

American helmet. According to another witness, two of the prisoners had tricolour straps, and the third wore a khaki overall.

4. DEFENCE OF THE ACCUSED

All the accused pleaded not guilty on account of superior orders.

Bauer invoked express orders issued by Hitler in April 1944 to execute irregular combatants, and thereby implied that such was the status of the prisoners. His plea was contested by the Prosecution. Witness Spielberg was quoted to have stated that Hitler's orders "were known to him," but that "in his opinion, they should not have been applied to prisoners captured among elements against which we had been fighting for a day."

Schrameck referred to orders given him by Bauer, and Falten to those given by Schrameck. The latter contended that Bauer's orders were "categorical" and were thus not "subject to discussion." It was shown that Falten, after taking the prisoners to the place of execution in pursuance of Schrameck's transmission of orders, had gone back to Schrameck to see once more whether he should carry on with the execution. He was told to do so "at once."

5. THE JUDGMENT

All the accused were found guilty of the charge. Bauer was sentenced to death. The fact that Schrameck and Falten had acted on Bauer's orders was admitted as an extenuating circumstance, and the two accused were each convicted to five years' imprisonment.

B. NOTES ON THE CASE

1. THE STATUS OF GUERRILLA UNITS

The central question in this trial is the status of the three members of the F.F.I. The Tribunal's findings, which coincided with the Prosecution's charges, were that the victims had the status of belligerents as recognised by the laws and customs of war, and that they were thus covered by the rules concerning the treatment of prisoners of war.

This is clearly indicated in the question put by the President of the Court to the judges and in the confirmative answer given by the latter. The question reads as follows:

"Is it established that in the area of Autun, on 9th September, 1944, a murder of three F.F.I. French soldiers, *prisoners of war*, was committed on the occasion or under pretence of the state of war, but without being justified by the laws and customs of war, by unidentified German marines belonging to a German column in retreat which included Colonels Bauer and Schrameck and Lieutenant Falten?" (Italics inserted.)

The judges answered "yes" by a majority vote.

Article I of the Regulations respecting the Laws and Customs of War on Land, appended to the IVth Hague Convention, recognises the status of belligerent not only to regular units of the army, "but also to militia and volunteer corps" on four conditions: that they are "commanded by a person responsible for his subordinate"; that they wear a "fixed

distinctive sign recognisable at a distance"; that they "carry arms openly"; and that they "conduct operations in accordance with the laws and customs of war."

Article 2 of the same Regulations goes further and extends the above recognition even to civilian combatants under certain circumstances and conditions. These are fulfilled when "inhabitants of a territory not under occupation, on the approach of the enemy, spontaneously take up arms without having had time to organise themselves in accordance with Article 1" of the Hague Regulations. In such cases it is not required that combatants fight under a commander, or that they wear a distinctive sign, such as a uniform. It is sufficient, and at the same time mandatory, that they carry arms openly and respect the laws and customs of war when conducting military operations.

The Prosecution specifically invoked this latter provision, and not that of Article 1 of the Hague Regulations. It stated that "F.F.I. troops had opposed for a day the column of Bauer, together with French regular troops and with the knowledge of the Germans, and had fought the invading troops without having had time to organise themselves."

The implementation of Article 2 of the Hague Regulations requires the presence of two essential elements: that arms were taken up to resist the enemy by inhabitants "of a territory not under occupation," and that this is done by inhabitants who had no "time to organise themselves" by having a commander and wearing distinctive signs.

From this it follows that the concept of what is and what is not an "occupied territory" is also essential. Article 42 of the Hague Regulations provides the following:

"Territory is considered occupied when *actually* placed under the authority of the hostile army.

"The occupation extends only to the territory where such authority *has been established* and *is in a position* to assert itself." (1)

The setting up and maintenance of an actual and effective occupying administration makes the difference between occupation and mere invasion.⁽²⁾ It thus appears that, when the occupant withdraws from a territory or is driven out of it, the occupation ceases to exist.⁽³⁾ This is clearly so in cases where liberating forces are steadily advancing and gradually regaining control of parts of the occupied territory. But the question arises of the status of smaller parts still *within* the occupied territory, in which the occupant's powers cannot be exercised on account of military operations still in progress. Are the inhabitants of such parts entitled to rise to arms, drive the enemy out, even temporarily, and while doing so, enjoy the rights of belligerents?

According to the facts of the trial as they appear from the indictment, it would seem that there was, in the area of Autun, a situation combining that of a territory being liberated by outside forces and that being freed by

(1) Italics are inserted.

(2) See L. Oppenheim-H. Lauterpacht, *International Law*, Vol. II, 6th Edition, pp. 339-340.

(3) *Op. cit.*, p. 341.

local inhabitants. In any case it would appear that the military operations were in full development and that, at the time of capturing the three F.F.I. combatants, the occupant's authority in the area had not yet disintegrated.

If one is to assume that the Tribunal accepted the Prosecution's thesis and applied Article 2 of the Hague Regulations, its decision that the F.F.I. combatants had the status of belligerents and were consequently to be treated as prisoners of war, would contribute to defining the concept of occupied territory. It would appear to be based upon the view that, once control of an occupied territory is disputed by the force of arms, and consequently, already at the stage in which the occupant's authority is at stake, the status of occupation ceases to exist. This would not necessarily mean that the contest may be wholly conducted by local inhabitants who are under the occupant's authority. The main fact of the trial is that the latter were fighting *jointly* with regular French troops, which formed part of the Allied forces who invaded France in June 1944 with the purpose of driving the Germans out of France and other occupied European countries. There is also no indication that the F.F.I. members had resorted to arms prior to their junction with the regular troops, and consequently before at least one portion of their own territory had been, however temporarily, already liberated. It can be observed, of course, that the fact that the F.F.I. members in question were fighting together with the regular troops, which in fact means within their ranks, could have provided grounds for both the prosecution and the Tribunal to establish that they were under proper command, and had thus fulfilled one of the conditions of Article 1 of the Hague Regulations. The fact that some or all of them wore certain military distinctive signs, as alleged by the Prosecution on the basis of witnesses' accounts, could have made possible the application of Article 1 instead of Article 2 of the said Regulations. The whole issue of whether the F.F.I. combatants were or were not in territory "not under enemy occupation," would have then been immaterial.

If, however, Article 2 is accepted as having been applied by the Court the case brings the following features to light in the manner in which Article 2 was implemented:

(a) Any part of territory in which the occupant has been deprived of *actual* means for carrying out *normal* administration by the presence of opposing military forces, would not have the status of "occupied" territory within the terms of Articles 2 and 42 of the Hague Regulations. The fact that other parts of the occupied country, as a whole, are under effective enemy occupation, would not affect this situation.

(b) Inhabitants of such parts as are described above, when taking up arms against the enemy, would be deemed to have done so "on the approach of the enemy." This would mean not only the resorting to arms in the initial stages of a country's invasion by the future occupant, but in any other stage during or nearing the end of occupation. The enemy's "approach" in contested areas, from which the enemy has been or is being driven out, would consist in the combats fought between the two hostile forces in the disputed area.

(c) Inhabitants resorting to arms in the above circumstances would enjoy the rights of belligerents. It is immaterial whether they wear civilian clothes or any other kind of dress. The sole conditions are that they carry

arms openly and respect the laws and customs of war when fighting. In our case the German witness Spielberg testified that the three F.F.I. men had committed no violations of the laws of war, and from the fact that they were captured while fighting it follows that they carried arms openly.

A word or two should be said regarding the allegation that the F.F.I. combatants "had no time to organize themselves" by having a commander of their own and by wearing military signs such as full uniforms. It has already been observed that, by fighting shoulder to shoulder with regular French troops, it could have been said that they were "commanded by a person responsible for his subordinates." On the other hand, it is a matter of opinion whether objects such as tricolour straps around the arm, helmets or khaki overalls, are sufficiently distinctive signs as required by the Hague Regulations. The F.F.I., as a whole, were an underground but nevertheless a single and well organised body of combatants throughout France, so that, from this point of view, it cannot be said that its members "had no time to organise themselves." They were divided into units, at the head of which stood commanders. Whenever on military duty they wore, as a rule, a French tricolour sign or badge. However, as the operations against the occupant developed and progressed, their ranks were filled by new members, who often had no time either to be placed under proper command, or to wear anything else but plain mufti clothes. This was particularly true of units which grew during the weeks and months that preceded the liberation of the whole of France, between June 1944 and April-May, 1945. It may well be, and it is very likely, that such was precisely the case with the units fighting in the area of Autun. Inhabitants were filling the ranks of F.F.I. combatants and joining regular troops in military operations in continuous streams and waves, and as a unit or units of the F.F.I., as distinct from the regular troops, they may have had no commander of their own in the strict sense of the word. It is probably this position which was meant by the Prosecution when it referred to Article 2 of the Hague Regulations.⁽¹⁾

2. THE KILLING OF PRISONERS OF WAR

Once the status of belligerent was recognised in regard to the F.F.I. combatants, the rule that they were to be treated as prisoners of war, and could not therefore be shot after capture, followed by itself.

Article 4 of the Hague Regulations provides:

"Prisoners of war are in the power of the hostile government, but not of the individuals or corps who capture them.

"They must be humanely treated."

The same rule is repeated in Article 2 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1929, which stresses that humane treatment has to be applied "at all times," and that the prisoners have to be "protected, particularly against acts of violence." A specific prohibition to "kill or wound an enemy" who has "laid down his arms" or "no longer has means of defence," and has surrendered, is contained in Article 23 (c) of the Hague Regulations.

Under the terms of Article 2, para. 4, of the French Ordinance of

⁽¹⁾ Regarding the status of guerrilla units, see also pp. 57-9.

28 August, 1944, concerning the Suppression of War Crimes,⁽¹⁾ any "putting to death in reprisals" is regarded as premeditated murder as provided against in Article 296 of the French Penal Code. It was submitted by the Prosecution and admitted by the Tribunal that the three F.F.I. prisoners had been shot as a "reprisal," that is in revenge for having fought against the German troops. The Tribunal applied Article 2 of the said Ordinance, and consequently also Article 296 of the Penal Code.

3. THE PLEA OF SUPERIOR ORDERS

As already stressed, the Tribunal dismissed the plea of superior orders in regard to the chief defendant, Bauer, and admitted it as an extenuating circumstance in the case of Schrameck and Falten.

In doing so the court applied the rule that superior orders do not, in themselves, exonerate the perpetrator from responsibility when the orders are illegal, but may be admitted in mitigation of punishment on the merits of each particular case. This rule is generally recognised in contemporary International and Municipal Law, and has been applied in numerous war crimes trials.⁽²⁾ In instruments of International Law the most authoritative source is Article 8 of the Nuremberg Charter:

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

In French law, the rule is laid down in Article 3 of the Ordinance of 28 August, 1944, concerning the Suppression of War Crimes, in the following terms:

"Laws, decrees or regulations issued by the enemy authorities, orders or permits issued by those authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Article 327 of the Penal Code, but can only, in suitable cases, be pleaded as an extenuating or exculpating circumstance."

Article 327 of the French Penal Code provides that if "homicide, wounds and blows" have been ordered by the law and committed under "command" of the proper authority, there is no crime.

Bauer's plea consisted in that there were orders issued personally by Hitler in April 1944, that "partisan" or "guerrilla" combatants should be regarded as rebels and shot after capture.

As was established at the Nuremberg Trial of the German Major War Criminals, orders of this kind existed as early as in 1942. On 18th October, 1942, a directive, authorised by Hitler, was issued to "slaughter to the last man" all members of Allied "Commando" units, whether armed or not, even if they surrendered.⁽³⁾ The Nuremberg Tribunal found all such orders contrary to the laws and customs of war, and consequently criminal in nature. The rejection of Bauer's plea was based upon the rule

⁽¹⁾ Regarding the French war crimes laws, see Vol. III of this series, pp. 93-102.

⁽²⁾ On this point, see Vol. I of this series, pp. 18-20, 31-33; and (particularly) Vol. V, pp. 13-22.

⁽³⁾ See *Judgment of the International Military Tribunal, sitting at Nuremberg*, H.M. Stationery Office, London, 1946, p. 45.

that he should not have obeyed orders which were of a criminal nature, and it may be noted further that, at the time of the crime, he was under no direct pressure or duress to implement Hitler's orders.

Bauer's personal liability in this case lay in that he originated the crime by giving orders to his subordinates in pursuance of Hitler's instructions. Such responsibility is covered by Article 6, last paragraph, of the Nuremberg Charter:

"Leaders, organisers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any . . . crimes are responsible for all acts performed by any persons in execution of such plan."

In French law, it is covered by Article 4 of the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes:

"Where a subordinate is prosecuted as principal perpetrator of a war crime, and his hierarchical superiors cannot be charged as joint perpetrators, the latter are regarded as accomplices to the extent to which they had organised or tolerated criminal acts of their subordinates."

From this it follows that, if a superior is prosecuted because of orders issued to subordinates, he is held responsible as principal or joint perpetrator, as the case may be.

In our case it would appear that Bauer was found guilty as principal perpetrator, and therefore convicted to death. This resulted from the findings regarding the part played by his two subordinates. By admitting their respective pleas, the Tribunal in fact decided that both were instrumental in the killing of the three F.F.I. prisoners, but bore lesser responsibility. The Tribunal presumably took into account Schrameck's defence that Bauer's orders were "categorical" and left no room for "discussion." It would also appear that it took into consideration the fact that Falten had postponed the execution on his own initiative and gone back to Schrameck to raise once more the issue, thus giving an opportunity for cancelling the order. All these or other considerations were in the powers of the Tribunal which was at liberty to estimate the degree of guilt of each participant in the crime according to the circumstances. By convicting the two to five years' imprisonment each, the Tribunal admitted the plea of superior orders only in mitigation of the punishment, but not in exculpation of guilt, as it was empowered to do under the terms of Article 3 of the Ordinance of 28th August, 1944.

TRIAL OF FRANZ HOLSTEIN AND TWENTY-THREE OTHERS

PERMANENT MILITARY TRIBUNAL AT DIJON
(COMPLETED 3RD FEBRUARY, 1947)

The killing of civilians as "reprisals"—Destruction of inhabited buildings—Ill-treatment of civilians—Pillage—Guilt of instigators and other accomplices.

A. OUTLINE OF THE PROCEEDINGS

1. THE ACCUSED

The accused were members of various German units who took part in a series of crimes against the French population in the area of Dijon in 1944. Some belonged to the Army, and others to the Gestapo and SD (Security Police).

Three accused were present at the trial. They were Franz Holstein, a Major; Georg Major, a Captain commanding "Ost Battalion 654"; and Emil Goldberg, an Adjutant of the S.D. at Châlon-sur-Saône. The remainder twenty-one accused, were tried *in absentia* and were the following: Hans Kruger, head of the S.D. at Châlon-sur-Saône; Ludwig Schellaas, Adjutant of the S.D. at Dijon; Klaus Schenevoigt, non-commissioned officer of the S.D. at Dijon; Schirmacher, a Lieutenant commanding the 3rd Company, Ost Battalion 654; Vier, a Colonel, Feldkommandant at Nevers; Eder, Artillery Lieutenant, Ortskommandant at Château-Chinon; Verfurt, Lieutenant serving at Autun; Gierszewski, a Lieutenant, commanding the 2nd Company, Ost Battalion 654; Fuierer, a Lieutenant, commanding the 1st Company, Ost Battalion 654; Lenartz, Adjutant, interpreter of the S.D. at Dijon; Gottlieb Hilgenstohler, sergeant of the S.D. at Châlon-sur-Saône; Runke-witz, sergeant, interpreter of the S.D. at Châlon-sur-Saône; Eugen Knodler, Chief Adjutant of the S.D. at Châlon-sur-Saône; Karl Haeberle, sergeant-major of the S.D. at Châlon-sur-Saône; Hildebrand, deputy O.C. of the German Officer Cadet School at Dijon; Moeckel, Lieutenant, Feldgendarmarie at Autun; Gunther Irmisch, Colonel, head of the Feldkommandantur 669 at Dijon; Hulf, Sturmbannführer of the Gestapo at Dijon; Hefeke, Captain, 2nd Battalion, 5 Kouban Regiment; Albert Hippe, Colonel, O.C. of the German Officer Cadet School at Dijon, and Merck, a Lieutenant serving at Dijon.

2. THE FACTS AND EVIDENCE

(i) Background of the Crimes and Composition of Units Involved

According to the evidence presented by the prosecution, the accused took part in combined operations against members of the French resistance movement. The operations were decided upon and planned at a conference held at Dijon under the auspices of General Hederich, Feldkommandant and "Befehlshaber Nord-Ost Frankreich" (G.O.C., North-East, France), in June, 1944. Six of the accused attended in their respective commanding capacities: Irmisch, Hippe, Major, Hulf, Kruger and Verfurt. They were

to provide the troops and issue instructions, and all had to take personal part in the operations at the head of their units.

The conference decided that the French resistance movement in the area was to be suppressed and annihilated, and that severe measures were to be taken against them and the population "in reprisals" for their struggle against the occupying authorities or assistance given in this respect. In the light of some of the evidence, such measures were to consist in executing on the spot every member of the resistance, captured with arms, pursuant to Hitler's orders to kill all "terrorists" or "saboteurs"; in the burning down of three farms for every German soldier killed, and of one farm for every German soldier wounded.

The events described by the Prosecution showed that, in carrying out the above instructions, the accused killed a large number of inhabitants, destroyed by fire many buildings in various localities, and pillaged property of the population.

The assignment was conducted and the crimes perpetrated by several columns operating simultaneously in the different areas, and moving from one area to the other. One column was composed of German officer-cadets supplied and commanded personally by Hippe and his deputy, Hildebrand. Another column consisted of Russian quisling troops, Ost Battalion 654, under the command of German officers and N.C.O.'s. The O.C. was Major. The ranks of a third column were filled with members of 5 Kouban Regiment, another Russian (cossack) unit, under Captain Hepeke. In addition, there were detachments of German Feldgendarmes from the Ortskommandantur at Château-Chinon, under Lieutenants Moeckel and Eder, and almost the entire personnel of the S.D. at Châlon-sur-Saône, with its head Kruger. In the events of August, 1944, another German officer, Colonel Vier, took an active part as Feldkommandant at Nevers.

(ii) The Crimes

The crimes were committed in six different places and their surroundings.

Events at Toulon-sur-Arroux

On 25th June, 1944, two columns left Dijon for Toulon-sur-Arroux. One was composed of the officer cadets and the other of one company of Ost Battalion 654. The latter arrived at Châlon-sur-Saône at 10 a.m. and was joined by three more companies of the same Battalion. The column then headed towards Toulon-sur-Arroux and, when approaching it, deployed in the fields. In a hamlet, Prayes, they shot at farmers who were hay-making. One was wounded and several others were seized and executed on the spot. When the wounded man moved, he was killed by five Germans. He was later identified as one Swedrowski.

The column then surrounded another small locality, St. Eugene, north-east of Toulon-sur-Arroux. They seized two inhabitants, ill-treated them and shot them without investigation or trial. After this the place was looted.

Events at Dun-les-Places

The column regrouped and arrived at Autun at 11 a.m. There they found the first column, with officer-cadets. At this juncture, a third column,

that of the Russian Cossacks, 5 Kuban Regiment, arrived from Dôle, via Châlon-sur-Saône. Together with the other two columns, as well as with elements of the Feldgendarmeries, Gestapo and S.D., they all moved the next day, 26th June, towards Dun-les-Places. According to some witnesses the Cossacks column, before arriving at Dun, met detachments of the French resistance movement and shots were exchanged, which did not extend beyond mere skirmishes. According to other witnesses, however, no such encounter took place. When the above combined force arrived at Dun-les-Places, Feldgendarmes and S.D. men arrested a large number of the male population. The arrestees were all taken at their homes, and were locked in the local church. Some were interrogated and all were physically ill-treated. At this point fires were heard in the village and a confusion arose. The Germans contended that shots were fired at them from the church steeple by resistance men. According to other witnesses, the incident was entirely invented by the Germans themselves in order to justify hard measures against the population. At any rate, after this the inhabitants detained in the church were massacred. They were lined up in front of the church and shot by Bren-guns. The massacre was carried out under Kruger's direct orders and supervision. In the early morning, an officer cadet was seen killing off some of those who had survived. Two of the victims, however, who had also survived, had time to flee before the morning, and were later to give full account of the event. Twenty-one inhabitants in all fell as victims on this occasion.

On 27th June, the place was thoroughly pillaged and twelve houses were set on fire and burnt to the ground. On 28th June, at 1 p.m., the Germans left the locality.

Events at Vermot

The third or Cossacks column, under the Command of Hefeke, had left on the 26th June, at about 5 p.m. It went to Vermot, a hamlet 2 kms. north of Dun. When leaving, it took with it six hostages from Dun-les-Places. According to the evidence of the Prosecution, while approaching Vermot, the column met a group of resistance men hidden in the nearby woods. A battle took place which lasted one hour. After the battle the column entered Vermot, and as revenge for the battle, severely ill-treated many inhabitants and pillaged their property. One of the victims, named Petit, had his jaw fractured by a rifle butt, and his grandson had his right arm broken. Petit died of the ill-treatment. In addition, the six hostages were executed. They were all identified. Eleven houses were set on fire and property of the inhabitants was looted. The column left Vermot on 28th June.

Events at Vieux Dun

According to the accused Major, on 26th June, in the evening, while at Dun-les-Places, he received orders from Hildebrand to proceed with a detachment to Vieux-Dun, another small locality in the area, and search all the woods on the way. He arrived at Vieux-Dun on 27th June, at 8 or 9 a.m. According to a German witness no members of the resistance movement were met or found and no incidents took place. The head of

the S.D., Kruger, also came to Vieux-Dun, and in spite of these quiet conditions, had one house set on fire. The village was also pillaged.

Events at Arleuf

Several weeks later, a similar expedition was made on the orders of Vier, Feldkommandant at Nevers and was carried out by Major. His assignment was to make a general search in the area of Nevers for hidden arms, to execute those found with arms, and to destroy houses from which shots would be fired. Major alleged that the expedition took place as a result of shots which were fired at German soldiers eight or ten days before. On 10th August the detachment arrived at Arleuf and soon several crimes were to be committed. According to a German witness the events took place in the following manner:

A French girl, Mlle. Buteau, had her parents arrested by members of the French resistance movement, and they were taken away. She appealed to Major for help to liberate them, and on this occasion told him that the whole population of Arleuf was in the resistance movement. Major had the locality surrounded by a company under Schirmacher, and gathered one member of every family in a café. He told them that if Mlle. Buteau's parents were not returned by the night, he would have the whole village set on fire. The Mayor despatched two youths to contact men of the resistance and request the return of the Buteau's by 8 p.m.

The crimes took place in the course of these events. At 6.30 a.m., when members of families were being collected, an agricultural worker, Goujon, took fright and tried to escape or hide. He was apprehended and brought to Major, who ordered that he be shot. The man was taken away and executed.

A revolver was found in the house of an old man, Boulle, aged 71. The man and the revolver were brought to Major. The latter fired a shot from the revolver into the ceiling and told Boulle: "For this you are going to be shot." These words were heard by a soldier who instantly took Boulle away and killed him.

A third man was killed in the following circumstances. Several inhabitants were lined up against a wall with their hands up, and were searched by Major's men. At one moment one of the inhabitants, Gantes, moved his right arm down. A soldier moved one or two yards back and killed him with a Bren-gun.

Events at Crux-la-Ville

Several days later an expedition took place under the direct command of Colonel Vier. The purpose was to annihilate units of the resistance movement, which were encamped west of Crux-la-Ville. Major and his men again took part in this operation.

On 15th August, Major and elements of his Battalion attacked a body of resistance men and suffered losses. The following day, after the battle was over, a young resistance combatant, Chermette, who had been captured on the 15th, was taken to a yard and tortured. Over a hundred soldiers watched the torture. The victim was laid on a table and beaten all over his body. After that he was thrown on a heap of refuse and killed by

Bren-guns. At 7 p.m., of the same day, soldiers broke into the house of a farmer, Ricard. They found his wife and son working on the cattle and accused the son of being a "terrorist." They shot him on the spot. Another four inhabitants were seized, tortured and killed, bringing the total to six victims. Seven houses were set on fire, one on 15th August and six on 16th August.

3. THE FINDINGS AND SENTENCES

Twenty-two accused were found guilty of some of the above offences and two were acquitted for lack of evidence that they had personally perpetrated crimes.

According to the findings the accused could conveniently be classified into three categories: those found guilty as instigators, mainly by issuing orders; those found guilty as perpetrators; and those found guilty as their accomplices.

Irmisch, Hippe, Hulf and Hildebrand were found guilty as instigators of the killing of twenty-one inhabitants at Dun-les-Places. Kruger, Schenevoigt, Lerertz, Hilgenstohler, Runkewitz, Knodler, Hoeberle, Schellhaas, were found guilty as perpetrators, and Merck, Goldberg, Eder and Moeckel as their accomplices.

Kruger was found guilty for instigating the arsons at Dun-les-Places, the killing of six hostages at Vermot and the arson at Vieux-Dun. He was also found guilty as perpetrator of the killing of Swedrowski at Toulon-sur-Arroux. Verfurt was found guilty as perpetrator of the arsons at Dun-les-Places, Hefeke was found guilty of instigating the arsons at Vermot, and of being an accomplice to the killing of the six hostages, the pillage and the ill-treatment of Petit and his grandson, all at Vermot. Major was found guilty of instigating the murder of two of the three victims at Arleuf, and the arson at Arleuf. Vier was found guilty as instigator of the killing of all the three victims at Arleuf and of the six victims at Crux-la-Ville, and of the arsons at Arleuf and Crux-la-Ville. Schirmacher was also held responsible as instigator in the arson at Arleuf and Holstein was found guilty of the arson at Crux-la-Ville as an accomplice.

The two acquitted were Fuierer and Gierszewski.

All the accused found guilty, except two, were sentenced to death. Holstein and Major were convicted with extenuating circumstances and were sentenced, Holstein to hard labour for 15 years, and Major to hard labour for 20 years.

B. NOTES ON THE CASE

1. THE NATURE OF THE OFFENCES

The offences for which the accused were found guilty fall into the following four categories: killing of civilians, which the court described as murders committed as "reprisals"; destruction of property by arson; pillage; and ill-treatment of civilians.

(a) Killing Civilians as "Reprisals"

Convictions for murder were made in respect of the killing of the twenty-one inhabitants at Dun-les-Places, the farmer Swedrowski at Toulon-sur-Arroux, the six hostages at Vermot, the three inhabitants at Arleuf, and the six victims at Crux-la-Ville.

In respect of all these killings the court found the accused concerned guilty of murder in that they "deliberately inflicted death" and that all such "wanton homicides were committed in reprisals."

The first part of this finding was based on Article 295 of the French Penal Code which provides:

"Homicide committed deliberately is murder."

The second part was based upon Article 2, para. 4, of the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes, which reads:

"Premeditated murder, as specified in Article 296 of the Penal Code, shall include killing as a form of reprisal."

In this manner the consequence of the finding that all the above killings were committed in "reprisals," was that the accused were found guilty of "premeditated" murder (*assassinat*) and not of ordinary murder (*meurtre*).⁽¹⁾

That murder, premeditated or not, is punishable as a war crime, has had a long recognition in the laws and customs of war. Its latest expression can be found in the Charter of the International Military Tribunal at Nuremberg (Article 6) and also of that at Tokyo (Article 5). It can also be found in the municipal law of many nations dealing with war crimes, as it emerged during or after the war 1939-45.⁽²⁾ The main point of interest in this trial, however, is the element of "reprisals" which, under the Ordinance of the 28th August, 1944, had the effect of making the accused guilty of premeditated murder.

The subject of "reprisals" is one of difficulty in International Law. Its limitations are still not well defined, and regarding the rules guiding it one has chiefly to rely on the opinion of learned publicists and on judicial precedents of a differing nature. This gap is particularly felt within the sphere of the laws and customs of war. As stressed by Lord Wright, Chairman of the United Nations War Crimes Commission, no complete "law of reprisals" in time of war has yet developed.⁽³⁾

In the theory concerning reprisals in time of peace it is generally agreed that the latter are exceptionally permitted as a means of enforcing International Law. They are then regarded as an answer to international delinquency and as one of several different modes of compulsive settlement of disputes when negotiations or other amicable modes have failed. The development of International Law after the first World War, by the setting

⁽¹⁾ One of the main consequences of the distinction which the French Penal Code draws between "assassinat" (Art. 296) and "meurtre" (Art. 295) is that, according to Art. 302 of the Penal Code, the former entails as a rule death penalty, whereas the latter entails, again as a rule and according to Art. 303 of the Penal Code, hard labour for life. In exceptional cases, "assassinat" is punishable with lesser penalties and "meurtre" with death.

⁽²⁾ For such laws, see Annexes to the different volumes of this series.

⁽³⁾ See *History of the United Nations War Crimes Commission and The Development of the Laws of War*, H.M. Stationery Office, London, 1948. Foreword, p. vi.

up of the League of Nations and, *mutatis mutandis*, of the United Nations, has led some authoritative writers to raise the problem as to whether, after the acceptance of obligations regarding the pacific settlement of international disputes, States are still entitled to resort to compulsive means of settlement between themselves, including reprisals. The opinion has been expressed that "so long as the renunciation of the right of war," as the paramount means of compulsive settlement, "is not accompanied by an obligation to submit disputes to obligatory judicial settlement, and so long as there is no agency enforcing compliance with that obligation and with the judicial decision given in pursuance thereof, reprisals, at least of non-forcible character, must be recognised as a means of enforcing international law."⁽¹⁾

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

It would thus appear that, in the present stage of its growth, International Law still recognises reprisals, admittedly within certain conditions and limitations. The problem in time of war, as a learned writer put it, is that "a war crime does not necessarily cease to be such for the reason that it is committed under the guise of reprisals," but that, on the other hand, "as a rule, an act committed in pursuance of reprisals, as limited by International Law, cannot properly be treated as a war crime."⁽³⁾ It is precisely the limitations within which reprisals are permissible that are still left to be answered with precision sufficient to remove elements of doubt and uncertainty.

In conditions created by a state at war, the question of reprisals arises when one belligerent violates the rules of warfare and the other belligerent retaliates in order to bring about a cessation of such violations. The problem then consists in determining the scope and nature of acts which the retaliating party is deemed entitled to undertake.

In the trial under review the killings, and in fact all the other offences as well, were committed by German occupying authorities against French inhabitants on account of the struggle of members of the French resistance movement. It would appear that the Germans had taken the view that such struggle was in violation of the laws and customs of war, and that the inhabitants were to be victimised as a means of inducing the resistance members to stop their struggle.

According to the general theory regarding reprisals, referred to above, it is required that retaliation is made "in proportion to the wrong done."⁽⁴⁾ One trend of opinion, however, gives further definition to this principle and qualifies it by certain limitations. In regard to reprisals in time of peace it is emphasised that "the only acts of reprisals admissible against foreign officials or citizens is arrest; they must be treated not like criminals, but like hostages, and in no circumstances may they be executed, or subjected

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

⁽²⁾ See *op. cit.* § 247, p. 446.

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

⁽⁴⁾ Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition (Revised), p. 115.

to punishment."⁽¹⁾ A similar conclusion regarding treatment of civilians is made by certain writers in respect of reprisals in time of war. It is considered that, in any case, reprisals must take place "in compliance with fundamental principles of war," and in this connection it is stressed that this implies "respect for the lives of non-combatants."⁽²⁾

This authoritative trend of opinion⁽³⁾ provides certain indications as to how our problems may be solved. According to it, it would appear that wherever persons are the object of reprisals, their lives are the ultimate limit the retaliating party is not permitted to transgress. On the other hand, the recognition that "foreign citizens" may lawfully be taken as hostages in time of peace, would also apply in time of war to inhabitants of occupied territory, as conditions are then more compelling than in time of peace. A further rule would then follow, that while entitled to take hostages in order to bring about a cessation of violations of the laws of war by the other party, the retaliating party is expected to treat hostages in a humane manner, which in no case may lead to putting them to death. Any such act committed in retaliation for acts for which persons were taken and kept as hostages, would be criminal and would, legally speaking, result in a situation where there was no "reprisal" in the proper sense, but merely arbitrary acts of revenge.

It will be noted that Article 2, para. 4, of the French Ordinance of 28th August, 1944, according to which any "killing as a form of reprisal" constitutes premeditated murder, is fully in line with this school of thought. One of the striking features of the case tried is that no evidence was at hand to show that any of the inhabitants killed was guilty of any violation of the laws and customs of war. There was nothing to show that they belonged to the resistance movement and that, as such, they indulged in the commission of acts prohibited or punishable under the said laws and customs.

The solution furnished by the French Ordinance of 28th August, 1944, is a welcome contribution to the gradual elimination of uncertainty regarding the law of reprisals in time of war, and to the further determination of obligations which lie upon belligerent powers. The fact that it reflects so strikingly the principles formulated by authoritative writers prior to the enactment of the Ordinance, tends to indicate that the course adopted may bear the seeds for a wider agreement among nations in the further development of International Law in this field.

(b) Destruction of Inhabited Buildings

Convictions for destruction of buildings were made in respect of the setting on fire of 12 houses at Dun-les-Places, 11 houses at Vermot, 7 houses at Crux-la-Ville, and 1 house each at Vieux-Dun and Arleuf.

The accused concerned were found guilty under the terms of Article 434, of the French Penal Code, which prescribes the heaviest penalty, death, for anybody who "wantonly sets fire to buildings, vessels, boats, shops, works, when they are inhabited or used as habitations." When the buildings

⁽¹⁾ *Op. cit.*, p. 114.

⁽²⁾ H. Lauterpacht, "The Law of Nations and the Punishment of War Crimes," *British Year Book of International Law*, 1944, p. 76.

⁽³⁾ It should be stressed that, according to Art. 38 of the Statute of the International Court of Justice, appended to the Charter of the United Nations, "teachings of the most highly qualified publicists" are recognized as one of the sources of international law.

or places are not inhabited or used as habitations, the penalty is hard labour for life.

In International Law, Article 23(g) of the Hague Regulations respecting the Laws and Customs of War on Land, 1907, forbids the "destruction or seizure of enemy property" unless it is "imperatively demanded by the necessities of War." This careful phraseology is usually interpreted to mean that "imperative demands of the necessities of war" may occur only in the course of active military operations. In the case tried there was no evidence to show that, on the few occasions of clashes between the German units involved and the French resistance movement, there was any necessity to set the houses on fire. On the contrary, the evidence was to the effect that the houses were deliberately set on fire as a measure of intimidation for suppressing the activities of the resistance movement in the area.

