁽¹⁾ Vol. X, p. 147.

⁽²⁾ Vol. XIV, p. 120.

Council Law No. 10 to determine if the acts charged were crimes at the time of their commission and that Control Council Law No. 10 is in fact declaratory of then existing International Law."⁽¹⁾

The view of the problem most commonly adopted seems, however, to be that since the rule against the enforcement of *ex post facto* law is in essence a principle of justice it cannot be applied in war crime trials where the ends of justice would be violated by its application.

6. THE PLEA OF DURESS

(i) The kind of circumstances generally alleged and relied upon in putting forward the plea of duress have already been defined.⁽²⁾ Various statements have been made in war crime trials regarding the extent of validity of this plea.

(ii) The Judgment delivered in the *Krupp Trial* included the following words :

"The defence of necessity in municipal law is variously termed as 'necessity', 'compulsion', 'force and compulsion', and 'coercion and compulsory duress'. Usually, it has arisen out of coercion on the part of an individual or a group of individuals rather than that exercised by a government.

"The rule finds recognition in the systems of various nations. The German criminal code, Section 52, states it to be as follows :

"A crime has not been committed if the defendant was coerced to do the act by irresistible force or by a threat which is connected with a present danger for life and limb of the defendant or his relatives, which danger could not be otherwise eliminated."

"The Anglo-American rule as deduced from modern authorities has been stated in this manner :

"Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable ; that there was no other adequate means of escape ; and that the remedy was not disproportioned to the evil. Homicide through necessity—i.e. when the life of one person can be saved only by the sacrifice of another—will be discussed in a subsequent chapter. The issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The canon law prescribes that a person whose life is dependent on immediate relief may set up such necessity as a defence to a prosecution for illegally seizing such relief. To the same general effect speak high English and American authorities. Life, however, can usually only be taken, under the

⁽¹⁾ Vol. VIII, p. 52. On p. 54 of that Volume the Tribunal is cited as repeating its view that "one may not be charged with crime for committing an act which was not a crime at the time of its commission." This rule is upheld, however, as a principle of fundamental justice, and the Tribunal conceded that there did exist to a limited extent a possible legality for the retroactive application of new rules.

⁽²⁾ See p. 156.

plea of necessity, when necessary for the preservation of the life of the party setting up the plea, or the preservation of the lives of relatives in the first degree."⁽¹⁾

The passage from Wharton's *Criminal Law* also appears in part in the Judgment delivered in the *Flick Trial* where it is added that :

"A note under subdivision 384 of Chapter XIII, Wharton's 'Criminal Law' Volume I, gives the underlying principle of the defence of necessity as follows :

"Necessity forcing man to do an act justifies him, because no man can be guilty of a crime without the will and intent in his mind. When a man is absolutely, by natural necessity, forced, his will does not go along with the act. Lord Mansfield in *Stratton's Case*, 21, How. St. Tr. (Eng.) 1046-1223."⁽²⁾

The Judgment delivered in the *Krupp Trial* stated that, when what it called "necessity" is pleaded, "the question is to be determined from the standpoint of the honest belief of the particular accused in question . . . The effect of the alleged compulsion is to be determined not by objective but by subjective standards. Moreover, as in the case of self-defence, the mere fact that such danger was present is not sufficient. There must be an actual bona fide belief in danger by the particular individual."⁽³⁾

In the *Flick, I.G. Farben and Krupp Trials*, the plea put forward was that the accused were obliged to meet the industrial production quotas laid down by the German Government and that in order to do so it was necessary to use forced labour supplied by the State, because no other labour was available, and that had they refused to do so they would have suffered dire consequences. The test applied by the Tribunal in the *Flick Trial* was whether a "clear and present danger" had threatened the accused at the time of their committing the alleged offences.⁽⁴⁾ The test applied in the *I.G. Farben Trial* was that laid down by the International Military Tribunal in dealing with the plea of superior orders, namely, whether a moral choice was possible.⁽⁵⁾ In the *Krupp Trial* Judgment it was said that : "Necessity is a defence when it is shown that the act charged was done to avoid an evil severe and irreparable ; that there was no other adequate means of escape ; and that the remedy was not disproportioned to the evil."⁽⁶⁾

The Judgment delivered in the *High Command Trial* included the following relevant passage :

"The defendants in this case who received obviously criminal orders were placed in a difficult position, but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognised as a defence. To establish the defence of coercion or necessity in the face of danger there must be a

⁽¹⁾ "Wharton's *Criminal Law*, Vol. I, Section 126, p. 177." This quotation is from Vol. X, p. 147.

⁽²⁾ See Vol. IX, p. 19.

⁽³⁾ See Vol. X, p. 148.

⁽⁴⁾ See Vol. IX, p. 20.

⁽⁵⁾ See Vol. X, pp. 54 and 57.

⁽⁶⁾ See Vol. X, pp. 147 and 149.

showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong."⁽¹⁾

(iii) In the *Flick Trial* the plea served to acquit all but two defendants of charges of using slave labour; these two had been shown to have gone beyond the limits of what they were required by the State to do in the matter of the employment of State-supplied forced labour.⁽²⁾ The Tribunal which conducted the *Krupp Trial* pointed the moral by saying that "if, in the execution of the illegal act, the will of the accused be not thereby over-powered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct."⁽³⁾ This principle was accepted by Judge Herbert who, however, dissented as to its application to the facts of the I.G. Farben Case.⁽⁴⁾

In his summing up in the trial of Gustav Alfred Jepsen and others,⁽⁵⁾ the Judge Advocate said that:

"Duress can seldom provide a defence; it can never do so unless the threat which is offered as a result of which the unlawful act is perpetrated is a threat of immediate harm of a degree far, far greater than that which would be created if the order were obeyed. So far as we know, and Jepsen had an opportunity of telling us but he did not, there might have been many steps which he could have taken to avoid himself being shot rather than submit to the threat and carry out a massacre of this nature. If you are contemplating that possibly this threat of death may provide a defence then let me ask you not to give effect to it unless you think that he really was in danger of imminent death and that the evil threatened him was on balance greater than the evil which he was called upon to perpetrate."

The Judge Advocate then went on to admit that if the plea of duress on the facts of the case failed as a complete defence it might be successful as a plea in mitigation of sentence:

"These considerations take a different aspect when one is considering not the question of liability but the degree of heinousness; a man who does things only under threats may well ask for a greater measure of mercy than one who does things *con amore*. That is another matter, it raises considerations which do not find their proper place in your present deliberations when you are deciding the question of guilt or innocence."

After the court had decided on its findings the Judge Advocate addressed the accused Jepsen as follows:

"Gustav Alfred Jepsen, you have been found guilty of the gravest criminal conduct, conduct for which the normal penalty is death. But for the fact that the court considers that there is an element of doubt as to whether or not you acted under some degree of compulsion, that

⁽¹⁾ Vol. XII, p. 72. (Italics inserted).

⁽²⁾ See Vol. IX, pp. 20-1.

⁽³⁾ See Vol. X, p. 149.

⁽⁴⁾ See Vol. X, p. 62.

⁽⁵⁾ Regarding this trial see also pp. 20 and 46. This trial has not been previously considered in this series.

is the penalty which would have been imposed upon you. As it is, the least sentence which the Court feels able to pass is that you be imprisoned for life, and that is the sentence of the Court upon you."

It must be assumed therefore that in this trial the plea of necessity was admitted as an argument in mitigation of sentence.

Similarly, the Judge Advocate acting in the trial of Valentin Fuerstein and others, by a British Military Court in Hamburg, 4th-24th August, 1948,⁽¹⁾ offered the court the following advice:

"There is, further, a defence which to some extent is akin to that of superior orders, and that is the defence which I may describe as the defence of 'duress and coercion'. It has been said here that once the order for the execution of these soldiers had been given, it was impossible for any of the accused to ignore it, and that the only way in which they could act was the way in which, in fact, they did act. Now that defence of 'duress and coercion' is not a defence in law. You are not entitled, even if you wished to save your own life, to take the life of another. There I may remind you of a case which is known as the *Mignonette* case, and in which a number of shipwrecked sailors, seeing no hope of reaching land, decided to kill one of their companions and to eat him. Lots were drawn, and in the end this object was carried out and one of these companions found his death in that way. Fortunately or unfortunately for these sailors, they were picked up and duly brought to trial at the Central Criminal Court in London, and they raised just this defence. They said: 'If we had not killed our companion, and had not eaten him, all of us would have starved and none of us would have been alive today'. This defence, Gentlemen, was rejected by the court, and it was said that you must not take another's life in order to save your own. Here again, however, if you believe that the degree of pressure was such that only a hero or a martyr would have found the strength to oppose it, then you are entitled to say that there are in this case mitigating circumstances, and the sentence ought to be less severe than it would have been had no such duress or coercion been present."

In his summing up, the Judge Advocate who acted in the trial of Robert Holzer and two others before a Canadian Military Court at Aurich, Germany, 25th March to 6th April, 1946, made this comment: "As to the law applicable upon the question of compulsion by threats, I would advise the court that there can be no doubt that a man is entitled to preserve his own life and limb, and on this ground he may justify much which would otherwise be punishable. The case of a person setting up as a defence that he was compelled to commit a crime is one of every day. There is no doubt on the authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent person can never be justified. . . . Sir J. Stephens expresses the opinion that in most if not all cases the fact of compulsion is a matter of mitigation of punishment and not matter of defence. . . ."⁽²⁾

The Judge Advocate acting in the *Stalag Luft III* trial advised the Court that "The same principle which excuses those who have no mental will in the perpetration of offences protects from the punishment of the law those who

⁽¹⁾ Not previously considered in this series.

⁽²⁾ See Vol. V, pp. 16 and 21.

commit crimes in subjection to the power of others and not as a result of an uncontrolled free action proceeding from themselves. But if a merely moral force is used as threats, duress of imprisonment, or even an assault to the peril of his life in order to compel the accused to kill, this is no excuse in law."⁽¹⁾

Similarly Article 5 of the Polish Law, promulgated on 11th December, 1946, concerning the punishment of war criminals and traitors, provides that :

"The fact that an act or omission was caused by a *threat*, order or command does not exempt from criminal responsibility.

"In such a case the Court may mitigate the sentence taking into consideration the circumstances of the perpetrator and the deed."⁽²⁾

The Norwegian Law of 13th December, 1946, on the punishment of foreign war criminals, makes the following provision :

"Article 5 :

"Necessity and superior order cannot be pleaded in exculpation of any crime referred to in Article 1 of the present law. The Court may, however, take the circumstances into account and may impose a sentence less than the minimum laid down for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted."⁽³⁾

The Tribunal acting in the *Einsatzgruppen Trial* expressed the following view : "Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.

"Nor need the peril be that imminent in order to escape punishment,"⁽⁴⁾

Under Article 40 of the Netherlands Penal Code, which is applicable to war crime trials, an act is not punishable if "forced by necessity". A similar provision is made by Article 48 of the Netherlands East Indies Penal Code.⁽⁵⁾

(iv) The general view seems therefore to be that duress may prove a defence if (a) the act charged was done to avoid an immediate danger both serious and irreparable ; (b) there was no other adequate means of escape ; (c) the remedy was not disproportionate to the evil. According to the decision in the *Krupp Trial*, these tests are to be applied according to the facts as they were honestly believed to exist by the accused. Finally, if the facts do not warrant the successful pleading of duress as a defence, they may constitute an argument in mitigation of punishment.

(v) It would appear that some sort of moral pressure different from superior orders yet not necessarily constituting physical threats may be regarded as a plea in mitigation of sentence. Thus, the Tribunal acting in the *Einsatzgruppen Trial*, in discussing what has been defined here as duress, held that

⁽¹⁾ Vol. XI, p. 47.

⁽²⁾ Vol. V, pp. 20-21 and Vol. VII, p. 88. (Italics inserted).

⁽³⁾ See Vol. III, pp. 14 and 85.

⁽⁴⁾ Vol. VIII, p. 91.

⁽⁵⁾ Vol. XI, p. 102.

"superior means superior in capacity and power to force a certain act. It does not mean superiority only in rank. It could easily happen in an illegal enterprise that the captain guides the major, in which case the captain could not be heard to plead Superior Orders in defence of his crime."⁽¹⁾ This Tribunal did not state explicitly that the major could possibly have pleaded superior orders, but the British Military Court which tried Gozawa Sadaichi and others,⁽²⁾ in passing sentence, addressed the following words to Gozawa Sadaichi, who was commanding officer of a prisoner of war camp :

"Gozawa Sadaichi, the Court has taken a merciful view, and grave as was your crime, inasmuch as out of every four helpless men committed to your care, one died ; nevertheless, you were led to acquiescence by your *more powerful adjutant*. But your punishment must be severe. The sentence of the Court is, subject to confirmation, that you be kept in prison for the term of twelve years." (Italics inserted.)