Another provision of International Law is contained in the general rule of Article 46 of the Hague Regulations, whereby "private property must be respected."

According to the list of war crimes drawn up by the 1919 Commission on Responsibilities, item XVIII, "wanton devastation and destruction of property" is regarded as a violation of the laws and customs of war. Finally, Article 56 of the Hague Regulations, which assimilates "the property of local authorities" to private property, prescribes that "any seizure or destruction of" property "should be made the subject of legal proceedings," thus presumably signifying both civil and penal proceedings.

Under the terms of Article 1 of the Ordinance of 28th August, 1944, when committed during the war against French citizens, destruction of property by arson, as covered by Article 434 of the Penal Code, is punishable as a war crime when such destruction "was not justified by the laws and customs of war." The Tribunal's findings were that the acts of arson committed were not justified by these laws and customs.

Reflected upon the question of reprisals, this means that, even though the Germans may have carried out destruction as a measure of retaliation for the activities of the resistance movement, their deeds were regarded by the Tribunal as trespassing the limitations of International Law, and, therefore, constituting arbitrary acts of revenge of a criminal nature. The distinction between lawful and unlawful, or legitimate and arbitrary reprisals, was, thus, brought to light once more.

(c) *Ill-treatment of Civilians*

Convictions for ill-treatment were made in regard to the farmer Petit and his grandson at Vermot, and also in regard to five of the six men who were killed at Crux-la-Ville. The five were beaten and tortured before being killed.

The accused concerned were found guilty of "wantonly inflicting blows and wounds" as provided against in Article 309 of the Penal Code. In the case of Petit, who died as a consequence of the ill-treatment, the findings were that the "wantonly inflicted blows and wounds had caused death without intent to inflict it."

According to Article 309, when the ill-treatment has resulted in illness or in a working incapacity for over twenty days, the penalty is imprisonment

for from two to five years. If it has resulted in more serious consequences, such as mutilation, amputation, or other permanent infirmities, the penalty is solitary confinement with hard labour for from five to ten years. If ill-treatment has resulted in death which was not intended, as in the case of Petit, the penalty is hard labour for from five to twenty years. Finally, according to Article 311, if none of the above consequences have occurred, the penalty is imprisonment for only from six days to two years.

As in the case of destruction of property, under Article 1 of the Ordinance of 28th August, 1944, the offences covered by the above provisions of the French Penal Code are punishable as war crimes if committed during the war against French citizens and not justified by the laws and customs of war. As already reported in connection with another trial, ill-treatment of civilians, irrespective of whether they are or are not guilty of offences, is explicitly regarded as a war crime and made punishable as such by provisions of both international and municipal law.⁽¹⁾

(d) *Pillage*

Convictions on the count of pillage were made for the lootings which took place at Dun-les-Places, Vermot and Vieux-Dun.

The accused concerned were found guilty of "pillage committed in gangs by military personnel with arms or open force," as provided against by Article 221 of the Code of Military Justice. The latter makes punishable by hard labour for life "any pillage or damage to food, merchandise or goods, committed by military personnel in gangs either with arms or open force, or with breakages of doors or external closures, or with violence against persons." Pillage in gangs committed in any other circumstances is punishable by solitary confinement with hard labour for from five to ten years. This provision was made applicable by the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes, to cases of pillage committed by enemy occupying authorities in France.

Pillage was recognised as a war crime in the list of the 1919 Commission on Responsibilities, as well as in the Charters of the International Military Tribunals at Nuremberg and Tokyo. Prior to that it was explicitly prohibited by Article 47 of the Hague Regulations.

2. THE PERSONAL GUILT OF THE ACCUSED

As previously stressed, each of the accused was found guilty of some of the above offences in different capacities: as instigator, as perpetrator, or as accomplice other than instigator. Some were found guilty in two or all three capacities, according to the part they took in the commission of the various crimes. The guilt of instigators and other accomplices in French law deserves special attention.

(a) *The Guilt of Instigators*

The offences for which a number of accused were found guilty as instigators include the killing of the twenty-one inhabitants at Dun-les-Places, of the six

⁽¹⁾ See Vol. VII of this series, p. 70.

hostages at Vermot, of the three men at Arleuf, and of the six inhabitants at Crux-la-Ville. They also include the arsons in all these places.

The accused involved were in all cases in command of the men who committed the crimes and were held responsible for either issuing orders to their subordinates or permitting that they commit their misdeeds.

The responsibility of persons in authority over perpetrators and other accomplices, is covered by a general provision of the French Penal Code and also by the Ordinance of 28th August, 1944.

Article 60, para. 1 of the Penal Code reads :

" Those who, by gifts, promises, threats, *abuse of authority or powers*, guilty machination, or artifices, provoke an act constituting a crime or a delict, or *give instructions* to commit it, shall be punished as accomplices."⁽¹⁾

Article 4 of the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes provides :

" When a subordinate is prosecuted as principal perpetrator of a war crime and when his hierarchical superiors cannot be accused as joint perpetrators, they are treated as accomplices to the extent to which they have organised or tolerated the criminal acts of their subordinates."

The Tribunal applied the provision of the Penal Code and found all those concerned guilty of " provoking " the offence in question " by abuse of authority and powers " or of " giving instructions." The accused found guilty in this capacity were: Irmisch, Hippe, Hulf, Hildebrand, Kruger, Hefeke, Major, Schirmacher and Vier.

The above provisions are based on the same principle as that expressed in Article 6, last paragraph, of the Charter of the International Military Tribunal at Nuremberg. Referring to crimes against peace, war crimes and crimes against humanity, as defined in its previous paragraphs, Article 6 provides :

" Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

This rule is to be regarded as evidence of the present state of International Law in the field of personal responsibility for war crimes.

(b) *Guilt of Accomplices other than Instigators*

It is a universally recognised principle of modern penal law that accomplices during or after the fact are responsible in the same manner as actual perpetrators or as instigators, who belong to the category of accomplices before the fact. That is a principle recognised equally in the field of war crimes.

It is a matter of comparative interest to pass briefly in review the provisions of the French municipal law under which the accused concerned were found guilty as accomplices other than instigators. Their liability is regulated in

⁽¹⁾ Italics inserted.

Article 60, paras. 2 and 3 of the Penal Code, which comprises among accomplices the following two categories :

" Those who have furnished arms, instruments or any other means which have served in the action⁽¹⁾ knowing that they would serve this purpose;

" Those who knowingly have aided or assisted the perpetrator or perpetrators of the action in the facts which have prepared or facilitated or in those which have consummated the action."

Most of the accused concerned were found guilty of complicity in the latter capacity, that is for having " aided or assisted in the facts which prepared or facilitated or in those which consummated " the crime involved. Some, however, were also found guilty for supplying the means used in the crime.

⁽¹⁾ The term " action " is defined in Art. 60, para. 1 quoted above, as " action constituting a crime or delict."

THE HOSTAGES TRIAL

TRIAL OF WILHELM LIST AND OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG
8TH JULY, 1947, TO 19TH FEBRUARY, 1948

The accused were all former high-ranking German army officers and they were charged with responsibility for offences committed by troops under their command during the occupation of Greece, Yugoslavia, Albania and Norway, these offences being mainly so-called reprisal killings, purportedly taken in an attempt to maintain order in the occupied territories in the face of guerrilla opposition, or wanton destruction of property not justified by military necessity. The accused were charged with having thus committed war crimes and crimes against humanity.

One defendant committed suicide before the arraignment, and a second became too ill for trial against him to be continued. Of the remaining accused, two were found not guilty and eight guilty on various counts. Sentences imposed ranged from imprisonment for life to imprisonment for seven years. In its judgment the Tribunal dealt with a number of legal issues, including the legality of the killing of hostages and reprisal prisoners, the extent of responsibility of commanders for offences committed by their troops and the degree of effectiveness of the plea of superior orders.

A. OUTLINE OF THE PROCEEDINGS

1. THE ACCUSED AND THE INDICTMENT

The persons against whom the Indictment in this trial was drafted were the following: Wilhelm List, Maximilian von Weichs, Lothar Rendulic, Walter Kuntze, Hermann Foertsch, Franz Boehme, Helmuth Felmy, Hubert Lanz, Ernst Dehner, Ernst von Leyser, Wilhelm Speidel, and Kurt von Geitner.

The defendant Franz Boehme committed suicide prior to the arraignment of the defendants, and the Tribunal ordered his name to be stricken from the list of defendants contained in the indictment. The defendant Maximilian von Weichs became ill during the course of the trial and, after it had been conclusively ascertained that he was physically unfit to appear in court before the conclusion of the trial, his motion that the proceedings be suspended as to him was sustained. The Tribunal ruled that "This

holding is without prejudice to a future trial of this defendant on the charges herein made against him if and when his physical condition permits."

The defendants were accused of offences alleged to have been committed by them while acting in various military capacities. The Indictment drawn up against them was a relatively lengthy one, and may be summarised in the following words taken from the Judgment of the Tribunal:

"In this case, the United States of America prosecutes each of the defendants on one or more of four counts of an indictment charging that each and all of said defendants unlawfully, wilfully and knowingly committed war crimes and crimes against humanity as such crimes are defined in Article II of Control Council Law No. 10. They are charged with being principals in and accessories to the murder of thousands of persons from the civilian population of Greece, Yugoslavia, Norway and Albania between September 1939 and May 1945 by the use of troops of the German Armed Forces under the command of and acting pursuant to orders issued, distributed and executed by the defendants at bar. It is further charged that these defendants participated in a deliberate scheme of terrorism and intimidation wholly unwarranted and unjustified by military necessity by the murder, ill-treatment and deportation to slave labour of prisoners of war and members of the civilian populations in territories occupied by the German Armed Forces, by plundering and pillaging public and private property, and wantonly destroying cities, towns and villages for which there was no military necessity. . . .

"Reduced to a minimum of words, these four counts charge:

"1. That defendants were principals or accessories to the murder of hundreds of thousands of persons from the civilian population of Greece, Yugoslavia and Albania by troops of the German Armed Forces; that attacks by lawfully constituted enemy military forces and attacks by unknown persons, against German troops and installations, were followed by executions of large numbers of the civilian population by hanging or shooting without benefit of investigation or trial; that thousands of non-combatants, arbitrarily designated as 'partisans,' 'Communists,' 'Communist suspects,' 'bandit suspects' were terrorised, tortured and murdered in retaliation for such attacks by lawfully constituted enemy military forces and attacks by unknown persons; and that defendants issued, distributed and executed orders for the execution of 100 'hostages' in retaliation for each German soldier killed and fifty 'hostages' in retaliation for each German soldier wounded.

"2. That defendants were principals or accessories to the plundering and looting of public and private property, the wanton destruction of cities, towns and villages, frequently together with the murder of the inhabitants thereof, and the commission of other acts of devastation not warranted by military necessity, in the occupied territories of Greece, Yugoslavia, Albania and Norway, by troops of the German Armed Forces acting at the direction and order of these defendants; that defendants ordered troops under their command to burn, level and destroy entire villages and towns and

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thereby making thousands of peaceful non-combatants homeless and destitute, thereby causing untold suffering, misery and death to large numbers of innocent civilians without any recognised military necessity for so doing.

" 3. That defendants were principals or accessories to the drafting, distribution and execution of illegal orders to the troops of the German Armed Forces which commanded that enemy troops be refused quarter and be denied the status and rights of prisoners of war and surrendered members of enemy forces be summarily executed; that defendants illegally ordered that regular members of the national armies of Greece, Yugoslavia and Italy be designated as 'partisans,' 'rebels,' 'communists' and 'bandits,' and that relatives of members of such national armies be held responsible for such members' acts of warfare, resulting in the murder and ill-treatment of thousands of soldiers, prisoners of war and their non-combatant relatives.

" 4. That defendants were principals or accessories to the murder, torture, and systematic terrorisation, imprisonment in concentration camps, forced labour on military installations, and deportation to slave labour, of the civilian populations of Greece, Yugoslavia and Albania by troops of the German Armed Forces acting pursuant to the orders of the defendants; that large numbers of citizens—democrats, nationalists, Jews and Gypsies—were seized, thrown into concentration camps, beaten, tortured, ill-treated and murdered while other citizens were forcibly conscripted for labour in the Reich and occupied territories.

" The acts charged in each of the four counts are alleged to have been committed wilfully, knowingly and unlawfully and constitute violations of international conventions, the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilised nations, the internal penal laws of the countries in which such crimes were committed, and were declared, recognised and defined as crimes by Article II of Control Council Law No. 10 adopted by the representatives of the United States of America, Great Britain, the Republic of France and the Soviet Union."

The accused pleaded not guilty.

2. THE EVIDENCE BEFORE THE TRIBUNAL

The Tribunal made the following remarks concerning the evidence placed before it:

" The evidence in this case recites a record of killing and destruction seldom exceeded in modern history. . . . It is the determination of the connection of the defendants with the acts charged and the responsibility which attaches to them therefore, rather than the commission of the acts, that poses the chief issue to be here decided."

The Tribunal continued:

" The record is replete with testimony and exhibits which have been offered and received in evidence without foundation as to their

authenticity and, in many cases where it is secondary in character, without proof of the usual conditions precedent to the admission of such evidence. This is in accordance with the provisions of Article VII, Ordinance No. 7, Military Government, Germany⁽¹⁾, which provides: 'The tribunals shall not be bound by technical rules of procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges, affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require.' This Tribunal is 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 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. The interpretation thus given and consistently announced throughout the trial by this Tribunal is not an idle gesture to be announced as a theory and ignored in practice—it is a substantive right composing one of the essential elements of a fair and impartial adjudication.

" The trial was conducted in two languages, English and German, and consumed 117 trial days. The prosecution offered 678 exhibits and the defendants 1025 that were received in evidence. The transcript of the evidence taken consists of 9,556 pages. A careful consideration of this mass of evidence and its subsequent reduction into concise conclusions of fact, is one of the major tasks of the tribunal.

" The prosecution has produced oral and documentary evidence to sustain the charges of the indictment. The documents consist mostly of orders, reports and war diaries which were captured by the Allied Armies at the time of the German collapse. Some of it is fragmentary and consequently not complete. Where excerpts of such documents were received in evidence, we have consistently required the production of the whole document whenever the Defence so demanded. The Tribunal and its administrative officials have made every effort to secure all known and available evidence. The Prosecution has repeatedly assured the tribunal that all available evidence, whether favourable or otherwise, has been produced pursuant to the Tribunal's orders.

" The reports offered consist generally of those made or received by the defendants and unit commanders in their chain of command.

⁽¹⁾ See Vol. III of these Reports, pp. 114 and 118. In general, for the United States law and practice on war crime trials, see that volume, pp. 103-20.

By the general term 'orders' is meant primarily the orders, directives and instructions received by them or sent by them by virtue of their position. By war diaries is meant the records of events of the various units which were commanded by these defendants, such war diaries being kept by the commanding officer or under his direction. This evidence, together with the oral testimony of witnesses appearing at the trial provides the basis of the prosecution's case.

"The Defence produced much oral testimony including that of the defendants themselves. Hundreds of affidavits were received under the rules of the tribunal. All affidavits were received subject to a motion to strike if the affiants were not produced for cross-examination in open court upon demand of the opposite party made in open court."

The following paragraphs contain a summary of the evidence relating to the individual accused:

(i) List

List was Commander-in-Chief of the Twelfth Army during the German invasion of Yugoslavia and Greece, and, in addition thereto, in June 1941, became the Wehrmacht Commander Southeast, a position which he retained until illness compelled his temporary retirement from active service on 15th October, 1941. In the latter position he was the supreme representative of the Wehrmacht in the Balkans and exercised executive authority in the territory occupied by German troops. Among the duties assigned to him was the safeguarding of the unified defence of those parts of Serbia and Greece, including the Greek Islands, which were occupied by German troops, against attacks and unrest. The defendant Foertsch, who had become Chief of Staff of the Twelfth Army on 10th May, 1941, continued as Chief of Staff to the defendant List in his new capacity as Wehrmacht Commander Southeast.

The evidence showed that, soon after the occupation by German forces of Yugoslavia and Greece, resistance on the part of Yugoslav and Greek guerrillas began, in the course of which German prisoners captured by the resistance forces were tortured, mutilated and killed, and the German military position threatened. Attacks on German troops and acts of sabotage against transportation and communication lines progressively increased throughout the summer of 1941 and even at this early date the shooting of innocent members of the population was commenced as a means of suppressing resistance.

By 5th September, 1941, the resistance movement had developed further and the defendant List issued an order on the subject of its suppression. In this order, he said in part: "In regard to the above the following aspects are to be taken into consideration:

Ruthless and immediate measures against the insurgents, against their accomplices and their families. (Hanging, burning down of villages involved, seizure of more hostages, deportation of relatives, etc., into concentration camps.)"

On 16th September, 1941, Hitler, in a personally signed order, charged the defendant List with the task of suppressing the insurgent movement in

the Southeast. This resulted in the commissioning of General Franz Boehme with the handling of military affairs in Serbia and in the transfer of the entire executive power in Serbia to him. This delegation of authority was done on the recommendation and request of the defendant List to whom Boehme remained subordinate. Boehme was shown to have issued orders, dated 25th September and 10th October, 1941, to the units under his command in which he ordered that "the whole population" of Serbia must be hit severely; and that "In all commands in Serbia all Communists, male residents suspicious as such, all Jews, a certain number of nationalistic and democratically inclined residents are to be arrested as hostages, by means of sudden actions," and "If losses of German soldiers or Volksdeutsche occur, the territorial competent commanders up to the regiment commanders are to decree the shooting of arrestees according to the following quotas: (a) For each killed or murdered German soldier or Volksdeutsche (men, women or children) one hundred prisoners or hostages, (b) For each wounded German soldier or Volksdeutsche 50 prisoners or hostages."

On 16th September, 1941, Fieldmarshal Keitel, Chief of the High Command of the Armed Forces, issued a directive pertaining to the suppression of the insurgent movement in occupied territories, which List caused to be distributed to his subordinate commanders. This order stated:

"Measures taken up to now to counteract this general communist insurgent movement have proven themselves to be inadequate. The Führer now has ordered that severest means are to be employed in order to break down this movement in the shortest time possible. Only in this manner, which has always been applied successfully in the history of the extension of power of great peoples can quiet be restored.

"The following directives are to be applied here: (a) Each incident of insurrection against the German Wehrmacht, regardless of individual circumstances, must be assumed to be of communist origin. (b) In order to stop these intrigues at their inception, severest measures are to be applied immediately at the first appearance, in order to demonstrate the authority of the occupying power, and in order to prevent further progress. One must keep in mind that a human life frequently counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such a case the death penalty for 50 to 100 communists must in general be deemed appropriate as retaliation for the life of a German soldier. The manner of execution must increase the deterrent effect. The reverse procedure—to proceed at first with relatively easy punishment and to be satisfied with the threat of measures of increased severity as a deterrent does not correspond with these principles and is not to be applied."

On 4th October, 1941, the defendant List directed the following order to General Bader, one of the Generals under his command:

"The male population of the territories to be mopped up of bandits is to be handled according to the following points of view:

"Men who take part in combat are to be judged by court martial.

"Men in the insurgent territories who were not encountered in battle, are to be examined and—

" If a former participation in combat can be proven of them to be judged by court martial.

" If they are only suspected of having taken part in combat, of having offered the bandits support of any sort, or of having acted against the Wehrmacht in any way, to be held in a special collecting camp. They are to serve as hostages in the event that bandits appear, or anything against the Wehrmacht is undertaken in the territory mopped up or in their home localities, and in such cases they are to be shot."

After the issuance of the foregoing orders, the shooting of innocent members of the population increased and a large number of reprisals against the population were carried out on the basis of the 100 to 1 order. Among the evidence appeared facts relating to a reprisal shooting at a village near Topola, to which the Tribunal made reference in its judgment.⁽¹⁾ This instance of shooting was carried out by the orders of General Boehme issued on 4th October, 1941, and on 9th October, 1941. General Boehme informed the defendant List as follows: " Execution by shooting of about 2,000 Communists and Jews in reprisal for 22 murdered of the Second Battalion of the 421st Army Signal Communication Regiment in progress." Several reports of reprisal shootings were also made to List by the Security Police and S.D.

There was no evidence, however, that the " Commissar Order" of 6th June, 1941, requiring the killing of all captured Commissars was issued, distributed or executed in the occupied territory under the command of List while he held the position of Armed Forces Commander Southeast, or that List was in any way responsible for the killing of Commissars merely because they were such. The evidence sustained the contentions of List that he never himself signed an order for the killing of hostages or other inhabitants, or fixed a ratio determining the number of persons to be put to death for each German soldier killed or wounded, and that many of these executions were carried out by units of the S.S., the S.D., and local police units which were not tactically subordinated to him. That he was not in accord with many of the orders of the High Command of the Armed Forces with reference to the pacification of Yugoslavia and Greece was also shown. That his appeals for more troops for the subjugation of the growing resistance movement were met with counter-directives and orders by Hitler and Keitel to accomplish it by a campaign of terrorism and intimidation of the population was also established.

(ii) Kuntze

On or about 24th October, 1941, the defendant Kuntze was appointed Deputy Wehrmacht Commander Southeast and Commander-in-Chief of the 12th Army. It was evident from the record that the appointment was intended as a temporary one for the period of the illness of Fieldmarshal List. He assumed the command on his arrival in the Balkans on 27th October, 1941. He was superseded by General Alexander Liehr in

⁽¹⁾ See pp. 65-6.

June 1942 but remained in the position until the arrival of General Loehr on 8th August, 1942.⁽¹⁾ Reports made to the defendant Kuntze, which were shown in the evidence, revealed that on 29th October, 1941, 76 persons were shot in reprisal in Serbia; on 2nd November, 1941, 125 persons were shot to death at Valjevo; and on 27th November, 1941, 265 Communists were shot as a reprisal measure at Valjevo. Under date of 31st October, 1941, the Commanding General in Serbia, General Boehme, recapitulated the shootings in Serbia in a report to Kuntze as follows: " Shootings: 405 hostages in Belgrade (total up to now in Belgrade, 4,750). 90 Communists in Camp Sebac. 2,300 hostages in Kragujevac. 1,700 hostages in Kraljevo." In a similar report under date of 30th November, 1941, General Boehme reported to Kuntze as follows: " Shot as hostages (total) 534 (500 of these by Serbian Auxiliary Police)." Many other similar shootings were shown to have taken place.

In a directive of 19th March, 1942, Kuntze made the following order: " The more unequivocal and the harder reprisal measures are applied from the beginning the less it will become necessary to apply them at a later date. No false sentimentalities! It is preferable that 50 suspects are liquidated than one German soldier lose his life. Villages with Communist Administration are to be destroyed and men are to be taken along as hostages. If it is not possible to produce the people who have participated in any way in the insurrection or to seize them, reprisal measures of a general kind may be deemed advisable, for instance, the shooting to death of all male inhabitants from the nearest villages, according to a definite ratio (for instance, one German dead—100 Serbs, one German wounded—50 Serbs)." Further shootings of large numbers of reprisal prisoners and hostages were reported to Kuntze after the issuance of this directive.

Although he was advised of these killings of innocent persons in reprisal for the actions of bands or unknown members of the population, Kuntze not only failed to take steps to prevent their recurrence but urged more severe action upon his subordinate commanders. In many cases persons were shot in reprisal who were being held in collecting camps without there being any connection whatever with the crime committed, actual, geographical or otherwise. Reprisal orders were not grounded on judicial findings.

Evidence brought relating to the alleged ill-treatment of Jews and other racial groups within the area commanded by the defendant Kuntze during the time he was Deputy Wehrmacht Commander Southeast proved the collection of Jews in concentration camps and the killing of one large group of Jews and Gypsies shortly after the defendant assumed command in the Southeast by units that were subordinate to him. The record did not show that the defendant ordered the shooting of Jews or their transfer to a collecting camp. The evidence did show, however, that he received reports that units subordinate to him carried out the shooting of a large

⁽¹⁾ In its Judgment the Tribunal pointed out that October, 1941 " exceeded all previous monthly records in killing innocent members of the population in reprisal for the criminal acts of unknown persons," and added: " It seems highly improbable that Kuntze could step into the command in the Southeast in the midst of the carrying out and reporting of these reprisal actions without gaining knowledge and approval."

group of Jews and Gypsies. He had knowledge that troops subordinate to him were collecting and transporting Jews to collecting camps, and it was not shown that the defendant acted to stop such practices.

There was evidence that the offences proved against Kuntze were ordered by his superiors and that, like List, he was impeded by the operations within his area of command of organizations receiving their orders direct from Berlin.

(iii) *Foertsch*

The whole period of Foertsch's stay in the Southeast was in the capacity of Chief of Staff of the Army Group commanding the territory.

The Chief of Staff was in charge of the various departments of the staff and was the first advisor of the Commander-in-Chief. It was his duty to provide all basic information for decisions by the Commander-in-Chief and was responsible for the channelling of all reports and orders. He had no troop command authority. Neither did he have any control over the legal department which was directly subordinate to the Commander-in-Chief. As Chief of Staff he was authorised to sign orders on behalf of the Commander-in-Chief when they did not contain any fundamental decision and did not require the exercise of judgment by the subordinate to whom they were directed.

Furthermore, the accused was on leave at the time of the issuing of List's order of 5th September, 1941, the distribution of the Keitel Order of 16th September, 1941, and the appointment of Lieutenant-General Boehme as Commander of Military Operations in Serbia.

It was the testimony of Foertsch that the Keitel Order of 16th September, 1941, fixing reprisal ratios from 50 up to 100 to 1, was the basic order under which reprisal measures were carried out in the Southeast. On the other hand the evidence showed many reprisal measures to have been executed prior to the Keitel order, on the reports of which appeared the signature or initials of Foertsch. For all practical purposes, the accused had the same information as the defendants List and Kuntze during their tenures as Wehrmacht Commanders Southeast. He knew of all the incidents described earlier in the outline of evidence dealing with the defendants List and Kuntze. The defendant Foertsch did not, however, participate in any of them. He gave no orders and had no power to do so had he so desired.

He did distribute some of the orders of the OKW, the OKH and of his commanding generals, including Fieldmarshal Keitel's order of 28th September, 1941, wherein it was ordered that hostages of different political persuasions such as Nationalists, Democrats and Communists be kept available for reprisal purposes and shot in case of attack, and General Kuntze's order of 19th March, 1942, wherein it was ordered that more severe reprisals be taken in accordance with a definite ratio "for instance, 1 German dead—100 Serbs, 1 German wounded—50 Serbs."

The Commando Order of 18th October, 1942, was distributed by Army Group E commanded by General Alexander Loehr and of which Foertsch was then Chief of Staff. Foertsch stated that he considered this order unlawful in that it called for the commission of offences and crimes under International Law but that he assumed that the issuing of the order was an

answer to similar actions by the enemy in contravention of International Law. It was not shown that the defendant knew that this order was in fact carried out in the territory in which he served.⁽¹⁾

(iv) *von Geitner*

During the entire period of his service in the Balkans, the defendant von Geitner served only as a chief of staff to the Commanding General in Serbia or to the Military Commander in Serbia and Military Commander in Southeast. His duties generally concerned operations, supplies, training and organization of troops.

The evidence showed that von Geitner initialed or signed orders issued by his commanding general for the shooting of hostages and reprisal prisoners.⁽²⁾ Applications for permission to take reprisal action were referred by the commanding general to a special legal officer who worked on them and submitted the result to the commander. The commander then made the decision and delivered a text to the defendant von Geitner for preparation and approval as to form. The order then was sent on its way through regular channels by von Geitner. No doubt existed that such an order was that of the military commander and that the defendant von Geitner lacked the authority to issue such an order on his own initiative. The accused claimed that the approval of the form of such orders was the full extent of his participation in the issuing and distributing of reprisal orders.

(v) *Rendulic*

The defendant Rendulic became Commander-in-Chief of the Second Panzer Army on 26th August, 1943, and remained in the position until June 1944. In July 1944 he became the Commander-in-Chief of the Twentieth Mountain Army, a position which he held until January 1945. In December 1944 he became the Armed Forces Commander North in addition to that of Commander-in-Chief of the Twentieth Mountain Army. In January 1945 he became Commander-in-Chief of Army Group North, a position which he held until March 1945.

At the time he assumed command of the Second Panzer Army, the headquarters of the army was in Croatia and its principal task was the guarding of the coast against enemy attacks and the suppression of band warfare in the occupied area. The Italians also had several army corps stationed in the immediately adjacent territory. The danger of the collapse of the Italian government and the possibility that the Italians might thereafter fight on the side of the Allies was a constant threat at the time of his assumption of the command of the Second Panzer Army.

The Hitler order of 16th September, 1941, providing for the killing of 100 reprisal prisoners for each German soldier shot, had been distributed to the troops in the Southeast and, in many instances, carried out before

⁽¹⁾ According to the Tribunal's judgment, "By this order, issued by Hitler in person, all sabotage troops generally referred to as commandos, were to be shot immediately upon capture." A text of the Order is reproduced in Vol. I of these Reports, pp. 32-3.

⁽²⁾ These orders were deemed by the Tribunal to be "unlawful when viewed in the light of the applicable international law."

the defendant Rendulic assumed command of the Second Panzer Army. The accused did not attempt to suppress illegal reprisal actions, but instead on 15th September, 1943, he issued an order which in part stated: "Attacks on German members of the Wehrmacht and damages to war-important installations are to be answered in every case by the shooting or hanging of hostages and the destruction of surrounding villages, which later is to take place—if possible—after the arrest of the male population which is capable of bearing arms. Only then will the population inform the German authorities if bandits collect so as to avoid reprisal measures.

"Unless in individual cases different orders are issued the rule for reprisal measures is: 1 German killed, 50 hostages; 1 German wounded, 25 hostages shot or hanged. Kidnapping of a German will be considered equal to killing a German if the kidnapped person does not return within a definite period. According to the severity of the attack a hundred hostages will be hanged or shot for each attack against war-essential installations. These reprisal measures are to be executed if the culprit is not caught within 40 hours."

The reports of the corps commanders subordinate to the defendant revealed that many acts of reprisals were taken in fact against the population by the 173rd and 187th Reserve Divisions for attacks upon troops and military installations. The defendant made no attempt to secure additional details of the killings or to apprehend the guilty. Public proclamations upon the taking of hostages were not made. Previous notice was not given the public that reprisals by shooting would be taken if unlawful acts were repeated. Court-martial proceedings were not held. Hostages, reprisal prisoners and partisans were killed without any semblance of a judicial hearing. There was no requirement that hostages or reprisal prisoners killed should be connected with the offence committed, either passively, or actively, or by proximity.

The accused's order of 15th September, 1943, was as he maintained, consistent with the orders of Hitler and Keitel and the record did not indicate that he ever issued an order directing the killing of a specific number of hostages or reprisal prisoners as retaliation for any particular offence. The issuance of such orders was delegated to divisional commanders, whose activities were known to him through reports. He acquiesced in them and took no steps to shape the hostage and reprisal practices in conformity with the usages and practices of war.

The evidence further showed that on 3rd September, 1943, Italy surrendered unconditionally to the Allies. The surrender was announced publicly on 8th September, 1943. The defendant testified that this event was anticipated by him as well as the possibility that Italy would become an enemy of the Germans. His testimony was to the effect that the German Army, in performing its task of guarding the coast to prevent an Allied landing, could not tolerate the presence of hostile Italians in these coastal areas. Holding these definite views of the necessities of the situation, the defendant set about removing the Italians from the coastal areas by making them prisoners of war. He forced General D'Almazzo, Commander of the Italian IXth Army, to sign an armistice with him; the former had no orders to do this. The accused then received Führer Orders directing that the

officers of all Italian units who had co-operated with insurgents or permitted their arms to fall into the hands of insurgents, were to be shot and that the officers of resisting units who continued their resistance after receipt of a short ultimatum, were also to be shot. The record disclosed that the defendant Rendulic was insistent that his corps commanders carry out these orders "without any scruples." Several Italian officers were subsequently shot; for instance, certain officers of the Bergamo Division of the IXth Army, which had resisted the Germans at Split, were executed after summary court-martial proceedings.

The defendant was also shown to have passed on to troops subordinate to him the Führer Order of 6th June, 1941, providing that all Commissars captured must be shot, when he was in command of the 52nd Infantry Division on the Russian Front. He admitted that the legality and correctness of this order was discussed in army circles and that it was generally considered illegal. He testified that he considered the order as a reprisal measure, the purpose of which was unknown to him.⁽¹⁾

There was evidence that, during the retreat of the German troops under Rendulic from Finnmark, much physical destruction was carried out on the latter's orders in an attempt to extricate the former from a strategically perilous situation arising out of the withdrawal from the war of Finland.

(vi) *Dehner*

The defendant Dehner was assigned as the commander of the LXIXth Reserve Corps in the last days of August 1943. He held this command until 15th March, 1944. The corps was stationed in Northern Croatia and occupied about one-third of that country. The chief task of this corps was to suppress the guerrilla bands operating in the territory and particularly to guard the Zagreb-Belgrade railroad and the communication lines in the assigned area.

The 173rd and 187th Reserve Divisions, which have been mentioned above in the section setting out the evidence relating to the defendant Rendulic, were directly subordinated to Dehner.⁽²⁾ Numerous other and similar offences were committed by troops under his command and the defendant appeared to have made no effort to require reports showing that hostages and reprisal prisoners were shot in accordance with International Law. The defendant attempted to excuse his indifference to these killings by saying that they were the responsibility of the division commanders. Dehner had knowledge of the offences; on the other hand, there was evidence of attempts on his part to correct certain irregularities connected with the taking of reprisals; for example in an order of 19th December, 1943, his corps headquarters stated: "Measures of the unit have repeatedly frustrated propaganda for the enemy as planned by the unit leadership. It must not happen that bandits who arrive at the unit with leaflets asking them to desert and which should be valid as passes, are shot out of hand. This makes any propaganda effort in this direction nonsensical. . . ."

⁽¹⁾ See p. 46, note 2.

⁽²⁾ See p. 44.

(vii) *von Leyser*

The defendant von Leyser was appointed to command the XXIst Mountain Corps on 1st August, 1944, and continued in the position until April 1945. Immediately previous thereto he had been in command of the XVth Mountain Corps, a position which he had held since 1st November, 1943. Other former assignments were his command of the 269th Infantry Division in Russia in 1941 and his command of the XXVIth Corps in Russia in 1942.

There was evidence that innocent members of the civilian populations were killed in reprisal for attacks on troops and acts of sabotage committed by unknown persons by troops subordinate to the defendant von Leyser, who admitted that he knew of many such killings. He denied that he ever issued an order to carry out any specific reprisal measure, and contended that this was the responsibility of divisional commanders in conjunction with Croatian government authorities. The record disclosed, however, that on 10th August, 1944, the defendant issued an order containing the following: "In case of repeated attacks in a certain road sector, Communist hostages are to be taken from the villages of the immediate vicinity, who are to be sentenced in case of new attacks. A connection between these Communists and the bandits may be assumed to exist in every case."⁽¹⁾

Shortly after taking command of the XVth Corps, the defendant formulated a plan for the evacuation of the male population between the ages of 15 and 55 from the area between Una and Korana. This territory was supposed to contain about 7,000 to 8,000 men who were partly equipped with arms procured from the Italians. The area had been under the temporary control of the bands to such an extent that the Croat government had complained of its inability to conscript men for military service from the area. It was planned to crush the bands and evacuate the men and turn them over to the Croatian government for use as soldiers and compulsory labour. The operation was designated as Operation "Panther" and was so referred to in the German Army reports. On 6th December, 1943, the Second Panzer Army approved Operation "Panther." The operation was carried out but only 96 men fit for military service were captured. The defendant attempted to justify his action by asserting that the primary purpose of the Operation "Panther" was the suppression of the bands, that the operation was purely a tactical one so far as he was concerned and that the disposition of the captured population fit for military service was for the decision of the Croatian government and not his concern.

The evidence also showed that the 269th Infantry Division, commanded by the defendant von Leyser in Russia, killed Commissars pursuant to the Commissar Order.⁽²⁾

⁽¹⁾ Of this order the Tribunal said: "This order is, of course, not lawful. Reprisals taken against a certain race, class or group irrespective of the circumstances of each case, sounds more like vengeance than an attempt to deter further criminal acts by the population. An assumption of guilt on the part of a particular race, class or group of people in all cases also contravenes established rules. This is a matter which a judicial proceeding should determine from available evidence."

⁽²⁾ The Tribunal said: "This was a criminal order and all killings committed pursuant to it were likewise criminal. We find the defendant guilty on this charge." The charge referred to was said to be one of "issuing the Commissar order of 6th June, 1941, and causing the same to be carried out while he was in command of the 269th Infantry Division in Russia in 1941." It would appear from an examination of the indictment, and of the Tribunal's summary thereof, that allegations regarding offences committed in Russia would, technically, fall outside its terms.

(viii) *Felmy*

The defendant Felmy was appointed Commander Southern Greece at about the middle of June 1941, and continued in the position until August 1942. During this period he had three battalions of security and police troops subordinate to him. On 10th May, 1943 the defendant became commander of the LXVIIIth Corps and continued in that position until the corps withdrew from Greece, an operation which was completed on 22nd October, 1944. In addition thereto on 9th September, 1943, he assumed command of Army Group Southern Greece. He had subordinate to him the 1st Panzer Division, 117th Rifle Division, and a number of fortress battalions. Until the collapse of Italy, two Italian divisions were subordinate to him. The defendant admitted having ordered reprisal measures but denied that they were unlawful. Many other reprisal actions on the part of his troops were brought to his notice in reports made to him.

The evidence showed that the accused received and passed on an order of General Loehr, Commander-in-Chief Southeast, dated 10th August, 1943, which stated in part: "In territories infested by the bandits, in which surprise attacks have been carried out, the arrest of hostages from all strata of the population remains a successful means of intimidation. Furthermore, it may be necessary, to seize the entire male population, in so far as it does not have to be shot or hung on account of participation in or support of the bandits, and in so far as it is incapable of work, and bring it to the prisoner collecting points for further transport into the Reich. Surprise attacks on German soldiers, damage to German property must be retaliated in every case with shooting or hanging of hostages, destruction of the surrounding localities, etc. Only then will the population announce to the German offices the collections of the bandits, in order to remain protected from reprisal measures." The defendant also received and passed on the order regarding reprisal measures issued by General Loehr, deputising for Field Marshal von Weichs as Commander-in-Chief Southeast, under date of 22nd December, 1943, an order which has been previously quoted in this opinion. It says in part: "Reprisal quotas are not fixed. The orders previously decreed concerning them are to be rescinded. The extent of the reprisal measures is to be established in advance in each individual case. . . . The procedure, of carrying out reprisal measures after a surprise attack or an act of sabotage at random on persons and dwellings, in the vicinity, close to the scene of the deed, shakes the confidence in the justice of the occupying power and also drives the loyal part of the population into the woods. This form of execution of reprisal measures is accordingly forbidden. If, however, the investigation on the spot reveals concealed collaboration or a conscientiously passive attitude of certain persons concerning the perpetrators then these persons above all are to be shot as bandit helpers and their dwellings destroyed. . . . Such persons are co-responsible first of all who recognise Communism."

The evidence showed many separate reprisal actions by troops subordinate to this defendant. In many instances there was no connection between the inhabitants shot and the offence committed. Reprisals were taken against special groups, such as "Communists" and "bandit suspects"

without any relationship to the offence being established. Reprisal prisoners were taken from hostage camps generally and at points distant from the place where the offences occurred. It was also shown that in many reprisal actions destruction of property accompanied the mass shootings.

(ix) *Lanz*

The defendant Lanz was appointed to command the XXIIInd Mountain Corps on 25th August, 1943, and actually assumed the position on 9th September, 1943.

On 3rd October, 1943, the defendant issued an order reading in part as follows: "On account of the repeated cable sabotage in the area of Arta: 30 distinguished citizens (Greeks) from Arta, 10 distinguished citizens (Greeks) from Filipias, are to be arrested and kept as hostages. The population is to be notified that for every further cable sabotage 10 of these 40 hostages will be shot to death."

The defendant denied that any of these hostages were shot and there was no evidence to the contrary. On the other hand, there was proof of many reprisal actions, of the same general type as those already described, having been committed by troops under the accused's command and with his knowledge and acquiescence.

There was also evidence that a number of Italian officers, whose troops had resisted German requests to surrender with their arms, were shot on the orders of Lanz. It was shown, however, that Lanz acted under orders from Hitler and that, by resisting a previous order, he reduced the number of persons whom he was required to have executed.

(x) *Speidel*

The defendant Speidel assumed the position of Military Commander Southern Greece in early October 1942, and remained in the position until September 1943. From September 1943 until May 1944 he occupied the position of Military Commander Greece.

That the Military Commander Greece could control the reprisal and hostage practice through the various sub-area headquarters which were subordinate to him was borne out by the testimony of the defendant himself and charts prepared by him. Nevertheless, there was evidence of numerous separate instances of reprisal killings by troops under his command and with his knowledge, the victims often having no connection with any offences committed against the German armed forces and having lived in other districts, and often no court-martial proceedings having been held.

3. THE JUDGMENT OF THE TRIBUNAL

In addition to summarising the evidence which had been placed before it, the Tribunal in its judgment dealt with a number of legal matters, as follows:

(i) *The General Nature and the Sources of International Law*⁽¹⁾

It seemed to the Tribunal advisable "to briefly state the general nature of International Law and the sources from which its principles can be ascertained." It added, however, that:

"No attempt will be here made to give an all inclusive definition of International Law, in fact, there is justification for the assertion that it ought not to be circumscribed by strict definition in order that it may have ample room for growth. Any system of law that is obviously subject to growth by the crystallisation of generally prevailing custom and practice into law under the impact of common acceptance or consent, must not be confined within the limits of formal pronouncement or complete unanimity. For our purposes it is sufficient to say that International Law consists of the principles which control or govern relations between nations and their nationals. It is much more important to consider the sources from which these principles may be determined."

The judgment then continued:

"The sources of International Law which are usually enumerated are: (1) customs and practices accepted by civilised nations generally, (2) treaties, conventions and other forms of interstate agreements, (3) the decisions of international tribunals, (4) the decisions of national tribunals dealing with international questions, (5) the opinions of qualified text writers, and (6) diplomatic papers. These sources provide a frame upon which a system of International Law can be built but they cannot be deemed a complete legal system in themselves. Any system of jurisprudence, if it is to be effective, must be given an opportunity to grow and expand to meet changed conditions. The codification of principles is a helpful means of simplification, but it must not be treated as adding rigidity where resiliency is essential. To place the principles of International Law in a formalistic strait-jacket would ultimately destroy any effectiveness that it has acquired.

"The tendency has been to apply the term 'customs and practices accepted by civilised nations generally', as it is used in International Law, to the laws of war only. But the principle has no such restricted meaning. It applies as well to fundamental principles of justice which have been accepted and adopted by civilised nations generally. In determining whether such a fundamental rule of justice is entitled to be declared a principle of International Law, an examination of the municipal laws of states in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of International Law would seem to be fully justified. There is convincing evidence that this not only is but has been the rule. The rules applied in criminal trials regarding burden of proof, presumption of innocence, and the right of a defendant to appear personally to defend himself, are derived from this source. Can it be doubted that

⁽¹⁾ The reader may find it of interest to compare the Tribunal's remarks on these matters with some observations of the Tribunal which conducted the *Justice Trial*, which are set out in Vol. VI of this series, pp. 34-8.

such a source of International Law would be applied to an insane defendant? Obviously he would not be subjected to trial during his incompetency. Clearly, such a holding would be based upon a fundamental principle of criminal law accepted by nations generally. If the rights of nations and the rights of individuals who become involved in international relations are to be respected and preserved, fundamental rules of justice and right which have become commonly accepted by nations must be applied. But the yardstick to be used must in all cases be a finding that the principle involved is a fundamental rule of justice which has been adopted or accepted by nations generally as such."

(ii) *The Plea of Superior Orders*

The Judgment then continued:

"The defendants invoke the defensive plea that the acts charged as crimes were carried out pursuant to orders of superior officers whom they were obliged to obey. This brings into operation the rule just announced. The rule that superior order is not a defence to a criminal act is a rule of fundamental criminal justice that has been adopted by civilized nations extensively. It is not disputed that the municipal law of civilized nations generally sustained the principle at the time the alleged criminal acts were committed. This being true, it properly may be declared as an applicable rule of International Law.

"It cannot be questioned that acts done in time of war under the military authority of an enemy, cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates International Law and outrages fundamental concepts of justice. In the German War Trials (1921), the German Supreme Court of Leipzig in *The Llandovery Castle* case⁽¹⁾ said: 'Patzig's order does not free the accused from guilt. It is true that according to para. 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. According to No. 2, however, the subordinate obeying such an order is liable to

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punishment, if it was known to him that the order of the superior involved the infringement of civil or military law.'

"It is true that the foregoing rule compels a commander to make a choice between possible punishment by his lawless government for the disobedience of the illegal order of his superior officer, or that of lawful punishment for the crime under the law of nations. To choose the former in the hope that victory will cleanse the act of its criminal characteristics manifests only weakness of character and adds nothing to the defence.

"We concede the serious consequences of the choice especially by an officer in the army of a dictator. But the rule becomes one of necessity, for otherwise the opposing army would in many cases have no protection at all against criminal excesses ordered by superiors.

"The defence relies heavily upon the writings of Professor L. Oppenheim to sustain their position. It is true that he advocated this principle throughout his writings. As a co-author of the British *Manual of Military Law*, he incorporated the principle there. It seems also to have found its way into the United States *Rules of Land Warfare* (1940). We think Professor Oppenheim espoused a decidedly minority view. It is based upon the following rationale: 'The law cannot require an individual to be punished for an act which he was compelled by law to commit.' The statement completely overlooks the fact that an illegal order is in no sense of the word a valid law which one is obliged to obey. The fact that the British and American armies may have adopted it for the regulations of its own armies as a matter of policy, does not have the effect of enthroneing it as a rule of International Law. We point out that army regulations are not a competent source of International Law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilized nations generally. It is possible, however, that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions had been put into general practice. It will be observed that the determination, whether a custom or practice exists, is a question of fact. Whether a fundamental principle of justice has been accepted, is a question of judicial or legislative declaration. In determining the former, military regulations may play an important rôle but, in the latter, they do not constitute an authoritative precedent.

"Those who hold to the view that superior order is a complete defence to an International Law crime, base it largely on a conflict in the articles of war promulgated by several leading nations. While we are of the opinion that army regulations are not a competent source of International Law, where a fundamental rule of justice is concerned, we submit that the conflict in any event does not sustain the position claimed for it. If, for example, one be charged with an act recognised as criminal under applicable principles of International Law and pleads superior order as a defence thereto, the duty devolves upon the Court to examine the sources of International Law to determine the merits

such a source of International Law would be applied to an insane defendant? Obviously he would not be subjected to trial during his incompetency. Clearly, such a holding would be based upon a fundamental principle of criminal law accepted by nations generally. If the rights of nations and the rights of individuals who become involved in international relations are to be respected and preserved, fundamental rules of justice and right which have become commonly accepted by nations must be applied. But the yardstick to be used must in all cases be a finding that the principle involved is a fundamental rule of justice which has been adopted or accepted by nations generally as such."

(ii) *The Plea of Superior Orders*

The Judgment then continued:

"The defendants invoke the defensive plea that the acts charged as crimes were carried out pursuant to orders of superior officers whom they were obliged to obey. This brings into operation the rule just announced. The rule that superior order is not a defence to a criminal act is a rule of fundamental criminal justice that has been adopted by civilized nations extensively. It is not disputed that the municipal law of civilised nations generally sustained the principle at the time the alleged criminal acts were committed. This being true, it properly may be declared as an applicable rule of International Law.

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of such a plea. If the Court finds that the army regulations of some members of the family of nations provide that superior order is a complete defence and that the army regulations of other nations express a contrary view, the Court would be obliged to hold, assuming for the sake of argument only that such regulations constitute a competent source of International Law, that general acceptance or consent was lacking among the family of nations. Inasmuch as a substantial conflict exists among the nations whether superior order is a defence to a criminal charge, it could only result in a further finding that the basis does not exist for declaring superior order to be a defence to an International Law crime. But, as we have already stated, army regulations are not a competent source of International Law when a fundamental rule of justice is concerned. This leaves the way clear for the Court to affirmatively declare that superior order is not a defence to an International Law crime if it finds that the principle involved is a fundamental rule of justice and for that reason has found general acceptance.

" International Law has never approved the defensive plea of superior order as a mandatory bar to the prosecution of war criminals. This defensive plea is not available to the defendants in the present case, although if the circumstances warrant, it may be considered in mitigation of punishment under the express provisions of Control Council Law No. 10."

(iii) *The Ex Post Facto Principle Regarded as Inapplicable in the Present Instance*

The following paragraphs set out the attitude of the Tribunal to the plea that Control Council Law No. 10 violated the *ex post facto* principle:⁽¹⁾

" It is urged that Control Council Law No. 10 is an *ex post facto* act and retroactive in nature as to the crime charged in the indictment. The act was adopted on 20th December, 1945, a date subsequent to the dates of the Acts charged to be crimes. 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 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.

" This very question was passed upon by the International Military Tribunal in the case of the United States v. Herman Wilhelm Goering

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in its judgment entered on 1st October, 1946. Similar provisions appearing in the Charter creating the International Military Tribunal and defining the crimes over which it had jurisdiction were held to be devoid of retroactive features in the following language: " The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in view of the Tribunal, as will be shown, it is the expression of International Law existing at the time of its creation; and to that extent is itself a contribution to International Law." We adopt this conclusion. Any doubts in our mind concerning the rule thus announced go to its application rather than to the correctness of its statement. The crimes defined in Control Council Law No. 10 which we have quoted herein, were crimes under pre-existing rules of International Law—some by conventional law and some by customary law. It seems clear to us that the conventional law such as that exemplified by the Hague Regulations of 1907 clearly make the War Crimes herein quoted, crimes under the proceedings of that convention. In any event, the practices and usages of war which gradually ripened into recognised customs with which belligerents were bound to comply, recognised the crimes specified herein as crimes subject to punishment. It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognised customs and usages of war, or the general principles of criminal justice common to civilised nations generally. If the acts charged were in fact crimes under International Law when committed, they cannot be said to be *ex post facto* acts or retroactive pronouncements.

" The crimes specified in the London Charter and defined in Control Council Law No. 10 which have heretofore been set forth and with which these defendants are charged, merely restate the rules declared by the Hague Regulations of 1907 in Articles 43, 46, 47, 50 and 23 (h) of the regulations annexed thereto. . . .

" We conclude that pre-existing International Law has declared the acts constituting the crimes herein charged and included in Control Council Law No. 10 to be unlawful, both under the conventional law and the practices and usages of land warfare that had ripened into recognised customs which belligerents were bound to obey. Anything in excess of existing International Law therein contained is a utilisation of power and not of law. It is true, of course, that courts authorised to hear such cases were not established nor the penalties to be imposed for violations set forth. But this is not fatal to their validity. The acts prohibited are without deterrent effect unless they are punishable as crimes. This subject was dealt with in the International Military Trial in the following language: " But it is argued that the pact does not expressly enact that such (aggressive) wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of

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truce and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes; punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. . . . The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.'

"It is true, of course, that customary International Law is not static. It must be elastic enough to meet the new conditions that natural progress brings to the world. It might be argued that this requires a certain amount of retroactive application of new rules and that by conceding the existence of a customary International Law, one thereby concedes the legality of retroactive pronouncements. To a limited extent the argument is sound, but when it comes in conflict with a rule of fundamental right and justice, the latter must prevail. The rule that one may not be charged with crime for committing an act which was not a crime at the time of its commission is such a right. The fact that it might be found in a constitution or bill of rights does not detract from its status as a fundamental principle of justice. It cannot properly be changed by retroactive action to the prejudice of one charged with a violation of the laws of war.

"An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen.

"Some war crimes, such as spying, are not common law crimes at all; they being pure war crimes punishable as such during the war and, in this particular case, only if the offender is captured before he rejoins his army. But some other crimes, such as mass murder, are punishable during and after the war. But such crimes are also war crimes because they were committed under the authority or orders of the belligerent who, in ordering or permitting them, violated the rules of warfare. Such crimes are punishable by the country where the crime was committed or by the belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent. There are many reasons why this must be so, not the least of which is that war is usually followed by political repercussions and upheavals which at

times place persons in power who are not, for one reason or another, inclined to punish the offenders. The captor belligerent is not required to surrender the alleged war criminal when such surrender is equivalent to a passport to freedom. The only adequate remedy is the concurrent jurisdictional principle to which we have heretofore adverted. The captor belligerent may therefore surrender the alleged criminal to the state where the offense was committed, or, on the other hand, it may retain the alleged criminal for trial under its own legal processes.

"It cannot be doubted that the occupying powers have the right to set up special courts to try those charged with the commission of War Crimes as they are defined by International Law. *Ex Parte Quirin*, 317 U.S. 1, *in re Yamashita*, 327 U.S. 1. Nor can it be said that the crimes herein charged are invalid as retroactive pronouncements—they being nothing more than restatements of the conventional and customary law of nations governing the rules of land warfare, restricted by charter provisions limiting the jurisdiction of the Tribunal by designating the class of cases it is authorised to hear. The elements of an *ex post facto* act or a retroactive pronouncement are not present in so far as the crimes charged in the instant case are concerned."

The Tribunal then proceeded to reject a defence argument that the former had no jurisdiction to hear the case which could "only be properly tried in accordance with the international principles laid down in Article 63 of the Geneva Convention of 1929 relative to the treatment of prisoners of war." It was pointed out that the Convention "applies only to crimes and offences committed while occupying the status of a prisoner of war and confers no jurisdiction over a violation of International Law committed prior to the time of becoming such," and the opinion of the United States Supreme Court in the *Yamashita Trial* was cited in support of this ruling.⁽¹⁾

(iv) *The Status of Yugoslavia, Greece and Norway, and of the Partisan Groups Operating Therein, at the Relevant Time*

The Judgment continued:

"It is essential to a proper understanding of the issues involved in the present case, that the status of Yugoslavia, Greece and Norway be determined during the periods that the alleged criminal acts of these defendants were committed. The question of criminality in many cases may well hinge on whether an invasion was in progress or an occupation accomplished. Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organised resistance and the

⁽¹⁾ See Vol. IV of this series, p. 78.

establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.

" The evidence shows that the invasion of Yugoslavia was commenced on 6th April, 1941. Nine days later the Yugoslav government capitulated and on 16th April, 1941, large scale military operations had come to an end. The powers of government passed into the hands of the German Armed Forces and Yugoslavia became an occupied country. The invasion of Yugoslavia followed through into Greece. On 22nd April, 1941, the Greek Armed Forces in the north were forced to surrender, and on 28th April, 1941, Athens fell to the invader. On and after that date Greece became an occupied country within the meaning of existing International Law.

" The evidence shows that the population remained peaceful during the spring of 1941. In the early summer following, a resistance movement began to manifest itself. It increased progressively in intensity until it assumed the appearance of a military campaign. Partisan bands, composed of members of the population, roamed the territory, doing much damage to transportation and communication lines. German soldiers were the victims of surprise attacks by an enemy which they could not engage in open combat. After a surprise attack, the bands would hastily retreat or conceal their arms and mingle with the population with the appearance of being harmless members thereof. Ambushing of German troops was a common practice. Captured German soldiers were often tortured and killed. The terrain was favourable to this type of warfare and the inhabitants most adept in carrying it on.

" It is clear that the German Armed Forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant.

" These findings are consistent with Article 42 of the Hague Regulations of 1907 which provide: ' Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'

" It is the contention of the defendants that after the respective capitulations a lawful belligerency never did exist in Yugoslavia or Greece during the period here involved. The Prosecution contends just as emphatically that it did. The evidence on the subject is fragmentary and consists primarily of admissions contained in the reports, orders, and diaries of the German Army units involved. There is convincing evidence in the record that certain band units in both Yugo-

slavia and Greece complied with the requirements of International Law entitling them to the status of a lawful belligerent. But the greater portion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent. The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents.

" The evidence shows that the bands were sometimes designated as units common to military organization. They, however, had no common uniform. They generally wore civilian clothes although parts of German, Italian and Serbian uniforms were used to the extent they could be obtained. The Soviet Star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. There is some evidence that various groups of the resistance forces were commanded by a centralised command, such as the partisans of Marshal Tito, the Chetniks of Draja Mihailovitch and the Edes of General Zervas. It is evidence also that a few partisan bands met the requirements of lawful belligerency. The bands, however, with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs.

" The status of an occupant of the territory of the enemy having been achieved, International Law places the responsibility upon the commanding general of preserving order, punishing crime and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsibility. But he is definitely limited by recognised rules of International Law, particularly the Hague Regulations of 1907. Article 43 thereof imposes a duty upon the occupant to respect the laws in force in the country. Article 46 protects family honour and rights, the lives of individuals and their private property as well as their religious convictions and the right of public worship. Article 47 prohibits pillage. Article 50 prohibits collective penalties. Article 51 regulates the appropriation of properties belonging to the state or private individuals which may be useful in military operations. There are other restrictive provisions not necessary to mention here. It is the alleged violation of these rights of the inhabitants thus protected that furnish the basis of the case against the defendants.

" The evidence is clear that during the period of occupation in Yugoslavia and Greece, guerrilla warfare was carried on against the occupying power. Guerrilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities

by harassing the enemy with unorganised forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured, may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applies to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured. The rule is based on the theory that the forces of two states are no longer in the field and that a contention between organised armed forces no longer exists. This implies that a resistance not supported by an organised government is criminal and deprives participants of belligerent status, an implication not justified since the adoption of Chapter I, Article 1, of the Hague Regulations of 1907. 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.

"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 under the laws of war. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.

"It is contended by the prosecution that the so-called guerrillas were in fact irregular troops. A preliminary discussion of the subject is essential to a proper determination of the applicable law. Members of militia or a volunteer corps, even though they are not a part of the regular army, are lawful combatants if (a) they are commanded by a responsible person, (b) if they possess some distinctive insignia which can be observed at a distance, (c) if they carry arms openly, and (d) if they observe the laws and customs of war. See Chapter I, Article I, Hague Regulations of 1907. In considering the evidence adduced on

this subject, the foregoing rules will be applied. The question whether a captured fighter is a guerrilla or an irregular is sometimes a close one that can be determined only by a careful evaluation of the evidence before the Court.

"The question of the right of the population of an invaded and occupied country to resist has been the subject of many conventional debates. (Brussels Conference of 1874; Hague Peace Conference of 1899). A review of the positions assumed by the various nations can serve no useful purpose here for the simple reason that a compromise (Hague Regulations, 1907) was reached which has remained the controlling authority in the fixing of a legal belligerency. If the requirements of the Hague Regulation, 1907, are met, a lawful belligerency exists; if they are not met, it is an unlawful one."

(v) *The Irrelevance to the Present Discussion of the Illegality of Aggressive War*

The Judgment states :

"The Prosecution advances the contention that since Germany's wars against Yugoslavia and Greece were aggressive wars, the German occupation troops were there unlawfully and gained no rights whatever as an occupant. It is further asserted as a corollary, that the duties owed by the populace to an occupying power which are normally imposed under the rules of International Law, never became effective in the present case because of the criminal character of the invasion and occupation.

"For the purposes of this discussion, we accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against person or property is a crime or that any and every act undertaken by the population of the occupied country against the German occupation forces thereby became legitimate defence. The Prosecution attempts to simplify the issue by posing it in the following words : 'The sole issue here is whether German forces can with impunity violate law by initiating and waging wars of aggression and at the same time demand meticulous observance by the victims of these crimes of duties and obligations owed only to a lawful occupant.'

"At the outset, we desire to point out 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 this subject.

"It must not be overlooked that International Law is prohibitive law. Where the nations have affirmatively acted, as in the case of the Hague Regulations, 1907, it prohibits conduct contradictory thereto. Its

specific provisions control over general theories, however reasonable they may seem. We concur in the views expressed in the following text on the subject: "Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral States. This is so, even if the declaration of war is *ipso facto* a violation of International Law, as when a belligerent declares war upon a neutral State for refusing passage to its troops, or when a State goes to war in patent violation of its obligations under the Covenant of the League or of the General Treaty for the Renunciation of War. To say that, because such a declaration of war is *ipso facto* a violation of International Law, it is 'inoperative in law and without any judicial significance,' is erroneous. The rules of International Law apply to war *from whatever cause it originates*. Oppenheim's *International Law*, II Lauterpacht, p. 174."

(vi) *The Question of Hostages and Reprisals raised by the Tribunal and its Field of Enquiry Delimited*

The Judgment continued:

"The major issues involved in the present case gravitate around the claimed right of the German Armed Forces to take hostages from the innocent civilian population to guarantee the peaceful conduct of the whole of the civilian population and its claimed right to execute hostages, members of the civil population, and captured members of the resistance forces in reprisal for armed attacks by resistance forces, acts of sabotage and injuries committed by unknown persons."

The Tribunal delimited its field of enquiry as follows:

"We wholly exclude from the following discussions of the subject of hostages the right of one nation to take them, to compel the armed forces of another nation to comply with the rules of war or the right to execute them if the enemy ignores the warning. We limit our discussion to the right to take hostages from the innocent civilian population of occupied territory as a guarantee against attacks by unlawful resistance forces, acts of sabotage and the unlawful acts of unknown persons and the further right to execute them if the unilateral guarantee is violated."

"Neither the Hague Convention of 1907, nor any other conventional law for that matter, says a word about hostages in the sense that we are to use the term in the following discussion. But certain rules of customary law and certain inferences legitimately to be drawn from existing conventional law lay down the rules applicable to the subject of hostages. In former times prominent persons were accepted as hostages as a means of insuring observance of treaties, armistices and other agreements, the performance of which depended on good faith. This practice is now obsolete. Hostages under the alleged modern practice of nations are taken (a) to protect individuals held by the enemy, (b) to force the payment of requisitions, contributions, and the

like, and (c) to insure against unlawful acts by enemy forces or people. We are concerned here only with the last provision. That hostages may be taken for this purpose cannot be denied.

"The question of hostages is closely integrated with that of reprisals. A reprisal is a response to an enemy's violation of the laws of war which would otherwise be a violation on one's own side. It is a fundamental rule that a reprisal may not exceed the degree of the criminal act it is designed to correct. Where an excess is knowingly indulged, it in turn is criminal and may be punished. Where innocent individuals are seized and punished for a violation of the laws of war which has already occurred, no question of hostages is involved. It is nothing more than the infliction of a reprisal. Throughout the evidence in the present case, we find the term hostage applied where a reprisal only was involved."

"Under the ancient practice of taking hostages they were held responsible for the good faith of the persons who delivered them, even at the price of their lives. This barbarous practice was wholly abandoned by a more enlightened civilization. The idea that an innocent person may be killed for the criminal act of another is abhorrent to every natural law. We condemn the injustice of any such rule as a barbarous relic of ancient times. But it is not our province to write International Law as we would have it—we must apply it as we find it."

"For the purposes of this opinion the term 'hostages' will be considered as those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken. The term 'reprisal prisoners' will be considered as those individuals who are taken from the civilian population to be killed in retaliation for offences committed by unknown persons within the occupied area."

(vii) *The Tribunal's Opinion on the Question of Hostages*

The Judgment then expressed the following opinion:

"An examination of the available evidence on the subject convinces us that hostages may be taken in order to guarantee the peaceful conduct of the populations of occupied territories and, when certain conditions exist and the necessary preliminaries have been taken, they may, as a last resort, be shot. The taking of hostages is based fundamentally on a theory of collective responsibility. The effect of an occupation is to confer upon the invading force the right of control for the period of the occupation within the limitations and prohibitions of International Law. The inhabitants owe a duty to carry on their ordinary peaceful pursuits and to refrain from all injurious acts toward the troops or in respect to their military operations. The occupant may properly insist upon compliance with regulations necessary to the security of the occupying forces and for the maintenance of law and order. In the accomplishment of this objective, the occupant may, only as a last resort, take and execute hostages."

"Hostages may not be taken or executed as a matter of military expediency. The occupant is required to use every available method

to secure order and tranquility before resort may be had to the taking and execution of hostages. Regulations of all kinds must be imposed to secure peace and tranquility before the shooting of hostages may be indulged. These regulations may include one or more of the following measures: (1) the registration of the inhabitants, (2) the possession of passes or identification certificates, (3) the establishment of restricted areas, (4) limitations of movement, (5) the adoption of curfew regulations, (6) the prohibition of assembly, (7) the detention of suspected persons, (8) restrictions on communication, (9) the imposition of restrictions on food supplies, (10) the evacuation of troublesome areas, (11) the levying of monetary contributions, (12) compulsory labour to repair damage from sabotage, (13) the destruction of property in proximity to the place of the crime, and any other regulation not prohibited by International Law that would in all likelihood contribute to the desired result.

"If attacks upon troops and military installations occur regardless of the foregoing precautionary measures and the perpetrators cannot be apprehended, hostages may be taken from the population to deter similar acts in the future provided it can be shown that the population generally is a party to the offence, either actively or passively. Nationality or geographic proximity may under certain circumstances afford a basis for hostage selection, depending upon the circumstances of the situation. This arbitrary basis of selection may be deplored but it cannot be condemned as a violation of International Law, but there must be some connection between the population from whom the hostages are taken and the crime committed. If the act was committed by isolated persons or bands from distant localities without the knowledge or approval of the population or public authorities, and which, therefore, neither the authorities nor the population could have prevented, the basis for the taking of hostages, or the shooting of hostages already taken, does not exist.

"It is essential to a lawful taking of hostages under customary law that proclamation be made, giving the names and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason that the hostages will be shot. The number of hostages shot must not exceed in severity the offences the shooting is designed to deter. Unless the foregoing requirements are met, the shooting of hostages is in contravention of International Law and is a war crime in itself. Whether such fundamental requirements have been met is a question determinable by court martial proceedings. A military commander may not arbitrarily determine such facts. An order of a military commander for the killing of hostages must be bottomed upon the finding of a competent court martial that necessary conditions exist and all preliminary steps have been taken which are essential to the issuance of a valid order. The taking of the lives of innocent persons arrested as hostages is a very serious step. The right to kill hostages may be lawfully exercised only after a meticulous compliance with the foregoing safeguards against vindictive or whimsical orders of military commanders."

(viii) *The Tribunal's Opinion Regarding the Taking and Killing of "Reprisal Prisoners"*

The Tribunal continued as follows:

"We are also concerned with the subject of reprisals and the detention of members of the civilian population for the purpose of using them as the victims of subsequent reprisal measures. The most common reason for holding them is for the general purpose of securing the good behaviour and obedience of the civil population in occupied territory. The taking of reprisals against the civilian population by killing members thereof in retaliation for hostile acts against the armed forces or military operations of the occupant seems to have been originated by Germany in modern times. It has been invoked by Germany in the Franco-Prussian War, World War I and in World War II. No other nation has resorted to the killing of members of the civilian population to secure peace and order in so far as our investigation has revealed. The evidence offered in this case on that point will be considered later in the opinion. While American, British and French manuals for armies in the field seem to permit the taking of such reprisals as a last resort, the provisions do not appear to have been given effect. The American manual provides in part: 'The offending forces or populations generally may lawfully be subjected to appropriate reprisals. Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed.' FM 27-10, *Rules of Land Warfare*, 1940, Sec. 358d. The British field manual provides in part: 'Although collective punishment of the population is forbidden for the acts of individuals for which it cannot be regarded as collectively responsible, it may be necessary to resort to reprisals against a locality or community,⁽¹⁾ or members who cannot be identified.' British Military Hand Book, Article 458.

"In two major wars within the last thirty years, Germany has made extensive use of the practice of killing innocent members of the population as a deterrent to attacks upon its troops and acts of sabotage against installations essential to its military operations. The right to so do has been recognised by many nations including the United States, Great Britain, France and the Soviet Union. There has been complete failure on the part of the nations of the world to limit or mitigate the practice by conventional rule. This requires us to apply customary law. That international agreement is badly needed in this field is self-evident.