7. MILITARY NECESSITY⁽³⁾

In the *High Command Trial*, the Tribunal conceded that the plea of military necessity did, in the circumstance proved, serve to exculpate the accused on certain charges concerning spoliation. It was emphasised that the defendants were "in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature."⁽⁴⁾

The Tribunal which conducted the *Hostages Trial* was also called upon to decide on the validity of pleas based on alleged military necessity put forward by the defendants in that trial.⁽⁵⁾ It decided that "Military necessity or expediency do not justify a violation of positive rules . . . The rules of international law must be followed even if it results in the loss of a battle or even a war". The Tribunal added, however, that the prohibitions contained in the Hague Regulations "are superior to military necessities of the most urgent nature *except where the Regulations themselves specifically provide the contrary*"⁽⁶⁾ and pointed out that Article 23 (g) of these Regulations prohibited "the destruction or seizure of enemy property *except in cases where this destruction or seizure is urgently required by the necessities of war*."⁽⁷⁾

Like the Tribunal which conducted the *High Command Trial*, that before which the *Hostages Trial* was held was of the opinion that the plea of necessity might be applicable in the circumstances of an army badly harassed while in retreat : "The destruction of public and private property by retreating military forces which would give aid and comfort to the enemy may constitute a situation coming within the exemptions contained in Article 23 (g)."

⁽¹⁾ Vol. VIII, p. 91.

⁽²⁾ See p. 159.

⁽³⁾ See also p. 156.

⁽⁴⁾ See Vol. XII, pp. 123-6.

⁽⁵⁾ See Vol. VIII, pp. 66-9.

⁽⁶⁾ Italics inserted.

⁽⁷⁾ Italics inserted.

The Tribunal thus adopted a favourable attitude to the plea as it related to the acts of the accused Rendulic in his retreat before the Russian army in Finmark, Norway.⁽¹⁾

This may be the appropriate place, however, to mention a separate ruling by the Tribunal acting in the *High Command Trial*, which, while not referring to armies in retreat, may possibly be regarded as an application of a rule as to necessity; the Tribunal approved the opinion that "A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavour by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence the cutting off of every source of sustenance from without is deemed legitimate. It is said that if the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender."⁽²⁾

The plea of military necessity has been more often rejected in war crime trials than accepted, however; indeed the success of Rendulic and of the accused in the *High Command Trial* in this respect was exceptional.⁽³⁾ A somewhat similar but more general plea was put forward in the *Milch Trial*, that "Modern war means total war and as such has suspended, in several points, international law as it existed up to now", was not allowed by the Tribunal which tried the case and Judge Musmanno made some remarks on his own attitude to it.⁽⁴⁾ Substantially the same plea was rejected in the *Krupp Trial*.⁽⁵⁾

It should be added that the Tribunal conducting the *High Command Trial* immediately before reading the passage quoted above, stated that the view that military necessity includes the right to do anything that contributes to the winning of a war "would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilised nations. Nor does military necessity justify the compulsory recruitment of labour from an occupied territory either for use in military operations or for transfer to the Reich, nor does it justify the seizure of property or goods beyond that which is necessary for the use of the army of occupation. Looting and spoliation are none the less criminal in that they were conducted, not by individuals, but by the army and the State.

"The devastation prohibited by the Hague Rules and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult."⁽⁶⁾

It may be mentioned here that Article VIII of the Chinese Law of 24th October, 1946, Governing the Trial of War Criminals, provides, *inter alia*, that the circumstance that war crimes were committed out of *political* necessity shall not exonerate the offenders.⁽⁷⁾

⁽¹⁾ See Vol. VIII, pp. 67-9.

⁽²⁾ See Vol. XII, p. 84.

⁽³⁾ Instances of the rejection of the defence have been mentioned in Vol. XII, p. 127. Compare also Vol. V, p. 35, Vol. VI, p. 63, Vol. VII, p. 10 and Vol. X, pp. 138-9.

⁽⁴⁾ See Vol. VII, pp. 44 and 64-5.

⁽⁵⁾ Vol. X, p. 133.

⁽⁶⁾ Vol. XII, pp. 93-4.

⁽⁷⁾ Vol. XIV, p. 157.

8. SELF-DEFENCE

A plea of self-defence may be successfully put forward, in suitable circumstances, in war crime trials as in trials held under municipal law. The Tribunal which conducted the *Krupp Trial* compared the defence of "necessity" and that of self-defence in a manner which leaves no doubt that it would have regarded the latter as being applicable in war crime trials had the question arisen to be decided.⁽¹⁾

The Judge Advocate, acting in the trial of Willi Tessmann and others, by a British Military Court, Hamburg, 1st-24th September, 1947,⁽²⁾ advised the court: "So far as the defence of self-defence is concerned, I need add but little to that which has been said. The law permits a man to save his own life by despatching that of another, but it must be in the last resort. He is expected to retreat to the uttermost before turning and killing his assailant; and, of course, such considerations as the nature of the weapon in the hands of the accused, the question whether the assailant had any weapon and so forth, have to be considered. In other words, was it a last resort? Had he retreated to the uttermost before ending the life of another human being?"

A successful plea of self-defence would appear to have been entered in the trial of Erich Weiss and Wilhelm Mundo before a United States Military Government Court at Ludwigsburg.⁽³⁾ On the other hand the plea failed in the trial before a British Military Court at Kuala Lumpur of Yamamoto Chusaburo.⁽⁴⁾

9. THE PLEA OF LEGITIMATE REPRISALS

(i) The plea of legitimate reprisals has two aspects; it may be used to justify acts between belligerents which would not be legal otherwise, and it may be quoted as justifying measures taken by an occupying power against the population of an occupied territory which would otherwise be illegal. The taking of reprisals against prisoners of war is forbidden by Article 2 of the Geneva Prisoners of War Convention. This rule was illustrated by the *Dostler Trial*.⁽⁵⁾

(ii) No judicial authority dealing directly with the first aspect has come to the notice of the compilers of the present series of volumes, perhaps mainly because of the paucity of trials in which any allegations have been made of the use during the second World War of illegal methods of conducting hostilities.⁽⁶⁾

(iii) The second aspect has arisen in a number of trials, mainly those reported in Volume VIII and the *High Command* and *Rauter Trials* reported in Volumes XII and XIV respectively. In the *Hostages Trial*,⁽⁷⁾ the Tribunal

⁽¹⁾ See Vol. X, p. 148.

⁽²⁾ This trial was also cited in Vol. V, pp. 73 and 76.

⁽³⁾ See Vol. XIII, pp. 149-50. Compare Vol. XIV, p. 129.

⁽⁴⁾ See Vol. III, pp. 77, 78 and 79-80, where the plea is examined a little further.

⁽⁵⁾ See Vol. I, pp. 28-31.

⁽⁶⁾ See pp. 109-111. The Tribunal acting in the *Hostages Trial* stated explicitly that this aspect was not before it (Vol. VIII, p. 77). Compare a comment in Vol. XIV, pp. 129-130.

⁽⁷⁾ See Vol. VIII, pp. 34-92.

distinguished between "reprisal victims" and "hostages" ⁽¹⁾ but it has been seen that the distinction appears to lie in the circumstances under which the victims are taken into captivity and not in the law which should govern their fate. ⁽²⁾

The plea of legitimate reprisals has usually come before the courts in cases of the killing of inhabitants of occupied territories rather than in cases of their ill-treatment. The Tribunal acting in the *Hostages Trial* held that, subject to a number of conditions, the killing of reprisal victims or hostages in order to guarantee the peaceful conduct in the future of the populations of occupied territories was legal. ⁽³⁾ These conditions were said to be the following:

(a) the step should be taken only "as a last resort" and only after regulations such as those elaborated by the Tribunal ⁽⁴⁾ had first been enforced;

(b) the hostages may not be taken or executed as a matter of military expediency;

(c) "The population generally" must be a party "either actively or passively" to the offences whose cessation is aimed at;

(The Tribunal did not define the nature of "active" or "passive" participation, but stated that "some connection" must be shown "between the population from whom the hostages are taken and the crime committed" ⁽⁵⁾.)

(d) it must have proved impossible to find the actual perpetrators of the offences complained of;

(e) a proclamation must be made, "giving the names and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason the hostages will be shot";

(f) "the number of hostages shot must not exceed in severity the offences the shooting is designed to deter";

(The Tribunal did not, however, suggest any tests whereby such measures could be related to offences whose perpetration was expected); and

(g) "unless the necessity for immediate action is affirmatively shown, the execution of hostages or reprisal prisoners without a judicial hearing is unlawful" ⁽⁶⁾;

(It was not stated on what charges hostages would be tried and what would be the nature of proceedings taken against them; a passage in the judgment, however, suggests that what was meant was not a trial in the usual sense but "a judicial finding that the necessary conditions exist and the essential steps have been taken to give validity to such action." ⁽⁷⁾.)

⁽¹⁾ See Vol. VIII, p. 61.

⁽²⁾ See Vol. VIII, p. 79.

⁽³⁾ See Vol. VIII, pp. 77-88.

⁽⁴⁾ See Vol. VIII, p. 62.

⁽⁵⁾ Elsewhere, however, the Tribunal pointed out that there was "nothing to infer that the population of Topola [from whom certain hostages had been taken and shot] supported or shielded the guilty persons." (Vol. VIII, p. 65.) (See also pp. 86-88 of Vol. VIII.)

⁽⁶⁾ See Vol. VIII, pp. 64-65.

⁽⁷⁾ Vol. VIII, p. 64.

The *Trial of Bruns and two others* by the Norwegian Courts provides evidence that, since the purpose of reprisal action is to coerce an adversary or an inhabitant of occupied territory to observe international law, it is one test of the *bona fides* of such action that its being taken should be publicly announced. ⁽¹⁾

An examination of the Judgment delivered in the *Hostages Trial* shows that the Tribunal's conclusion that the killing of hostages and reprisal prisoners may in certain circumstances be legal has not been the reason for a finding of not guilty regarding any of the accused in the trial with the possible exception of the defendant von Leyser, of whom the Tribunal said: "The evidence concerning the killing of hostages and reprisal prisoners within the corps area is so fragmentary that we cannot say that the evidence is sufficient to support a finding that the measures taken were unlawful. The killing of hostages and reprisal prisoners is entirely lawful under certain circumstances. The evidence does not satisfactorily show in what respect, if any, the law was violated. This is a burden cast upon the prosecution which it has failed to sustain". This accused was, therefore, found not guilty under Count One of the Indictment, but guilty on other counts.

The Judge Advocate acting in the Trial of Kesselring expressed the opinion that there was "nothing which makes it absolutely clear that in no circumstances—and especially in the circumstances which I think are agreed in this case—that an innocent person properly taken for the purpose of a reprisal cannot be executed" ⁽²⁾.

On the other hand, the London Charter, in Article 6 (b), and Control Council Law No. 10, in paragraph 1 (b) of Article II, both recognise without qualification the "killing of hostages" as a war crime ⁽³⁾ as do also the Australian, Netherlands and Chinese War Crimes laws, ⁽⁴⁾ while the French War Crimes Ordinance of 28th August, 1944 states that "Premeditated murder . . . shall include killing as a form of reprisal" ⁽⁵⁾.

Furthermore, Article 46 of the Hague Convention protects "individual life" in occupied territory and Article 50 provides:

"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" ⁽⁶⁾.

The Tribunal which conducted the *Einsatzgruppen Trial* had no hesitation in regarding Article 50 of the Hague Regulations as being applicable to the

⁽¹⁾ See Vol. III, pp. 21-22. Compare Vol. VI, pp. 115-16 and 119.

⁽²⁾ Vol. VIII, pp. 12, 83 and 85.

⁽³⁾ The defence in the *Hostages Trial* claimed that the killing of hostages which was prohibited by the Charter of the International Military Tribunal and Law No. 10, as by paragraph 461 of the British Manual, to which Counsel also made reference, was the execution of hostages in the old sense of prisoners held as a guarantee of the observance of treaties, armistices or other agreements, or of persons taken by an occupying power as security for requisitions and contributions and not the killing of inhabitants of occupied territories with the aim of ensuring the observance of good order in such territories. The prosecution replied that it was inconceivable that, since thousands of hostages were executed in reprisal for hostile acts during the last two wars, this was not precisely the practice which the Charter and Control Council Law condemned. If these statutes were held not to include the execution of all kinds of hostages, they would be completely anachronistic and meaningless. (See Vol. VIII, p. 83).

⁽⁴⁾ Vol. V, p. 95, Vol. XI, p. 93 and Vol. XIV, p. 153.

⁽⁵⁾ See Vol. III, p. 52, Vol. VIII, pp. 27-29 and Vol. IX, p. 60.

⁽⁶⁾ See however, Vol. VIII, p. 78.

taking of reprisals and consequently ruled that reprisals may only be taken against persons who can be regarded as jointly responsible for the acts complained of.⁽¹⁾

In the *High Command Trial* the Tribunal, faced with facts concerning reprisal killings in occupied territories similar to those proved in the *Hostages Trial*, found it "unnecessary to approve or disapprove the conclusions of the law [announced in the Judgment delivered in the latter trial] as to the permissibility of such killings." It was content to hold that the killings proved to have taken place would not fall within the field of what was permissible according to the Judgment in the *Hostages Trial*.⁽²⁾

The British Military Courts which conducted the Trial of von Mackensen and Maelzer,⁽³⁾ and the Trial of Kesselring,⁽⁴⁾ must be taken, in finding the accused guilty, to have rejected the plea of legitimate reprisals on the facts of the two cases, and the confirming officer did not upset the findings of guilty passed on the accused. Nor did the accused in the Trials of Franz Holstein and 23 others and of Hans Szabados⁽⁵⁾ which were conducted before French Military Tribunals, benefit from any consideration that their acts might be justifiable as legitimate reprisals, for here again the offences proved to have taken place went beyond what could be considered as legitimate even taking into account the unsettled state of the law on this point.⁽⁶⁾

(iv) The Judge Advocate acting in the Trial of Captain Eikichi Kato, by an Australian Military Court, Rabaul, 7th May, 1946, drew the Court's attention to the following paragraphs in Chapter XIV of the Australian *Manual of Military Law*, thereby seemingly giving his approval to these passages:

"386. If, contrary to the duty of the inhabitants to remain peaceful, hostile acts are committed by individual inhabitants, a belligerent is justified in requiring the aid of the population to prevent their recurrence and, in serious and urgent cases, in resorting to reprisals.

"387. An act of disobedience is not excusable because it is committed in consequence of the orders of the legitimate Government, and any attempt to keep up relations with that Government or to act in understanding with it, to the detriment of the occupant, is punishable as war treason. . . .

"459. What kinds of acts should be resorted to as reprisals is a matter for the consideration of the injured party. Acts done by way of reprisals must not, however, be excessive and must not exceed the degree of violation committed by the enemy."⁽⁷⁾

These passages however do not deal specifically with the killing of innocent inhabitants in occupied territory.⁽⁸⁾

(v) The Netherlands Courts acting in the Trial of Hans Rauter dealt at some length with the question of reprisals in general⁽⁹⁾ and the Court of

⁽¹⁾ See Vol. VIII, pp. 86-7.

⁽²⁾ See Vol. XII, pp. 84-5.

⁽³⁾ See Vol. VIII, pp. 1-8.

⁽⁴⁾ See Vol. VIII, pp. 9-14.

⁽⁵⁾ See Vol. VIII, pp. 22-23 and Vol. XI, p. 60.

⁽⁶⁾ Compare Vol. VIII, pp. 12-13 and 80-1.

⁽⁷⁾ Vol. V, p. 38.

⁽⁸⁾ In fact the *Manual* does not represent the rules of international law as permitting such killings.

⁽⁹⁾ See Vol. XIV, pp. 123-138.

Cassation, on appeal, adopted the view that no right of reprisal can arise except as a result of an illegal act of a State. Consequently, acts on the part of inhabitants of occupied territories, unless they can be regarded as acts of a State, do not give rise to a right to reprisal but only to a right to punish the individual offenders.

In its Judgment the Netherlands Special Court of Cassation distinguished between three separate issues:

(a) The legal basis of legitimate reprisals;

(b) The possible objects of such lawful reprisals;

(c) The nature of certain acts allegedly committed in reprisals, in the absence of a proper legal basis.

(a) The Court took the view that legitimate reprisals could only arise between States as subjects of international law. The main consequence of this opinion was that the original violation, giving rise to legitimate reprisals, must be in the nature of an act involving the responsibility of a State. The Court stressed the fact that such acts can be committed only through the medium of individuals, but they must be individuals acting *on behalf* of the State and thereby representing it as its *organs*. The Court referred specifically to members of governments and military commanders.

From this it followed that where violations are committed by *irresponsible* individuals, this can never give a legal basis for resorting to lawful reprisals. The Court found that such was the case with the hostile acts of the Dutch population against the Germans. They constituted acts of individuals and not of a State, so that, in the absence of any violation for which the Netherlands State could be held responsible, the Germans could not and did not acquire the right to answer these hostile acts by reprisals.

(b) When reprisals are lawful under this rule, they may be taken "against all objects which, in the given circumstances, come into consideration to this end". This includes, as the Court put it, the "subjects" (citizens) of the State guilty of the criminal violation "wherever they may be".

The Court of Cassation did not go beyond this point with regard to the possible objects of lawful reprisals, and consequently did not state its views as to whether or in what circumstances it was permissible to kill inhabitants detained as hostages.

(c) Acts allegedly committed in reprisals which lacked the legal basis described above, were treated by the Court of Cassation as "so-called" or illegitimate reprisals. All the acts committed by the accused Rauter against the Dutch population were regarded as falling within this concept for the reason that, under international law, the Netherlands State, as represented by its organs during the war, had not been guilty of any violation of international law against the German State. In the absence of such violation the German State, as represented by its organs in occupied Holland, was not entitled to take any reprisals against any possible object, including members of the Dutch population.⁽¹⁾

⁽¹⁾ It would appear that the Court of Cassation took the view that in any case the German government lost any right of reprisal which it may otherwise have had by waging a war of aggression against the Netherlands and failing to fulfil its duties as an occupant. (See Vol. XIV, pp. 136-137).

While classifying the accused's acts in the above fashion, the Court of Cassation entered into the related question as to the position arising when inhabitants of occupied territory do commit hostile acts against the occupant to which the latter cannot reply by reprisals. The court came to the conclusion that in such cases the occupant was entitled to impose punishment upon the offenders. It stressed two points in this respect :

(a) The punishment must affect only the actual offenders.

(b) The punishment imposed must not be contrary to the laws and customs of war.

In the court's opinion this derived from Article 50 of the Hague Regulations, which prohibits the imposition of collective penalties of any kind. The only exception allowed is when the population in a given area can be "regarded as collectively responsible" for an offence. This, in the Court's opinion, meant that even in this exceptional case the individuals affected were the actual offenders. The general conclusion drawn by the Court was that, when acts of violence are committed by inhabitants, the punishment may never affect *innocent* persons.

The rule that individuals guilty of a violation of the laws and customs of war, including the taking of illegitimate reprisals, are penally responsible, is left unaffected. Under the Court's theory a State official who commits *illegitimate* reprisals and thus affects *innocent* persons, is guilty of a war crime.

(vi) The remark of the Tribunal before which the *Einsatzgruppen Trial* was held that "under International Law, as in domestic law, there can be no reprisal against reprisal" (since a legal reprisal cannot create the grounds for a legal counter-reprisal) suggests that the inhabitant of an occupied territory is not always bound to refrain from hostile acts against the occupying power.⁽¹⁾

10. IGNORANCE OF THE LAW

In general, under municipal law systems, a mistake of law is not regarded as an excuse. There has, however, been some tendency to recognise that an alleged war criminal can not be expected to have been quite as well aware of the provision of international law as of those of his own municipal law. Among other instances,⁽²⁾ the advice of the Judge Advocate in the *Scuttled U-Boats Case* may perhaps be relevant. The case turned substantially on what view the Court was to take of the question whether the accused at the material time knew of the surrendering of the German armed forces in the North West region of Germany. Since the act of surrender laid down law binding upon the accused, the question may perhaps be regarded as one of mistake of law (although admittedly of rather a different character from a mistake of the general law) because it is analogous to the position under municipal law when an accused pleads that he was unaware of the promulgation of a law defining crimes.

⁽¹⁾ See Vol. VIII, pp. 87-8. Lord Wright in his Foreword to Vol. VIII has maintained that it is never legitimate deliberately to kill innocent individuals and that to do so is prohibited by the Hague Convention, the London Charter and Law No. 10. The Report of the 1919 law mission on Responsibilities and the opinions of eminent international lawyers were quoted in support of this thesis.

⁽²⁾ See Vol. I, p. 12, Vol. V, p. 44 and Vol. VII, p. 64.

The Judge Advocate in concluding his summing-up advised the court in the following way :

"Do you think it is at all reasonably possible that the accused had heard nothing at all which would put him upon his guard as regards the handing over of the submarines, remembering that he was with this security flotilla, and was in a naval port at a time when rumours were presumably going round like wild fire? Are you satisfied that the man's state of mind at the time in question was this: 'I honestly believed I had an order: I did not know anything about any surrender; it was not for me to inquire why the higher command should be scuttling submarines; I honestly, conscientiously and genuinely believed I had been given a lawful command to scuttle these submarines and I have carried out that command and I cannot be held responsible'? Gentlemen, that is a matter for you to consider.

"The Defence suggests if you look at the evidence as a whole that that is a reasonable possibility. I am going to tell you that in my view, *if the accused did not have any knowledge of these terms* and that he did believe honestly that he had an order of this kind and that he carried it out; well, then, gentlemen, you will be entitled to acquit him."⁽¹⁾

A statement made by the Tribunal which conducted the *Flick Trial* is relevant here, although it may be thought that the passage refers to an occupant's duty to respect, unless absolutely prevented, *the laws in force in the occupied country* :

"It was stated in the beginning that responsibility of an individual for infractions of international law is not open to question. In dealing with property located outside his own State, he must be expected to ascertain and keep within the applicable law. *Ignorance thereof will not excuse guilt but may mitigate punishment.* The Tribunal will find defendant Flick guilty in respect of the Rombach matter but will take fully into consideration in fixing his punishment all the circumstances under which he acted."⁽²⁾

In the Judgment delivered in the *High Command Trial* it was said that : "Military Commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. *He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.*"⁽³⁾

The use of the word "error" indicates that the Tribunal had not in mind a situation in which a defendant is to be regarded as innocent because the law relating to his acts is *too vague* to give a definite answer as to the legality

⁽¹⁾ See Vol. V, pp. 69-70. (Italics inserted.)

⁽²⁾ Vol. IX, p. 23. (Italics inserted.)

⁽³⁾ Vol. XII, pp. 73-74. (Italics inserted.)

of those acts. Indeed, the attitude usually taken by the courts to the plea of superior orders⁽¹⁾ seems to involve admitting that a mistake of law may at any rate be pleaded in mitigation; if an order was not known to an accused to be illegal, and it was not unreasonable for him to mistake it as legal, he may plead in mitigation that he acted on that order in carrying out the acts charged.

In the *Latza Trial* a Norwegian Lagmannsrett held that the accused had been under a pardonable misconception in incorrectly believing that a certain German law was consistent with international law, but on appeal the Norwegian Supreme Court stated that it could not find, in view of the uncertainty of international law on the point, that the German provision was in fact illegal.⁽²⁾

11. MISTAKE OF FACT

A mistake of fact, however, may constitute a defence in war crime trials just as it may in trials before municipal courts. This is illustrated by the fact that the executioners of allied victims have sometimes been found not guilty on the grounds of their having reasonably believed that the executions which they were carrying out were legal.⁽³⁾

The Judge Advocate in the *Almelo Trial* advised the court that, if the court felt that the existing circumstances were such that a reasonable man might have believed that a victim whose killing was charged had been tried according to law and that a proper judicial legal execution had been carried out, then it would be open to the court to acquit the accused. The relevant consideration was whether certain accused had reason to believe that they were carrying out a lawful sentence.⁽⁴⁾

A *bona fide* mistake of fact does not negative the operation of the defences of military necessity,⁽⁵⁾ duress⁽⁶⁾ or (possibly) the defence that a prisoner of war was shot while trying to escape.⁽⁷⁾ In the *Hostages Trial* the Tribunal said that: "In determining the guilt or innocence of any army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence."⁽⁸⁾

⁽¹⁾ See pp. 157-158.