"International law is prohibitive law and no conventional prohibitions have been invoked to outlaw this barbarous practice. The extent to which the practice has been employed by the Germans exceeds the most elementary notions of humanity and justice. They invoke the plea of military necessity, a term which they confuse with convenience and strategical interests. Where legality and expediency

⁽¹⁾ The words "for some act committed by its inhabitants" which here appear in the text of para. 458 of Chapter XIV of the British *Manual of Military Law*, should be inserted in the above quotation.

have coincided, no fault can be found in so far as International Law is concerned. But where legality of action is absent, the shooting of innocent members of the population as a measure of reprisal is not only criminal but it has the effect of destroying the basic relationship between the occupant and the population. Such a condition can progressively degenerate into a reign of terror. Unlawful reprisals may bring on counter reprisals and create an endless cycle productive of chaos and crime. To prevent a distortion of the right into a barbarous method of repression, International Law provides a protective mantle against the abuse of the right.

" Generally it can be said that the taking of reprisal prisoners, as well as the taking of hostages, for the purpose of controlling the population involves a previous proclamation that if a certain type of act is committed, a certain number of reprisal prisoners will be shot if the perpetrators cannot be found. If the perpetrators are apprehended, there is no right to kill either hostages or reprisal prisoners.

" As in the case of the taking of hostages, reprisal prisoners may not be shot unless it can be shown that the population, as a whole is a party to the offence, either actively or passively. In other words, members of the population of one community cannot properly be shot in reprisal for an act against the occupation forces committed at some other place. To permit such a practice would conflict with the basic theory that sustains the practice in that there would be no deterrent effect upon the community where the offence was committed. Neither may the shooting of innocent members of the population as a reprisal measure exceed in severity the unlawful acts it is designed to correct. Excessive reprisals are in themselves criminal and guilt attaches to the persons responsible for their commission.

" It is a fundamental rule of justice that the lives of persons may not be arbitrarily taken. A fair trial before a judicial body affords the surest protection against arbitrary, vindictive or whimsical application of the right to shoot human beings in reprisal. It is a rule of International Law, based on these fundamental concepts of justice and the rights of individuals, that the lives of persons may not be taken in reprisal in the absence of a judicial finding that the necessary conditions exist and the essential steps have been taken to give validity to such action. The possibility is great, of course, that such judicial proceedings may become ritualistic and superficial when conducted in wartime but it appears to be the best available safeguard against cruelty and injustice. Judicial responsibility ordinarily restrains impetuous action and permits principles of justice and right to assert their humanitarian qualities. We have no hesitancy in holding that the killing of members of the population in reprisal without judicial sanction is itself unlawful. The only exception to this rule is where it appears that the necessity for the reprisal requires immediate reprisal action to accomplish the desired purpose and which would be otherwise defeated by the invocation of judicial inquiry. Unless the necessity for immediate action is affirmatively shown, the execution of hostages or reprisal prisoners

without a judicial hearing is unlawful. The judicial proceeding not only affords a measure of protection to innocent members of the population, but it offers, if fairly and impartially conducted, a measure of protection to the military commander, charged with making the final decision.

" It cannot be denied that the shooting of hostages or reprisal prisoners may under certain circumstances be justified as a last resort in procuring peace and tranquility in occupied territory and has the effect of strengthening the position of a law abiding occupant. The fact that the practice has been tortured beyond recognition by illegal and inhuman application cannot justify its prohibition by judicial fiat."

The following remarks on the Keitel Order of 16th September, 1941,⁽¹⁾ and its outcome will serve to illustrate the attitude taken by the Tribunal to the specific instances of reprisals which came before it:

" It is urged that the order was worded in such a way that literal compliance was not required. We do not deem it material whether the order was mandatory or directory. In either event, it authorised the killing of hostages and reprisal prisoners to an extent not permitted by International Law. An order to take reprisals at an arbitrarily fixed ratio under any and all circumstances constitutes a violation of International Law. Such an order appears to have been made more for purposes of revenge than as a deterrent to future illegal acts which would vary in degree in each particular instance. An order, directory or mandatory, which fixes a ratio for the killing of hostages or reprisal prisoners, or requires the killing of hostages or reprisal prisoners for every act committed against the occupation forces is unlawful. International Law places no such unrestrained and unlimited power in the hands of the commanding general of occupied territory. The reprisals taken under the authority of this order were clearly excessive. The shooting of 100 innocent persons for each German soldier killed at Topola, for instance, cannot be justified on any theory by the record. There is no evidence that the population of Topola were in any manner responsible for the act. In fact, the record shows that the responsible persons were an armed and officered band of partisans. There is nothing to infer that the population of Topola supported or shielded the guilty persons. Neither does the record show that the population had previously conducted themselves in such a manner as to have been subjected to previous reprisal actions. An order to shoot 100 persons for each German soldier killed under such circumstances is not only excessive but wholly unwarranted. We conclude that the reprisal measure taken for the ambushing and killing of 22 German soldiers at Topola were excessive and therefore criminal. It is urged that only 449 persons were actually shot in reprisal for the Topola incident. The evidence does not conclusively establish the shooting of more than 449 persons although it indicates the killing of a much greater number. But the killing of 20 reprisal prisoners for each German soldier killed was not warranted under the circumstances

⁽¹⁾ See p. 39.

shown. Whether the number of innocent persons killed was 2,200 or 449, the killing was wholly unjustified and unlawful.

"The reprisal measures taken for the Topola incident were unlawful for another reason. The reprisal prisoners killed were not taken from the community where the attack on the German soldiers occurred. The record shows that 805 Jews and Gypsies were taken from the collection camp at Sabac and the rest from the Jewish transit camp at Belgrade to be shot in reprisal for the Topola incident. There is no evidence of any connection whatever, geographical, racial or otherwise, between the persons shot and the attack at Topola. Nor does the record disclose that judicial proceedings were held. The order for the killing in reprisal appears to have been arbitrarily issued and under the circumstances shown is nothing less than plain murder."

(ix) *The Plea of Military Necessity*

The Judgment dealt with this plea as follows:

"Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of International Law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication or any other property that might be utilised by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit of wanton devastation of a district or the wilful infliction of suffering upon its inhabitants for the sake of suffering alone. . . .

"It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification of their acts. We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules. International Law is prohibitive law. Articles 46, 47 and 50 of the Hague Regulations of 1907 make no such exceptions to its enforcement. The rights of the innocent population therein set forth

must be respected even if military necessity or expediency decree otherwise."

At a later point, in a section of its Judgment dealing with the individual accused, the Tribunal made the following remarks regarding List:

"The record shows that after the capitulation of Yugoslavia and Greece, the defendant List remained as the commanding general of the occupied territory. As the resistance movement developed, it became more and more apparent that the occupying forces were insufficient to deal with it. Repeated appeals to the High Command of the Armed Forces for additional forces were refused with the demand for a pacification of the occupied territory by more draconic measures. These orders were protested by List without avail. He contends that although such orders were in all respects lawful, he protested from a humanitarian viewpoint. It is quite evident that the High Command insisted upon a campaign of intimidation and terrorism as a substitute for additional troops. Here again the German theory of expediency and military necessity (*Kriegsraison geht vor Kriegsmanier*) superseded established rules of International Law. As we have previously stated in this opinion, the rules of International Law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation. What then was the duty of the Armed Forces Commander South-east? We think his duty was plain. He was authorised to pacify the country with military force; he was entitled to punish those who attacked his troops or sabotaged his transportation and communication lines as *francs tireurs*; he was entitled to take precautions against those suspected of participation in the resistance movement, such as registration, limitations of movement, curfew regulations, and other measures hereinbefore set forth in this opinion. As a last resort, hostages and reprisal prisoners may be shot in accordance with international custom and practice. If adequate troops were not available or if the lawful measures against the population failed in their purpose, the occupant could limit its operations or withdraw from the country in whole or in part, but no right existed to pursue a policy in violation of International Law."

Of the accused Rendulic, however, it was said:

"The defendant is charged with the wanton destruction of private and public property in the province of Finnmark, Norway, during the retreat of the XXth Mountain Army commanded by him. The defendant contends that military necessity required that he do as he did in view of the military situation as it then appeared to him.

"The evidence shows that in the spring of 1944, Finland had attempted to negotiate a peace treaty with Russia without success. This furnished a warning to Germany that Finland might at any time remove itself as an ally of the Germans. In June, 1944, the Russians commenced an offensive on the southern Finnish frontier that produced a number of successes and depressed Finnish morale. On 24th June, 1944, the defendant Rendulic was appointed commander-in-chief of the XXth Mountain Army in Lapland. This army was committed from the Arctic Ocean south to the middle of Finland along its eastern

frontier. Two army corps were stationed in central Finland and one on the coast of the Arctic Ocean. The two groups were separated by 400 kilometres of terrain that was impassable for all practicable purposes.

" On 3rd September, 1944, Finland negotiated a separate peace with Russia and demanded that the German troops withdrew from Finland within fourteen days, a demand with which it was impossible to comply. The result was that the two army corps to the south were obliged to fight their way out of Finland. This took three months' time. The distance to the Norwegian border required about 1,000 kilometers of travel over very poor roads at a very inopportune time of year. The Russians attacked almost immediately and caused the Germans much trouble in extricating these troops. The XIXth Corps located on the Arctic coast was also attacked in its position about 150 kilometres east of Kirkenes, Norway. The retreat into Norway was successful in that all three army corps with their transport and equipment arrived there as planned. The difficulties were increased in middle October when the four best mountain divisions were recalled to Germany, thereby reducing the strength of the army by approximately one-half.

" The evidence shows that the Russians had very excellent troops in pursuit of the Germans. Two or three land routes were open to them as well as landings by sea behind the German lines. The defendant knew that ships were available to the Russians to make these landings and that the land routes were available to them. The information obtained concerning the intentions of the Russians was limited. The extreme cold and the short days made air reconnaissance almost impossible. It was with this situation confronting him that he carried out the 'scorched earth' policy in the Norwegian province of Finnmark which provided the basis for this charge of the indictment.

" The record shows that the Germans removed the population from Finnmark, at least all except those who evaded the measures taken for their evacuation. The evidence does not indicate any loss of life directly due to the evacuation. Villages were destroyed. Isolated habitations met a similar fate. Bridges and highways were blasted. Communication lines were destroyed. Port installations were wrecked. A complete destruction of all housing, communication and transport facilities was had. This was not only true along the coast and highways, but in the interior sections as well. The destruction was as complete as an efficient army could do it. Three years after the completion of the operation, the extent of the devastation was discernible to the eye. While the Russians did not follow up the retreat to the extent anticipated, there are physical evidences that they were expected to do so. Gun emplacements, fox-holes, and other defence installations are still perceptible in the territory. In other words there are mute evidences that an attack was anticipated.

" There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it

cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist.

" The Hague 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.' Article 23 (g). The Hague Regulations are mandatory provisions of International Law. The prohibitions therein contained control and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destructions 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 exceptions contained in Article 23 (g). We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finnmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered with his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision to carry out the 'scorched earth' policy in Finnmark as a precautionary measure against an attack by superior forces. It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act. We find the defendant not guilty on this portion of the charge."

(x) *The Extent of Responsibility of the Commanding General of Occupied Territory*

On this point the Tribunal expressed its opinion in these words:

" We have hereinbefore pointed out that it is the duty of the commanding general in occupied territory to maintain peace and order, punish crime and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territory having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent or approval of these defendants. But this cannot be a defence for the commanding general of occupied territory. The duty and

responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence. The fact is that the reports of subordinate units almost without exception advised these defendants of the policy of terrorism and intimidation being carried out by units in the field. They requisitioned food supplies in excess of their local need and caused it to be shipped to Germany in direct violation of the laws of war. Innocent people were lodged in collection and concentration camps where they were mistreated to the everlasting shame of the German nation. Innocent inhabitants were forcibly taken to Germany and other points for use as slave labour. Jews, Gypsies and other racial groups were the victims of systematised murder or deportation for slave labour for no other reason than their race or religion, which is in violation of the express conventional rules of the Hague Regulations of 1907. The German theory that fear of reprisal is the only deterrent in the enforcement of the laws of war cannot be accepted here. That reprisals may be indulged to compel an enemy nation to comply with the rules of war must be conceded.

"It is not, however, an exclusive remedy. If it were, the persons responsible would seldom, if ever, be brought to account. The only punishment would fall upon the reprisal victims who are usually innocent of wrong-doing. The prohibitions of the Hague Regulations of 1907 contemplate no such system of retribution. Those responsible for such crimes by ordering or authorising their commission, or by a failure to take effective steps to prevent their execution or recurrence, must be held to account if International Law is to be anything more than an ethical code, barren of any practical coercive deterrent."

A little later, the Tribunal made the following ruling:

"An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit.⁽¹⁾ Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during war time. No doubt such occurrences result occasionally because of unexpected contingencies, but they are the unusual. With reference to statements that responsibility is lacking where temporary absence from headquarters for any cause is shown, the general rule to be applied is dual in character. As to events occurring in his absence resulting from orders, directions or a general prescribed policy formulated by him, a military commander will be held responsible in the absence of special circumstances. As to events, emergent in nature and presenting matters for original decision, such commander will not

⁽¹⁾ Of the accused Kuntze, the Tribunal later ruled that: "The collection of Jews and Gypsies in collection or concentration camps merely because they are such, is likewise criminal. The defendant claimed that he never heard of any such action against Jews or Gypsies in the Southeast. The reports in the record which were sent to him in his capacity as Wehrmacht Commander Southeast, charge him with knowledge of these acts. He cannot close his eyes to what is going on around him and claim immunity from punishment because he did not know that which he is obliged to know."

ordinarily be held responsible unless he approved of the action taken when it came to his knowledge.

"The matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime and protecting lives and property, subordinations are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. Subordinate commanders in occupied territory are similarly responsible to the extent that executive authority has been delegated to them."

Elsewhere the Judgment laid down that a commanding general "is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence. Absence from headquarters cannot and does not relieve one from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced. He may not, of course, be charged with acts committed on the order of someone else which is outside the basic orders which he has issued. If time permits he is required to rescind such illegal orders, otherwise he is required to take steps to prevent a recurrence of their issue.

"Want of knowledge of the contents of reports made to him is not a defence. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.

"The reports made to the defendant List as Wehrmacht Commander Southeast charge him with notice of the unlawful killing of thousands of innocent people in reprisal for acts of unknown members of the population who were not lawfully subject to such punishment. Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence, constitutes a serious breach of duty and imposes criminal responsibility."

(xi) *The Legal Position of Italian Troops who Resisted German Demands for Surrender*

In the course of its judgment, the Tribunal discussed the position of the Italian officers who were executed after resisting the Germans at Split.⁽¹⁾

"It is the contention of the defendant Rendulic that the surrender of the IXth Italian Army, commanded by General D'Almazzo, brought

⁽¹⁾ See p. 45.

about *ipso facto* the surrender of the Bergamo Division in Split and that elements of this division by continuing to resist the German troops became *francs tireurs* and thereby subject to the death penalty upon capture. An analysis of the situation is required for clarification. . . .

" It must be observed that Italy was not at war with Germany, at least in so far as the Italian commanders were informed, and that the Germans were the aggressors in seeking the disarmament and surrender of the Italian forces. The Italian forces which continued to resist met all the requirements of the Hague Regulations as to belligerent status. They were not *francs tireurs* in any sense of the word. Assuming the correctness of the position taken by the defendant that they became prisoners of war of the Germans upon the signing of the surrender terms, then the terms of the Geneva Convention of 1929, regulating the treatment of prisoners of war were violated. No representative neutral power was notified nor was a three months period allowed to elapse before the execution of the death sentences. Other provisions of the Geneva Convention were also violated. The coercion employed in securing the surrender, the unsettled status of the Italians after their unconditional surrender to the Allied forces and the lack of a declaration of war by Germany upon Italy creates grave doubts whether the members of the Bergamo Division became prisoners of war by virtue of the surrender negotiated by General D'Almazzo. Adopting either view advanced by the Defence, the execution of the Italian officers of the Bergamo Division was unlawful and wholly unjustified. It represents another instance of the German practice of killing as the exclusive remedy or redress for alleged wrongs. The execution of these Italian officers after the tense military situation had righted itself and the danger had passed cannot be described as anything but an act of vengeance."

(xii) *The Legal Status of the "Croatian Government."*

In dealing with the case against the accused von Leyser, formerly commander of the XXIst German Mountain Corps,⁽¹⁾ the Tribunal made the following remarks concerning the so-called independent state of Croatia:

" The reprisal practice as carried out in this corps area and the alleged deportation of inhabitants for slave labour is so interwoven with the powers of the alleged independent state of Croatia that its status and relationship to the German Armed Forces must be examined. Prior to the invasion of Yugoslavia by Germany on 6th April, 1941, Croatia was a part of the sovereign state of Yugoslavia and recognised as such by the nations of the world. Immediately after the occupation and on 10th April, 1941, Croatia was proclaimed an independent state and formally recognised as such by Germany on 15th April, 1941. In setting up the Croatian government, the Germans, instead of employing the services of the Farmers' Party, which was predominant in the country, established an administration with Dr. Ante Pavelitch at its head. Dr. Pavelitch was brought in from Italy along with others

⁽¹⁾ See p. 46.

of his group and established as the governmental head of the state of Croatia even though his group represented only an estimated five per cent of the population of the country. This government, on 15th June, 1941, joined the Three Power Pact and, on 25th November, 1941, joined the Anti-Comintern Pact. On 2nd July, 1941, Croatia entered the war actively against the Soviet Union and on 14th December, 1941, against the Allies. The Military Attaché became the German Plenipotentiary General in Croatia and was subordinated as such to the Chief of the High Command of the Armed Forces. The territorial boundaries of the new Croatia were arbitrarily established and included areas that were occupied by Serbians who were confirmed enemies of the Croats.

" The Croatian government, thus established, proceeded to organise a national army, the troops of which are referred to in the record as Domobrans. Certain Ustasha units were also trained and used. The Ustasha in Croatia was a political party similar to the Nazi party of Germany. Similar to the Waffen SS Divisions of the general Ustasha were trained and used. In addition, by an alleged agreement between Germany and Croatia, the Croatian government conscripted men from its population for compulsory labour and military service. Many of these men were used in German organised Croat Divisions and became a part of the Wehrmacht under the command of German officers.

" It is further shown by the evidence that all matters of liaison were handled through the German Plenipotentiary General. It is evident that requests of the Germans were invariably acceded to by the Croatian government. It is quite evident that the answers to such requests were dictated by the German Plenipotentiary General. Whatever the form or the name given, the Croatian government during the German war-time occupation was a satellite under the control of the occupying power. It dissolved as quickly after the withdrawal of the Germans as it had arisen upon their occupation. Under such circumstances, the acts of the Croatian government were the acts of the occupation power. Logic and reason dictate that the occupant could not lawfully do indirectly that which it could not do directly. The true facts must control irrespective of the form with which they may have been camouflaged. Even International Law will cut through form to find the facts to which its rules will be applied. The conclusion reached is in accord with previous pronouncements of International Law that an occupying power is not the sovereign power although it is entitled to perform some acts of sovereignty. The Croatian government could exist only at the sufferance of the occupant. During the occupation, the German Military Government was supreme or its status as a military occupant of a belligerent enemy nation did not exist. Other than the rights of occupation conferred by International Law, no lawful authority could be exercised by the Germans. Hence, they had no legal right to create an independent sovereign state during the progress of the war. They could set up such a provisional government as was necessary to accomplish the purposes of the occupation but further than that they could not legally go. We are of the view that Croatia was at all times here

involved an occupied country and that all the acts performed by it were those for which the occupying power was responsible.⁽¹⁾

Of the accused's claim that the disposition of the men captured as a result of "Operation Panther"⁽²⁾ was a matter for the "Croatian Government and not his concern," the Tribunal ruled as follows:

"We point out that the Croatian government was a satellite government and whatever was done by them was done for the Germans. The captured men fit for military service were turned over to the Croat administration and were undoubtedly conscripted into the Domobrans, the Waffen Ustasha, the Croat units of the Wehrmacht or shipped to Germany for compulsory labour just as the defendant well knew that they would be. The occupation forces have no authority to conscript military forces from the inhabitants of occupied territory. They cannot do it directly, nor can they do it indirectly. When the defendant as commanding general of the corps area participated in such an activity, he did so in violation of International Law. The result is identical if these captured inhabitants were sent to Germany for compulsory labour service. Such action is also plainly prohibited by International Law as the evidence shows. See Articles 6, 23, 46, Hague Regulations. We find the defendant von Leyser guilty on this charge."⁽³⁾

(xiii) *General Remarks on the Mitigation of Punishment*

Towards the end of its Judgment, the Tribunal made the following remark regarding the circumstances which might be considered in mitigation of punishment:

"Throughout the course of this opinion we have had occasion to refer to matters properly to be considered in mitigation of punishment. The degree of mitigation depends upon many factors including the nature of the crime, the age and experience of the person to whom it applies, the motives for the criminal act, the circumstances under which the crime was committed and the provocation, if any, that contributed to its commission. It must be observed, however, 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."

In dealing with the evidence against Dehner, the Tribunal said:

"There is much that can be said, however, in mitigation of the punishment to be assessed from the standpoint of the defendant. Superior orders existed which directed the policy to be pursued in dealing with the killing of hostages and reprisal prisoners. Such

⁽¹⁾ Compare a similar attitude adopted by the Tribunal which conducted the *Milch Trial*, towards the Vichy Government. See Vol. VII, pp. 38 and 46.

⁽²⁾ See p. 46.

⁽³⁾ The charge referred to was defined by the Tribunal as "pertaining to the evacuation of large areas within the corps command for the purpose of conscripting the physically fit into the Croatian military units and of conscripting others for compulsory labour service."

superior orders were known by his subordinate commanders, a situation that made it difficult for him to act. That the defendant recognised certain injustices and irregularities and attempted to correct them is evident from the record. . . . Such examples of conscientious efforts to comply with correct procedure warrant mitigation of the punishment."⁽¹⁾

4. THE FINDINGS OF THE TRIBUNAL

During the course of its Judgment, the Tribunal found the accused not guilty of certain of the allegations made against them:

"Much has been said about the participation of these defendants in a preconceived plan to decimate and destroy the populations of Yugoslavia and Greece. The evidence will not sustain such a charge and we so find. The only plan demonstrated by the evidence is one to suppress the bands by the use of severe and harsh measures. While these measures progressively increased as the situation became more chaotic, and appeared to have taken a more or less common course, we cannot say that there is any convincing evidence that these defendants participated in such measures for the preconceived purpose of exterminating the population generally.

"Neither will the evidence sustain a finding that these defendants participated in a preconceived plan to destroy the economy of the Balkans. Naturally there was a disruption of the economy of these countries but such only as could be expected by a military occupation. There were unlawful acts that had the effect of damaging the economy of Yugoslavia and Greece, possibly the result of a preconceived plan, but the evidence does not show the participation of these defendants therein."

Of List the Tribunal said: "The evidence shows that after the capitulation of the armies of Yugoslavia and Greece, both countries were occupied within the meaning of International Law. It shows further that they remained occupied during the period that List was Armed Forces Commander Southeast. It is clear from the record also that the guerrillas participating in the incidents shown by the evidence during this period were not entitled to be classed as lawful belligerents within the rules herein before announced. We agree, therefore, with the contention of the defendant List that the guerrilla fighters with which he contended were not lawful belligerents entitling them to prisoner of war status upon capture. We are obliged to hold that such guerrillas were *francs tireurs* who, upon capture, could be subjected to the death penalty. Consequently, no criminal responsibility attaches to the defendant List because of the execution of captured partisans in Yugoslavia and Greece during the time he was Armed Forces Commander Southeast." List was also found not guilty of "any crime in connection with the Commissar Order."⁽²⁾ He was, however, found guilty on Counts One and Three as a whole.

Kuntze and Rendulic were found guilty on Counts One, Three and Four. Of Foertsch, the Tribunal concluded that "the nature of the position of the defendant Foertsch as Chief of Staff, his entire want of command

⁽¹⁾ The Tribunal dealt with the plea of superior orders more fully earlier in its Judgment. See pp. 50-2.

⁽²⁾ See p. 40.

authority in the field, his attempts to procure the rescission of certain unlawful orders and the mitigation of others, as well as the want of direct evidence placing responsibility upon him, leads us to conclude that the Prosecution has failed to make a case against the defendant. No overt act from which a criminal intent could be inferred, has been established.

"That he had knowledge of the doing of acts which we have herein held to be unlawful under International Law cannot be doubted. It is not enough to say that he must have been a guilty participant. It must be shown by some responsible act that he was. Many of these acts were committed by organisations over which the Wehrmacht, with the exception of the commanding general, had no control at all. Many others were carried out through regular channels over his voiced objection or passive resistance. The evidence fails to show the commission of an unlawful act which was the result of any action, affirmative or passive, on the part of this defendant. His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be one who orders, abets or takes a consenting part in the crime. We cannot say that the defendant met the foregoing requirements as to participation. We are required to say therefore that the evidence does not show beyond a reasonable doubt that the defendant Foertsch is guilty on any of the counts charged."

Von Geitner was also found not guilty, on the grounds of his not having been shown to have taken any consenting part in illegal acts, "coupled with the nature and responsibilities of his position and the want of authority on his part to prevent the execution of the unlawful acts charged."

Dehner was held "criminally responsible for permitting or tolerating" the practice of illegally killing hostages and reprisal prisoners "on the part of his subordinate commanders." He was found guilty on Count One of the Indictment.

Von Leyser was found guilty on Counts Three and Four, Felmy on Counts One and Two, Lanz on Counts One and Three, and Speidel on Count One.

List and Kuntze were sentenced to life imprisonment, Rendulic and Speidel were sentenced to imprisonment for twenty years, Felmy for fifteen years, Lanz for twelve years, Leyser for ten years and Dehner for seven years.

At the time of going to press the sentences had not received the approval of the Military Governor.

B. NOTES ON THE CASE

I. THE LAW RELATING TO HOSTAGES AND REPRISALS

The most interesting passages in the Judgment of the Tribunal⁽¹⁾ are those dealing with the law concerning the taking and killing of hostages and the question of reprisals.

The Tribunal began by ruling that, at the relevant time, Yugoslavia, Albania, Greece and Norway were occupied territories within the meaning of the Hague Convention No. IV of 1907, and that the partisan bands,

⁽¹⁾ See pp. 55-66.

many of whose members were victims of the accused's acts, were not lawful belligerents within the terms of Article 1 of the Convention,⁽¹⁾ but guerrillas liable to be shot on capture.

It would seem that in the Tribunal's opinion, it would be possible for a fighting group to be entitled to belligerent status under Article 1 of the Convention, even though not "supported by an organised government"; and "where room exists for an honest error in judgment," the opposing commander "is entitled to the benefit thereof by virtue of the presumption of his innocence."⁽²⁾

The Tribunal laid down further that the rights and duties of an occupying power were not altered by his having become such an occupant as the result of aggressive warfare.

Turning to the question of hostages and reprisals, the Tribunal pointed out that it restricted its enquiry to "the right to take hostages from the innocent civilian population of occupied territory as a guarantee against attacks by unlawful resistance forces, acts of sabotage and the unlawful acts of unknown persons and the further right to execute them if the unilateral guarantee is violated"; the taking of hostages to compel armed forces to respect the laws of war would not be discussed.⁽³⁾

In the opinion of the Tribunal the taking and shooting of hostages in order to guarantee the peaceful conduct in the future of the populations of occupied territories, may in certain circumstances be legal under International Law. The Tribunal based its opinion upon the "available evidence," which was said earlier to consist of "certain rules of customary law and certain inferences legitimately to be drawn from existing conventional law."⁽⁴⁾ At a later point⁽⁵⁾ the Tribunal drew attention to the fact that the British *Manual of Military Law* permitted the taking of reprisals against a civilian population (putting to death is not mentioned), and the United States *Basic Field Manual (Rules of Land Warfare)* even the putting to death of hostages; and claimed that the killing of hostages was not prohibited under international agreement; but added: "The taking of reprisals against the civilian population by killing members thereof in retaliation for hostile acts against the armed forces or military operations of the occupant seems to have been originated by Germany in modern times. It has been invoked by Germany in the Franco-Prussian War, World War I and in World War II. No other nation has resorted to the killing of members

⁽¹⁾ Article 1 provides: "The laws, rights and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions:

- (1) they must be commanded by a person responsible for his subordinates;
- (2) they must have a fixed distinctive sign recognizable at a distance;
- (3) they must carry arms openly; and
- (4) they must conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'."

⁽²⁾ See p. 58.

⁽³⁾ In the next paragraph, the Tribunal said that it was concerned only with hostages taken "to ensure against unlawful acts by enemy forces or people." This second reference to "enemy forces" must, however, be taken to mean guerrilla units not falling within the category of the legal belligerents.

⁽⁴⁾ See pp. 60 and 61.

⁽⁵⁾ See p. 63.

of the civilian population to secure peace and order in so far as our investigation has revealed."

The Tribunal stated that "the taking of hostages is based fundamentally on a theory of collective responsibility," and, in its consideration, *in camera*, of Article 50 of the Hague Regulations, it may have been influenced by the report of the Hague Conference of 1899 (page 151) which stated that the Article was "without prejudice of the question of reprisals" (Quoted in footnote 2 to paragraph 452 of Chapter XIV of the British *Manual of Military Law*). Article 50 provides as follows:

"Article 50. 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."

The conditions under which hostages may be taken and killed were said to be the following:

- (i) the step should be taken only "as a last resort" and only after regulations such as those elaborated by the Tribunal⁽¹⁾ had first been enforced;
- (ii) the hostages may not be taken or executed as a matter of military expediency;
- (iii) "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."⁽²⁾)

- (iv) It must have proved impossible to find the actual perpetrators of the offences complained of;
- (v) 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";
- (vi) "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

- (vii) "Unless the necessity for immediate action is affirmatively shown, the execution of hostages or reprisal prisoners without a judicial hearing is unlawful."⁽³⁾

(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

⁽¹⁾ See p. 62.

⁽²⁾ 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." See p. 65.

⁽³⁾ See pp. 64-5.

usual sense but "a judicial finding that the necessary conditions exist and the essential steps have been taken to give validity to such action."⁽¹⁾)

The Tribunal next turned its attention to the taking and killing of "reprisal prisoners" whom it defined as "those individuals who are taken from the civilian population to be killed in retaliation for offences committed by unknown persons within the occupied area." It may be thought that, according to the stress placed by the Tribunal, such prisoners differ from hostages in that they are killed after, and not in anticipation of, offences on the part of the civilian population;⁽²⁾ but, in practice, the difference is not likely to be great, since reprisals are essentially steps taken to prevent future illegal acts, just as are the taking and killing of hostages according to the Tribunal's definition.⁽³⁾ Indeed the latter pointed out that "the most common reason for holding them [*i.e.*, reprisal prisoners] is for the general purpose of securing the good behaviour and obedience of the civil population in occupied territory,"⁽⁴⁾ and spoke of the deterrent effect of the shooting of reprisal prisoners,⁽⁵⁾ and the conditions under which, according to the Tribunal, it is legal to take and shoot hostages on the one hand and reprisal prisoners on the other are much the same.⁽⁶⁾ In fact, the only practical difference between "hostages" and "reprisal prisoners" seems to be that the former are taken into custody before, and the latter only after, the offences as a result of which they are executed.

It will be noted that, in its investigation of the question of the legality of the shooting of hostages and reprisal prisoners, the Tribunal preferred to express an opinion on the position as it appeared to it to exist under customary International Law, and left out any reference to Control Council Law No. 10 and the Charter of the Nuremberg International Military Tribunal, both of which include "killing of hostages" in their definition of "war crimes." On the other hand, an examination of the judgment 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.

While its conclusion on the question of hostages and reprisals was not, therefore, of any great practical importance as far as the findings on the

⁽¹⁾ See p. 64.

⁽²⁾ See p. 61.

⁽³⁾ See p. 61.

⁽⁴⁾ See p. 63.

⁽⁵⁾ See pp. 63-4.

⁽⁶⁾ Compare pp. 61-2 with pp. 63-6.

individual accused were concerned,⁽¹⁾ the Tribunal apparently considered that sufficient uncertainty existed in the law relating to hostages and reprisals to justify its ruling that the killing of hostages could be legal in certain circumstances and it took the opportunity to make clear its regret that the matter had not been dealt with by international agreement.⁽²⁾ In this it was echoing the sentiments expressed in Oppenheim-Lauterpacht, *International Law*, Volume II, Sixth Edition, at page 461, as a result of the experiences of the first World War:

"During the World War, Germany adopted a terrible practice of taking hostages in the territories occupied by her armies, and shooting them when she believed that civilians had fired upon German troops. The experience of the World War shows that the taking of hostages is a matter urgently demanding regulation; the Hague Regulations do not mention it."

On the question of reprisals, the same authority has said, on pages 449-50:

"In face of the arbitrariness with which, according to the present state of International Law, resort can be had to reprisals, it cannot be denied that an agreement upon some precise rules regarding them is an imperative necessity. The events of the World War illustrate the present condition of affairs. The atrocities committed by the German army in Belgium and France, if avowed at all, were always declared by the German Government to be justified as measures of reprisal. There is no doubt that Article 50 of the Hague Regulations, enacting that no general penalty, pecuniary or otherwise, may be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible, does not prevent the burning, by way of reprisals, of villages or even towns, for a treacherous attack committed there on enemy soldiers by unknown individuals, and, this being so, a brutal belligerent has his opportunity. It should, therefore, be expressly enacted that reprisals, like ordinary penalties, may not be

⁽¹⁾ In similar circumstances the Tribunal which conducted the *High Command Trial* (Trial of Von Leeb and Others, to be reported in a later volume of this series), was content to state that:

"In the Southeast Case, *United States v. Wilhelm List, et al* (Case No. 7), the Tribunal had occasion to consider at considerable length the law relating to hostages and reprisals. It was therein held that under certain very restrictive conditions and subject to certain rather extensive safeguards, hostages may be taken, and after a judicial finding of strict compliance with all pre-conditions and as a last desperate remedy hostages may even be sentenced to death. It was held further that similar drastic safeguards, restrictions, and judicial pre-conditions apply to so-called 'reprisal prisoners'. If so inhumane a measure as the killing of innocent persons for offences of others, even when drastically safeguarded and limited, is ever permissible under any theory of international law, killing without full compliance with all requirements would be murder. If killing is not permissible under any circumstances, then a killing with full compliance with all the mentioned prerequisites still would be murder."

"In the case here presented, we find it unnecessary to approve or disapprove the conclusions of law announced in said Judgment as to the permissibility of such killings. In the instances of so-called hostage taking and killing, and the so-called reprisal killings with which we have to deal in this case, the safeguards and pre-conditions required to be observed by the Southeast Judgment were not even attempted to be met or even suggested as necessary. Killings without full compliance with such pre-conditions are merely terror murders. If the law is in fact that hostage and reprisal killings are never permissible at all, then also the so-called hostage and reprisal killings in this case are merely terror murders."