⁽²⁾ See Vol. XIV, pp. 60, 69 and 82-83.

⁽³⁾ See Vol. V, pp. 79-81.

⁽⁴⁾ Vol. I, pp. 41 and 45. So also in the trial by a British Military Court at Hamburg of Carl Rath and Richard Thiel, 23rd-29th January, 1948 (not previously treated in these volumes), the Judge Advocate advised the court that it would be a good defence to the charge of having unlawfully executed certain Luxemburg nationals if an accused could show that he *honestly believed* that he was participating in a lawful execution upon someone who was lawfully conscripted into the German army and had been sentenced to death. Compare also Vol. XI, pp. 50-1.

⁽⁵⁾ See Vol. VIII, pp. 68 and 69.

⁽⁶⁾ See Vol. X, pp. 175-6.

⁽⁷⁾ See p. 186, note 5.

⁽⁸⁾ Vol. VIII, p. 58.

12. THE MENTAL CAPACITY OF THE ACCUSED

In the trial of Wilhelm Gerbsch, the Special Court in Amsterdam, while passing a sentence of 15 years' imprisonment, recognised as a mitigating circumstance the fact that the accused's "mental faculties were defective and undeveloped" at the time of the crimes as well as at that of the trial.⁽¹⁾

On the other hand a mere plea of drunkenness was rejected in the trial of Yamamoto Chusaburo by a British Military Court at Kuala Lumpur,⁽²⁾ while in the *Milch Trial*, the Tribunal rejected a defence claim that the accused made violent statements, due to uncontrollable temper, overwork and head injuries, which were not to be taken seriously.⁽³⁾

No exhaustive study of the ages of persons condemned as war criminals has been made in these volumes, but it may be mentioned that sentences recorded in these volumes have on occasions been passed upon persons of 15 years and upwards.⁽⁴⁾

13. THE ALLEGED VAGUENESS, UNCERTAINTY OR OBSOLETENESS OF THE LAW

This plea was put forward in the *Peleus Trial*⁽⁵⁾ and in the *Flick, I.G. Farben and Krupp Trials*, where it was often amalgamated with the argument that the international law relating to economic offences in occupied territories had been rendered obsolete by the coming of "total war" which included a highly developed economic warfare.⁽⁶⁾

The United States Military Tribunal which conducted the *I.G. Farben Trial* showed a willingness to admit that changing international custom may render a rule of law obsolete and so take away its obligatory nature: "As custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilised nations as to alter the substantive content of certain of its principles."⁽⁷⁾ "Technical advancement in weapons and tactics used in the actual waging of war" may have rendered obsolete or inapplicable certain rules relating to "the actual conduct of hostilities and what is considered legitimate warfare."⁽⁸⁾ Similarly, the Judgment delivered in the *Flick Trial* stated that certain specified technical developments occurring since 1907 "make plain the necessity of appraising the conduct of defendants with relation to the circumstances and conditions of their environment. Guilt, or the extent thereof, may not be determined theoretically or abstractly. Reasonable and practical standards must be considered."⁽⁹⁾

Such considerations, nevertheless, did not serve to acquit Flick of guilt in connection with the Rombach plant,⁽¹⁰⁾ and the Tribunals acting in the *I.G. Farben Trial* and the *Krupp Trial*, explicitly and tacitly respectively, rejected their application to the protection afforded by the Hague Convention to

⁽¹⁾ See Vol. XIII, pp. 132 and 137.

⁽²⁾ See Vol. III, pp. 77-8 and 80.

⁽³⁾ See Vol. VII, p. 47.

⁽⁴⁾ See Vol. IX, p. 66 and Vol. XI, p. 74.

⁽⁵⁾ See Vol. I, pp. 14-15.

⁽⁶⁾ See Vol. X, p. 64-7.

⁽⁷⁾ See Vol. X, p. 48.

⁽⁸⁾ See Vol. X, p. 49.

⁽⁹⁾ See Vol. IX, p. 23.

⁽¹⁰⁾ Ibid, p. 23.

property rights in occupied territories.⁽¹⁾ The plea based on the alleged vagueness of the relevant law was also explicitly rejected by the Tribunal acting in the *I.G. Farben Trial*,⁽²⁾ and an argument based on its alleged obsolete nature was rejected in the *Milch Trial*.⁽³⁾

Similarly, the Judge Advocate acting in the *Peleus Trial* said that if this were a case which involved the careful consideration of the question whether or not the command to fire at helpless survivors struggling in the water was lawful in International Law, the Court might well think it would not be fair to hold any of the subordinates accused in this case responsible for what they were alleged to have done. In the present case, however, it must have been obvious to the most rudimentary intelligence that it was not a lawful command.⁽⁴⁾

14. THE PLEA THAT A SHOT PRISONER OF WAR WAS SHOT WHILE ATTEMPTING TO ESCAPE

(i) The legality of shooting prisoners of war while attempting to escape has been recognised.⁽⁵⁾

The Judge Advocate acting in the *Dreierwalde Trial*, however, said that such shooting would be legal "if it is reasonable in the circumstances",⁽⁶⁾ while, in the Trial of Erwin Wiczeorek and two others by a British Military Court at Hamburg, 28th August to 6th November, 1948,⁽⁷⁾ the Judge Advocate advised the Court that :

"Colonel Barratt has drawn your attention to the law . . . which is, of course, that there is no justification for killing a prisoner of war, except to prevent him escaping. Even then, of course, although the volume of Oppenheim, which was referred to, did not, I think, deal with this point—even then I must advise you that the English law on this matter is that you should only in such circumstances use such a degree of violence as is necessary to the circumstances. If a prisoner of war were escaping, the guard in charge of such a prisoner would only be justified in using firearms lethally if there were no other reasonable prospect or recapture of reducing into captivity the prisoner again. If the prisoner could reasonably be re-apprehended without the use of firearms, then such lesser course should be resorted to."

(ii) On the other hand, it is not permissible to shoot a prisoner of war on recapture *on the grounds that he attempted to escape*.⁽⁸⁾ Among the provisions of the Hague and Geneva Conventions which the Tribunal acting

⁽¹⁾ See Vol. X, pp. 48-9 and 133-4.

⁽²⁾ See Vol. X, p. 49.

⁽³⁾ See Vol. VII, pp. 44 and 64-5.

⁽⁴⁾ Vol. I, p. 15.

⁽⁵⁾ See Vol. I, pp. 86-7, Vol. III, p. 22, and Vol. VII, p. 61. Compare Vol. XI, pp. 74-5. The Judge Advocate acting in the *Dreierwalde Case* advised the court that, if the accused Amberger "did see that his prisoners were trying to escape or had reasonable grounds for thinking that they were attempting to escape," to shoot at them to prevent their escape would not be a breach of the laws and customs of war. (See Vol. III, pp. 86-7. Italics inserted.)

⁽⁶⁾ Vol. I, p. 86.

⁽⁷⁾ Not previously referred to in these Reports.

⁽⁸⁾ See Vol. VII, p. 61, and Vol. XII, pp. 101-2.

in the *High Command Trial* regarded as being declaratory of customary international law, were part of Article 8 of the former, and Article 50 of the latter, which provide :

"Article 8 :

" . . . Escaped prisoners who are retaken before being able to rejoin their own army, or before leaving the territory occupied by the army which captured them, are liable to disciplinary punishment.

"Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of their previous escape."⁽¹⁾

"Article 50 :

"Escaped prisoners of war who are re-captured before they have been able to rejoin their own armed forces or to leave the territory occupied by the armed forces which captured them shall be liable only to disciplinary punishment.

"Prisoners who, after succeeding in rejoining their armed forces or in leaving the territory occupied by the armed forces which captured them, are again taken prisoner shall not be liable to any punishment for their previous escape."⁽²⁾

(iii) Nor is it permissible to shoot prisoners of war *to prevent their attempting to escape*, even though their intentions to make the attempt is known.⁽³⁾

(iv) Finally, a prisoner of war may not legally be shot if attempting to escape to save his life.⁽⁴⁾

15. PLEAS IN MITIGATION OF SENTENCE

As has already been seen, the courts have recognised that some pleas, while they do not exculpate an accused, are worthy of consideration as reasons for mitigating the sentence to be passed ; such pleas include that of superior orders.

It should be added that on many occasions defence counsel have availed themselves of a right to enter a special plea in mitigation of sentence, based upon facts of a varied nature including the age, experience and family responsibilities of the accused ; such pleas were made, between the announcement of findings and pronouncement of sentence, in, for instance, the *Belsen Trial*.⁽⁵⁾

Furthermore the judgments delivered in war crime trials have themselves often pointed out that, while an accused is guilty of an offence charged, there exist factual circumstances which the court will consider as mitigating the severity of the sentence which ought to be imposed ; such statements have been made for instance by French, United States, and Netherlands

⁽¹⁾ This Article was held to have been infringed in the trial of Flesch by the Norwegian courts. See Vol. VI, p. 114.

⁽²⁾ See Vol. XII, pp. 90 and 91.

⁽³⁾ See Vol. VII, p. 61.

⁽⁴⁾ See Vol. VII, p. 61.

⁽⁵⁾ See Vol. II, pp. 122-5. Compare Vol. I, pp. 87 and 102 and Vol. XI, p. 74.

courts in trials of war criminals.⁽¹⁾ As was stressed in the judgment delivered in the *Hostages Trial*, however, "it must be observed that mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defence. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings of the Court with reference to the degree of magnitude of the crime."⁽²⁾

The circumstances which have been thus regarded as being extenuating have been varied in nature; of more legal interest than most perhaps is the circumstance that an illegal order was not carried out, which the Tribunal in the *Hostages Trial* regarded as being worthy of consideration in deciding upon the punishment of a commander who issued such an order.⁽³⁾

⁽¹⁾ See Vol. VIII, pp. 16, 74-5 and 92; Vol. IX, pp. 29-30 and 66; Vol. XI, p. 4; Vol. XII, pp. 94 and 121-2 and p. 93, note 1; Vol. XIII, pp. 121, 132 and 137; and Vol. XIV, pp. 141 and 143.

⁽²⁾ Vol. VIII, p. 74.

⁽³⁾ See Vol. VIII, p. 90.

VIII

THE PROCEDURE OF THE COURTS

This present section does not purport to be a complete summary of all provisions and decisions on questions of procedure which have been set out in the previous volumes of this series. The purpose of this final Volume is primarily to provide a summary of the rules of *international law* which have been illustrated in the Reports and, on the matter of the procedure to be followed in trials for offences against the international criminal law, customary international law makes no provisions except for requiring that an accused shall be accorded a fair trial. The judgment delivered in the *Justice Trial*, for instance, pointed out that it was essential to recognise that: "The jurisdictional enactments of the Control Council, the form of the indictment, and the judicial procedure prescribed for this Tribunal are not governed by the familiar rules of American criminal law and procedure. This Tribunal, although composed of American judges schooled in the system and rules of common law, is sitting by virtue of international authority and can carry with it only the broad principles of justice and fair play which underlie all civilised concepts of law and procedure."⁽¹⁾

Some indication of what Allied Courts have regarded as the characteristics of a fair trial, when deciding that such a trial had been denied to Allied victims by enemy accused, has already been given.⁽²⁾ What can usefully be attempted now is to show what steps have been taken to ensure that the same courts shall accord those rights to enemy accused.⁽³⁾

⁽¹⁾ Vol. VI, p. 49 (Italics inserted). Compare the passage from the Judgment delivered in the *High Command Trial* quoted on p. 167.

⁽²⁾ See pp. 161-166.

⁽³⁾ For provisions regarding the composition and procedure of courts, including those provisions about to be examined, see Vol. I, pp. 13 and 106-10 (British courts); Vol. III, pp. 85-92 (Norwegian courts), pp. 38-40, 48-50, 53, 94 and 96-100 (French Courts) and 57, 107-113 and 116-120 (United States Courts); Vol. IV, pp. 126-30 (Canadian Courts); Vol. V, pp. 98-101 (Australian Courts); Vol. VII, pp. 91-7 (Polish Courts); Vol. XI, pp. 103-10 (Netherlands Courts); and Vol. XIV, pp. 159-160 (Chinese Courts). See also Vol. IX, pp. 31-2 (United States Courts).

No particular treatment will be given in this Volume to the presumption of innocence and the rule that conviction is dependent upon proof of the crime charged beyond a reasonable doubt, but these basic elements of a fair trial have also been frequently stressed by Judge Advocates or war crime courts. (See for instance Vol. IX, p. 16 and Vol. X, pp. 109-10).

While the general right to a fair trial is less easy to provide for than certain constituent parts of that right, such as the right to the aid of counsel, it is nevertheless provided by certain of the United States enactments that Military Commissions shall conduct their proceedings as may be deemed necessary for a full and fair trial. (See Vol. III, pp. 108-9).

War Crime trials have sometimes been held before mixed inter-allied courts. The British Royal Warrant and the analogous Canadian and Australian laws make provision for such trials (Vol. I, p. 106, Vol. IV, p. 126 and Vol. V, p. 98), and Art. II of Ordinance No. 7 of the United States Zone of Germany envisages trials by courts appointed jointly by the Military Governor of that Zone and by one or more other zone commanders of the member nations of the Allied Control Authority. (Vol. III, p. 117). The British provision has been applied (see for instance, Vol. I, p. 1 and Vol. V, p. 41), but no use has been made of the United States provision. It may be added that, as far as the writer's knowledge goes, no court trying offences against international criminal law connected with the Second World War has been composed either wholly or partly of members from states which were neutral in that war.

The rules relating to evidence and procedure which are applied in trials by courts of the various countries, and by the International Military Tribunals in Nuremberg and Tokyo, when viewed as a whole, are seen to represent an attempt to secure to the accused his right to a fair trial while ensuring that the guilty shall not escape punishment because of legal technicalities. Certain *typical examples* are examined in the following paragraphs. The survey of information illustrating the protection of certain selected and more important rights (see headings 1-5) makes it clear that an attempt has in fact been made to secure to an alleged war criminal his rights to a fair trial. The later part of the section, however, makes it clear that the aim has also been to ensure that the courts are not so bound by technical rules that the guilty shall benefit from the exceptional circumstances under which war crime trials are necessarily held, and so escape just punishment.

It will have been noted that a marked general similarity exists between the rules laid down in the Charters of the International Military Tribunals and in the various municipal enactments governing all the matters discussed in this section on the rights of the accused. These procedural rules, as much as those quoted elsewhere which lay down provisions of substantive law, represent a further contribution to the development of an international penal law. They will prove of value in the sphere of the codification of international law and will serve as a convenient basis for further developments in this sphere.

1. RIGHT OF ACCUSED TO KNOW THE SUBSTANCE OF THE CHARGE

Paragraph (a) of Article 16 of the Charter of the Nuremberg International Military Tribunal, which falls under the heading: *IV. Fair Trial for Defendants*, provides that:

"The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial."

Similarly, Article 9 (a) of Section III—*Fair Trial for Accused*—of the Charter of the Tokyo International Military Tribunal runs as follows:

"(a) *Indictment*. The indictment shall consist of a plain, concise, and adequate statement of each offence charged. Each accused shall be furnished, in adequate time for defence, a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused."

The Pacific September and December Regulations and the China Regulations for trials by United States Military Commissions all provide that: "The accused shall be entitled: (a) To have in advance of trial a copy of the charges and specifications, so worded as clearly to apprise the accused of each offence charged."

A similar provision is made in Article IV (a) of Ordinance No. 7 of the Military Government of the United States Zone of Germany, under which the Nuremberg Subsequent Proceedings were held, and in Article V of Ordinance No. 2 under which Military Government Courts were established.

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

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

Article 179 of the French Code de Justice Militaire provides that an alleged war criminal ordered to appear before a Military Tribunal established in a territorial district in a state of war must, 24 hours at least before the meeting thereof, receive notification of the summons containing the order of convocation of the Court as well as the indication of the crime or delict alleged, the text of the law applicable and the names of the witnesses which the prosecution proposed to produce.

Under the laws relating to trials in the Netherlands, the indictment must be made known to an accused at least ten days before trial.

2. RIGHT OF ACCUSED TO BE PRESENT AT TRIAL AND TO GIVE EVIDENCE

Article 16 (e) of the Charter of the Nuremberg International Military Tribunal provides that:

"A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution."

Article 9 (d) of the Charter of the International Military Tribunal for the Far East runs as follows:

"d. Evidence for Defence. An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defence, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine."

Rule of Procedure 40 makes the following provision applicable to trials by British Military Courts:

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

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

The right of an accused to appear at his own trial and to give evidence if he pleases is also safeguarded, either explicitly or implicitly, by the regulations governing trials by United States Military Commissions, Military Government Courts and Military Tribunals. The right is explicitly provided also by, *inter alia*, the relevant Polish laws.

3. RIGHT OF ACCUSED TO HAVE AID OF COUNSEL

Article 16 (d) of the Charter of the International Military Tribunal provides that :

"(d) A Defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel."

Article 9 (c) of the Charter of the International Military Tribunal for the Far East seems to go even further, in view of its final sentence :

"(c) *Counsel For Accused*. Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial."

Regulation 7 of the Royal Warrant provides that Counsel may appear on behalf of the Prosecutor and accused in like manner as if the Military Court were a General Court Martial. The appropriate provisions of the Rules of Procedure, 1926, apply accordingly. In practice accused persons tried as war criminals are defended either by advocates of their own nationality or by British serving officers appointed by the Convening Officer, who may or may not be lawyers. Similar provisions are made by the relevant Canadian and Australian laws.

The relevant United States provisions assure a similar right to the accused. The following provision is contained in Article 5b of the Pacific December Regulations :

"The accused shall be entitled : . . . To be represented, prior to and during trial, by counsel appointed by the convening authority or counsel of his own choice, or to conduct his own defence.

"To testify in his own behalf and have his counsel present relevant evidence at the trial in support of his defence, and cross-examine each adverse witness who personally appeared before the commission."⁽¹⁾

The corresponding wording in the China Regulations (Article 14 (b)), contains a mandatory element :

"The accused shall be entitled : . . . To be represented prior to and during trial by counsel of his own choice, or to conduct his own defence. If the accused fails to designate his counsel, *the commission shall appoint competent counsel* to represent or advise the accused." (Italics inserted).

⁽¹⁾ See Vol. I, p. 72 for an application of this provision.

Similarly, Article IV (c) of Ordinance No. 7 of the United States Zone of Germany provides that a Military Tribunal set up thereunder " . . . shall appoint qualified counsel to represent a defendant who is not represented by counsel of his own selection ", and the Polish Decree of 31st October, 1946, on the establishment of a Supreme National Tribunal lays down in its Article 12 (1) that : " At the trial, the defendant must appear with counsel. If he does not appoint one, the President of the Supreme National Tribunal is to appoint a counsel *ex officio* from among the advocates residing in Poland."⁽¹⁾ In trials before French Military Tribunals, if the accused has not chosen a defending Counsel such Counsel will be appointed for him. Again, under Articles 99-101 and 107 of the Norwegian General Law No. 5 of 1st July, 1887, on Criminal Procedure, which is applied in war crime trials before Norwegian Courts, the Court officially appoints a Counsel at the State's expense to defend an alleged war criminal ; this Counsel is usually that already chosen or engaged by the accused. Provision for choice or appointment of Counsel for the Defence is also made in the Netherlands laws.⁽²⁾

4. THE RIGHT OF THE ACCUSED TO HAVE THE PROCEEDINGS MADE INTELLIGIBLE TO HIM BY INTERPRETATION

Most persons accused of war crimes do not speak the same language as the members of the court, or of most of the witnesses (particularly those called by the Prosecution). Consequently the question of making the proceedings intelligible to the accused usually arises.

Article 16 (c) of the Charter of the International Military Tribunals states that : " A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands ".

Article 9 (b) of the Charter of the International Military Tribunal for the Far East provides as follows :

" b. *Language*. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested ".

In Article 9, the United States European Directive lays down that :

" The accused shall have the right to have the proceedings of the commission interpreted into his own language if he so desires."

The Pacific September Regulations in Article 14 (d) provide that the accused shall be entitled :

" To have the charges and specifications, the proceedings and any documentary evidence translated when he is unable otherwise to understand them ".

The China and Pacific December Regulations contain the same rule, except that the latter makes reference to " the substance of the charges and specifications " instead of " the charges and specification ", while similar provisions are made by Articles IV (a) and (b) of Ordinance No. 7.

⁽¹⁾ See for instance, Vol. VII, p. 17 and Vol. XIII, p. 102.

⁽²⁾ Regarding the right to counsel, see also Vol. VI, p. 118 and Vol. IX, p. 16.

An examination of the records of war crime trials indicates that this right of the accused has been well preserved.⁽¹⁾

5. RULES REGARDING APPEAL AND CONFIRMATION

An accused may be further preserved from any kind of summary treatment by provisions relating to appeal or confirmation.

While Article 26 of the Charter of the International Military Tribunal states that: "The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review", Article 29 provides for possible intervention by a higher agency in the determination of sentence: "In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. . . ."

While the question of appeal is not specifically mentioned in the Article, various of those sentenced at Nuremberg did in fact appeal to the Control Council for Germany, though without success.

Similarly Article 17 of the Charter of the International Military Tribunal for the Far East contains the following passage:

"*Judgment and Review.* The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action. Sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity."

No right of appeal in the ordinary sense of that word exists against the decision of a British Military Court. The accused may, however, within 48 hours of the termination of proceeding in Court, give notice of his intention to submit a petition to the Confirming Officer against the finding or the sentence or both, and the petition must be submitted within 14 days. If it is against the finding it must be referred by the Confirming Officer to the Judge Advocate General or to his deputy.⁽²⁾

⁽¹⁾ See for instance Vol. II, p. 145, Vol. III, pp. 74-75 and Vol. XII, p. 5. Some indication of the limits beyond which the courts would not be prepared to go in this matter is provided, however, by the Trial of Oberleutnant Gerhard Grumpelt by a British Military Court held at Hamburg, Germany, on 12th and 13th February, 1946, but the interests of the accused in this case were fully safeguarded by the fact that two, and later, during the evidence for the defence, a further three, officers and soldiers were detailed to act as interpreters. (See Vol. I, pp. 65-66).

The Judgment of the International Military Tribunal for the Far East contains the following passage (on p. 17 of the official transcript thereof):

"In addition, the need to have every word spoken in Court translated from English into Japanese, or vice versa, has at least doubled the length of the proceedings. Translations cannot be made from the one language into the other with the speed and certainty which can be attained in translating one Western speech into another. Literal translation from Japanese into English or the reverse is often impossible. To a large extent nothing but a paraphrase can be achieved, and experts in both languages will often differ as to the correct paraphrase. In the result the interpreters in Court often had difficulty as to the rendering they should announce, and the Tribunal was compelled to set up a Language Arbitration Board to settle matters of disputed interpretation."

⁽²⁾ Regulation 10 of the Royal Warrant.

Confirmation by higher military authority is in any case necessary. The finding and any sentence which the Court had jurisdiction to pass, if confirmed, are valid, notwithstanding any deviation from the Regulations or the Rules of Procedure or any defect or objection, technical or other. An exception exists only in the case where "it appears that a substantial miscarriage of justice has actually occurred."⁽¹⁾ Provision for review by higher military authority is also made in the Australian War Crimes Law and in the Canadian War Crimes Regulations.

Similarly, the sentence of a United States Military Commission must not be carried into execution until it has been approved by the appointing authority. Death sentences must, in addition, be confirmed also by the Theatre Commander. The approving and confirming authorities have before them, in acting, a review and recommendation by the appropriate Judge Advocate. Thus, while no "appeal" as that term is used in judicial proceedings is provided for, every record of trial is scrutinised as to the facts and points of law, and the Commanding General has trained legal advice as to the right course to take.⁽²⁾

A person convicted by a United States Military Government Court has the right to petition for review of the finding or sentence. The petition must be filed with the Court within 10 days of conviction.

No sentence of a Military Government Court shall be carried into execution until the case record has been examined by an Army/Military District Judge Advocate and the sentence approved by the officer appointing the Court or by the Officer Commanding for the time being. No sentence of death shall be carried into execution until confirmed by higher authority.

The reviewing authority may, upon review, *inter alia*,

- (a) confirm or set aside any finding.
- (b) substitute the finding of guilty by an amended charge,
- (c) confirm, suspend, reduce, commute or modify any sentence or order, or
- (d) increase any sentence, where a petition for review which is considered frivolous has been filed and the evidence in the case warrants such increase.

The reviewing authority may at any time remit or suspend any sentence or part thereof.