⁽²⁾ See p. 63.

inflicted on the whole population for acts of individuals for which it cannot be regarded as collectively responsible. The Convention of 1929 concerning the Treatment of Prisoners of War, in prohibiting altogether the use of reprisals against prisoners of war, showed, in another sphere, the feasibility of conventional regulation of this matter. The potentialities of aerial warfare and the extreme vulnerability of non-combatants to its attacks tend to emphasise the urgency of agreements of this nature. In the absence of such agreements there remains the danger, clearly revealed during the World War, that reprisals instead of being a means of securing legitimate warfare may become an effective instrument of its wholesale and cynical violation in matters constituting the very basis of the law of war."

The Tribunal has thus performed a service by pointing out the need for international regulation on the question of the taking of reprisals and the killing of hostages. It would be useful for any conference or other body called upon to perform that task to be supplied with a statement of the authorities upon which the Tribunal relied in coming to its decision as far as those can be ascertained. As has been seen,⁽¹⁾ the Tribunal itself did not state in detail what its authorities were; it would have been particularly useful to know the authorities on which the Tribunal relied in laying down the detailed conditions on which hostages or reprisal prisoners may be killed.

An examination of the speeches of Counsel, however, throws some light on the possible authorities on which the Tribunal may have relied in arriving at certain of its conclusions. This is mainly true of the Defence speeches.

In their pleadings before the Tribunal, the Prosecution submitted that: "The concepts of 'hostage' and 'reprisal' both derive from relations between nations, or between their opposing armed forces, and not from the relations between a nation or its armed forces on the one hand and the civilian population of an occupied territory on the other."

It was added that, although the Hague Convention contained no "express provisions concerning either the taking or the execution of hostages in occupied territory" and even if Articles 43 and 46 thereof did not explicitly forbid such practices, "full account must be taken of the preamble to the Convention which declared that 'until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.'"

The Prosecution continued: "The majority of the text writers in the field of International Law, ancient and modern, have determined, either from the unwritten usages of war, or by clear implication from the language of the Hague Convention, that the killings of hostages, under the circumstances and for the purposes with which we are here concerned, is unlawful, and that the continued confinement of hostages is as far as the occupying

⁽¹⁾ See p. 77.

power is permitted to go. For example, Oppenheim sanctions the taking of hostages by the occupying power only 'provided that he does not kill them.' The classical statement by Grotius that 'hostages should not be put to death unless they have themselves done wrong' is in accordance with the views of other old authorities and has been echoed in more recent times not only by Oppenheim but by Garner, and others. As might be expected, in view of the German propensity for occupying the territory of neighbouring countries, and the sustained practice of the German Army in recent decades, German scholars take the contrary view, and defend the execution of hostages as a necessary measure in the event of continued civil disturbances, dangerous to the security of the occupying forces. A few English and American writers have expressed agreement with this view and argue, theoretically rather than practically, that there is a fundamental absurdity in taking hostages if they cannot be executed." In dealing with the provisions of the British and United States Military Manuals on this point, the Prosecution observed that while "the American manual states that 'hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed', it added "that 'when a hostage is accepted, he is treated as a prisoner of war' and that 'reprisals against prisoners of war are expressly forbidden by the Geneva Convention of 1929'."

It was also pointed out by the Prosecution that "The London Charter", in Article 6 (b), and Control Council Law No. 10, in paragraph 1 (b) of Article II, both recognise the 'killing of hostages' as a war crime. The opinion of the International Military Tribunal makes repeated reference to the killing of hostages as a war crime. . . .⁽¹⁾ The provisions of Law No. 10 are not only binding upon the Tribunal, but are in accordance with the views which most authorities in the field have held for decades past."

These views of the Prosecution must be taken to have been overruled by the Tribunal and do not therefore throw light on the possible reasons for the Tribunal's ruling.

Much of the arguments of the Defence were devoted to showing that the persons, on account of whose activities against the German army reprisal action was taken, were not entitled to recognition as legitimate belligerents. As has been seen,⁽²⁾ the Tribunal decided that, while certain forces were active in the areas in question which were entitled to such recognition, they did not include the guerrilla forces whose activities were relevant in this trial.

The Defence made certain remarks also on the question of hostages and reprisals which may be dealt with, according to the conclusions of the Tribunal to which they relate, as follows:

(i) The Defence claimed the authority of, among others, Professor Lauterpacht for claiming that certain acts of reprisal were legal under International Law and could not therefore be regarded as war crimes.⁽³⁾

⁽¹⁾ See British Command Paper, Cmd. 6964, pp. 48 and 49-50.

⁽²⁾ See pp. 55-9.

⁽³⁾ See pp. 3-4 of this volume. The Defence also quoted the passages from the British and United States Military Manuals which the Tribunal cited. See p. 63.

Such legal acts of reprisal included acts taken by an occupying power with a view to forcing the civilian population to desist from illegal conduct. At a later point, Defence Counsel quoted a statement made by the Judge Advocate in the *Kesselring Trial*⁽¹⁾ that: "It cannot be excluded entirely that innocent persons may be shot by way of reprisals; the International Law is very flexible."

Counsel added that: "neither in the London Statutes nor in the Control Council Law No. 10 is the killing of persons by way of reprisal designated as a war crime although this problem had no lesser practical importance during World War II than the problem of killing hostages." The position of the Defence was 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,⁽²⁾ 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.⁽³⁾ Of the latter, Counsel claimed: "In the modern hostage form, however, the killing or other punishment of the hostages are at least preponderantly reprisals, that is, compulsory measures adopted against acts of the civilian population or the enemy forces committed contrary to International Law in order to force them to abide by martial law. The Prosecutor already said in his opening statement that 'the purpose of taking hostages is to place oneself into a position of being able to adopt retaliatory measures.' The nature of reprisals of the modern hostage practice has been recognised especially clearly in composing the American *Rules of Land Warfare* as follows from the incorporation of No. 358 (d), which deals with hostages, into the rules on *reprisals*." It was prisoners of the former type, according to the Defence, who were entitled to prisoner of war rights and were guaranteed such rights by paragraph 359 of the United States Military Manual, *Rules of Land Warfare*, according to which ". . . when a hostage is accepted he is treated as a prisoner of war."

(ii) The Tribunal made clear its opinion that shooting of hostages or reprisal prisoners can only be legal as a last resort. Defence Counsel quoted paragraph 454 of the British *Manual*: "Reprisals are an extreme measure because in most cases they inflict suffering upon innocent persons. In this, however, their coercive force exists, and they are indispensable as a

⁽¹⁾ See pp. 12-13.

⁽²⁾ "461. The practice of taking hostages as a means of securing legitimate warfare was in former times very common. To ensure the observance of treaties, armistices and other agreements depending on good faith, hostages were given or exchanged, whose lives were held responsible for any perfidy. This practice is now obsolete, and if hostages are nowadays taken at all they have to suffer in captivity, and not death, in case the enemy violates the agreements in question. The Hague Rules do not mention hostages, and it must be emphasized that in modern times it is deemed preferable to resort to territorial guarantees instead of taking hostages."

⁽³⁾ 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.

last resource," and it may be added that paragraph 358 (b) of the United States *Manual* states that "Reprisals are never adopted merely for revenge, but only as an unavoidable last resort. . . ."

The Tribunal set out a detailed list of the steps which must be taken before shooting hostages or reprisal prisoners, in an attempt to secure the cessation of offences.⁽¹⁾ These steps were not suggested in the pleas of Counsel, but it was perhaps open to the Tribunal to take judicial notice of the fact that certain courses were open to the administrator of occupied territory faced with attacks from illegal belligerents.

(iii) The Defence made no remarks which can be related to the Tribunal's finding that reprisal action must not be taken as a matter of military expediency, but this conclusion would in any case command universal support.

(iv) As to the connection between reprisal victims and the offences whose recurrence it is hoped to prevent, Defence Counsel made the following submission: "At times, a territorial connection between the hostages and the preceding action was demanded. However, no reasons can be given for such a demand, not even with Article 50 of the Hague Rules of Land Warfare—as is being attempted occasionally—because Article 50 does not refer to reprisal measures. From the nature of reprisal measures as coercive measures, a general principle results, which Professor Bonfils has formulated in the following way:

"Reprisals have to be such as not to fail to impress those who are the authors and instigators of the excess in question."

"Territorial connection between hostages and perpetrators might have played a part in earlier days when acts of resistance and sabotage against the occupation forces mostly emanated from a limited circle of persons. However, it was of no importance, whatsoever, in Yugoslavia and Greece, where the resistance activity emanated from forces which reached beyond all local frontiers. In such a situation only the spiritual connection between hostages and perpetrators could be taken into account, such as it becomes apparent from the membership in or support of the illegal resistance forces, or merely from the fact of a common national basis."

It cannot be said that this submission of the Defence throws any great light on the problem of the relation which must be shown between offences and victims, and even the rather indefinite test applied by the Tribunal to this crucial point would not render legal reprisal action taken against innocent victims having only a common nationality with those responsible for breaches of order in occupied territories.

(v) The rule that reprisals may not be taken if the actual perpetrators of offences can be found was suggested by, *inter alia*, Article 358 (c) of the United States Basic Field Manual, *Rules of Land Warfare*, which was quoted by the Defence and which states that:

"Illegal acts of warfare justifying reprisals may be committed by a government, by its military commanders, or by a community or

⁽¹⁾ See p. 62.

individuals thereof, whom it is impossible to apprehend, try, and punish."⁽¹⁾

Article 458 of the British *Manual of Military Law* makes the same proviso.⁽²⁾

(vi) Defence Counsel claimed that hostages could be shot "if the unlawful acts are committed by the opposite side in spite of warnings"⁽³⁾ and as has been seen the Tribunal also pointed out the necessity to give the populace due warning that, if illegal acts continued, reprisal action would be taken.

(vii) It is an accepted principle of reprisal law that the reprisal action shall be in some way proportionate to the acts anticipated, and this is laid down for instance in paragraph 459 of the British *Manual*, which the Defence cited:

"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."

(viii) The Tribunal's ruling that reprisal action may only follow a judicial proceeding could not, on the other hand, have been suggested by anything which Counsel said. The Defence claimed that there was no rule laying down that a commander less than a division commander may not order reprisals. Counsel referred to paragraph 358 (b) of the United States *Manual* according to which, if immediate action is demanded, as a matter of military necessity, "a subordinate commander may order appropriate reprisals upon his own initiative."⁽⁴⁾

The possibility remains that a comparison with other relevant trials may help in elucidating the law on these questions or in showing where *lacuna* exist therein.

Among others, three trials reported in this present volume apart from the *Hostages Trial* are relevant in this connection: the *Trial of Von Mackensen and Maelzer*,⁽⁵⁾ the *Trial of Kesselring*,⁽⁶⁾ and the *Trial of Franz Holstein and 23 others*.⁽⁶⁾

The Judge Advocate acting on the second of these three trials 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." Nevertheless, the British Military Courts which conducted the first two trials mentioned above 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 third trial, which was conducted before a French Military Tribunal, benefit from any consideration that their acts might be justifiable as legitimate reprisals,

⁽¹⁾ Italics inserted.

⁽²⁾ See p. 63.

⁽³⁾ Counsel made reference to para. 358 (d) of the United States *Manual*, which speaks of "Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people."

⁽⁴⁾ See pp. 1-8.

⁽⁵⁾ See pp. 9-14.

⁽⁶⁾ See pp. 22-23.

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.

Two further trials may be mentioned. The *Dostler case*, illustrates the rule laid down in Article 2 of the Geneva Prisoners of War Convention, that there can be no legitimate reprisals against a prisoner of war.⁽¹⁾ The *Trial of Bruns and two others* provides evidence that, since the purpose of reprisal action is to coerce an adversary (or, it may be added, 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⁽²⁾.

Finally, it is of interest to quote the contents of the section headed *Reprisals* of the Judgment in the *Einsatzgruppen Trial*⁽³⁾. It will be noted that the Tribunal which conducted this case had no hesitation in regarding Article 50 of the Hague Regulations as being applicable to the 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:

"From time to time the word 'reprisals' has appeared in the *Einsatzgruppen* reports. Reprisals in war are the commission of acts which, although illegal in themselves, may, under the specific circumstances of the given case, become justified because the guilty adversary has himself behaved illegally, and the action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future. Thus, the first prerequisite to the introduction of this most extraordinary remedy is proof that the enemy has behaved illegally. While generally the persons who become victims of the reprisals are admittedly innocent of the acts against which the reprisal is to retaliate, there must at least be such close connection between these persons and these acts as to constitute a joint responsibility.

"Article 50 of the Hague Regulations states unequivocally:

"No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as *jointly and severally* responsible."

"Thus, when, as one report says, 859 out of 2,100 Jews shot in alleged reprisal for the killing of twenty-one German soldiers near Topola, were taken from concentration camps in Yugoslavia, hundreds of miles away, it is obvious that a flagrant violation of International Law occurred and outright murder resulted. That 2,100 people were killed in retaliation for twenty-one deaths only further magnifies the criminality of this savage and inhuman so-called reprisal.

"Hyde, *International Law*, Vol. III, page 35, has this to say on reprisals:

"A belligerent which is contemptuous of conventional or customary prohibitions is *not* in a position to claim that its adversary when responding with like for like, lacks the requisite excuse."

"If it is assumed that some of the resistance units in Russia or members of the population did commit acts which were in themselves

⁽¹⁾ See Vol. I of this series, pp. 28-31.

⁽²⁾ See p. 90.

⁽³⁾ See Vol. III, pp. 21-2.

unlawful under the rules of war, it would still have to be shown that these acts were not in legitimate defence against wrongs perpetrated upon them by the invader. Under International Law, as in domestic law, there can be no reprisal against reprisal. The assassin who is being repulsed by his intended victim may not slay him and then, in turn, plead self-defence.

"Reprisals, if allowed, may not be disproportionate to the wrong for which they are to retaliate. The *British Manual of Warfare*, after insisting that reprisals must be taken only in last resorts, states:

"459 . . . Acts done by way of reprisals must not, however, be excessive and must not exceed the degree of violation committed by the enemy."

"Similarly, Article 358 of the *American Manual* states:

"(b) When and how employed:

Reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from illegitimate practices. . . .

(c) Form of reprisals:

The acts resorted to by way of reprisals . . . should not be excessive or exceed the degree of violations committed by the enemy."

"Stowell, in the *American Journal of International Law*, quoted General Halleck on this subject:

"Retaliation is limited in extent by the same rule which limits punishment in all civilised governments and among all Christian people—it must never degenerate into savage or barbarous cruelty." (Stowell, *American Journal of International Law*, Vol. 36, p. 671.)

"The *Einsatzgruppen* reports have spoken for themselves as to the extent to which they respected the limitations laid down by International Law on reprisals in warfare."

The remark 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 and is reminiscent of a paragraph from an article by two learned authors which states that:

"The Germans have violated every duty of the occupying power to the civilian population. Automatically then the oppressed populations are released from any obligation of obedience: they cannot be denied the right of self-defence. The taking of hostages by the Germans for the purposes of reprisal and, generally, to maintain order in Europe, can have no legal sanction. Where expediency and legality have coincided, acceptable examples of hostage-taking may be found. But these result more from circumstance than from deference to International Law. In no way do they mitigate the illegality of the German position. By destroying the basic legal relationship between the occupant and the civilian, the Germans have created a reign of terror."⁽¹⁾

⁽¹⁾ Ellen Hammer and Marina Salvin, "The Taking of Hostages in Theory and Practice," in *American Journal of International Law*, January, 1944, pp. 20-33.

The judgment in the *Hostages Trial* includes a similar passage.⁽¹⁾

The attitude taken to the question of the shooting of hostages and reprisal prisoners by the Tribunals which tried on the one hand the *Hostages Trial* and on the other the *Einsatzgruppen Trial* can be reconciled if the statement of the former, that the population against whom action is taken must be a party to the offences whose cessation is aimed at, is interpreted strictly, so as to ensure observance of Article 50 of the Hague Convention.⁽²⁾ This provision received no treatment in the judgment in the *Hostages Trial*; except in so far as it was said that the Convention made no provision regarding hostages⁽³⁾ and, since the great bulk, if not the entirety, of the killings of hostages or reprisal prisoners which were proved to have taken place were held by the Tribunal to fall outside the range of legal executions, there is no indication of the degree of connection between the victims of the killings and the original or the feared offences which the Tribunal would have regarded as sufficient to make these victims "parties" to those offences.

On the other hand, if persons are jointly responsible for an offence, action may be taken against them irrespective of any law of reprisals, and this suggests that if a law of reprisals in occupied territories is to be preserved at all,⁽⁴⁾ three possible courses are open to the codifying agent:—

- (i) to insist that the victims be in some way connected with the offences but not necessarily so closely as to make them "parties" in the usual legal sense;
- (ii) to insist that the strict rules as to complicity should apply but to permit more severe action to be taken where the complicity was trivial than would have been permissible but for a law of reprisals; or
- (iii) to rule that in no event may actual executions appear among the reprisal acts taken against persons not "parties" to the offences in the strict sense of the word.

2. THE EXTENT OF THE RESPONSIBILITY OF COMMANDING GENERALS

The passages quoted above⁽⁵⁾ from the judgment of the Tribunal indicate the attitude of the latter to the extent to which a commanding general in occupied territory may be held liable for the offence of troops under his command. Three points in particular are worthy of note: (a) a commander having executive authority over occupied territory—in effect the person on whom rests principally the obligations laid down in Section III (*Military Authority over the Territory of the Hostile State*) of Hague Convention No. IV of 1907—shall not be able to plead that offences were committed, within the occupied territory under his authority, by persons taking orders from authorities other than himself, as the S.S. took orders directly from Himmler, and the same applies to subordinate commanders to whom executive powers have been delegated; (b) such a commander—and indeed

⁽¹⁾ See p. 64.

⁽²⁾ Persons who hid or otherwise shielded illegal belligerents could probably be regarded as parties to their offences.

⁽³⁾ See p. 60.

⁽⁴⁾ There is a feeling that the possibility of the taking of some kind of reprisals is such a strong weapon in the hands of an administrator of occupied territories that to abolish it altogether is impracticable. See Hammer and Salvin, *op cit.*, p. 33.

⁽⁵⁾ See pp. 69–71.

any commander—will not usually be permitted to deny knowledge of the contents of reports made specially for his benefit; and (c) a commanding general will usually be held liable for events during his temporary absence from headquarters which arise out of a "general prescribed policy formulated by him."

The judgment elsewhere reinforced the first principle by stating that a commanding general of occupied territory "cannot escape responsibility by a claim of a want of authority. The authority is inherent in his position as commanding general of occupied territory. The primary responsibility for the prevention and punishment of crime lies with the commanding general, a responsibility from which he cannot escape by denying his authority over the perpetrators." From this rule it follows that a commanding general cannot hide behind a "puppet government" and plead that he is not responsible for their acts; the Tribunal applied this conclusion to the accused von Leyser who was commanding general of a corps area.⁽¹⁾ Elsewhere, the Tribunal repeated: "We must assert again, in view of the defendant's statement that the responsibility for the taking of reprisal measures rested with the divisional commanders and the Croatian government, that a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about."

The facts of the present case are similar in many respects to those of the *Yamashita Trial*⁽²⁾ and the remarks made in the preceding paragraphs on the extent of a commander's responsibility are to be read together with those made on the same topic in the notes to that trial.⁽³⁾ Perhaps the most interesting issue in this connection is the question to what extent the accused's knowledge of offences being committed by his troops must be proved in order to make him responsible for their acts. The task of the Prosecution in the *Hostages Trial* was made easier by the fact that reprisal actions were often reported by lesser officials to various of the accused, and many such reports were quoted in the Judgment, in which appears also the ruling that a commander would not usually be permitted to deny knowledge of such reports. In the *Yamashita Trial* few if any reports of atrocities committed were made to the accused and here it is probable that the widespread nature of the offences proved was an important factor in so far as it may have convinced his judges either that the accused must have known or must be deemed to have known of their perpetration, or that he failed to fulfil a duty to discover the standard of conduct of his troops.⁽⁴⁾

3. THE LIMITATIONS ON THE RESPONSIBILITY OF A CHIEF OF STAFF

A comparison of the evidence relating to the accused Foersch and von Geitner⁽⁵⁾ and the findings of the Tribunal upon them⁽⁶⁾ indicates the limits beyond which the Tribunal found it impossible to hold a chief of staff liable for the acts of the subordinates of his commander. The Tribunal took the view, for instance, that a chief of staff could not be held responsible

⁽¹⁾ See pp. 72–4.

⁽²⁾ See Vol. IV of this series, pp. 1–96.

⁽³⁾ *Ibid.*, pp. 83–96.

⁽⁴⁾ *Ibid.*, p. 94. On the general question of a commander's responsibility and the element of knowledge, see also Vol. VII, pp. 61–4.

⁽⁵⁾ See pp. 42–3.

⁽⁶⁾ See pp. 75–6.

for the outcome of his commander's orders which he approved from the point of view of form, and issued on the latter's behalf.

On the other hand, two trials reported in an earlier volume of this series have shown that a Chief of Staff may be held guilty of committing war crimes.⁽¹⁾ Certainly the position of Chief of Staff provides no immunity upon its holder and the responsibility of such a person for war crimes must be judged upon the facts of each case. An examination of the relevant facts of the two trials mentioned above shows that the chiefs of staff who were held guilty took a closer and more willing and active part in the offences charged than did Foersch and von Geitner.⁽²⁾

4. LIABILITY FOR UNEXECUTED ORDERS

In dealing with the Prosecution's allegation that the accused Rendulic passed on to troops subordinate to him the "Commissar Order" of 6th June, 1941, the Tribunal made the following remark: "The order was clearly unlawful and so recognised by the defendant. He contends, however, that no captured Commissars were shot by troops under his command. This is, of course, a mitigating circumstance but it does not free him of the crime of knowingly and intentionally passing on a criminal order."

This constitutes recognition that the mere passing on of an illegal order, even if it is not obeyed, may constitute a crime under International Law; and a rule which applies to an order passed on by a defendant would certainly apply to an order originating with him. This question receives further treatment at other points in these volumes.⁽³⁾

5. THE PLEA OF SUPERIOR ORDERS

The Tribunal's treatment of the law relating to the plea of superior orders⁽⁴⁾ is interesting as the most exhaustive *judicial* examination of the question so far reported in these volumes. It will be seen that the Tribunal's opinion regarding the extent of effectiveness of the plea corresponds to the approach thereto which has been generally adopted in war crime trials arising out of the Second World War.⁽⁵⁾

Furthermore, it is possible that the relatively light sentences passed upon some of the accused in the trial at present under examination were partly the result of a recognition by the Tribunal that the accused were acting under orders which they had received from Hitler, Keitel or others of their superiors, and which their subordinates often knew them to have received.

The Tribunal before which the Trial of Otto Ohlendorf and others (the *Einsatzgruppen Trial*) was held (Nuremberg, September, 1947—April, 1948), dealt even more extensively with the plea of superior orders than did the Tribunal which conducted the *Hostages Trial*, and it may be of interest to quote certain passages from the judgment of the former which supplement

⁽¹⁾ See Vol. V, p. 79.

⁽²⁾ Cf. Vol. V, pp. 62, 63, 67, 68 and 69 with pp. 42-3 of the present volume.

⁽³⁾ See the notes to the reports on the *Moehle Trial* in Vol. IX and the *Falkenhorst Trial* in Vol. XI, and the *High Command Trial* in Vol. XII.

⁽⁴⁾ See pp. 50-2.

⁽⁵⁾ See Vol. V of these Reports, pp. 13-22, and the references to earlier volumes set out on p. 14 thereof, footnote 2.

or elaborate the words of the latter on this question and what has been said in Volume V in the same connection.

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."

Again, the Tribunal ruled that: "To plead superior orders one must show an excusable ignorance of their illegality. The sailor who voluntarily ships on a pirate craft may not be heard to answer that he was ignorant of the probability he would be called upon to help in the robbing and sinking of other vessels. He who willingly joins an illegal enterprise is charged with the natural development of that unlawful undertaking. What S.S. man could say that he was unaware of the attitude of Hitler toward Jewry?" It added later that "if the cognizance of the doer has been such, prior to the receipt of the illegal order, that the order is obviously but one further logical step in the development of a programme which he knew to be illegal in its very inception, he may not excuse himself from responsibility for an illegal act which could have been foreseen by the application of the simple law of cause and effect. . . . One who embarks on a criminal enterprise of obvious magnitude is expected to anticipate what the enterprise will logically lead to."

Under a heading *Duress needed for Plea of Superior Orders*, the Tribunal expressed the following opinion: "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 pull a lethal lever.

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

On the other hand "the doer may not plead innocence to a criminal act ordered by his superior 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."

The Tribunal added that "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."

As to the effectiveness of the plea when validly argued, the Tribunal's general conclusion was that now most commonly adopted, namely that

while superior orders do not constitute a defence they may be taken into consideration in mitigation of punishment.

6. OTHER FACTORS WHICH MAY BE CONSIDERED IN MITIGATION OF PUNISHMENT

Certain passages from the judgment of the Tribunal on the factors which may be considered in mitigation of punishment have already been quoted; they form a useful summary of the considerations which the Tribunal found relevant in this connection.⁽¹⁾ It may be added that in dealing with the guilt of the accused List, the Tribunal said: "The failure of the nations of the world to deal specifically with the problem of hostages and reprisals by convention, treaty, or otherwise, after the close of World War I, creates a situation that mitigates to some extent the seriousness of the offence. These facts may not be employed, however, to free the defendant from the responsibility for crimes committed. They are material only to the extent that they bear upon the question of mitigation of punishment."

It would seem that the relatively uncodified nature of the law on hostages and reprisals also is here regarded as a mitigating circumstance; the Tribunal is not claiming that the accused could be held guilty in the absence of any law on the point.

⁽¹⁾ See pp. 74-5.

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LAW REPORTS OF TRIALS OF WAR CRIMINALS

continued from p. 2 of cover

The volumes have been made as internationally representative as the available material has allowed and the legal matters which have received report and comment have included questions of municipal as well as international law. The Reports, together with the notes on the cases and the Annexes on municipal law, should, therefore, prove of value as source-books and commentaries not only to the historian and the international lawyer but also to all students of comparative jurisprudence and legislation, and in general the intention of the Reports is to ensure that the lessons of the War Crime trials held by the various Allied courts during recent years shall not be lost for lack of a proper record made accessible to the public at large.

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10
LAW REPORTS
OF
TRIALS OF
WAR CRIMINALS

Selected and prepared by
THE UNITED NATIONS
WAR CRIMES COMMISSION

VOLUME IX

LONDON

PUBLISHED FOR
THE UNITED NATIONS WAR CRIMES COMMISSION
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1949

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LAW REPORTS OF TRIALS OF WAR CRIMINALS

SELECTED AND PREPARED
BY THE UNITED NATIONS WAR CRIMES
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One of the aims of this series of Reports is to relate in summary form the course of the most important of the proceedings taken against persons accused of committing war crimes during the Second World War, apart from the major war criminals tried by the Nuremberg and Tokyo International Military Tribunals, but including those tried by United States Military Tribunals at Nuremberg. Of necessity, the trials reported in these volumes are examples only, since the trials conducted before the various Allied Courts number well over a thousand. The trials selected for reporting, however, are those which are thought to be of the greatest interest legally and in which important points of municipal and international law arose and were settled.

Each report, however, contains not only the outline of the proceedings in the trial under review, but also, in a separate section headed "Notes on the Case", such comments of an explanatory nature on the legal matters arising in that trial as it has been thought useful to include. These notes provide also, at suitable points, general summaries and analyses of the decisions of the courts on specific points of law derived primarily from a study of relevant trials already reported upon in the series. Furthermore, the volumes include, where necessary, Annexes on municipal war crimes laws, their aim being to explain the law on such matters as the legal basis and jurisdiction, composition and rules of procedure on the war crime courts of those countries before whose courts the trials reported upon in the various volumes were held.

Finally, each volume includes a Foreword by Lord Wright of Durley, Chairman of the United Nations War Crimes Commission.

continued inside back cover

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FOREWORD

The Reports contained in this Volume cover an extensive and diversified area. The main portion of these trials deals with crimes against property, which will also be more fully dealt with in the next volume of this series, and most of what I have to say on these questions I shall therefore reserve for the Foreword to Volume X.

Crimes against property are sometimes almost indistinguishable from crimes against persons, as, for instance, in those cases where villages are destroyed and the inhabitants are turned adrift, perhaps in very inclement conditions of weather, and deprived of their homes. As notorious instances of such cases I may recall the destruction of Lidice and the murder of its inhabitants, and the similar case of Oradour-sur-Glane. The two aspects in these crimes, however, can be distinguished. Systematic pillaging and excessive contributions from a country which is being over-run or which is already occupied, also present this double aspect. These classes of war crimes form an important subject in the well-known Regulations attached to the Hague Convention No. IV of 1907 which are quoted in this volume. They are fully set out, and discussed up to a certain point, by Mr. Brand in this volume, and what he says there is supplemented and developed in Volume X, which comprises Reports on the I. G. Farben and Krupp trials held before United States Military Tribunals in Nuremberg.

Volume IX, however, also illustrates further the important question of crimes against persons as illustrated by the offences in regard to the enslavement and deportation of civilians to slave labour, and the employment of prisoners of war in work having a direct connection with military operations. This question received treatment in Volume VII, in the notes to the Milch Trial. The spoliation of occupied territory which was undoubtedly carried on to a great extent in World War II receives some illustration and discussion in this volume, but for a fuller discussion the reader is referred to Volume X.

A feature of great interest in the present volume is the treatment of what may be called economic exploitation, and reference may in particular be made to the grounds on which Flick was held responsible in respect of the Rombach Plant. His responsibility was based upon his occupation and use of private property without the free consent of the rightful owner, irrespective of the use to which he put the property and the condition in which he left it.

The Flick case also gives an excellent illustration of the scope of crimes against humanity, and the discussion in the Notes attached to the Judgment is of great value. It is particularly significant as indicating the limitations which have been introduced in connection with those crimes.

The illustrative French cases reported and annotated by Dr. Zivković deal in the main with rather different types of offences against property, and they are noteworthy as showing the strong preference of the French Tribunals to deal with war crimes as far as possible within the principles of their own penal code. In the earlier days in which war crimes were discussed, and in which the principles of jurisdiction of military tribunals had not been fully developed, emphasis was laid on the idea that war crimes could be adequately dealt with, in so far as they were committed in occupied countries, simply on the basis of the penal law of the occupied country, because it was pointed out that the national law was not abrogated by the occupation, but was merely suspended, so that after the occupation had ended the criminals, if

arrested and in custody, could be brought to the country and tried by the national tribunals which could order the sentences to be carried out by the national machinery. As things have developed, a more prominent part in the matter of jurisdiction over war crimes has been taken by the military courts. Their nature and the nature of their jurisdiction is authoritatively discussed in the Supreme Court of the United States in the case of *ex parte Quirin*. On the general question of the relation between national laws and the special jurisdiction in regard to war crimes, I should like to quote a paragraph from an article by Professor J. L. Brierly on "The Nature of War Crimes Jurisdiction", published in the issue of *The Norseman* dated May-June, 1944:

"Jurisdiction over war crimes is created and defined (though only in very general terms) by the laws of war; it has no territorial basis, and it may therefore be exercised without any reference to the *locus delicti*; it comes into force on the outbreak of any war, and hence no action which is legitimate under it can be affected with the vice of retro-activity; it is one of the means whereby international law tries to secure that the laws of war are observed, in other words, a sanction. The laws of war, however, do not establish any international machinery for the exercise of this jurisdiction; they leave a wide discretion to belligerent states, without giving any precise indication as to the kind of court (e.g. whether military or civil), the forms of procedure, or the definition of particular offences, which they should adopt. Hence in exercising its right a state is free within wide limits, which may be defined as the limits set by natural justice, to adopt its own policy in these matters. There is, for example, no reason why a state, if it thinks fit, should not use its courts of ordinary criminal jurisdiction, though in that event those courts would be exercising not their ordinary, but a special war jurisdiction. Similarly, if the court, however constituted, is of opinion that its own municipal criminal law contains rules, either of procedure or substantive law, which are appropriate to the trial of war crimes, there is no reason why it should not apply such rules; but if it does so, it will be not because they are binding on it *proprio vigore*, but because the court considers them a useful guide in formulating a rule which will make explicit some principle which the laws of war have laid down only in general terms."

The remaining cases reported in this volume are interesting cases based on offences alleged to have been committed in the actual conduct of hostilities. Two are naval cases and deal with the law of the sea. The third case involves an allegation of the use of enemy uniforms in land warfare.

The last-mentioned Reports are the work of Mr. Stewart, and, as already stated, the French reports were prepared by Dr. Zivković. Mr. Aars-Rynning drafted the Outline of the Proceedings in the Flick Trial, while the notes and general commentary attached thereto were written by Mr. Brand, who is the Editor of this series of volumes.

WRIGHT.

London, November, 1948.

THE FLICK TRIAL

TRIAL OF FRIEDRICH FLICK AND FIVE OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG

20TH APRIL-22ND DECEMBER, 1947

Liability for War Crimes, Crimes Against Humanity and Membership of Criminal Organisations of leading German Industrialists

Friedrich Flick was the principal proprietor, dominating influence and active head of a large group of industrial enterprises, including coal and iron ore mines and steel-producing and manufacturing plants, commonly referred to as the "Flick concern". He was also a member of the supervisory board of numerous other large industrial and financial companies. The other five accused in this trial were leading officials of numerous Flick enterprises.

During the Second World War, Flick became an important leader of the military economy, member of the official bodies for regulation of the coal, iron and steel industries, and a member of a Governmentally sponsored company for exploitation of the Russian mining and smelting industries.

All the defendants were accused of responsibility for enslavement and deportation to slave labour of a great number of civilians from populations of countries and territories under belligerent occupation and the use of prisoners of war in work having a direct relation to war operations, including the manufacture and transportation of armament and munitions. All the defendants except one were also accused of spoliation of public and private property in occupied territories. Flick and two others were further accused of crimes against humanity in compelling, by means of anti-Semitic economic pressure, the Jewish owners of certain industrial properties to part with title thereto. Flick and Steinbrinck were accused of having, as members of the "Keppler Circle" or "Friends of Himmler," contributed large sums to the finances of the S.S. Finally, one defendant was accused of membership

in the S.S. in circumstances which were alleged to incriminate him under the ruling of the International Military Tribunal in Nuremberg regarding criminal organisations.

The Tribunal dismissed as being neither within its jurisdiction, nor sustained by the evidence, the Count charging Flick and two others with crimes against humanity as far as the alleged compelling by anti-Semitic economic pressure of Jewish owners of certain industrial properties to part with their title thereto was concerned.

Flick was, however, found guilty of war crimes in so far as the Counts relating to the employment of slave labour and prisoners of war and spoliation of public and private property in occupied territories were concerned. Flick was also found guilty of financial support to the S.S.

Steinbrinck was found guilty in so far as the Counts relating to financial support of and membership in the S.S. were concerned.

Weiss was found guilty of war crimes in so far as the Count relating to the employment of slave labour and prisoners of war was concerned. As to the other Counts charged, apart from Count Three which was dismissed, he was acquitted.

Each of the other three accused were acquitted on the Counts in which they were charged, except Count Three which was dismissed.

As to the three accused found guilty, the Tribunal held that there was much to be said in mitigation. Flick was sentenced to imprisonment for seven years. The two others convicted were sentenced to imprisonment for five and two and a half years.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court before which this trial was held was a United States Military Tribunal set up under the authority of Law No. 10 of the Allied Control Council for Germany, and Ordinance No. 7 of the Military Government of the United States Zone of Germany.⁽¹⁾

⁽¹⁾ For a general account of the United States law and practice regarding war-crime trials held before Military Commissions and Tribunals and Military Government Courts, see Vol. III of this series, pp. 103-120.

2. THE INDICTMENT

The accused, whose names appeared in the Indictment, were the following: Friedrich Flick, Otto Steinbrinck, Bernard Weiss, Odilo Burkart, Konrad Kaletsch and Hermann Terberger.

The Indictment filed against the six accused made detailed allegations which were arranged under five Counts, charging all or some of the accused respectively with the commission of War Crimes, Crimes against Humanity, Membership of, and/or Financial Support to, Criminal Organisations. The individual Counts made the following allegations and charges.

In Count 1 it was charged that, between September, 1939, and May, 1945, all six accused, in different capacities, committed war crimes and crimes against humanity, as defined by Article II of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of, organisations or groups connected with, the enslavement and deportation to slave labour on a gigantic scale of members of the civilian populations of countries and territories under the belligerent occupation of or otherwise controlled by, Germany; enslavement of concentration camp inmates including German nationals, and the use of prisoners of war in war operations and work having a direct relation to war operations, including the manufacture and transportation of armaments and munitions. In the course of these activities, hundreds of thousands of persons were enslaved, deported, ill-treated, terrorised, tortured and murdered. During this period tens of thousands of slave labourers and prisoners of war were sought and utilised by the accused in the industrial enterprises and establishments owned, controlled, or influenced by them. These slave workers were exploited under inhuman conditions with respect to their personal liberty, shelter, food, pay, hours of work and health.

The acts and conduct of the accused set forth in this Count were alleged to have been committed unlawfully, wilfully and knowingly and in violation of international conventions, particularly of Articles 3, 4, 5, 6, 7, 14, 18, 23, 43, 46 and 52 of the Hague Regulations of 1907, and of Articles 2, 3, 4, 6, 9-15, 23, 25, 27-34, 46-48, 50, 51, 54, 56, 57, 60, 62, 63, 65-68 and 76 of the Prisoners-of-War Convention (Geneva, 1929) of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of all civilised nations, of the internal penal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10.

According to Count Two, between September, 1939, and May, 1945, all the accused except Terberger committed war crimes and crimes against humanity, as defined by Article II of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with, plans and enterprises involving, and were members of organisations or groups connected with plunder of public and private property, spoliation, and other offences against property in countries and territories which came under the belligerent occupation of Germany in the course of its aggressive wars. These acts bore no relation to the needs of the army of occupation and were out of all proportion to the resources of the occupied territories. Their plans and enterprises were intended not only to strengthen Germany in waging its aggressive wars, but also to secure the permanent

economic domination by Germany of the continent of Europe and its industrial resources and establishments. All the accused except Terberger, participated extensively in the formulation and execution of the foregoing plans and policies of spoliation by seeking and securing possession, in derogation of the rights of the owners of valuable properties in the countries occupied by Germany, for themselves, for the Flick concern, and for other enterprises owned, controlled or influenced by them, and by exploiting these properties for German war purposes to an extent unrelated to the needs of the army of occupation and out of all proportion to the resources of the occupied territories.

The acts and conduct of the accused were said to have been committed unlawfully, wilfully and knowingly and in violation of those sources, rules and instruments of international and municipal law referred to under Count One and in particular of Articles 46-56 of the Hague Regulations of 1907.

It was charged in Count Three, that between January, 1936, and April, 1945, the accused Flick, Steinbrinck and Kaletsch committed crimes against humanity, as defined in Article II of Control Council Law No. 10 in that they were principals in, accessories to, ordered, abetted, took a consenting part in and were connected with plans and enterprises involving persecutions on racial, religious and political grounds, including particularly the "aryanisation" of properties belonging in whole or in part to Jews. As part of its programme of persecution of the Jews, the German Government pursued a policy of expelling Jews from the economic life. The Government and the Nazi Party embarked upon a programme involving threats, pressure and coercion generally, formalised or otherwise to force the Jews to transfer all or part of their property to non-Jews, a process usually referred to as "aryanisation". The means of forcing Jewish owners to relinquish their properties included discriminatory laws, decrees, orders and regulations; seizure of property under spurious charges, etc. The accused Flick, Steinbrinck and Kaletsch and the Flick concern participated in the planning and execution of numerous aryanisation projects. Activities in which they participated included procurement of sales which were voluntary in form but coercive in character. They used their close connections with high Government officials to obtain special advantages and some transactions, including those referred to hereinafter, were carried out in close co-operation with officials of the Army High Command (O.K.W.) and of the Office of the Four Year Plan, including Hermann Goering, who were interested in having the properties exploited as fully as possible in connection with the planning and waging of Germany's aggressive wars. Examples of such aryanisation projects in which Flick, Steinbrinck and Kaletsch were involved included:

- (1) Hochofenwerk Luebeck A.G. and its affiliated company, Rawack and Gruenfeld A.G.
- (2) The extensive brown coal properties and enterprises in central and south-eastern Germany owned, directly or indirectly, in substantial part by members of the Petschek family, many of whom were citizens of foreign nations, including Czechoslovakia.

As a result of these aryanisation projects, Jewish owners were alleged to have been deprived of valuable properties, which were transferred, directly or

indirectly, to the Flick Concern, the Hermann Goering Works, I.G. Farben, the Wintershall and Mannesman concerns and other German enterprises.

It was charged that the acts and conducts of the accused were committed unlawfully, wilfully and knowingly and in violation of the sources, rules and regulations of international and municipal law referred to under Count One.

Count Four claimed that between 30th January, 1933, and April, 1945, the accused Flick and Steinbrinck committed war crimes and crimes against humanity as defined by Article II of Control Council Law No. 10, in that they were accessories to, abetted, took a consenting part in, were connected with, plans and enterprises involving, and were members of organisations or groups connected with, murder, brutalities, cruelties, tortures, atrocities and other inhuman acts committed by the Nazi Party and its organisations, including principally Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (the S.S.) whose criminal character, purposes and actions were established and enlarged upon by the International Military Tribunal at Nuremberg. The accused Flick and Steinbrinck were members of a group variously known as "Friends of Himmler", "Freundeskreis" ("Circle of Friends") and the "Keppler Circle", which throughout the period of the Third Reich, worked closely with the S.S., and frequently and regularly with its leaders and furnished aid, advice and financial support to the S.S. This organisation ("Friends of Himmler") was composed of some 30 German business leaders and a number of the most important S.S. leaders, including Himmler himself. The business members of the Circle represented Germany's largest enterprises in the fields of iron, steel and munitions production, banking, chemicals and shipping. The Circle was formed early in 1932 at Hitler's suggestion by his economic adviser Wilhelm Keppler. The Circle met regularly up to and including 1945 with Himmler, Keppler and other high Government officials. Each year from 1933 to 1945 the Circle contributed about 1,000,000 marks a year to Himmler to aid financially the activities of the S.S. During this period the accused Flick and Steinbrinck made and procured large contributions by Flick and the Flick concern to the S.S. through the Circle.

Flick and Steinbrinck, it was charged, became members of this Circle and made their financial contributions to the S.S. through the Circle unlawfully, wilfully and knowingly in violation of the sources, rules and regulations of international and municipal law referred to in Count One of the Indictment.

Count Five charged the accused Steinbrinck with membership subsequent to 1st September, 1939, in Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (S.S.), declared to be criminal by the International Military Tribunal, and paragraph 1(d) of Article II of Control Council Law No. 10.

3. THE EVIDENCE BEFORE THE TRIBUNAL

The Record of the Trial comprises 10,343 pages, not including those portions of documents which were admitted without reading. The Court sat five days a week for six full months exclusive of recesses. Practically all the significant evidence was received without objection.

At the close of the proceedings, however, the accused jointly and severally sought to strike from the record hearsay testimony and affidavits on various grounds. This motion was ruled out by the Tribunal, which gave the following grounds for the admissibility and weight in general of hearsay evidence and affidavits: "As to hearsay evidence and affidavits: A fair trial does not necessarily exclude hearsay testimony and *ex parte* affidavits, and exclusion and acceptance of such matters relate to procedure and procedure is regulated for the Tribunal by Article VII of Ordinance 7 issued by order of the Military Government and effective 18th October, 1946. By this Article, the Tribunal is freed from the restraints of the common law rules of evidence and given wide power to receive relevant hearsay and *ex parte* affidavits as such evidence was received by the International Military Tribunal. The Tribunal has followed that practice here".

(i) *Evidence Regarding the Flick Organisation*

The Tribunal admitted evidence relating to the growth and construction of the so-called "Flick concern", which evidence was considered by the Tribunal to give a useful background for all the five Counts of the Indictment.

It was shown that the industrial career of the accused Flick had a small beginning. His first employment was as prokurist or confidential clerk in a foundry. His first major capital acquisition was in the Charlottenhuetten, a steel rolling mill, in 1915. Since then steel had been his principal interest, though he extended his organisation to include iron and coal mining companies as foundation for steel production. Incidentally, plants had been acquired for the further processing of the steel. His genius for corporate organisation enabled him to obtain voting control of numerous companies in which he did not have a majority capital interest. At the height of his career, through the Friedrich Flick Kommanditgesellschaft, the chief holding company, he had voting control of a dozen companies employing at least 120,000 persons engaged in mining coal and iron, making steel and building machinery and other products which required steel as raw material.

He had always been an advocate of individual enterprise and concerned in maintaining as his own against nationalisation the industries so acquired. As companies came under his voting domination, it was his policy to leave in charge the management which had proved its worth, and until the end of the war the Vorstände (managing boards) of the different companies were in a large degree autonomous. There were no central buying, selling or accounting agencies. Each company was administered by its own Vorstand. He was not a member of the Vorstand of any of the companies but confined his activities to the Aufsichtsrate (advisory boards) which dealt chiefly with financial questions. As chairman of the Aufsichtsrat of several companies, he had a voice beyond that of the ordinary member in the selection of members of the Vorstand. These companies were scattered over Germany. For the purpose of co-ordinating the companies into one system, he established offices in Berlin where he spent most of his time. The total office force did not exceed 100 persons, including secretaries, statisticians, file clerks, drivers and messengers.

Until 1940 the accused Steinbrinck was Flick's chief assistant, with Burkart and Kaletsch having lesser roles but not necessarily subordinate to Steinbrinck. When Steinbrinck resigned in December, 1939, the accused Weiss, who was a

nephew of Flick, was called to the Berlin office as Flick's assistant but with permission to devote about one-fourth of his time to his own company, Siegener Maschinenbau A.G. (Siemag), in the Siegerland, with about 2,000 employees. Thereafter Weiss, Burkart and Kaletsch, each in his own field, acted as assistants to Flick in the Berlin office. Weiss supervised the hard-coal mining companies and finishing plants; Burkart the soft-coal mining companies and steel plants, while Kaletsch acted as financial expert. The accused Terberger was not in the Berlin office but was a part of a local administration as a member of the Vorstand of Eisenwerkegesellschaft Maximilianshuetten, A.G., commonly called Maxhuetten, an important subsidiary operating plant in Bavaria, and through stock ownership controlling other plants in Thuringia and south Germany.

(ii) *Evidence Relating to Count One: The Accused's Responsibility for the Enslavement and Deportation of Civilians to Slave Labour, and for the Employment of Prisoners of War in Work having a direct Relation to War Operations*

From the evidence it was clear that the German slave-labour programme had its origin in Reich Governmental circles, and that for a considerable period of time prior to the use of slave labour proved in this case, the employment of such labour in German industry had been directed and implemented by the Reich Government.

Labourers procured under Reich regulations, including voluntary and involuntary foreign civilian workers, prisoners of war and concentration camp inmates, were shown to have been employed in some of the plants of the Flick Konzern and similarly some foreign workers and a few prisoners of war in Siemag. It further appeared that in some of the Flick enterprises prisoners of war were engaged in war work.

The accused, however, had no control of the administration of this labour supply, even where it affected their own plants. On the contrary, the evidence showed that the programme thus created by the State was supervised by the State. Prisoner-of-war labour camps and concentration camp inmate labour camps were established near the plants to which such prisoners or inmates had been allocated, the prisoner-of-war camps being in the charge of the Wehrmacht (Army), and the concentration camp inmate labour camps being under the control and supervision of the S.S. Foreign civilian labour camps were under camp guards appointed by the plant management subject to the approval of State police officials. The evidence showed that the managers of the plants here involved did not have free access to the prisoner-of-war labour camps or the concentration labour camps connected with their plants, but were allowed to visit them only at the pleasure of those in charge.

The evacuation by the S.S. of sick concentration camp labourers from the labour camp at the Groeditz plant for the purpose of "liquidating" them was done despite the efforts of the plant manager to frustrate the perpetration of the atrocity and illustrated the extent and supremacy of the control and supervision vested in and exercised by the S.S. over concentration labour camps and their inmates.

With the specific exception which will be dealt with below, the following

appeared to have been the procedure with respect to the procurement and allocation of workers. Workers were allocated to the plants needing labour through the Governmental labour offices. No plant management could effectively object to such allocation. Quotas for production were set for industry by the Reich authorities. Without labour, quotas could not be filled. Penalties were provided for those who failed to meet such quotas. Notification by the plant management to the effect that labour was needed resulted in the allocation of workers to such plant by the Governmental authorities. This was the only way in which workers could be procured.

It was shown by the evidence that, apart from the specific exception mentioned below, the accused were not desirous of employing foreign labour or prisoners of war. It further appeared that they were conscious of the fact that it was both futile and dangerous to object to the allocation of such labour. It was known that any act that could be construed as tending to hinder or retard the war economy programmes of the Reich would be construed as sabotage and would be treated with summary and severe penalties, sometimes resulting in the imposition of death sentences. Numerous proclamations and decrees of the Reich kept such threats and penalties before the people. There were frequent examples of severe punishment imposed for infractions. Of this, all of the defendants were ever conscious. Moreover, the Prosecution admitted that the accused were justified in their fear that the Reich authorities would take drastic action against anyone who might refuse to submit to the slave-labour programme.

Under such compulsion, despite the misgivings which it appears were entertained by some of the defendants with respect to the matter, they submitted to the programme and, as a result, foreign workers, prisoners of war or concentration camp inmates became employed in some of the plants of the Flick Konzern and in Siemens. Such written reports and other documents as from time to time may have been signed or initialed by the accused in connection with the employment of foreign slave labour and prisoners of war in their plants were for the most part obligatory and necessary to a compliance with the rigid and harsh Reich regulations relative to the administration of its programme.

The exception to the foregoing, and to which reference has been made, was the active participation of accused Weiss, with the knowledge and approval of the accused Flick in promoting increased freight-car production quota for the Linke-Hofmann Werke, a plant in the Flick Konzern. It likewise appeared that Weiss took an active and leading part in securing an allocation of Russian prisoners of war for use in the work of manufacturing such increased quotas. In both efforts the accused were successful.

The evidence failed to show that defendant Flick, as a member of the Praesidium of the Reichsvereinigung Eisen (an official organisation for the regulation of the entire German iron and steel industry commonly referred to as RVE) and of the Praesidium of the Reichsvereinigung Kohle (an official organisation for the regulation of the entire German coal industry commonly referred to as RVK) or as a member of the Beirat of the Economic Group of the iron-producing industry, exerted any influence or took any part in the formation, administration or furtherance of the slave-labour programme. The same may

be said with respect to the accused Steinbrinck's membership in the Praesidium of RVK. With respect to the accused Steinbrinck's activities and participation in the slave-labour programme as Plenipotentiary for coal in the occupied western territories (Beauftragter Kohle West, commonly referred to as Bekowest) and as Plenipotentiary General or Commissioner for the steel industry in northern France, Belgium and Luxembourg, the evidence was that he entered these positions long after the slave-labour programme had been created and put into operation by the Reich. His duties and activities in these positions, in so far as they involved the slave-labour programme, were obligatory. His only alternative to complying was to refuse to carry out the policies and programmes of the Government in the course of his duties, which, as hereinbefore indicated, would have been a hazardous choice. It appeared, however, that his actions in these positions in so far as they affected labour were characterised by a distinctly humane attitude.

The charges in this Count to the effect that the labourers thus employed in the accused's plants were exploited by the accused under inhumane conditions with respect to their personal liberty, shelter, food, pay, hours of work and health were not sustained by the proof. The evidence showed that the cruel and atrocious practices which are known to have characterised the slave-labour programme in many places where such labour was employed did not prevail in the plants and establishments under the control of the defendants. Isolated instances of ill-treatment or neglect shown by the evidence were not the result of a policy of the plants' managements, but were in direct opposition to it.

The accused did not have any actual control and supervision over the labour camps connected with their plants. Their duties as members of the governing boards of various companies in the Flick Konzern required their presence most of the time in the general offices of the concern in Berlin. The evidence also showed that the accused authorised and caused to be carried out measures conducive to humane treatment and good working conditions for all labourers in their plants. This was strongly evidenced by the fact that it was the policy and practice of the managers of the plants with which the accused were associated to do what was within their power to provide healthy housing for such labourers, and to provide them with not only better but more food.

It was also proved that following the collapse of Germany and the liberation of the slave labourers within the plants here under consideration, there were a number of striking demonstrations of gratitude by them toward the management of such plants for the humane treatment accorded while they were there employed.

As to the accused Steinbrinck, Burkart, Kaletsch and Terberger, the evidence clearly established that they had taken no active steps towards the employment of slave labour and that they would have been exposed to danger had they in any way objected to or refused to accept the employment of the forced labour allocated to them.

On the other hand, evidence was submitted of the active steps taken by Weiss with the knowledge of Flick to procure for the Linke-Hofmann Werke an increased production of freight cars,⁽¹⁾ and Weiss's part in the procurement of

⁽¹⁾ Which, in the opinion of the Tribunal, constituted military equipment within the contemplation of the Hague Regulations.

large numbers of Russian prisoners of war for work in the manufacture of such equipment. The steps taken in this instance were initiated not in Government circles, but in the plant management. Moreover, the evidence showed that these steps were taken not as a result of compulsion or fear, but admittedly for the purpose of keeping the plant as near capacity production as possible.

(iii) *Evidence Relating to Count Two: The Accused's Responsibility for Spoliation and Plunder in Occupied Territories*

After the Prosecution had withdrawn certain allegations originally covered by this Count, there remained the following: the accused Flick, Weiss, Burkart and Kaletsch were claimed to have exploited properties which for convenience during the trial were called Rombach in Lorraine, Vairogs in Latvia and Dnjepr Stahl in the Ukraine. Steinbrinck's activities as Plenipotentiary General for the steel industry and Plenipotentiary for coal in certain occupied western territories were also claimed to be criminal. Flick and Steinbrinck were accused of participating in spoliation plans and programmes through connections with RVE, RVK and their predecessor and subsidiary organisations. This latter charge was not sustained by the evidence. Flick alone was charged with participation in the spoliation plans and programme in Russia through his position as member of the Verwaltungsrat (supervisory board) of the Berg und Huettenwerke Ost (B.H.O.). It was shown by the evidence that Flick's influence on this latter matter, if any, was negligible.

There was no evidence of the actual removal of property by the accused. Moveable properties had been brought from Latvia and Ukraine upon the approach of the returning Russian armies. A large part thereof had, however, been taken there from Germany to equip industrial plants, which had been stripped by the Russians in their retreat. Other moveable properties left by the Russians were of little value. It was not established with any certainty that they were shipped to Germany. Furthermore, the evidence did not connect any of the defendants with responsibility for the evacuation. Ten barges that disappeared from the plant of Rombach were all found by the French owners on their return. Some had been sunk or damaged during the retreat of the fleeing German Army, but for these acts the accused were not responsible.

Evidence was produced relating to Steinbrinck's activities directing the production of coal and steel in the western territories, the Flick administration of the Rombach plant and the occupation and use of Vairogs and Dnjepr Stahl plants in the east.

(a) *Evidence Regarding the Seizure and Use of the Rombach Plant*

It was established by the evidence that the Rombach plant in Lorraine, at the time of the German invasion, was owned by a French corporation dominated by the Laurent family. The enterprise consisted in 1940 principally of blast furnaces, Thomas works, rolling mills and cement works. It furnished employment and the means of livelihood for a large indigenous population. When the German Army invaded Lorraine in 1940, the management fled, but many of the workers, including technicians, remained. Key installations had been removed or destroyed, so that the plant was inoperable until extensive repairs had been made. In the meanwhile the workers were idle, except in so far as

they were employed to renovate the plant. After the occupation of western territories, the Supreme Commander of the German Army issued a "Decree concerning the orderly management and administration of enterprises and concerns in the occupied territories" dated 23rd June, 1940. It stated that, should an orderly management or administration of enterprises, including concerns dedicated to industry, not be insured owing to the absence of the persons authorised or for other compelling reasons, public commissioners should be appointed during whose administration the powers of the property holders or owners were to be suspended. The costs of the administration were to be borne by the enterprise. The commissioner was obliged to exercise the care of a prudent business man in the conduct of the enterprise. He was "not empowered to transfer his administration to a third party". On 27th July, 1940, the same commander issued a directive in compliance with the decree of 23rd June, 1940. This directive was not produced in evidence, but an affidavit stated that the appointment of administrators "had to take place exclusively through the chief for the civil administration". There were apparently other relevant directives which also were not in evidence. In any event a public commissioner or administrator was appointed for the Rombach plant and ultimately executed a contract with the Friedrich Flick Kommanditgesellschaft called "Use of enterprise conveyance agreement" dated 15th December, 1942, but effective as from 1st March, 1941, when the Flick group took possession. The agreement recited an order of the Plenipotentiary for the Four Year Plan to the effect that the iron foundries situated in Lorraine are "in the name of the Reich to be controlled, managed and operated by single individuals or enterprises on their own account". The contract, however, designated the Flick Kommanditgesellschaft as trustee not grantee. Prior to taking possession the Flick group had learned through Governmental agencies that a number of plants in Lorraine were to be parcelled out for administration by German firms. These firms, including Flick, had the hope of ultimately acquiring title to the respective properties and this trusteeship was sought to that end. There were provisions in the contract providing terms of purchase and also providing for remuneration for capital investment by the lessee if the purchase should not materialise. At no time, however, was there any definite sale commitment and in the event the hope of its realisation was frustrated by the fortunes of war. Charles Laurent as a witness testified that he was expelled from Lorraine in 1940 and that the Flick administration had nothing to do therewith. It did not appear that he tried to regain possession of the plant. A corporation called Rombacher Huettenwerke, G.M.B.H., was organised by Flick to operate the plant, and operations continued from March, 1941, until the Allied invasion about 1st September, 1944. All the profits were invested in repairs, improvements and new installations. As the Allied armies approached Rombach, the German military authorities gave orders for the destruction of the plants, which were disobeyed by the officials of the trustees. When the French management returned the plants were intact. There was conflicting testimony as to their condition in early 1941 and again in September, 1944. The evidence showed, however, that the trustee left the properties in better condition than when they were taken over. Approximately one-third of the production of the blast furnaces in this district went to Germany, the rest to France, Belgium and other countries; this general ratio of exports had also existed before the war. There were no separate figures for the Rombach plant.

The evidence showed that some time after the seizure the Reich Government, in the person of Goering, Plenipotentiary for the Four Year Plan, made clear its manifested intention that the Rombach plant should be operated as the property of the Reich. Although Flick apparently saw the possibilities resulting from the invasion and sought to add the Rombach property to his concern, the evidence proved that what had actually been done by his company in the course of its management fell far short of such exploitation. His expectation of ownership caused him to invest in the property the profits from the operation, which ultimately proved to be to the benefit of the owners. Laurent, as a witness, agreed that the factory had not been mismanaged or ransacked. There were no figures in the record showing the needs of the army of occupation in respect to the products from Rombach, or any statistics tending to show the effect of the Rombach production and distribution on the French economy.

The fact remained, however, that the owners of the plant had, subsequent to its seizure, and until the liberation, been deprived of its possession. According to the evidence it had at one time been suggested that the French management be included in the controlling body, but Flick had refused to agree to this proposal.

As to Weiss, Burkart and Kaletsch, the evidence showed that they had played a minor part in this transaction. They were employed and paid by Flick but had no capital interests in his enterprises. They thereby supplied him with information and advice. The decisions were taken by Flick himself.

(b) *Evidence Regarding the Seizure and Use of the Vairogs and Dnjepr Steel Plants*

The Vairogs plant was a railroad-car and engine factory in Riga, once owned by a Flick subsidiary, sold to the Latvian State about 1936 and then expropriated in 1940 as the property of the Soviet Government.

Dnjepr Stahl was a large industrial group consisting of three foundries, two tube plants, a rolling mill and a machine factory, also owned by the Russian Government. These plants had been stripped of usable moveables when the Russian Army retreated eastward and further steps had been taken to render them useless to the Germans. Dnjepr Stahl particularly had been largely dismantled and immoveables seriously damaged or destroyed. Over 1,000,000 Reichmarks of German funds at Vairogs and 20,000,000 at Dnjepr Stahl were spent in reactivating the plants. They were in the possession of Flick subsidiary companies as trustees, the former for less than two years, beginning in October, 1942, the latter for the first eight months of 1943.

At the railway-car plant the trustee not only manufactured and repaired cars and equipment for the German railways but also nails, horseshoes, locks, and some other products. The source of the raw materials was not shown except that iron and steel were bought from German firms. The evidence did not sustain the Prosecution's claim that gun carriages were manufactured. At Dnjepr Stahl the output consisted of sheet steel, bar iron, structural products, light railroad rails and a small quantity of semi-finished shell products, but the plants barely got into production. When the German civilians departed all plants were undamaged.

The only activity of the individual defendants in respect to these industries consisted in negotiating the procurement of trustee contracts. Operations were solely under the direction of technicians lent to the trustees. Their salaries were paid from funds furnished by Governmental agencies and they were responsible only to Reich officials. The Dnjepr Stahl contract was made with B.H.O.⁽¹⁾ which, under the direction of Goering for the Four Year Plan, took over as trustee all Soviet industrial property under a decree which declared this to be "marshalled for the national economy and belonging to the German State". The contract for Vairogs was with a Reich commissioner, as a part of the civil administration of Latvia that was set up in the wake of the invading German Army. The capital for operation was furnished by B.H.O. and the commissioner, whose directives were conclusive.

(c) *Evidence Relating to the Accused Steinbrinck's Activities as Commissioner for Steel in Luxembourg, Belgium and Northern France from May, 1941, until July, 1942, and as Commissioner for Coal (Bekowest) in Holland, Belgium, Luxembourg and Northern France excepting Lorraine from March, 1942, until September, 1944*

These two positions involved similar tasks: to get the steel plants into operation in the districts under his supervision and to bring into production the collieries of his territory as Bekowest. As commissioner for steel his directives came from General von Hanneken, whose authority was derived from Goering as Plenipotentiary for the Four Year Plan. As Bekowest he was given discretionary powers by Paul Pleiger, General Plenipotentiary for Coal in Germany and the occupied territories under a programme formulated and directed by Goering. The accused's actual policies of administration, however, brought him into conflict with other German administrators, including Roehling, and led to his resignation as commissioner for steel on 2nd July, 1942. In obtaining steel production he worked in co-operation with local industrialists, most of whom after their first flight from the German Army returned to their tasks. There was no evidence that on Steinbrinck's orders any of them were displaced or excluded. His relations with them were cordial and their respect for his ability and conduct is shown by numerous affidavits, including some from representatives of the coal industry.

The evidence showed that in his administration he endeavoured to disturb as little as possible the peace-time flow of coal and steel between industries in these countries. With respect to Belgium and Luxembourg the ratio of steel export to home consumption under his regime was not materially different from that in peace-time. The evidence also showed that the steel production in northern France remained there either for home consumption or for processing. The different companies were paid for their shipments in some cases at better prices than in peace-time. Prior to the occupation, France had been receiving annually about 20,000,000 tons of coal from England which, of course, ceased with the German invasion. Vichelonne, a Frenchman, in charge of coal production in southern France, attempted by maximum production there to make up this shortage. His lack of success caused Steinbrinck as Bekowest to turn over to Vichelonne 68 per cent of the coal produced in northern France. He also sent coal to Vichelonne from Belgium

(1) Berg und Huettenerwerke Ost, G.m.b.H.

and Holland and some from Germany. From the figures submitted it was not proved that the accused Steinbrinck was incorrect when stating that the ratio between export and home consumption did not materially differ in the period before and that of the occupation. Coal for home consumption was rationed under his administration but the evidence did not show that the ration per person was materially less than for peace-time consumption. Despite the Wehrmacht's order to the contrary, he left the mines in operable conditions.

(iv) *Evidence Relating to Count Three: the Responsibility of the Accused Flick, Steinbrinck and Kaletsch in Connection with the Persecution of Jews: Crimes against Humanity*

The evidence dealt exclusively with four separate transactions. Three of them were shown to be outright sales of controlling shares in manufacturing and mining corporations. In the fourth, involving the Ignatz Petschek brown coal mines in central Germany, there was an expropriation by the Third Reich, from which afterwards the Flick interests and others ultimately acquired the substance of the properties.

There was no contention that the accused in any way participated in the Nazi persecution of Jews other than taking advantage of the so-called aryani-sation programme by seeking and using State economic pressure to obtain from the owners, not all of whom were Jewish, the four properties in question.

All these transactions were in fact completed before the outbreak of the war.⁽¹⁾

(v) *Evidence Relating to Counts Four and Five: Charging Respectively Financial Support to, and Membership of, the S.S., adjudged criminal by the International Military Tribunal in Nuremberg*

The evidence established that the accused Steinbrinck was a member of the S.S. from 1933 to the time of the German collapse. There is no evidence to show that he was personally implicated in the commission of its crimes. It was not contended that he was drafted into membership in such a way as to give him no choice. The point at issue was, therefore, whether he remained a member after 1st September, 1939, with knowledge that the organisation was being used for the commission of acts declared criminal.

The accused Flick, although a member of the Himmler Circle of Friends, was not a member of the S.S.

The accused Steinbrinck became a member of the Circle of Friends of Himmler in 1932 in its early days when it was known as the Keppler Circle. There is evidence that industrialists believed that Keppler would become Hitler's chief economic adviser and that they were not unwilling to meet and exchange views with a man who was likely to become a powerful State leader. The accused Flick was not drawn into the group until three years later and then only casually. Keppler's influence with Hitler waned and Himmler's influence grew and his ascendancy began, so that even before the beginning of

⁽¹⁾ There is no need to describe further the evidence concerning these transactions because, as will be noted from the judgment, the Tribunal held that neither did these acts constitute crimes against humanity as defined in the Charter, Control Council Law No. 10, or the judgment of the International Military Tribunal, nor had the Tribunal any jurisdiction to try alleged crimes against humanity committed before 1st September, 1939. See pp. 24-28 and 44 *et seq.*

the war the group came to be known as the Circle of Friends of Himmler. As the war went on more and more high S.S. leaders and officers attended the meetings, probably on the invitation or command of Himmler. There used to be an annual meeting in connection with the party rally at Nuremberg. Later there were more frequent meetings taking the form of dinner parties. There was no regular seating and after dinner the party broke up into small groups. Himmler was not always present, and he did not single out the accused Flick and Steinbrinck for attention. There was no evidence that the criminal activities of the S.S. were discussed. In 1936 Himmler took members of the Circle on an inspection trip to visit Dachau Concentration Camp which was under his charge. They had seen nothing of any atrocities, but Flick, who was also present, got the impression that it was not a pleasant place. On the day after Heydrich's funeral in 1942 there was a meeting of the Circle, and from the evidence it seemed reasonably clear that both the accused Flick and Steinbrinck were present. During this meeting Kranefuss, an assistant to Keppler and Himmler, delivered an eulogy of Heydrich which he afterwards sent in written form to at least one member of the Circle. Referring to Himmler as the Reichsführer, Kranefuss said in part: "The Reichsführer said yesterday that he, the deceased, was feared by sub-humans (Untermenschen), hated and denounced by Jews and other criminals, and at one time was misunderstood by many a German. His personality and the unusually difficult tasks assigned to him were not of a nature to make him popular in the ordinary sense of the word. He carried out many harsh measures ordered by the State and covered them with his name and person, just as the Reichsführer does every day". (It was claimed by the Prosecution that what had been said here could hardly fail to give the impression that not only Heydrich but Himmler was inhuman in his attitude and in his deeds.)

After the Dachau trip, members of the Circle were called upon by Keppler to contribute money to Himmler. He informed them at a meeting which Flick attended that the funds were to be spent for some of his cultural hobbies and for emergencies for which he had no appropriations. Von Schroeder, a witness for the prosecution, as well as Flick and Steinbrinck, testified that they were always of the opinion that the monies they contributed were spent for these hobbies. However, the early letters requesting gifts, some of which were signed by Steinbrinck, did not mention hobbies, but stated that the money was to be used for "special purposes".