The proceedings shall not be invalidated nor any findings or sentences disapproved for any error or omission, technical or otherwise, occurring at any such proceedings, unless in the opinion of the reviewing authority it appears that the error or omission has resulted in injustice to the accused.

Provision is made in Article XVII of Ordinance No. 7 for the review by higher military authority of sentences passed by United States Military Tribunals. Sentences may thereby be altered or reduced but not increased in severity.

⁽¹⁾ Regulation 11 of the Royal Warrant.

⁽²⁾ Regarding the degree of control exercised by the Supreme Court of the United States over United States Military Commissions, see Vol. III, pp. 112-13 and Vol. IV, pp. 38 and 48. Contrast the position of the United States Military Tribunals in the United States Zone of Germany as examined in Vol. VII, pp. 47-48 and 66.

A war criminal sentenced by a Norwegian Lagmannsrett has the right to appeal to the Supreme Court of Norway on points of Law or on the question of the severity of the sentence, but not on the facts. There is also the possibility of a retrial,⁽¹⁾ or of reprieve or pardon.

French Law makes provisions regarding appeals from French Military Tribunals of which persons condemned by the Permanent Military Tribunals can avail themselves.

In time of war, according to the provisions of a Decree of 3rd November, 1939, Permanent Military Appeal Tribunals are to be set up, their number, seat and jurisdiction being fixed by decree. They are to deal only with cases involving persons convicted by Military Tribunals. Article 135 of the *Code de Justice Militaire* states that such persons shall have twenty-four hours during which they may appeal to such a court. This period begins to run at the end of the day on which judgment of the Military Tribunal is read.

This appeal to a Permanent Military Appeal Tribunal is the only one possible in war time against a decision of a Permanent Military Tribunal. The former, in accordance with Article 133 of the *Code de Justice Militaire*, is not concerned with reviewing the whole trial conducted by the inferior tribunal, but only with finding whether the judgment delivered thereby constituted a correct application of the law.⁽²⁾

Article 134 states that: "Military Appeal Tribunals can annul decisions only in the following cases:

- (1) when the Military Tribunal has not been composed in accordance with the provisions of the Code,
- (2) when the rules of competence have been violated,
- (3) when the penalty laid down by the law has not been applied to the acts declared to be proved by the Military Tribunal or when a penalty has been pronounced which goes beyond the cases stated by the law.
- (4) when there has been a violation or omission of the formalities laid down by law as a condition of validity, and
- (5) when the Military Tribunal has omitted to decide upon a request of the accused, or an application of the Public Prosecutor, which aims at making use of a power or a right accorded by the law."

According to the provisions of the Decree of 3rd November, 1939:

"In all cases where a Military Appeal Tribunal has been established, persons sentenced by Military Tribunals cannot appeal to the Court of Appeal (*Cour de Cassation*) against the decisions of Military Tribunals and of Military Appeal Tribunals."

In peace-time,⁽³⁾ in accordance with Article 100 of the *Code de Justice Militaire*, judgments delivered by Military Tribunals can only be challenged by way of an appeal to the Court of Appeal, for the reasons and under the conditions set out by Article 407 *et seq.*, of the *Code d'Instruction Criminelle*. A convicted person has three whole days, after that on which his sentence has been notified to him, in which to inform the Clerk of the Court of his desire to appeal.

⁽¹⁾ As for instance in the *Latza Trial*; Vol. XIV, pp. 49-85; cf. Vol. V, p. 92.

⁽²⁾ The Permanent Military Appeal Tribunal does not, therefore, enquire into mere questions of fact.

⁽³⁾ The legal date of the end of war time is, for purposes of French War Crimes Law, 1st June, 1946.

Provision is made for a right of appeal also in Article 16 of the Yugoslav War Crimes Law of 25th August, 1945, and Article 15 of the Polish Law of 31st October, 1946, establishing the Supreme National Tribunal, provides for an appeal for mercy to the President of the National Council. Provision for review by higher authority is made by the second of these provisions and by Article XXXII of the Chinese War Crimes Law of 24th October, 1946. The relevant Netherlands laws provide for either appeal or review by higher authorities, and for the possibility of a pardon.

6. STRESS PLACED ON EXPEDITIOUS PROCEDURE

The care shown in ensuring to the accused his essential rights during trial is balanced by an attempt at ensuring that there shall be no unnecessary delays arising out of purely technical disputes. Some relevant provisions and judicial utterances have been quoted in Volume IV, pp. 81-83.

7. RULES OF EVIDENCE

The clearest examples of the attempt to avoid miscarriage of justice through unnecessary legal technicalities are provided by the rules of evidence applied in war crime trials, to which attention is now briefly to be turned.

In general the rules of evidence applied in War Crime trials are less technical than those governing the proceedings of courts conducting trials in accordance with the ordinary criminal laws of states.⁽¹⁾

A study of the various provisions relating to the admissibility of evidence indicates that most of the courts which have actually been entrusted with the trial of criminals under international law have in effect been empowered to admit all evidence which appeared to the Court to have probative value,⁽²⁾ while a study of the application of these rules shows that the practice of the courts has been to interpret them widely, so as to render admissible a considerable range of evidence and to allow the court concerned then to decide what weight to place on each item.⁽³⁾

Thus the Tribunal which conducted the *Hostages Trial*, in commenting upon Article VII of Ordinance No. 7, which enables the United States Military Tribunals to admit any evidence which they deem to have probative value, said that it was "of the opinion that this rule applies to the competency of evidence only and does not have the effect of giving weight and credibility to such evidence as a matter of law. It is still within the province of the

⁽¹⁾ This is not to say that any unfairness is done to the accused; the aim has been to ensure that no guilty person will escape punishment by exploiting technical rules. The circumstances in which war crime trials are often held make it necessary to dispense with certain such rules. For instance many eye witnesses whose evidence was needed in trials in Europe had in the meantime returned to their homes overseas and been demobilized. To transport them to the scene of trial would not have been practicable, and it was for that reason that affidavit evidence was permitted and so widely used. In the *Belsen Trial*, the Prosecutor pointed out that although the trial was held under British law, the Regulations had made certain alterations in the laws of evidence for the obvious reason that otherwise many people would be bound to escape justice because of movements of witnesses. A number of affidavits had been taken from ex-prisoners from Belsen, but many of the deponents had since disappeared. Therefore the Prosecution would call all the witnesses available and would then put the affidavits before the Court and ask for the evidence contained therein to be accepted. (Vol. II, pp. 131-2).

⁽²⁾ See Vol. I, pp. 46, 84-5 and 107-8; Vol. II, pp. 130-1; Vol. III, pp. 62-3, 109-11, 117 and 118; (especially) Vol. IV, pp. 78-81 and pp. 127-8; Vol. V, pp. 92-100; and Vol. XI, p. 108.

⁽³⁾ See Vol. II, pp. 131-8 and 142-3; Vol. III, pp. 73-4; Vol. IV, pp. 3, 23, 55, 57-8 and 60-2; (especially) Vol. IV, pp. 78-81; Vol. V, pp. 58-9; Vol. XI, pp. 9, 11-12, 51-2 and 84-5; and the references in footnote 2 to p. 198.

Tribunal to test it by the usual rules of law governing the evaluation of evidence. Any other interpretation would seriously affect the right of the defendants to a fair and impartial trial."⁽¹⁾

Much reliance as evidence has been placed during war crime trials on affidavits, that is to say signed statements by a witness made before trial. Defence counsel have more than once protested against such evidence, mainly on the ground that, unlike a witness in the box, affidavits cannot be cross-examined, but there can be no doubt as to their admissibility under the laws governing at least most of the courts which have conducted trials of offences against the international criminal law.⁽²⁾

During the trial of Erich Killinger and four others by a British Military Court, Wuppertal, 26th November–3rd December, 1945, before the tendering of the affidavit evidence for the Prosecution, the Defence applied for one deponent to be produced in person. The Defence had been given to understand that the British Officer in question would be available for questioning. The Court decided, after hearing argument, that the deponent could not be produced "without undue delay" (in the wording of Regulation 8 (i) (a)), and the President of the Court added that "we realise that his affidavit business does not carry the weight of the man himself here, as evidence, and when it is read we will hear what objections you have got to anything that the affidavit says, and we will give that, as a court, due weight". The President's words may fairly be taken as a reference to the fact that if evidence is given by means of an affidavit the person providing the evidence is not present in Court to be examined, cross-examined and re-examined.⁽³⁾

Nevertheless, in his summing up, the Judge Advocate in the trial of Karl

⁽¹⁾ Vol. VIII, p. 37.

⁽²⁾ For examples of and discussion of the admission of such documentary evidence, see Vol. I, pp. 14, 42, 82–3, 85 and 96; Vol. II, pp. 119, 132–3 and 134–5; Vol. III, pp. 35, 39, 70–1 and 88; Vol. IV, pp. 23 and 79–81; Vol. V, pp. 47–9; Vol. VIII, pp. 15, 36–7 and 38; Vol. IX, p. 6, Vol. XI, pp. 60–64. Regarding the admission of pre-trial statements by one accused against another, see, for instance, Vol. II, pp. 134–5 and Vol. III, p. 63. Regarding the admission of pre-trial statements of an accused concerning himself, see Vol. II, pp. 135–8; Vol. III, pp. 71–2 and Vol. XI, pp. 52, 78 and 83.

⁽³⁾ See Vol. III, p. 71.

The Judge Advocate acting in the Trial of Oscar Hans by a British Military Court at Hamburg, 18th–25th August, 1948, advised the Court as follows:

"Another matter of general warning that I must draw your attention to relates to the documentary evidence which has been given. It is, as I think you may have heard me say earlier in these proceedings, a rule of English law that the Court must have the best evidence, and of course the best evidence of a person who is alleged to have seen something is the spoken testimony of that person given in court. You have in many cases here not got that particular person before you, but only some document, either an affidavit made by him or some other document, and we will deal with them all as we go through them, which has come into existence at some time outside the confines of this Court, and which, of course, nobody has had any opportunity in this Court of testing. Documents of that kind are subject to the criticism that the defence have been denied the opportunity of cross-examining about them, of investigating them further, of knowing anything of the circumstances in which they were taken, of being in any other way able to probe their reliability, and, therefore, I should tell you this, that in the ordinary procedure of the English Courts, many of these documents would not be admissible as evidence at all for that particular reason, and no doubt you know from your experience of administering Military Law in Courts Martial, such documents would not be admissible. By special regulations made for the conduct of these Courts here for the trial of war criminals, an exception to the main rule of evidence has been made, and these documents are made admissible, but it is my duty to warn you that that is an exception, and that you must not necessarily accept them at their face value. You must have regard to each particular document and consider what weight you ought to attach to it. If you think, in spite of that warning that the contents of the documents are true, then you are entitled to treat them as well as any other evidence. If you feel doubts about them, that may reduce the value which you give to them."

Adam Golkel and thirteen others, by a British Military Court, Wuppertal, Germany, 15th–21st May, 1946, stressed that: "There is no rule that evidence given in the witness box must be given more weight than evidence, statements, taken on oath outside the court. As I said earlier, take into account all the circumstances . . ."⁽¹⁾

Further examples of the more elastic rules of evidence permissible before courts trying war criminals are found in the greater frequency with which "hearsay" evidence is admitted, when compared with proceedings before most courts dealing with offences purely under national law. For instance, in English Civil Courts, subject to exceptions, a statement, whether oral or written, made by a person who is not called as a witness is not admissible to prove the truth of any matter contained in that statement (see Harris and Wilshire's *Criminal Law*, Seventeenth Edition, p. 482). Such evidence is rendered permissible by Regulation 8 (i) of the Royal Warrant provided it satisfied the conditions laid down therein.⁽²⁾

⁽¹⁾ See Vol. V, pp. 47–9.

⁽²⁾ See, as examples of the admitting of hearsay evidence, Vol. I, p. 85, Vol. II, p. 138, Vol. IV, p. 23, Vol. IX, p. 6.

As an indication of the precise limits of the legal rights of an alleged war criminal it should also be mentioned that such persons are not entitled to the rights laid down to protect prisoners of war in Arts. 60–66 of the Geneva Prisoners of War Convention; see pp. 99–100.