About forty persons were in the Circle, including bankers, industrialists, some Government officials as well as S.S. officers. At least half of them responded to the request for funds. There were six donations of 100,000 Reichmarks each and the total sum raised annually was over 1,000,000 Reichmarks. Apparently Flick's donations were paid by Mittelstahl, one of his companies, and Steinbrinck's came from Vereinigte Stahlwerke A.G., a State-owned corporation with which he was connected when the contributions began. Other officials of that corporation approved the payment. The contributions began long before the war at a time when the criminal activities of the S.S., if they had begun, were not generally known. The same amount was raised annually until 1944. The money went into a special fund in the Stein Bank at Cologne controlled by Von Schroeder and thence, as it accumulated, into an account in the Dresdner Bank upon which Karl Wolff, Himmler's personal adjutant, drew cheques.

It was not shown that the accused knew of the second account or of the specific purpose of the several cheques drawn thereon. Nor could the prosecution positively prove that any part of the money was directly used for the criminal activities of the S.S.

From the evidence it was, however, clear that the contributions continued and the members regularly accepted invitations to the meetings of the Circle after the criminal activities of the S.S. must have been commonly known. Some of the members withdrew and were nevertheless still alive. These, however, were not of the prominence of Flick and Steinbrinck. Flick suggested in his testimony that he regarded membership in the Circle as being in the nature of an insurance. There was, however, no evidence to show that the accused's membership of, and contribution through the Circle, was the result of any such compulsion as was pleaded in connection with the charges under Count One.

4. THE JUDGMENT OF THE TRIBUNAL

The judgment was delivered on 22nd December, 1947. In addition to summarising the evidence which had been placed before it, the Tribunal in its judgment dealt with a number of questions of law. These last, together with the findings and sentences, are set out in the following pages.

(i) *The Relevance of Control Council Law No. 10 and of Ordinance No. 7 of the United States Zone in Germany*

The Tribunal commented briefly upon its own legal nature and competence in the following words:

"The Tribunal is not a Court of the United States as that term is used in the Constitution of the United States. It is not a court martial. It is not a military commission. It is an international tribunal established by the International Control Council, the high legislative branch of the four Allied Powers now controlling Germany. (Control Council Law No. 10 of 20th December, 1945.) The Judges were legally appointed by the Military Governor and the later act of the President of the United States in respect to this was nothing more than a confirmation of the appointments by the Military Governor. The Tribunal administers international law. It is not bound by the general statutes of the United States or even by those parts of its Constitution which relate to courts of the United States.

"Some safeguards written in the Constitution and statutes of the United States as to persons charged with crime, among others such as the presumption of innocence, the rule that conviction is dependent upon proof of the crime charged beyond a reasonable doubt, and the right of the accused to be advised and defended by counsel, are recognised as binding on the Tribunal as they were recognised by the International Military Tribunal (I.M.T.). This is not because of their inclusion in the Constitution and statutes of the United States but because they are deeply ingrained in our Anglo-American system of jurisprudence as principles of a fair trial."

As to the admissibility of hearsay evidence and affidavits, the Tribunal gave the following general ruling:

"A fair trial does not necessarily exclude hearsay testimony and *ex parte* affidavits, and exclusion and acceptance of such matters relate to procedure and

procedure is regulated for the Tribunal by Article VII of Ordinance No. 7 issued by order of the Military Government and effective from 18th October, 1946. By this Article, the Tribunal is freed from the restraints of the common law rules of evidence and given wide power to receive relevant hearsay and *ex parte* affidavits as such evidence was received by the International Military Tribunal. The Tribunal has followed that practice here."

As to the substantive law administered, the Tribunal declared:

"The Tribunal is giving no *ex post facto* application to Control Council Law No. 10. It is administering that law as a statement of international law which previously was at least partly uncodified. Codification is not essential to the validity of law in our Anglo-American system. No act is adjudged criminal by the Tribunal which was not criminal under international law as it existed when the act was committed.

"To the extent required by Article 10 of Military Government Ordinance No. 7, the Tribunal is bound by the judgment of the International Military Tribunal (hereinafter referred to as I.M.T.) in Case No. 1 against Goering *et al.*, but we shall indulge in no implications therefrom to the prejudice of the defendants against whom the judgment would not be *res judicata* except for this Article. There is no similar mandate either as to findings of fact or conclusions of law contained in judgments of co-ordinate Tribunals. The Tribunal will take judicial notice of the judgments but will treat them as advisory only."

(ii) *The Question of the Criminal Responsibility of Individuals in General for such Breaches of International Law as Constitute Crimes*

The Tribunal expressed its opinion upon this question in the following words:

"It is noteworthy that the defendants were not charged with planning, preparation, initiation or waging a war of aggression or with conspiring or co-operating with anyone to that end. Except as to some of Steinbrinck's activities the accused were not officially connected with Nazi Government, but were private citizens engaged as business men in the heavy industry of Germany. Their counsel, and Flick himself in his closing unsworn statement, contended that in their persons industry itself is being persecuted. They had some justification for so believing since the Prosecution at the very beginning of the trial made this statement:

'The defendants in this case are leading representatives of one of the two principal concentrations of power in Germany. In the final analysis, Germany's capacity for conquest derived from its heavy industry and attendant scientific techniques, and from its millions of able-bodied men, obedient, amenable to discipline and overly susceptible to panoply and fanfare. Krupp, Flick, Thyssen and a few others swayed the industrial group: Beck, von Fritsch, Runstedt and other martial exemplars ruled the military clique. On the shoulders of these groups Hitler rode to power, and from power to conquest.'

"But the Prosecution made no attempt to prove this charge and when the accused presenting their case prepared to call witnesses to disapprove it, the Tribunal excluded the testimony.

"The question of the responsibility of individuals for such breaches of international law as constitute crimes, has been widely discussed and is settled in part by the judgment of the I.M.T. It cannot longer be successfully maintained that international law is concerned only with the actions of sovereign States and provides no punishment for individuals.

"That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised. In the recent case of *Ex Parte Quirin* (1942, 317 U.S. 1, 63 S.Ct. 2, 87 L. Ed. 3) before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:

'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribed for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals.' (Judgment of I.M.T.)

"But the International Military Tribunal was dealing with officials and agencies of the State, and it is argued that individuals holding no public offices and not representing the State, do not, and should not, come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in *propria persona*. The application of international law to individuals is no novelty. (See *The Nuremberg Trial and Aggressive War*, by Sheldon Glueck, Chapter V, pp. 60-67 inclusive, and cases there cited.) There is no justification for a limitation of responsibility to public officials."

(iii) *Count One: The Admissibility and Relevance of the Defence of Necessity*

It appears from the evidence relating to Count One that the accused were conscious of the fact that it was both futile and dangerous to object to the allocation of slave labourers and prisoners of war. It was known that any act that could be construed as tending to hinder or retard the war economy programmes of the Reich would be construed as sabotage and would be treated with summary and severe penalties, sometimes resulting in the imposition of death sentences. There were frequent examples of severe punishments imposed for infractions.

The following paragraphs set out the Tribunal's attitude to the accused's plea of necessity:

"Recognizing the criminality of the Reich labour programme⁽¹⁾ as such, the only question remaining for our decision with respect to this Count is whether the defendants are guilty of having employed conscripted foreign

⁽¹⁾ See pp. 52-4.

workers, concentration camp inmates or prisoners of war allocated to them through the slave-labour programme of the Reich under the circumstances of compulsion under which such employment came about. These circumstances have hereinbefore been discussed. The Prosecution has called attention to the fact that defendants Walter Funk and Albert Speer were convicted by the International Military Tribunal because of their participation in the slave-labour programme. It is clear, however, that the relation of Speer and Funk to such programme differs substantially from the nature of the participation in such programme by the defendants in this case. Speer and Funk were numbered among the group of top public officials responsible for the slave-labour programme.

"We are not unmindful of the provision of paragraph 2 of Article II of Control Council Law No. 10, which states that:

'2. Any person without regard to the nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission. . . .'

nor have we overlooked the provision in paragraph 4, subdivision (b) of Article II of such Control Council Law No. 10, which states:

'(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.'

"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 obtained in this case with respect to defendants Steinbrinck, Burkart, Kaletsch and Terberger. This Tribunal might be reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defence of necessity here urged in their behalf. This principle has had wide acceptance in American and English courts and is recognised elsewhere.

"Wharton's *Criminal Law*, Vol. I, Chapter VII, subdivision 126, contains the following statement with respect to the defence of necessity, citing cases in support thereof:

'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.'

"A note under subdivision 384 in Chapter XIII, Wharton's *Criminal Law*, Vol. 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.'

"The Prosecution, on final argument, contended that the defendants are barred from interposing the defence of necessity. In the course of its argument, the Prosecution referred to paragraph 4, subdivision (b), of Article II of Control Council Law No. 10, and stated:

"This principle has been most frequently applied and interpreted in military cases. . . ."

"Further on in the argument, it was said:

"The defendants in this case, as they have repeatedly and plaintively told us, were not military men or Government officials. None of the acts with which they are charged under any Count of the Indictment were committed under 'orders' of the type we have been discussing. By their own admissions, it seems to us they are in no position to claim the benefits of the doctrine of 'superior orders' even by way of mitigation."

"The foregoing statement was then closely followed by another, as follows:

"The defence of 'coercion' or 'duress' has a certain application in ordinary civilian jurisprudence. But despite the most desperate efforts, the defendants have not, we believe, succeeded in bringing themselves within the purview of these concepts."

"The Prosecution then asserted that this defence has no application unless the defendants acted under what is described as 'clear and present danger'. Reference was made to certain rules and cases in support of such position.

"The evidence with respect to defendants Steinbrinck, Burkart, Kaletsch and Terberger in our opinion, however, clearly established that there was in the present case 'clear and present danger' within the contemplation of that phrase. We have already discussed the Reich reign of terror. The defendants lived within the Reich. The Reich, through its hordes of enforcement officials and secret police was always 'present' ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of Governmental regulations or decrees.

"In considering the application of rules to the defence of necessity, attention may well be called to the following statement:

"The law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules, and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as matter of surprise, therefore, if much instituted rule (*sic*) is not to be found on such subject." (Wharton's *Criminal Law*, Vol. I, Chapter VII, subdivision 126 and cases cited.)

"In this case, in our opinion, the testimony establishes a factual situation which makes clearly applicable the defence of necessity as urged in behalf of the defendants Steinbrinck, Burkart, Kaletsch and Terberger.

"The active steps taken by Weiss with the knowledge and approval of Flick to procure for the Linke-Hofmann Werke increased production quota of freight cars which constitute military equipment within the contemplation of the Hague Convention, and Weiss's part in the procurement of a large number of Russian prisoners of war for work in the manufacture of such equipment

deprive the defendants Flick and Weiss of the complete defence of necessity. In judging the conduct of Weiss in this transaction, we must, however, remember that obtaining more materials than necessary was forbidden by the authorities just as short in filling orders was forbidden. The war effort required all persons involved to use all facilities to bring the war production to its fullest capacity. The steps taken in this instance, however, were initiated not in Governmental circles but in the plant management. They were not taken as a result of compulsion or fear, but admittedly for the purpose of keeping the plant as near capacity production as possible."

(iv) *Spoliation and Plunder of Occupied Territories as a War Crime: Articles 45, 46, 47, 52 and 55 of the Hague Regulations of 1907*

After having summed up the evidence submitted with regard to Count Two, the Tribunal went on to discuss the legal questions involved in the following words:

"I.M.T. dealt with spoliation under the title 'Pillage of Public and Private Property'. Much that is said therein has no application to this case. No defendant is shown by the evidence to have been responsible for any act of pillage as that word is commonly understood. . . ."

"No crimes against humanity are here involved. Nor are war crimes except as they may be embodied in the Hague Regulations. The Prosecution so admits in its concluding brief, saying: 'Thus, the charge amounts to, and it need only be proved, that the defendants participated in the systematic plunder of property which was held to be in violation of the Hague Regulations'. The words 'systematic plunder' came from the I.M.T. judgment. They are not very helpful in enabling us to point to the specific regulations which defendant's acts are supposed to violate.

"In the listed Articles we find that 'private property . . . must be respected . . . and cannot be confiscated'. 46, 'Pillage is formally forbidden'. 47. There is nothing pertinent in 48, 49, 40 and 51. From 52 I.M.T. gets some of the language of its judgment. The Article reads:

"Requisitions in kind and services shall not be demanded from municipalities 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 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 cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible."

"We quote also, as bearing on the questions before us, Article 53:

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

"All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots or arms and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made."

"Submarine cables, treated in 54, and properties referred to in 56 are not here involved. This leaves only 55, which reads:

"The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."

"From Articles 48, 49, 52, 53, 55 and 56, I.M.T. deduced that 'under the rules of war, 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'. Following this lead the prosecution in the first paragraph of Count Two says that defendants' 'acts bore no relation to the needs of the army of occupation and were out of all proportion to the resources of the occupied territories'. A legal concept no more specific than this leaves much room for controversy when an attempt is made to apply it to a factual situation. This becomes evident when Rombach is considered."

(a) *The Application of the Hague Regulations to the Seizure and Management of Private Property: Even if the Original Seizure of the Property is in itself not unlawful, its subsequent Detention from the Rightful Owners is unlawful and amounts to a War Crime: The Plea of Military Necessity*

The judgment recalls that the Rombach plant was a private property, owned by a French corporation dominated by the Laurent family. After having commented on the evidence which showed that the trustee left the property intact and even in a better condition than when it was taken over, the judgment continues:

"The seizure of Rombach in the first instance may be defended upon the ground of military necessity. The possibility of its use by the French, the absence of responsible management and the need for finding work for the idle population are all factors that the German authorities may have taken into consideration. Military necessity is a broad term. Its interpretation involves the exercise of some discretion. If after seizure the German authorities had treated their possession as conservatory for the rightful owners' interests, little fault could be found with the subsequent conduct of those in possession."

"But some time after the seizure the Reich Government in the person of Goering, Plenipotentiary for the Four Year Plan, manifested the intention that it should be operated as the property of the Reich. This is clearly shown by the quoted statement in the contract which Flick signed. It was, no doubt, Goering's intention to exploit it to the fullest extent for the German war effort. We do not believe that this intent was shared by Flick. Certainly what was done by his company in the course of its management falls far short of such

exploitation. Flick's expectation of ownership caused him to plough back into the physical property the profits of operation. This policy ultimately resulted to the advantage of the owners. In all of this we find no exploitation either for Flick's present personal advantage or to fulfil the aims of Goering."

The judgment then continues:

"While the original seizure may not have been unlawful, its subsequent detention from the rightful owners was wrongful. For this and other damage they may be compensated. Laurent, as a witness, told of his intention to claim reparations. For suggesting an element of damage of which he had not thought, he thanked one of the defendant's Counsel. It may be added that he agreed with Counsel that the factory had not been 'mismanaged or ransacked'."

"But there may be both civil and criminal liability growing out of the same transaction. In this case Flick's acts and conduct contributed to a violation of Hague Regulation 46 that is, that private property must be respected. Of this there can be no doubt. But his acts were not within his knowledge intended to contribute to a programme of 'systematic plunder' conceived by the Hitler regime and for which many of the major war criminals have been punished. If they added anything to this programme of spoliation, it was in a very small degree."

"The purpose of the Hague Convention, as disclosed in the Preamble of Chapter II, was 'to revise the general laws and customs of war, either with a view to defining them with greater precision or to confine them within such limits as would mitigate their severity so far as possible'. It is also stated that 'these provisions, the wording of which has been inspired by a desire to diminish the evils of war, as far as military requirements will permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants'. This explains the generality of the provisions. They were written in a day when armies travelled on foot, in horse-drawn vehicles and on railroad trains; the automobile was in its Ford Model T stage. Use of the airplane as an instrument of war was merely a dream. The atomic bomb was beyond the realms of imagination. Concentration of industry into huge organisations transcending national boundaries had barely begun. Blockades were the principal means of 'economic warfare'. 'Total warfare' only became a reality in the recent conflict. These developments 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."

In its adjudgment of the accused's individual responsibility in connection with the seizure and management of the Rombach plant, the judgment concludes:

"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 to the Rombach matter but will take fully into consideration in fixing his punishment all the circumstances under which he acted."

"Weiss, Burkart and Kaletsch had minor roles in this transaction. They were Flick's salaried employees without capital interest in his enterprises. They furnished him with information and advice. But the decisions were his. He alone could gain or lose by the transaction. They did not conspire with him or State officials in any plan of 'systematic plunder'. We cannot see in their conduct any culpability for which they should now be punished."

(b) *The Application of the Hague Regulations to the Seizure and Management of State Property: The Occupant has a Usufructuary Right in such Property*

As to the legal questions involved in connection with the seizure and management of the Vairogs and Dnjepr Stahl plants, the Tribunal held:

"These activities stand on a different legal basis from those at Rombach. Both properties belonged to the Soviet Government. The Dnjepr Stahl plant had been used for armament production by the Russians. The other was devoted principally to production of railroad cars and equipment. No single one of the Hague Regulations above quoted is exactly in point, but adopting the method used by I.M.T., we deduce from all of them, considered as a whole, the principle that State-owned property of this character may be seized and operated for the benefit of the belligerent occupant for the duration of the occupancy. The attempt of the German Government to seize them as the property of the Reich of course was not effective. Title was not acquired nor could it be conveyed by the German Government. The occupant, however, had a usufructuary privilege. Property which the Government itself could have operated for its benefit could also legally be operated by a trustee. We regard as immaterial Flick's purpose ultimately to acquire title. To covet is a sin under the Decalogue but not a violation of the Hague Regulations nor a war crime. We have already expressed our views as to the evacuation of moveables from these plants. Weiss congratulated the manager of Vairogs upon his success in moving out machinery and equipment. In this we see nothing incriminating since Weiss neither had nor attempted to exercise any control of the evacuation and learned of it only after it was accomplished. We conclude, therefore, that there was no criminal offence for which any of the defendants may be punished in connection with Vairogs and Dnjepr Stahl."

(c) *The Application of the Hague Regulations to the Alleged Spoliation in General of the Economy of an Occupied Territory by the Accused Steinbrinck in his Capacities as Commissioner for Steel and Coal in Luxembourg, Belgium, Holland and Northern France*

In this connection, the Tribunal felt satisfied that there was no criminality in the way in which the accused had performed his duties.⁽¹⁾

(v) *The Charge of Crimes against Humanity: The Omission from Control Council Law No. 10 of the Modifying Phrase "in execution of or in connection with any Crime within the Jurisdiction of the Tribunal" (found in Article 6(a) of the Charter attached to the London Agreement of 8th August, 1945) does not widen the scope of Crimes against Humanity in the Opinion of this Tribunal: Offences against Jewish Property such as charged under Count Three are not Crimes against Humanity*

⁽¹⁾ See the relevant summary of evidence, on pp. 13-14.

As has been seen,⁽¹⁾ the evidence submitted in connection with the charge under Count Three dealt exclusively with four separate transactions by which the Flick interests acquired industrial property formerly owned or controlled by Jews. Three were outright sales. In the fourth there was an expropriation by the Third Reich from which afterwards the Flick interests and others ultimately acquired the substance of the property. The Tribunal found it proved that all four transactions were in fact completed before 1st September, 1939. The judgment then turned to the legal questions involved.

(a) *The Legal Effect of the Omission from Control Council Law No. 10 of the Modifying Phrase "in execution of or in connection with any crime within the jurisdiction of the Tribunal", found in Article 6(a) of the Charter attached to the London Agreement of 8th August, 1945*

The judgment states:

"In the I.M.T. trial the Tribunal declined to take jurisdiction of crimes against humanity occurring before 1st September, 1939, basing its ruling on the modifying phrase 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' found in Article 6(a) of the Charter attached to the London Agreement of 8th August, 1945. It is argued that the omission of this phrase from Control Council Law No. 10 evidences an intent to broaden the jurisdiction of this Tribunal to include such crimes. We find no support for the argument in express language of Law No. 10. To reach the desired conclusion its advocates must resolve ambiguity by a process of statutory construction. Jurisdiction is not to be presumed. A Court should not reach out for power beyond the clearly defined bounds of its chartering legislation.

"Law No. 10 was enacted on 20th December, 1945, but not all of its content was written at that time. Article I expressly states:

"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."

"The Charter was not merely attached to the London Agreement, but by Article II thereof, was incorporated therein as an 'integral part'. The construction placed on the Charter by I.M.T. can hardly be separated therefrom. These documents constitute the chartering legislation of this Tribunal. The only purpose of the London Agreement was to bring to trial 'war criminals'."

After observing that the words 'war criminals' were to be found in many sections of the London Agreement, the judgment goes on:

"The only purpose of the Charter was to bring to trial 'major war criminals'. We conceive the only purpose of this Tribunal is to bring to trial war criminals that have not already been tried. Implicit in all this chartering legislation is the purpose to provide for punishment of crimes

⁽¹⁾ See p. 14.

committed during the war or in connection with the war. We look in vain for language evincing any other purpose. Crimes committed before the war and having no connection therewith were not in contemplation.

"To try war crimes is a task so large, as the numerous prosecutions prove, that there is neither necessity nor excuse for expecting this Tribunal to try persons for offences wholly unconnected with the war. So far as we are advised no one else has been prosecuted to date in any of these Courts, including I.M.T., for crimes committed before and wholly unconnected with the war. We can see no purpose nor mandate in the chartering legislation of this Tribunal requiring it to take jurisdiction of such cases.

"There was no pleading questioning jurisdiction until the conclusion of the evidence. During the long trial the conduct of defendants claimed to incriminate them under Count Three was explored meticulously and exhaustively by Prosecution and Defence. Hundreds of documents and volumes of oral testimony are before the Tribunal. Under the circumstances we make the following statements on the merits relating to this Count with full appreciation that statement as to the merits are pure dicta where a finding of lack of jurisdiction is also made."

(b) *The Law in Force at the Time when the Acts were Committed Governs the Question of their Legality; the Definition of Crimes against Humanity*

The judgment then continues:

"The law existing when the defendants acted is controlling. To the extent that Law No. 10 declares or codifies that law, and no further, is this Tribunal willing to go. Under the basic law of many States the taking of property by the sovereign, without just compensation, is forbidden, but usually it is not considered a crime. A sale compelled by pressure or duress may be questioned in a court of equity, but, so far as we are informed, such use of pressure, even on racial or religious grounds, has never been thought to be a crime against humanity. A distinction could be made between industrial property and the dwellings, household furnishings and food supplies of a persecuted people. In this case, however, we are only concerned with industrial property, a large portion of which (ore and coal mines) constitutes natural resources in which the State has a peculiar interest."

The judgment continues:

"Jurists and legal writers have been and are presently groping for an adequate inclusive definition of crimes against humanity. Donnedieu de Vabres recently said: 'The theory of "crimes against humanity" is dangerous: dangerous for the peoples by the absence of precise definition (our emphasis), dangerous for the States because it offers a pretext to intervention by a State in the internal affairs of weaker States.'⁽¹⁾ The VIII Conference for the Unification of Penal Law held at Brussels 10th and 11th July, 1947, in which the United States of America took part, endeavoured to formulate a definition. In none of the drafts presented was deprivation of property included. Eugene

⁽¹⁾ *The Judgment of Nuremberg and the Principle of Legality of Offences and Penalties*, (Donnedieu de Vabres), published in *Review of Penal Law and of Criminology* in Brussels, July 1947, translated by J. Harrison, p. 22.

M. Arroneau's definition, referred to in the report of the proceedings, specified, 'harm done on racial, national, religious or political grounds to liberty or the life of a person or group of persons, etc.' (our emphasis). Mentioned in the proceedings was a section from a Brazilian law decree of 18th May, 1938, to the effect that it is an offence 'to incite or prepare an attempt upon the life of a person or upon his goods, for doctrinaire, political or religious motives', with penalty from two to five years' imprisonment. The Brazilian representative, ignoring the purport of the phrase 'or upon his goods', himself submitted a definition to the conference reading: 'Any act or omission which involves a serious threat of violence, moral or physical, against anyone by reason of his nationality, race or his religion, philosophical or political opinion, is considered as a crime against humanity'. A resolution was adopted evidencing agreement that:

"Any manslaughter or act which can bring about death, committed in peace-time as well as in war-time, against individuals or groups of individuals, because of their race, nationality, religion or opinions, constitutes a crime against humanity and must be punished as murder. . . ."

"But from the report of the conference proceedings this seems to have been the extent of agreement.

"In the opening statement of the prosecution are listed numerous instances of foreign intervention or diplomatic representations objecting to mistreatment of a population by its own rulers. It may be that incidental to those persecutions the oppressed peoples lost their homes, household goods and investments in industrial property, but so far as we are aware the outcry by the other nations was against the personal atrocities not the loss of possessions. We believe that the proof does not establish a crime against humanity recognised as such by the law of nations when defendants were engaged in the property transactions here under scrutiny.

"The Prosecution in its concluding argument contends that the contrary has been decided in the I.M.T. judgment. We find nothing therein in conflict with our conclusion. That Tribunal mentioned economic discrimination against the Jews as one of numerous evidentiary facts from which it reached the conclusion that the Leadership Corps was a criminal organisation. Similarly when dealing with the question of Frick's guilt of war crimes and crimes against humanity, it mentioned anti-semitic laws drafted, signed and administered by Frick. These led up to his final decree placing Jews 'outside the law' and handing them over to the Gestapo, which was the equivalent to an order for their extermination. Likewise in the cases of Funk and Seyss-Inquart, anti-semitic economic discrimination is cited as one of several facts from which it is concluded that he was a war criminal. But it nowhere appears in the judgment that I.M.T. considered, much less decided, that a person becomes guilty of a crime against humanity merely by exerting anti-semitic pressure to procure by purchase or through State expropriation industrial property owned by Jews.

"Not even under a proper construction of the section of Law No. 10 relating to crimes against humanity, do the facts warrant conviction. The 'atrocities and offences' listed therein, 'murder, extermination', etc., are

all offences against the person. Property is not mentioned. Under the doctrine of *ejusdem generis* the catch-all words 'other persecutions' must be deemed to include only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category."

The Tribunal added:

"The presence in this section of the words 'against any civilian population', recently led Tribunal III to 'hold that crimes against humanity as defined in Control Council Law No. 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by Governmental authority'. U.S.A. vs. Altstoetter et al, decided 4th December, 1947. The transactions before us, if otherwise within the contemplation of Law No. 10 as crimes against humanity, would be excluded by this holding."

(vi) *Membership of Criminal Organisations*

The judgment considered together Counts Four and Five. The latter charged the accused Steinbrinck with membership subsequent to 1st September, 1939, in the S.S. The gist of Count Four was that as members of the Himmler Circle of Friends, the accused Flick and Steinbrinck, with knowledge of the criminal activities of the S.S., contributed funds and influence to its support.

(a) *The Factual and Mental Prerequisites for Individual Criminal Responsibility for Membership in and Financial Support of the S.S.*

The judgment states that the "basis of liability of members of the S.S. as declared by I.M.T., is that after 1st September, 1939, they 'became or remained members of the organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or were personally implicated as members of the organisation in the commission of such crimes, except, however, those who were drafted into membership by the State in such a way as to give them no choice in the matter and who had committed no such crimes'. Steinbrinck was a member of the S.S. from 1933 to the time of the German collapse. There is no evidence that he was personally implicated in the commission of its crimes. It is not contended that he was drafted into membership in such a way as to give him no choice. His liability therefore must be predicated on the fact that he remained a member after 1st September, 1939, with knowledge that 'it was being used for the commission of acts declared criminal'.

"I.M.T. also found 'that knowledge of these criminal activities was sufficiently general to justify declaring that the S.S. was a criminal organisation to the extent . . . ' later described in the judgment, namely, that 'the S.S. was utilised for purposes which were criminal under the Charter, involving the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave-labour programme and the mistreatment and murder of prisoners of war'."

(b) *The Burden of Proof for the Factual and Mental Qualifications of Criminal Responsibility in Connection with Membership in the S.S. subsequent to 1st September, 1939, rests entirely with the Prosecution*

The judgment states:

"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."⁽¹⁾

(c) *Financial Support to a Criminal Organisation (S.S.) is in itself a Crime subject to the Contributor having Knowledge of the Criminal Aims and Activities of that Organisation*

The judgment gave its opinion on this question in the following words:

"One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes. So there can be no force in the argument that when, from 1939 on, these two defendants were associated with Himmler and through him with the S.S. they could not be liable because there had been no statute nor judgment declaring the S.S. a criminal organisation and incriminating those who were members or in other manner contributed to its support."

(vii) *General Remarks on the Mitigation of Punishment*

Towards the end of its judgment the Tribunal made the following remarks regarding the circumstances which ought to be considered in mitigation of the punishment:⁽²⁾

"There is considerable to be said in mitigation. Their fear of reprisals has already been mentioned. In that respect Flick was the more vulnerable. He had backed Hindenburg with large sums when in 1932 he defeated Hitler for election to the Reich presidency. This doubtless was not forgotten. To Flick's knowledge his telephone conversations were subjected to wire tapping. He had other reasons to believe his position with party leaders, and particularly Himmler, was none too secure. Steinbrinck, however, as an outstanding naval officer of the first World War, respected and admired by the public, had a more favourable position. This very respectability was responsible for his membership in the S.S. He did not seek admission. His membership was honorary. But the honour was accorded to the S.S. rather than to Steinbrinck. During the entire period of his membership he had but two official tasks. The first was to attend, and perhaps stimulate the attendance of the Generals, at a meeting at Godesberg in 1933 when they

⁽¹⁾ The extent of the accused's Steinbrinck's knowledge and the part he played with such knowledge will be clear from the evidence previously reported under Counts Four and Five.

⁽²⁾ Compare similar passages in the *Hostages Trial*, Vol. VIII of this series, pp. 74-75.

were convened with heads of the party, the S.A. and the S.S. to be addressed by Hitler. The second was to escort the family of Hindenburg at his funeral. The S.S. uniform, doubtless worn on these occasions, was also helpful to Steinbrinck in obtaining from the Wehrmacht compliance with his directives as Bekowest. He received two promotions in rank, the second to Brigadefuehrer (Brigadier General), on his fiftieth birthday in 1938. Otherwise he had no duties, no pay and only casual connection with S.S. leaders. These activities do not connect him with the criminal programme of the S.S. But he may be justly reproached for voluntarily lending his good reputation to an organisation whose reputation was bad.

"Both defendants joined the Nazi Party, Steinbrinck earlier than Flick, but after seizure of power. Membership in it also was to them a sort of insurance. They participated in no party activities and did not believe in its ideologies. They were not pronouncedly anti-Jewish. Each of them helped a number of Jewish friends to obtain funds with which to emigrate. They did not give up their church affiliations. Steinbrinck was in Pastor Niemoller's congregation and interceded twice to prevent his internment. He succeeded first through Goering. When Niemoller was again arrested Steinbrinck had an interview with Himmler, described at length in his testimony, and persuaded Himmler to ask for Niemoller's release, which was refused by Hitler.

"Defendants did not approve nor do they now condone the atrocities of the S.S. It is unthinkable that Steinbrinck, a U-boat commander who risked his life and those of his crew to save survivors of a ship which he had sunk, would willingly be a party to the slaughter of thousands of defenceless persons. Flick knew in advance of the plot on Hitler's life in July, 1944, and sheltered one of the conspirators. These and numerous other incidents in the lives of these defendants, some of which involved strange contradictions, we must consider in fixing their punishment. They played but a small part in the criminal programme of the S.S., but under the evidence and in the light of the mandate of Ordinance 7, giving effect to the judgment of I.M.T., there is in our minds no doubt of guilt."

(viii) *The Findings of the Tribunal*

The accused Flick was found guilty on Counts One, Two and Four.

The accused Steinbrinck was found guilty on Counts Four and Five.

The accused Burkart, Kaletsch and Terberger were all acquitted on the Counts in which they were charged, except Count Three which was dismissed.

(ix) *The Sentences*

The accused Flick, Steinbrinck and Weiss were sentenced to imprisonment for 7, 5 and 3½ years respectively.

The Tribunal ruled that periods already spent by the accused in confinement before and during the trial be credited them with the effect that a corresponding part of the terms of imprisonment imposed be regarded as already served.

The sentences passed were confirmed by the Military Governor of the United States Zone of Germany.

B. NOTES ON THE CASE

1. UNITED STATES MILITARY TRIBUNALS NOT BOUND BY RULES OF PROCEDURE APPLIED IN UNITED STATES COURTS

The Tribunal trying Flick and others stressed that it was administering international law and was "not bound by the general statutes of the United States or even by those parts of its constitution which relate to courts of the United States". If certain rights were guaranteed to the accused it was "not because of their inclusion in the Constitution and statutes of the United States but because they are deeply ingrained in our Anglo-American system of jurisprudence and principles of a fair trial".

This is not the only occasion on which stress was placed on the fact that United States Laws of Procedure are not binding on United States Military Tribunals; the fact was made particularly plain in the judgment of the *Justice Trial*.⁽¹⁾ The Tribunal which delivered the latter judgment was said to be "sitting by virtue of international authority", just as the Tribunal sitting in the *Flick Trial* claimed that it was "not a court of the United States as that term is used in the Constitution of the United States" or a court-martial or military commission, but "an international tribunal established by the International Control Council".

United States Military Commissions, which could not make a similar claim to an international legal basis (though all jurisdiction over war crimes is *permitted* under international law), are nevertheless similarly free from the obligation to apply United States law regarding procedure in the courts of war-crime trials conducted by them, but apparently for a different reason. It seems reasonable to assume from the opinions delivered by the Supreme Court in the *Yamashita Trial* that Articles 25 and 38 of the United States Articles of War do not apply to proceedings before United States Military Commissions simply because they have not been made applicable by the United States Congress, not because it was beyond the powers of the latter to make them applicable.⁽²⁾

The Tribunal conducting the *Flick Trial* stated that certain rights were granted to the accused because they were "deeply ingrained in our Anglo-American system of jurisprudence and principle of a fair trial". A word of amplification could be added here. Article III.2 of Control Council Law No. 10 lays down that "The Tribunal by which persons charged with offences hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective zone".

⁽¹⁾ See Vol. VI of these Reports, p. 49.

⁽²⁾ See Vol. IV of this series, pp. 44-46. Article 38 provides: "The President may, by regulations which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions and other military tribunals, which regulations shall in so far as he shall deem practicable, apply the rules of evidence generally recognised in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed . . .".

In accordance with this Article, Ordinance No. 7 of the United States Zone provides in its Article IV that:

"In order to ensure fair trial for the defendants, the following procedure shall be followed:

"(a) A defendant shall be furnished, at a reasonable time before his trial, a copy of the Indictment, and of all documents lodged with the Indictment, translated into a language which he understands. The Indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offences charged.

"(b) The trial shall be conducted in, or translated into, a language which the defendant understands.

"(c) A defendant shall have the right to be represented by Counsel of his own selection, provided such Counsel shall be a person qualified under existing regulations to conduct cases before the courts of defendant's country, or any other person who may be specially authorised by the Tribunal. The Tribunal shall appoint qualified Counsel to represent a defendant who is not represented by Counsel of his own selection.

"(d) Every defendant shall be entitled to be present at his trial except that a defendant may be proceeded against during temporary absences if in the opinion of the Tribunal defendant's interests will not thereby be impaired, and except further as provided in Article VI(c). The Tribunal may also proceed in the absence of any defendant who has applied for and has been granted permission to be absent.

"(e) A defendant shall have the right through his Counsel to present evidence at the trial in support of his defence, and to cross-examine any witness called by the Prosecution.

"(f) A defendant may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located and shall also state the facts to be proved by the witness or the document and the relevancy of such facts to the defence. If the Tribunal grants the application, the defendant shall be given such aid in obtaining production of evidence as the Tribunal may order."

2. LAW NO. 10 AS NOT CONSTITUTING *Ex Post Facto* LAW

In the Judgment in the *Flick Trial* it was stated that: "The Tribunal is giving no *ex post facto* application to Control Council Law No. 10. It is administering that law as a statement of international law which previously was at least partly uncoded.⁽¹⁾ Codification is not essential to the validity

⁽¹⁾ The Judgment delivered in the *Hostages Trial* stressed that: "It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, *recognised customs and usages of war, or the general principles of criminal justice common to civilised nations generally*". See Vol. VIII, p. 53 (italics inserted). The Judgment delivered in the *Einsatzgruppen Trial* stressed that: "Control Council Law No. 10 is but the codification and systemisation of already existing legal principles, rules and customs".

of law in our Anglo-American system".⁽¹⁾ Similarly, the Tribunal which conducted the *Justice Trial* was at pains to show that "The Charter, the International Military Tribunal Judgment, and Control Council Law No. 10 . . . constitute authoritative *recognition* of principles of individual penal responsibility in international affairs, which, as we shall show, had been developing for many years."⁽²⁾ Its reasons with reference to Law No. 10 may be summarised as follows:

(i) Control Council Law No. 10, together with Ordinance No. 7, provides "procedural means previously lacking for the enforcement within Germany of certain rules of international law which exist throughout the civilised world independently of any substantive legislation". The development of international law does not depend upon the existence of world-wide legislative and enforcing agency.⁽³⁾

(ii) General acceptance of a rule of international conduct need not be manifested by express adoption thereof by all civilised States.⁽⁴⁾

(iii) Article II.1(b) "War Crimes" of Law No. 10 required the Tribunal only "to determine the content", "under the impact of changing conditions", of "the rules by which war crimes are to be identified".⁽⁵⁾

(iv) "Many of the laws of the Weimar era which were enacted for the protection of human rights have never been repealed. Many acts constituting war crimes or crimes against humanity as defined in Control Council Law No. 10 were committed or permitted in direct violation also of the provisions of the German criminal law. It is true that this Tribunal can try no defendant merely because of a violation of the German penal code, but it is equally true that the rule against retrospective legislation, as a rule of justice and fair play, should be no defence if the act which he committed in violation of Control Council Law No. 10 was also known to him to be a punishable crime under his own domestic law."⁽⁶⁾

⁽¹⁾ See p. 17. In their opening statement the Prosecution had expressed the following view: "The definitions of crimes in Law No. 10, and the comparable definitions in the London Agreement and Charter of 8th August, 1945, are statements and declarations of what the law of nations was at that time and before that time. They do not create 'new' crimes: Article II of Law No. 10 states that certain acts are 'recognised' as crimes. International law does not spring from legislation: it is a 'customary' or 'common' law which develops from the 'usages established among civilised peoples' and the 'dictates of the public conscience'. As they develop, these usages and customs become the basis and reason for acts and conduct, and from time to time they are recognised in treaties, agreements, declarations and learned texts. The London Charter and Law No. 10 are important items in this stream of acts and declarations through which international law grows: they are way stations from which the outlook is both prospective and retrospective, but they are not retroactive. Mr. Henry L. Stimson has recently expressed these principles with admirable clarity (in *The Nuremberg Trial: Landmark in Law*, published in *Foreign Affairs*, January, 1947): 'International law is not a body of authoritative codes or statutes: it is the gradual expression, case by case, of the moral judgments of the civilised world. As such, it corresponds precisely to the common law of Anglo-American tradition. We can understand the law of Nuremberg only if we see it for what it is—a great new case in the book of international law, and not a formal enforcement of codified statutes'."

⁽²⁾ See Vol. VI, pp. 35-36.

⁽³⁾ See Vol. VI, pp. 34 and 37, and Vol. VIII, p. 53. In the Judgment in the *Einsatzgruppen Trial* it was also said that: "The specific enactments for the trial of war criminals which have governed the Nuremberg trials have only provided a machinery for the actual application of international law theretofore existing".

⁽⁴⁾ See Vol. VI, p. 35.

⁽⁵⁾ *Ibid.*, p. 41.

⁽⁶⁾ *Ibid.*, p. 43.

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

The Tribunal illustrated this claim by a number of historical examples of which the general purport is summed up in the following words of the Tribunal:

"Finally, we quote the words of Sir Hartley Shawcross, the British Chief Prosecutor at the trial of Goering, *et al*:

"The right of humanitarian intervention on behalf of the rights of man trampled upon by a State in a manner shocking the sense of mankind has long been considered to form part of the law of nations. Here, too, the Charter merely develops a pre-existing principle." (Transcript, p. 813.)"⁽²⁾

⁽¹⁾ See Vol. VI, p. 45.

⁽²⁾ *Ibid*, p. 47. In the *Flick Trial*, the Prosecution, after providing the Tribunal with a similar historical survey, made the following interesting comments: "There can be no doubt, in summary, that murderous persecutions and massacres of civilian population groups were clearly established as contrary to the law of nations long before the First World War. Upon occasion, nations resorted to forceful intervention in the affairs of other countries to put a stop to such atrocities. Diplomatic or military intervention was, accordingly, the sanction traditionally applied when crimes against humanity were committed. Before passing to more recent declarations on this subject, the prosecution wishes to point out that, in its view, unilateral sanctions of this kind to-day are ineffective if confined to words and dangerous if military measures are resorted to. Intervention may well have been an appropriate sanction in the nineteenth century, when the fearful resources of modern warfare were unknown, and particularly when resorted to by a strong nation on behalf of minorities persecuted by a much weaker nation. Indeed, lacking some vehicle for true collective action, interventions were probably the only possible sanction. But they are outmoded, and cannot be resorted to in these times either safely or effectively. It is, no doubt, considerations such as these which led the distinguished French member of the International Military Tribunal to look upon crimes against humanity with such a jaundiced eye." (A footnote to the Prosecution's opening address here states:

"When he wanted to seize the Sudetenland or Danzig, he charged the Czechs and the Poles with crimes against humanity. Such charges give a pretext which leads to interference in international affairs of other countries." (*Le Procès de Nuremberg*, Conférence de Monsieur le Professeur Donnedieu de Vabres, Juge au Tribunal Militaire International des Grands Criminels de Guerre, under the Auspices of the Association des Études Internationales and the Association des Études Criminologiques, March, 1947.)"

"But the fact that a particular method of enforcing law and punishing crime has become outmoded does not mean that what was previously a well-recognised crime at international law is such no longer. International criminal law is merely going through a transition which municipal criminal law passed through centuries ago. If I discover that my next-door neighbour is a Bluebeard who has murdered six wives, I am thoroughly justified in calling the police, but I can not legally enter his house and visit retribution on him with my own hand. International society, too, has now reached the point where the enforcement of international criminal law must be by true collective action, through an agent—be it the United Nations, a world court, or what you will—truly representative of all civilised nations. This Tribunal is such an agent. It renders judgment under a statute enacted by the four great powers charged with the occupation of Germany. The principles set forth in the statute are derived from an international agreement entered into by the same four powers and adhered to by 19 other nations. Although constituted by the American occupation authorities, and composed of American judges, it is, in short, an international Tribunal." (Italics inserted.)

The Tribunal's final argument in this connection was based upon the recognition by the General Assembly of the United Nations, the "most authoritative organ in existence for the interpretation of world opinion", of genocide, which the Tribunal characterised as "the prime illustration of a crime against humanity under Control Council Law No. 10, which by reason of its magnitude and its international repercussions has been recognised as a violation of common international law".⁽¹⁾

(vi) Arguing by way of the invoking of authority, the Tribunal pointed out that the opinion of the International Military Tribunal "went on to show that the Charter was also 'an expression of international law at the time of its creation'",⁽²⁾ and claimed that "surely the Charter must be deemed declaratory of the principles of international law in view of its recognition as such by the General Assembly of the United Nations".⁽³⁾ The concurrence of Lord Wright in the view that the Charter merely declared existing international law was also quoted.⁽⁴⁾

The Tribunals in the *Justice* and *Flick trials* did not deal specifically with the provisions of Law No. 10 relating to crimes against peace, since that question did not arise in these two trials. Remarks concerning Law No. 10 in general, however, would necessarily include within their scope those provisions.

3. THE RULE AGAINST *Ex Post Facto* LAW AND ITS RELATIONSHIP TO INTERNATIONAL LAW

The Tribunal which conducted the *Justice Trial* added that "the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field".⁽⁵⁾ 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 Control Council Law No. 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

⁽¹⁾ See Vol. VI, p. 48. The question of genocide has received treatment on pp. 7-9 of Vol. VII of this series, and will receive further treatment in the notes to the *Greifelt Trial* to be reported in Vol. XIII.

⁽²⁾ *Ibid*, pp. 34 and 37. The Charter of the International Military Tribunal was made an integral part of Control Council Law No. 10 by Article I of the latter.

⁽³⁾ *Ibid*, p. 36.

⁽⁴⁾ *Ibid*, pp. 36-37.

⁽⁵⁾ *Ibid*, p. 41.

retribution by the express declaration of the Allies at Moscow of 30th October, 1943. Long prior to the second World War the principle of personal responsibility had been recognised."⁽¹⁾

While it is not intended to go further in the question whether Law No. 10 constitutes in some of its aspects a violation of the rule *nulla poena sine lege* it would perhaps not be out of place to cite here, rather by way of a footnote to the last section, the opinions of some other authorities regarding the extent to which the rule against the application of *ex post facto* law can in any case be said to apply to the enforcement of international law.

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 those 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."⁽²⁾

This statement, together with several others, was quoted by the Tribunal acting in the *Justice Trial*.⁽³⁾ The weight of authorities could have been further augmented. Thus, the fact that Professor A. L. Goodhart asks the following two questions in his article on *The Legality of the Nuremberg Trial* is significant:

"In determining the legal, as apart from the political, justification for the Nuremberg trials it is therefore necessary to consider two major questions: (a) to what extent is the law in the Charter *ex post facto* in character? (b) in so far as it is *ex post facto* can this departure from principle be justified?"⁽⁴⁾

Professor Goodhart's conclusion is that, "It is only when we turn to *Count Four: Crimes against Humanity*, that we encounter serious legal difficulty". He continues, however: "Count Four is, in a sense, *ex post facto* in character. But even if this is granted, there is not a ground on which the Count can be criticised, either from the moral or the juristic standpoint, because the acts charged in the Indictment are so contrary to all common decency that no possible excuse for their performance could be advanced.

⁽¹⁾ See Vol. VI, p. 44.

⁽²⁾ British Command Paper, Cmd. 6964, p. 39. (Italics inserted.)

⁽³⁾ Vol. VI, pp. 41-43, and compare also Vol. VIII, pp. 53-54.

⁽⁴⁾ *Juridical Review*, April, 1946, p. 7.

The objection to *ex post facto* legislation is based on the ground that the actor might, at the time when he performed the act, have believed that he was entitled to perform it, but how could such a belief exist in the case of wholesale murder? To argue that the perpetrators of such acts should get off scot-free because at the time when they were committed no adequate legal provision for dealing with them had been devised, is to turn what is a reasonable principle of justice in fully developed legal systems into an inflexible rule which would, in these circumstances, be in direct conflict with the very idea of justice on which it itself is based. No such inflexible course has ever been followed in English law because it has been recognised that on occasions *ex post facto* legislation, although in principle undesirable, may nevertheless be necessary. If ever there was an instance in which such a necessity existed, then it can be found in the concentration camps of Belsen and Dachau."⁽¹⁾

Dr. Schwarzenberger argues that a State may act in such defiance of international law as to fall completely outside the protection of the laws. "Even in a system of power politics, there is a difference between a State which slides into war and international gangsters which (like the totalitarian States) deliberately plan wholesale aggression and indiscriminately flout every rule of international law as well as all standards of civilisation or humanity. Such States forfeit their international personality and put themselves beyond the pale of international law. In short, they become outlaws, and subjects of international law may treat them as their own standards and conscience permit. It is submitted that, in the present state of international society, such treatment of international gangsterism is less artificial than the assertion that aggressive war is already a crime under international customary law."⁽²⁾

In the judgment in the *Justice Trial*, stress was placed on the similarity between international law and common law which develops through a succession of judicial decisions. The following words of Professor Sheldon Glueck (in particular reference to crimes against peace) could be added to the authorities cited:⁽³⁾

"The claim that in the absence of a specific, detailed, pre-existing code of international penal law to which all States have previously subscribed, prosecution for the international crime of aggressive war is necessarily *ex post facto* because no world legislature has previously spoken is specious. . .

"In the international field . . . as in the domestic, part of the system of prohibitions implemented by penal sanctions consists of customary or

⁽¹⁾ *Juridical Review*, April, 1946, pp. 15 and 17. On p. 9, Professor Goodhart deals with a related point in the following words: "It is true, of course, that in the past there has been no international criminal court before which individuals could be prosecuted, but this does not prove that no international criminal law exists. . . . This distinction between law and the machinery for enforcing the law is recognised in the principle against *ex post facto* law, because this principle does not apply to the creation of new legal machinery. Thus no defendant can complain that he is being tried by a court which did not exist when he committed the act."

⁽²⁾ *The Judgment of Nuremberg in Tulane Law Review*, March, 1947, pp. 329-361. The argument cited above appears on p. 351 and is further developed in the same learned author's *International Law and Totalitarian Lawlessness*, London, 1943, pp. 82-110.

⁽³⁾ And compare Quincy Wright in *American Journal of International Law*, January, 1947, p. 58: "The sources of general international law are general conventions, general customs, general principles, judicial precedents and juristic analysis. International law, therefore, resembles the common law in its developing character."

common law. In assuming that an act of aggressive war is not merely lawless but also criminal, the Nuremberg Court would merely be following the age-old precedent of courts which enforce not only the specific published provisions of a systematic code enacted by a legislature, but also "unwritten" law. During the early stage (or particularly disturbed stages) of any system of law—and international law is still in a relatively undeveloped state—the courts must rely a great deal upon non-legislative law and thereby run the risk of an accusation that they are indulging in legislation under the guise of decision, and are doing so *ex post facto*. . . .

"In England, even the most serious offences (e.g. murder, manslaughter, robbery, rape, arson, mayhem) originated as crimes by way of custom. . . .

"Now whenever an English common-law court for the first time held that some act not previously declared by Parliament to be a crime was a punishable offence for which the doer of that act was now prosecuted and held liable, or whenever a court, for the first time, more specifically than theretofore defined the constituents of a crime and applied that definition to a new case, the court in one sense 'made law' . . .

"So it is with modern international common law, in prohibiting aggressive war on pain of punishment. Every custom and every recognition of custom as evidence of law must have a beginning some time; and there has never been a more justifiable stage in the history of international law than the present, to recognise that by the common consent of civilised nations as expressed in numerous solemn agreements and public pronouncements the instituting or waging of an aggressive war is an international crime."⁽¹⁾

Again, Professor Hans Kelsen has written:

"The rule against retroactive legislation . . . is not valid at all within international law. . . .

"The rule excluding retroactive legislation is restricted to penal law and does not apply if the new law is in favour of the accused person. It does not apply to customary law and to law created by a precedent, for such law is necessarily retroactive in respect to the first case to which it is applied.

"A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, seems also to be an exception to the rule against *ex post facto* laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law

⁽¹⁾ *The Nuremberg Trial and Aggressive War*, New York, 1946, pp. 38–45. 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".

has provided only collective responsibility. The rule against retroactive legislation is a principle of justice. *Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility, the typical technique of primitive law.* Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions."⁽¹⁾

Finally, it should be added that Professor F. B. Schick has challenged from another point of view the soundness of any rule against the enforcement of *ex post facto* rules of international law. Of "the maxim *nulla poena sine lege* and the *ex post facto* principle" he has said that: "neither one of the above-mentioned municipal law principles constitutes a rule of positive international law since it would be impossible, indeed, to prove that these doctrines are expressive of a general practice accepted as law by civilised nations. Quite apart from Article 2 of the German Criminal Code as amended on 28th June, 1935 (R.G.B. No. 1, 839), the Criminal Codes of the Russian Socialist Federative Soviet Republic of 1922 and 1925, for example, do not recognise the rule against *ex post facto* legislation."⁽²⁾

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.

4. OFFENCES AGAINST PROPERTY AS WAR CRIMES

The present notes are not intended to be an exhaustive exposé of the law on the subject of offences against property as war crimes. The aim at present is simply to attempt a summary of the decisions reached in the trials reported upon in the present volume, in so far as these relate to the *international law* on the matter. More will be said on the relevant law in Vol. X of the Reports, where the decisions of the United States Military Tribunals in the *I.G. Farben Trial* and the *Krupp Trial* are to be dealt with, and it should be added that the notes to the French trials reported in the present volume contain explanatory comments concerning the relevant *French law* which will not receive further treatment here.⁽³⁾

⁽¹⁾ *Op. cit.* pp. 164–165 (italics inserted). The learned author then proceeds, however, to argue that, in view of the provision made for the punishment of *individuals* for membership of *organisations* declared criminal, "the London Agreement is not consistent in this respect". (*Op. cit.* pp. 165–167.)

⁽²⁾ *The Nuremberg Trial in Juridical Review*, December, 1947, pp. 192–207: the passage cited appears on p. 206.

⁽³⁾ See pp. 59–74.

(i) Of the accused in the *Flick Trial*, Flick alone was found guilty under Count Two of the Indictment.⁽¹⁾ The designation of the offence of which he was found guilty is not, however, completely clear. "No defendant," said the Tribunal, "is shown by the evidence to have been responsible for any act of pillage as that word is commonly understood. . . . Flick's acts and conduct contributed to a violation of Hague Regulation 46, that is that private property must be respected. Of this there can be no doubt. But his acts were not within his knowledge intended to contribute to a programme of 'systematic plunder' conceived by the Hitler regime and for which many of the major war criminals have been punished. If they added anything to this programme of spoliation, it was in a very small degree."⁽²⁾ At the beginning of its treatment of Count Two, the Tribunal said that "Count Two . . . deals with spoliation and plunder of occupied territories". A little later it added: "I.M.T. dealt with spoliation under the title 'Pillage of Public and Private Property'."

If it is to be taken that in the Tribunal's opinion, spoliation is the same as, or one aspect of, the offence of pillage and if Flick was not found guilty of pillage, "as that word is commonly understood", then he must be taken to have been found guilty either of an offence charged under Count Two other than spoliation or of an unusual type of pillage. The problem is made a little easier by the fact that Count Two charged "plunder of public and private property, spoliation and other offences against property in countries and territories which came under the belligerent occupation of Germany in the course of its aggressive wars". It may be that Flick's offence is to be regarded as an offence against property in occupied territories other than plunder or spoliation.

(ii) Flick's offences against Article 46 of the Hague Regulations seems to have consisted in operating a plant in occupied territory of which he was not the owner and without the consent of the owner. It is interesting to note that the Tribunal regarded his acts as illegal despite the fact that (a) "the original seizure may not have been unlawful"⁽³⁾; (b) Flick had nothing to do with the expulsion of the owner⁽⁴⁾; (c) the property was left "in a better condition than when it was taken over"⁽⁵⁾; (d) there was "no exploitation either for Flick's personal advantage or to fulfil the aims of Goering", there being no proof that the output of the plant went to countries other than those which benefited before the war.⁽⁶⁾

In their closing statement the Prosecution made the following claim relating to the Rombach plant:

"It is uncontested that the defendants were in full possession and control of the property for over three years, in the course of which they operated it for the benefit of the German economy and the German war effort, and with

⁽¹⁾ See pp. 3 and 30.

⁽²⁾ See pp. 21 and 23.

⁽³⁾ See p. 23.

⁽⁴⁾ See p. 11.

⁽⁵⁾ See p. 22.

⁽⁶⁾ See pp. 12 and 23.

no regard for the French economy. This in itself would be criminal under the Hague Conventions and Law No. 10 even if Flick had never intended or expected to acquire title. The seizure and operation of Rombach was a part—and an important part—of the general pattern of German occupation under which, as the International Military Tribunal found, the resources of the occupied countries 'were requisitioned in a manner out of all proportion to the economic resources of those countries and resulted in famine, inflation and an active black market'. It was, in short, part of a pattern of deliberate plunder. . . .

"Finally, as has already been pointed out, the defendants' guilt does not lie only in their taking possession of the Rombach plants and seeking to acquire title to them. Regardless of how they obtained the plants, they operated them for three and a half years in such a manner as to injure the French economy and promote the German war economy, and this in itself was unlawful under the Hague Convention and Control Council Law No. 10."

It is clear from an examination of the Tribunal's judgment that the Prosecution need not have claimed that the German war economy was promoted or the French economy damaged; it was apparently enough to prove that Flick had operated the Rombach plant without the consent of the rightful owner.

(iii) Flick's guilt may at first sight be thought to resemble in some ways that of persons found guilty in several French war crime trials of the offence of receiving stolen goods.⁽¹⁾ On the other hand it will be recalled that the Rombach plant included much real property, in addition to moveables and that the Tribunal ruled that the proving of the offence did not depend upon the original seizure having been unlawful.

(iv) The Tribunal which tried Flick and others ruled that *State property* like the Vairogs and Dnjepr Stahl plants "may be seized and operated for the benefit of the belligerent occupation for the duration of the occupancy". The enemy occupant has "a usufructuary privilege".⁽²⁾

In this respect public property is treated on a different footing from private property, as instanced by the Rombach plant in whose operations by Flick without consent it will be noted, the rights of an individual person were infringed. Regarding this question the Prosecution had made the following submissions which throw some light on the meaning of "usufructuary privilege":

"As far as plunder in Russia is concerned, we will assume in favour of the defendants that, in the Soviet Union, we have to deal with public property only, though it may well be questioned whether it was all public property within Article 55 of the Hague Regulations. In any event, the Hague Convention provides in Article 55:

"The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estates, forests and agricultural estates belonging to the hostile State and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."

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⁽²⁾ See pp. 12-13 and 24.

"What is meant by the words 'administrator and usufructuary' does not call for any elaborate definition since the word 'usufructuary' has been taken over from private law and there the basic conception is quite clear and common to both Anglo-Saxon and Continental law systems. To quote from the *Encyclopedia Americana*, 1945 (Vol. 27, p. 608), usufruct in law is:

"... the right to use and enjoy the things of another person, and to draw from them profit, interest or advantage, *without reducing or wasting them*. . . . It may be established in any property which is capable of being used *as far as is compatible with the substance not being destroyed or injured*." (Emphasis supplied.)

"The conclusion follows that, wherever the occupying power acts or holds itself out as owner of the public property owned by the occupied country, Article 55 is violated. The same applies if the occupying power or its agents who took possession of public buildings or factories or plants, assert ownership, remove equipment or machinery, and ship it to their own country, or make any other use of the property which is incompatible with usufruct. The only exception to the public property rule that the occupying power, or its agents, is limited by the rules of usufruct is the right to "take possession of" certain types of public property under Article 53.⁽¹⁾ But the exception applied only with respect to certain named properties and 'all moveable property belonging to the State which may be used for military operations', and thus is not applicable to such properties as means of production."

(v) In finding Steinbrinck not guilty under Count Two, the Tribunal rejected the following argument of the Prosecution:

"The unlawful nature of Steinbrinck's activities as Plenipotentiary-General for both coal and steel are, we submit, wholly clear under Articles 46 and 52 of the Hague Regulations and the decision of the International Military Tribunal. Steinbrinck's control of production and allocation of output constituted 'requisitions in kind and services' which were enforced not merely 'for the needs of the army of occupation' but for the benefit of German domestic economy and the over-all German war effort. And his activities fall squarely within the language of the judgment of the International Military Tribunal:

"In some of the occupied countries in the East and the West, this exploitation was carried out within the framework of the existing economic structure. The local industries were put under German supervision, and the distribution of war materials was rigidly controlled. The industries thought to be of great value to the German war effort were compelled to continue, and most of the rest were closed down altogether."

(vi) The rule of international law forbidding *the destruction of public monuments*, which has received expression in Articles 56 and 46 of the Hague

⁽¹⁾ Article 53 (paragraph 1): "An army of occupation can only take possession of cash, funds and realisable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all moveable property belonging to the State which may be used for military operations".

Convention, was enforced by a French Military Tribunal in the trial of Karl Lingfelder.⁽¹⁾

(vii) *The wanton destruction of inhabited buildings by fire and explosives*, a clear case of a war crime, was punished by a French Military Tribunal in, for instance, the trial of Hans Szabados.⁽²⁾

(viii) *The theft of personal property* has been treated as a war crime in numerous French trials.⁽³⁾

(ix) 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.⁽⁴⁾

(x) In several French war crime trials offences coming within the French municipal law conception of *abuse of confidence* have been treated as war crimes.⁽⁵⁾ Roughly speaking, these offences consisted of the misappropriation of private property given into the care of the wrongdoer by way of hire, for use free of charge or for safe keeping.

The application of the relevant detailed provisions of French law in these cases illustrates the process whereby the international law of war crimes is elaborated, and it is submitted that, like the finding of guilty passed on Flick for his acts relating to the Rombach plant, it demonstrates the increasing unsuitability of applying any portmanteau expression such as "pillage" or "spoliation" to the diverse offences against property which are now recognised as war crimes.

(xi) In connection with those acts which have been regarded as war crimes, a word should be said relating to the degree of connection between an accused and a crime which has been regarded as necessary to make that accused guilty of that crime.

The French trials reported upon in the present volume do not illustrate this problem, since the finding that certain accused were too young to be guilty of war crimes⁽⁶⁾ depended upon a different consideration. In the *Flick Trial*, however, the accused Weiss, Burkart and Kaletsch were found not guilty under Count Two apparently on the ground mainly that, while they supplied information and even advice to Flick relating to the Rombach plant (and presumably must be said to have had knowledge of the offence committed), they were merely Flick's salaried employees and had no power to make decisions.⁽⁷⁾

⁽¹⁾ See p. 67.

⁽²⁾ See p. 61.

⁽³⁾ See, for instance, pp. 61, 62 and 69.

⁽⁴⁾ See pp. 72-74.

⁽⁵⁾ See pp. 69-71.

⁽⁶⁾ See p. 65.

⁽⁷⁾ See p. 24.

5. CRIMES AGAINST HUMANITY

(i) On the question of crimes against humanity the Tribunal which conducted the *Flick Trial* (Tribunal IV of the United States Tribunals in Nuremberg) came to three important decisions.

(a) In the first place, the Tribunal laid down ⁽¹⁾ that 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" ⁽²⁾ 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 ⁽³⁾, 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. ⁽⁴⁾

The Tribunal thus overruled the submission made by the Prosecution that "Law No. 10 covers crimes against humanity committed prior to the attack on Poland in 1939, and at least as far back as the Nazi seizure of power on 30th January, 1933. This is the interpretation most consistent with the obvious purposes of Law No. 10 as an enactment for the administration of justice in Germany. But, again, the provisions of the law itself leave no room for doubt. Article II of Law No. 10 provides (in paragraph 5) that:

"In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation

⁽¹⁾ See p. 25.

⁽²⁾ Article 6(c) of the Charter proscribes "*Crimes against humanity*: namely, murder, extermination, enslavement, deportation and other inhuman 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". Article II(c) of Law No. 10 on the other hand runs as follows: "*Crimes against humanity*. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhuman 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".

⁽³⁾ 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".

⁽⁴⁾ 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 when crimes were committed on a vast scale, which were also crimes against humanity; and in so far as the inhuman acts 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.)

in respect of the period from 30th January, 1933, to 1st July, 1945, nor shall any immunity, pardon, or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.'

"This provision has no application to war crimes, since the rules of war did not come into play, at the earliest, before the annexation of Austria in 1938. Nor, so far as we know, were there any German municipal laws recognising or punishing crimes against peace, to which statutes of limitations might have applied, or any Nazi amnesties or pardons with respect thereto. This provision is clearly intended to apply primarily to crimes against humanity, and explicitly recognises the possibility of their commission on and after 30th January, 1933. . . .

"Acts properly falling within the definition in Law No. 10 are, we believe, punishable under that law *when viewed as an occupational enactment* ⁽¹⁾ whether or not they were connected with crimes against peace or war crimes. No other conclusion can be drawn from the disappearance of the clause "in execution of or in connection with any crime within the jurisdiction of the Tribunal". And no other conclusion is consonant with the avowed purposes of the occupation as expressed at the Potsdam Conference, cardinal among which are the abolition of the gross and murderous racial and religious discriminations of the Third Reich, and preparation: ⁽²⁾

"... for the eventual reconstruction of German political life on a democratic basis, and for eventual peaceful co-operation in international life by Germany.'

"These purposes cannot possibly be fulfilled if those Germans who participated in these base persecutions of their fellow nationals during the Hitler regime go unpunished. Were sovereignty in Germany presently exercised by a democratic German Government, such Government would perforce adopt and enforce legislation comparable to these provisions of Law No. 10. Much better it would be if this legislation were German and enforced by German courts, but there is as yet no central German Government, old passions and prejudices are not yet completely dead, the judicial tradition is not yet fully re-established and the American authorities have not, as yet, seen fit to exercise their discretionary power to commit the enforcement of Law No. 10, as between Germans, to German courts."

The principle laid down in the *Flick Trial*, one of first-rate importance, had been left undecided by the Tribunal conducting the *Justice Trial* (Tribunal III) which, in its exposé 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 Three 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 I.M.T. Charter, but it must be noted that Control Council Law No. 10 differs materially from the Charter.

⁽¹⁾ Italics inserted. Elsewhere the Prosecution stressed "Law No. 10's dual nature as an occupational enactment and as a declaration of principles of the law of nations".

⁽²⁾ "Joint Report on the Anglo-Soviet-American Conferences, Berlin, 2nd August, 1945, part III, paragraphs 3 and 4."

The latter defines crimes against humanity as inhumane acts, etc., committed '... in execution of, or in connection with, any crime within the jurisdiction of the tribunal ...', whereas in Control Council Law No. 10 the words last quoted are deliberately omitted from the definition."⁽¹⁾

It will be recalled that in the *Justice Trial* the only Count in the Indictment which charged offences committed before 1939 was Count One (Common Design and Conspiracy).⁽²⁾ The Tribunal ruled that it had "no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offence", but added: "This ruling must not be construed as denying to either Prosecution or Defence the right to offer in evidence any facts or circumstances occurring either before or after September, 1939, if such facts or circumstances tend to prove or to disprove the commission by any defendant of war crimes or crimes against humanity as defined in Control Council Law No. 10."⁽³⁾

Elsewhere the Tribunal threw some further light on its attitude to the question. It said: "We direct our consideration to the issue of guilt or innocence after the outbreak of the war in accordance with the specific limitations of time set forth in Counts Two, Three and Four of the Indictment". Immediately before reviewing the evidence relating to the changes to the German legal system made under Nazi rule from 1933 onwards, the Tribunal said: "... though the overt acts with which the defendants are charged occurred after September, 1939, the evidence now to be considered will make clear the conditions under which the defendants acted and will show knowledge, intent and motive on their part, for in the period of preparation some of the defendants played a leading part in moulding the judicial system which they later employed".⁽⁴⁾

The Tribunal thus left open the question whether it would have considered evidence of offences committed before 1939 had they been charged in Counts Two, Three and Four. It will be noted that in holding itself bound by the "limitations of time set forth in Counts Two, Three and Four of the Indictment", the Tribunal chose to put aside any possible argument that a residuum of charges of the committing "between January, 1933, and April, 1945", of war crimes and crimes against humanity were still facing the accused under Count One, after the Tribunal had rejected the conspiracy element in the Count as a result of the following paragraph in its ruling:

"Count One of the Indictment, in addition to the separate charge of conspiracy, also alleged unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. *We therefore cannot properly strike the whole of Count One from the Indictment*, but, in so far as Count One charges the commission of the alleged crime of conspiracy as a separate substantive offence, distinct from any war crime or crime against humanity, the Tribunal will disregard that charge."⁽⁵⁾

⁽¹⁾ See Vol. VI of this series, pp. 40-41 and 83.

⁽²⁾ *Ibid.*, p. 2.

⁽³⁾ *Ibid.*, pp. 5-6.

⁽⁴⁾ *Ibid.*, pp. 73 and 90. (Italics inserted).

⁽⁵⁾ *Ibid.*, p. 5. (Italics inserted).

On the other hand, the judgment in the *Einsatzgruppen Trial*⁽¹⁾ 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 authoritativeness 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 Three 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, and here it is useful to quote the words of an eminent authority in which he comments upon the statement of the International Military Tribunal quoted above:⁽⁶⁾

"In the opinion of the Tribunal, all the crimes formulated in Article 6(c) are crimes against humanity only if they were committed in execution of or in connection with a crime against peace or a war crime.

"The scope of the phrase 'before or during the war' is therefore considerably narrowed as a consequence of the view that, although the time when a crime was committed is not alone decisive, the connection with the war must be established in order to bring a certain set of facts under the notion of a crime against humanity within the meaning of Article 6(c). As will be seen later, *this statement does not imply that no crime committed before 1st September, 1939, can be a crime against humanity*. The Tribunal recognised some crimes committed prior to 1st September, 1939 as crimes against humanity in cases where their connection with the crime against

⁽¹⁾ Trial of Otto Ohlendorf and others, United States Military Tribunal, Nuremberg, September, 1947, to April, 1948.

⁽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 p. 4.

⁽⁴⁾ See p. 25.

⁽⁵⁾ See p. 26. (Italics inserted.)

⁽⁶⁾ See p. 44, note 4.