For material on certain other matters of procedure and evidence, reference may be made to the following pages: Vol. II, p. 107, Vol. IV, p. 44, Vol. VI, pp. 49–50 and Vol. XI, pp. 9, 10–11 and 24 (Charges against an accused are, under the British and United States War Crimes legislation, not required to be drafted with the same precision and formality as a charge under common law); Vol. II, pp. 146–7 and Vol. X, pp. 158–9 (procedure followed upon an accused falling ill); Vol. II, p. 70 and Vol. IV, pp. 7–8 and 11–14 (possibility of defence pleas that charge stated no offence); Vol. II, pp. 145–6 (presence of witnesses in the court room after giving evidence); Vol. III, pp. 72–3 and Vol. XI, p. 78 (procedure followed when accused produced no evidence other than his own testimony); Vol. VII, p. 95 and Vol. XI, pp. 81–2 (procedure followed upon a plea of guilty); Vol. II, pp. 5–7 and 143–5, Vol. III, pp. 38 and 66, and Vol. XI, p. 11 (severing of charges and severing of trials); Vol. X, pp. 67–8 (rules concerning judicial notice); Vol. X, p. 76, note 1 (the taking of evidence on commission); and Vol. II, pp. 147–8 (recording of a special finding).

The material here referred to often illustrates further the policy of leaving wide discretionary powers in the hands of the Courts, as does also for instance the rule generally followed as regards the pleas of superior orders and of alleged legality or compulsion under municipal law. This provision of a wide discretion to the courts is an aspect of the attempt to exclude from war crime trial proceedings such unnecessary technicalities as might lead to a miscarriage of justice in favour of the accused; this tendency has been demonstrated also in certain provisions that a trial cannot be invalidated after its completion merely because of technical faults of procedure which caused no injustice to the accused. (See Vol. I, p. 109–10, Vol. III, p. 120, Vol. IV, p. 130 and Vol. V, p. 101).

It need hardly be added that the courts have often worked upon circumstantial evidence as well as upon direct evidence; this has been of particular interest in connection with questions turning upon an accused's knowledge of certain activities or of the criminality of certain activities or organisations; see for instance Vol. VI, pp. 88–9, Vol. XI, p. 4; and pp. 151–3 of the present volume, concerning knowledge of the criminality of the aims or activities of certain organisations. Judge Musmanno's judgment in the *Milch Trial* includes the statement that: "Although Milch has here repudiated belief in the master race theory, yet we know that he went through a formal procedure to establish the absence of Jewish blood in his veins. This procedure even took the embarrassing turn of statements concerning his parentage. In doing this, *Milch could not help but know* that the Jews were being persecuted by the political party to which he voluntarily belonged." (Italics inserted). One relevant passage chosen from among several made in the judgment in the *Pohl Trial* is the following: The Tribunal concludes that the knowledge of the defendant concerning the erection and maintenance of the gas chambers and crematoria in the various concentration camps put him upon actual notice of the intended use of these installations. *Owing to the high position he held in the WVHA, we are forced to conclude* that defendant Eirschmalz had actual knowledge of "Action Reinhardt," and the "Final Solution of the Jewish Problem" and that he knew that numberless thousands of unfortunate Jews and nationals of occupied territories were exterminated in the gas chambers and crematoria erected and maintained under the supervision of his office and other offices of the WVHA." (Italics inserted).

IX

PUNISHMENT OF CRIMINALS

(i) International law lays down that a war criminal may be punished with death whatever crime he may have committed. Some use has been made of the latitude allowed in this matter insofar as certain offences other than killing have, on occasions, been punished with death, for instance cases of torture and/or rape punished by the Norwegian and Australian courts. Illustrative Norwegian trials have been reported upon in these volumes.⁽¹⁾ Among the Australian trials mention should be made of the trial of Tsugiji Matsumoto and others at Rabaul, 6th April, 1946, when three accused were sentenced to death for torturing a civilian inhabitant of occupied territory, and the trial of Hiroe Sakoda and others at Rabaul, 26th-29th April, 1946, when the accused Hiroshi Nakajima and Shigenobu Takahashi were sentenced to death for torturing another civilian. In each case the charge was one of torture; the record contains no mention of any death of the victims having resulted, and the findings and sentences were confirmed and carried out. In a third trial held at Rabaul on 13th December, 1945, an Australian Military Court sentenced to death Yoshio Taki on charges of rape and torture committed against a Chinese civilian of Rabaul, although the victim survived. Again the sentence was confirmed and carried out.

Death sentences have also been awarded by several Australian Courts for cannibalism and mutilation of the dead. These sentences have however usually been either commuted or overruled by the Confirming Authority.⁽²⁾

On the other hand, it is open to the courts to award sentences less than the death sentence to accused found guilty of charges of unlawful killing and this has been done in many trials, including some Australian cases where the charges were explicitly charges of murder.⁽³⁾

It has also been seen that punishment other than death and imprisonment can be made for war crimes; thus in the *Goeth, Hoess, Krupp and Greiser Trials* confiscation of property appears among other sentences meted out⁽⁴⁾ and in certain French trials fines or confiscation of property have also been imposed.⁽⁵⁾ It is interesting to note that, as far as the knowledge of the writer goes, corporal punishment has never been the sentence, or part of the

⁽¹⁾ See Vol. III, pp. 1-22. In considering the plea of the appellants in the *Bruno Trial* to the effect that their acts of torture had in no case resulted in death or permanent disablement, Judge Larssen stated that the acts that had been committed were not casual violations of various paragraphs of Norwegian law but constituted a methodically carried out ill-treatment of Norwegian patriots, conducted throughout several years. (Vol. III, p. 20).

⁽²⁾ See for example, Vol. XIII, pp. 151-152.

⁽³⁾ As in the Trial of Jiro Sakata and others and the trial of Kazuyoshi Shimada, held at Rabaul, 29th-30th April and 26th June, 1946, respectively.

⁽⁴⁾ See Vol. VII, pp. 4 and 17, Vol. X, pp. 177-181 and Vol. XIII, p. 104. The infrequency of such punishments for offences against international criminal law does not result from the lack of provisions enabling them to be passed. See Vol. X, p. 177, note 2.

⁽⁵⁾ See for instance Vol. III, p. 42.

sentence, passed upon anyone found guilty of offences against international criminal law, and has never appeared among the various types of punishment explicitly made permissible by special war crimes legislation.⁽¹⁾

(ii) It has been seen⁽²⁾ that among the circumstances which Allied Courts have regarded as constituting some evidence of the denial of a fair trial by ex-enemy accused is the fact that a punishment meted out by such accused on Allied victims was one which was excessive compared with the offence punished. Furthermore the Tribunal which conducted the *Doctors' Trial* was clear and definite in declaring illegal the infliction of punishment by maiming or torture upon spies, war rebels and other resistance workers, who have been, however legally, condemned to death.⁽³⁾ It seems that, despite the fact that international law has previously permitted the death sentence to be passed for any war crime, some kind of international practice is growing according to which Allied Courts, apart from avoiding inhumane punishments, have themselves attempted to make the punishment fit the crime; any habitual practice of this kind would tend in time to modify the general rule that any war crime is punishable by death.

It has thus been seen above that the death sentence has been generally reserved for cases of killing unlawfully, torturing and rape. Similarly, a study made in Volume IV of the punishment meted out to certain military commanders and a police chief for *not preventing* crimes, including killings, on the part of their subordinates⁽⁴⁾ has shown that, after action by reviewing or appellate authorities, no guilty accused suffered death with the exception of Lt. General Masao Baba⁽⁵⁾ and General Yamashita; and in the case of Yamashita there was some, though not uncontradicted, evidence that he had actually ordered his subordinates to commit atrocities.⁽⁶⁾ It is also worthy of note that the International Military Tribunal made recommendations relating to the awarding of sentences for membership of criminal organisations which aimed at securing a certain standardisation of approach on the part of courts set up in the Zones of Germany. Its words included the following recommendation:

"That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions and penalties be standardised. Uniformity of treatment so far as practical should be a basic principle. This does not, of course, mean that discretion in sentencing should not be vested in the court; but the discretion should be within fixed limits appropriate to the nature of the crime.

"Law No. 10, to which reference has already been made, leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty.

⁽¹⁾ Regarding this legislation concerning permissible penalties, see Vol. I, p. 109; Vol. III, pp. 88-89, 96-97, 112 and 119; Vol. IV, pp. 129-130; Vol. V, pp. 100-101; Vol. VII, pp. 84-86; Vol. X, p. 177; Vol. XI, pp. 102-103 and Vol. XIV, pp. 158-159.

⁽²⁾ p. 164.

⁽³⁾ See Vol. VII, pp. 51-52.

⁽⁴⁾ See Vol. IV, pp. 95-96.

⁽⁵⁾ See Vol. IV, p. 87 and Vol. XI, pp. 56-57.

⁽⁶⁾ This evidence is set out in Vol. IV, pp. 19-20, and the contradictory evidence on pp. 21-23. The Commission which tried Yamashita and the Supreme Court did not speak in terms of his having ordered the committing of any offences; See Vol. IV, pp. 35 and 42-44.

"The De-Nazification Law of 5th March, 1946, however, passed for Bavaria, Greater-Hesse and Wurttemberg-Baden, provides definite sentences for punishment in each type of offence. The Tribunal recommends that in no case should punishment imposed under Law No. 10 upon any members of an organisation or group declared by the Tribunal to be criminal exceed the punishment fixed by the De-Nazification Law.⁽¹⁾

The De-Nazification Law of 5th March, 1946, referred to by the Tribunal, was in force in the United States Zone and, as far as restriction of personal liberty is concerned, its heaviest penalty did not exceed 10 years' imprisonment. There were also provisions for confiscation of property and deprivation of civil rights. As a study of the sentences passed by the United States Military Tribunal in Nuremberg for the crime of membership shows, these Tribunals have in fact followed the recommendation of the International Military Tribunal.⁽²⁾

It may be also pointed out that for committing crimes against humanity (a category more recently evolved and recognised as offences than war crimes), the accused Rothaug, who had been found guilty of no other types of crimes, was sentenced by the Military Tribunal which conducted the *Justice Trial* not to death but to life imprisonment, although many of his victims had suffered death.⁽³⁾ On the other hand the International Military Tribunal sentenced to death Julius Streicher after finding him guilty on the one count of crimes against humanity, which however involved many deaths.⁽⁴⁾

It is thought that an interesting study could be made of the different types and degrees of severity of penalties passed on persons found guilty of different offences under international law by Courts acting within the limits laid down by that law as to the punishment of criminals. It is not possible, however, to attempt such an analysis here.

⁽¹⁾ See Vol. XIII, pp. 52-53.

⁽²⁾ See Vol. XIII, pp. 53 and 55-65, and Vol. X, pp. 58-59.

⁽³⁾ See Vol. VI, p. 83.

⁽⁴⁾ See British Command Paper, Cmd. 6964, pp. 102 and 131.

ANNEX I

CERTAIN JURISDICTIONAL PROVISIONS RELATING TO BELGIAN, CZECHOSLAVAK AND YUGOSLAV COURTS EMPOWERED TO TRY WAR CRIMINALS

Due to the fact that no records of trials before Danish, Belgian, Czechoslovak or Yugoslav Courts were forwarded to the United Nations War Crimes Commission,⁽¹⁾ it has not been possible to include reports in the present volumes on war crime trials held before the courts of these countries. The relevant legislation of these countries has however been kindly furnished by the respective governments, and it has already been mentioned,⁽²⁾ and the jurisdictional provisions made by the Danish law have been quoted⁽³⁾. It has been thought that it would be useful for the student of international law and comparative legislation if the jurisdictional provisions of the war crimes laws of Belgium, Czechoslovakia and Yugoslavia were also set out. It will be seen that the articles to be quoted provide for the trial not only of war crimes but also of acts of treasonable nature.

1. THE JURISDICTION OF BELGIAN MILITARY TRIBUNALS OVER WAR CRIMES AND CERTAIN TREASONABLE ACTS

Article 2 of the Belgian Law of 20th June, 1947, relating to the competence of Belgian Military Tribunals in the matter of war crimes provides that :

"Article 2. Crimes falling within the jurisdiction of the Belgian Criminal Code committed in violation of the laws and customs of war between 9th May, 1940 and 1st June, 1945, by persons who, at the time of the commission of the offence, were in the enemy forces or the forces allied to those of the enemy of whatever standing, but especially in the capacity of a functionary in the judicial and administrative services, in the military or auxiliary services as an agent or inspector of an organisation, or a member of a formation of any sort whatever, who is charged by such persons with a mission of any nature at all, shall be tried by military tribunals in accordance with the provisions of this present law and those which are not contrary to the Code of Military Penal Procedure."

Apart from this general enactment there exist certain other provisions relating to the competence of Military Courts over war crimes and treasonable offences committed outside of Belgium.

⁽¹⁾ See pp. xvi-xvii.

⁽²⁾ See pp. 31 and 36.

⁽³⁾ See pp. 32-33.

Article 1 of the above-mentioned law states that :

"Article 1. Article 2 of the Decree of 5th August, 1943, is replaced by the following text :

"Article 10 of the Preliminary Chapter of the Code of Criminal Procedure, which enumerates the cases in which a foreigner can be tried in Belgium for crimes committed outside the territory of the Kingdom, is completed by the addition of the following paragraph :

"4. In time of war, against a Belgian citizen or a foreigner resident in Belgium at the time of the outbreak of hostilities, a crime of homicide, wilful bodily injury, rape, indecent assault or denunciation of the enemy."

The original Article 2 made the same provision except for the omission of the words "or a foreigner resident in Belgium at the time of the outbreak of hostilities."

Articles 1 and 3 of the Decree of 5th August, 1943, have been amended by an Act of Parliament of 30th April, 1947, which provides as follows :

"Article 1. Article 1 of the decree of 5th August, 1943, conferring exceptional jurisdiction on the Belgian courts in the matter of certain crimes and misdemeanours committed outside national territory in time of war is replaced by the following article :

"The following addition shall be made to Article 8 of the preliminary chapter of the Code of Criminal Procedure :

"A Belgian who, in time of war, committed outside national territory a crime or misdemeanour against a national of a country allied to Belgium as defined in paragraph 2 of Article 117 of the Criminal Code, can be tried in Belgium, either on the request of the injured foreigner or of his family, or on receipt of an official notice served to the Belgian authorities by the authorities of the country where the crime was committed or of the country of which the injured party is or has been a national. This applies even if the crime is not one of those mentioned in the law of extradition."

"Article 2. Article 3 of the decree of 5th August, 1943, is replaced by the following :

"Article 12 of the preliminary chapter of the Code of Criminal Procedure is replaced by the following article :

"Except in cases covered by No. 1 and 2 of Articles 6 and 10, the trial of crimes dealt with in the present decree can only be held if the accused is arrested in Belgium.

"However, when the crime has been committed in time of war, the trial can be held in all cases, provided the accused is a Belgian, even if he is not arrested in Belgium, but, if the accused is a foreigner, the trial can be held in Belgium if the accused is found in enemy territory or if his extradition can be obtained ; the trial can also be held in Belgium in cases mentioned in the preceding paragraph."

2. JURISDICTION OF THE PEOPLE'S COURTS IN CZECHOSLOVAKIA OVER WAR CRIMINALS AND TRAITORS

The Czechoslovak Decree No. 16 of 1945, as amended by Law No. 22 of 24th January, 1946, makes detailed provisions regarding the types of offences punishable thereunder and the penalties attaching to each category of offences. The following provisions are of particular interest :

(i) Section 1 of the Decree provides that :

"Any person who during the period of imminent danger to the Republic (see para. 18) committed, either on the territory of the Republic or outside it, any of the following offences under the Law on the Defence of the Republic of 19th March, 1923, No. 50 in the Collection of Laws, is to be punished according to the provisions set out below :

conspiracy against the Republic (para. 1) is to be sentenced to death ;

any person guilty of planning conspiracies (para. 2), or of threat to the security of the Republic (para. 3), treason (para. 4, Article 1), betrayal of State secrets (para. 5, Article 1), military treachery (para. 6, Articles 1, 2 and 3) or of violence against constitutional agents (para. 10, Article 1), is to be sentenced to penal servitude for a period varying from twenty years to a life sentence and in the case of especially aggravating circumstances is to be sentenced to death.

(ii) Section 2 of the Decree makes it a punishable offence to have been at the time of imminent danger to the Republic a member of any of the following organisations : Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (SS, Freiwillige Schutzstaffeln (F.S.)), Rodobrana (a Slovak fascist organisation) or the Szabadosapatok (a Hungarian fascist organisation active during the war in the Hungarian occupied part of Czechoslovakia), or of other, not enumerated, organisations of a similar kind.

(iii) According to paragraph 1 of Section 3 :

"(1) Any person who during the period of imminent danger to the Republic (see paragraph 18) carried out propaganda for or supported the Nazi or Fascist movement, or who approved or defended the enemy government on the territory of the Republic or any of the illegal acts of the occupation High Command and the authorities and organs under its orders during this period in the press, on the wireless, in films or plays or at public gatherings shall, if not guilty of an offence punishable by a severer penalty, be sentenced for his crime to penal servitude for from five to twenty years, but if he committed the said crime with the intention of destroying the moral, national or state consciousness of the Czechoslovak people, and especially of Czechoslovak youth, he shall be sentenced to penal servitude for from ten to twenty years and in the presence of especially aggravating circumstances to penal servitude for a period varying from twenty years to a life sentence or to death."

(iv) Under Section 3, paragraph 2, a person who, at the time of imminent danger to the Republic, was a functionary or commander in

one of certain organisations, is punishable by hard labour from 5-20 years. The organisations are: The Nazi Party, the Sudetendeutsche Partei (the party led by Henelin), Vlakja (a Czechoslovak Quisling organisation), Hlinkova Garda (a Slovak Militant Quisling organisation). Here it is not membership as such, that establishes the criminal liability, since only functionaries or commanders in these organisations are to be punished.

(v) Section 6 of the Decree makes the ordering of forced labour and the taking part in giving effect to such orders, during the same period of danger, a criminal offence. The punishment is to be more severe if forced labour was connected with deportation abroad.

(vi) Section 7 of the Decree makes it a criminal offence, punishable by death or lesser penalties, to have caused, during the same period, loss of liberty or bodily harm in the interests of Germany or her Allies. Under the express provision of paragraph 3 of Section 7 this applies also to causing such an effect by means of a court decree or an administrative decision. A related provision is that of Section 11, which provides sanctions for denunciations effected in the interests of the enemy. If loss of life was the effect of such denunciation, the death penalty may be imposed; otherwise such denunciations are punishable by hard labour from 10-20 years, and under aggravating circumstances by life imprisonment.

(vii) Offences against property during the same period and cloaked in the form of judicial or official acts, are also punishable (Sections 8 and 9).

(viii) Section 10 makes it a punishable offence to have exploited, at the time of the imminent danger to the Republic, the distress caused by national, political or racial persecution, in order to enrich oneself, to the detriment of the State, a legal corporation or any person.

(ix) Section 12 provides that:

"Under this law any foreigner who committed the crime mentioned in Section 1, or any of the crimes mentioned in Sections 4-9 while on foreign territory, shall be punished if he committed them against a Czechoslovak citizen or against Czechoslovak public or private property."

(x) The "time of the imminent danger to the Republic" is defined in Section 18 of the Decree as the time between 21st May, 1938, the time of the first Czechoslovak mobilisation against the threat of German invasion, and a day to be appointed by Government decree.

The Slovak Decree No. 33/1945 as amended by Decree Nos. 83/1945 and 57/1946 sets out detailed provisions defining various types of quislings and collaborators, and the punishment to be meted out to each. In addition, Section 1 of the Decree states that:

"Any foreign national⁽¹⁾ who

(a) has supported the dismemberment of the Czechoslovak Republic or destruction of its democratic government, or who

(b) has taken part in political, economic or any other kind of oppression of the Slovak nation, especially any person who has

⁽¹⁾ Italics inserted.

terrorised or plundered the Slovak people, fought with the German Army on the territory of the Czechoslovak Republic against the Red Army, the other Allied Armies, the Slovak uprising or the partisans in Slovakia, or who has in the course of such action committed murder, robbery, arson, extortion, or has been an informer or committed other outrages or acts of violence, or been in the service of Nazi Germany or Horthy's Hungary, or has ordered or aided the deportation of Slovak nationals abroad, or been guilty of any other act against the Slovak national interest, shall be sentenced to death for his crime."

3. JURISDICTION OF YUGOSLAV COURTS OVER WAR CRIMES AND TREASONABLE ACTIVITIES

Articles 2 and 3 of the Yugoslav Law of 25th August, 1945, set out the types of offences which fall within the jurisdiction of Courts acting under that Law.

"Article 2

1. As a criminal act against the people and the State is considered an act aimed at the forcible overthrow of or threat to the existing State system of Democratic Federal Yugoslavia, or any menace to its foreign security, or to the basic democratic, political, national and economic achievements of the liberation war, e.g., the Federal structure of the State, the equality and fraternity of the Yugoslav peoples, and the system of the people's authorities.

"2. As a criminal act under this Law any act outlined in the preceding paragraph directed against the security of other States with which Democratic Federal Yugoslavia has a treaty of alliance, friendship or co-operation, is punishable with due regard to the principle of reciprocity."

"Article 3

As guilty of criminal acts under Article 2, the following shall be liable to punishment:

"1. Any person who undertakes an act aimed at the forcible overthrow of the people's representative body of Democratic Federal Yugoslavia or of the Federative Units, or at overthrowing the Federal or Federative Units organs of supreme State administration, or the local organs of State administration, or at preventing these by menace from fulfilling their legal rights and duties, or at compelling them to fulfil those to the end desired by the person thus exercising force.

"2. Any subject of Yugoslavia who commits an act to the detriment of the military strength, the defensive capacity or the economic power of Democratic Federal Yugoslavia, or which threatens the independence or integrity of its territory.

"3. Any person who commits a war crime, i.e., who during the war or the enemy occupation acted as instigator or organiser, or who ordered, assisted or otherwise was the direct executor of murders, of

condemnations to the punishment of death and the execution of such, or of arrests, torture, forced deportation or removal to concentration camps, or interning, or of forced labour of the population of Yugoslavia; any person who caused the intentional starvation of the population, compulsory loss of nationality, compulsory mobilisation, abduction for prostitution, or raping, or forced conversion to any other faith; any person who under these circumstances was responsible for any denunciation resulting in any of the measures of terror or terrorism outlined in this paragraph, or any person who in these circumstances ordered or committed arson, destruction or loot of private or public property; any person who entered the service of the terroristic or police organisations of the occupying forces, or the service of any prison or concentration or labour camp, or who treated Yugoslav subjects and prisoners-of-war in an inhumane manner.

" 4. Any person who during the war organised or recruited others to enter, or himself entered any armed military or police organisation composed of Yugoslav subjects, for the purpose of assisting the enemy and fighting with the enemy against his own Fatherland, accepting from the enemy arms and submitting to the orders of the enemy.

" 5. Any person who during the war against Yugoslavia or against the allies of Yugoslavia, accepted service in the enemy army, or took part in the war as a fighter against his Fatherland or its allies.

" 6. Any person who during the war and enemy occupation entered the police service or accepted service in any organ of enemy authority, or assisted these in the execution of requisition orders for the taking of food and other goods, or in the pursuance of any other measures of force against the population of Yugoslavia.

" 7. Any person who organised armed revolt or took part in this, or organised armed bands or their illegal entry to the territory of the State for the purpose or effecting acts outlined in Article 2 of this Law, or any person who abandoned his place of residence and joined any armed and organised group for the commission of such acts.

" 8. Any person who in the country or outside organised any association having fascist aims, for the execution of any act outlined in Article 2 of this Law.

" 9. Any citizen of Yugoslavia who incites a foreign State to war against his Fatherland, or to armed intervention, to economic warfare, to seizure of any property of Democratic Federal Yugoslavia, or of its subjects, to the rupture of diplomatic relations, the cancellation of international treaties, or to any interference in the internal affairs of his Fatherland, or who in any way whatsoever assists any foreign State at war with Yugoslavia.

" 10. Any person who carries out espionage, i.e., who either hands over or steals or collects data and documents which by their content constitute any particularly guarded State or military secret for the purpose of handing such information to any foreign State, or any fascist or enemy organisation, or any unknown person.

" 11. Any person who during the war undertook any action aimed at any defensive objects or positions or any means for waging war or other war needs passing to enemy hands or being destroyed or put out of service, or the use of these being frustrated, or action resulting in the Yugoslav Army or the armies of any allied lands or any individual soldiers falling into enemy hands, or in any military enterprise or measure being hindered or endangered.

" 12. Any person who kills any military person or representative or person in the service of the people's authorities either when these are carrying out their official duties or because of these, or commits such act against any person of an allied or friendly State.

" 13. Any person who for the purposes outlined in Article 2, destroys or damages by arson or any other means any transport, building or other material, any water supply system, public warehouse or any public property."

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- not complete or not needed for listing
- not found

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