

# The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany

by Matthew Lippman\*

## I. INTRODUCTION

Nineteen ninety-one marked the forty-fifth anniversary of the verdict in the International Military Tribunal's trial at Nuremberg of leading officials of the Third Reich.<sup>1</sup> The Tribunal's decision is considered a historic landmark which exerted a major influence on the substance and spirit of Anglo-American and international jurisprudence.<sup>2</sup>

Following the Nuremberg case, the United States undertook the prosecution of an array of lower-echelon Nazi leaders, military officers, and major industrialists in twelve separate prosecutions. These twelve decisions applied and extended the Nuremberg principles and made a substantial contribution to the development of the corpus of international criminal law. Yet, virtually no comprehensive discussion of these cases exists in the legal literature.<sup>3</sup> This essay first outlines the decision of the International Military Tribunal at Nuremberg and then sketches the twelve post-Nuremberg decisions.<sup>4</sup> The concluding section provides a summary of the legal principles established by these tribunals.

## II. THE LEIPZIG AND NUREMBERG TRIALS

### A. *The Versailles Treaty*

Following World War I the Allied Powers and their associated states had a strong feeling that those defeated belligerents responsible

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1. See generally Matthew Lippman, *Nuremberg: Forty Five Years Later*, 7 CONN. J. INT'L L. 1 (1991).

2. For a novel insight into the impact of the Nuremberg judgment on the jurisprudence of Justice Robert H. Jackson, United Chief Counsel at Nuremberg, see generally Jeffrey D. Hockett, *Justice Robert H. Jackson, The Supreme Court and the Nuremberg Trial*, 1990 SUP. CT. REV. 257.

3. For the most complete discussion see generally William A. Zeck, *Nuremberg: Proceedings Subsequent to Goering Et Al*, 26 N.C. L. REV. 350 (1948).

4. The twelve tribunals had some overlap in their factual discussion and legal analysis and I have attempted to avoid duplication of facts and principles in outlining the cases.

for war crimes should be brought before the bar of justice.<sup>5</sup> A commission created by the Allied Powers recommended that all those guilty of offenses against the "laws and customs of war or the laws of humanity" should be prosecuted and punished regardless of their rank, status or position.<sup>6</sup>

The commission recommended that the Allies establish and carry out these prosecutions before their own national courts as well as before a multinational tribunal. It suggested that each Allied Power should take responsibility for prosecuting prisoners-of-war and those accused over whom they had custody. It recommended that a multinational tribunal appointed by the Allied Powers and their associated states should be charged with adjudicating those whose actions victimized nationals of more than one country. This international tribunal also should assume jurisdiction over high-echelon officials who ordered or failed to halt the commission of war crimes and also over those not prosecuted before national courts. In carrying out these prosecutions, the tribunal should apply "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience."<sup>7</sup>

These unprecedented recommendations toward the creation of a new world order floundered on the shoals of politics.<sup>8</sup> The United States objected to what it viewed as a significant incursion on the prerogatives of state sovereignty.<sup>9</sup> The Americans particularly objected to the creation

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5. See generally *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, Mar. 29, 1919, reprinted in 14 AM. J. INT'L L. 95 (1920) (multinational commission appointed on Jan. 25, 1919 to inquire into violations of the law of war).

6. *Id.* at 117. The commission condemned the Central Power's war of aggression, but did not recommend prosecution for those who designed and ordered such military action. It urged that in the future that penal sanctions should be lodged against those responsible for such grave outrages against the elementary principles of international law. This recommendation was based on the lack of positive law regulating States' deployment of force. In addition, the complexity and time-consuming nature of such an investigation would consume time and attention and detract from the prosecution of those responsible for violations of the laws and customs of war. Punishment inevitably would be tardily imposed and would lack moral potency. *Id.* at 119-20.

7. *Id.* at 121-22.

8. Violations of the law of war traditionally were punished through the use of reprisals or the payment of compensation. Following the termination of hostilities, peace treaties incorporated clauses providing for the amnesty of those charged with offenses against the law of war. See Lippman, *supra* note 1, at 2-3.

9. See *Memorandum of Reservations Presented by the Representatives of the United States*

of a multinational tribunal<sup>10</sup> empowered to apply the novel and vague principles of humanity.<sup>11</sup> The United States also disagreed with abrogating the act of state doctrine and permitting an international tribunal to exercise jurisdiction over heads of state.<sup>12</sup> According to the Americans, sovereigns were only legally and politically accountable to those within their domestic constituency.<sup>13</sup> The Americans expressed the need to strictly define the circumstances under which high-echelon officials would be held liable for a failure to take affirmative acts to prevent violations of the laws or customs of war.<sup>14</sup>

The Allied leaders reached a compromise. In Article 227 of the Treaty of Versailles, the Allied Powers and associated states accused William II of Hohenzollern ("Kaiser Wilhelm") of a "supreme offence against international morality and the sanctity of treaties."<sup>15</sup> A "special" multinational tribunal composed of representatives of the United States, Great Britain, France, Italy and Japan was to "try the accused."<sup>16</sup> Article 227 did not charge the Kaiser with an international crime; however, it brought a political charge which technically preserved the Kaiser's legal immunity.<sup>17</sup> The Germans accused of having committed acts in violation of the laws and customs of war were to be brought before military tribunals.<sup>18</sup>

In the end, the Germans were not held internationally liable for war crimes. The Dutch bowed to pressure from European conservatives and refused to extradite the Kaiser to stand trial. The Allies developed a fear that war crimes trials would create domestic unrest and destabilize the German government and, in the end, agreed that the Germans should prosecute forty-five individuals.<sup>19</sup> Predictably, the Germans had

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*to the Report of the Commission on Responsibilities*, Apr. 4, 1919, Annex II, reprinted in 14 AM. J. INT'L L. 127 (1920).

10. *Id.* at 142, 146.

11. *Id.* at 134.

12. *Id.* at 135.

13. *Id.* at 136.

14. *Id.* at 143.

15. Treaty of Peace with Germany (Treaty of Versailles), signed at Versailles, June 28, 1919, art. 227, 2 Bevans 43, 136 [hereinafter Versailles Treaty] cited in Lippman, *supra* note 1, at 9 n.57.

16. Lippman, *supra* note 1, at 9. In its decision, the tribunal was to be "guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality." *Id.* The tribunal was "to fix the punishment which it considers should be imposed." *Id.*

17. *Id.*

18. *Id.* at 10.

19. *Id.*

little enthusiasm for prosecuting their own belligerents charged with war crimes. Some were acquitted,<sup>20</sup> others received lenient sentences<sup>21</sup> and the vast majority of the cases were dropped.<sup>22</sup> Those convicted eventually had their convictions annulled.<sup>23</sup>

The Versailles Treaty signified the resolve of the international community to hold personally liable those accused of violations of the laws and customs of war. The public "arraignment" of the Kaiser for offenses against "international morality and the sanctity of treaties" was a step towards the abrogation of the act of state doctrine and the imposition of criminal liability upon governmental leaders.<sup>24</sup> Ultimately this effort was frustrated by the continuing hold of sovereign immunity and nationalistic sentiment. The Allies' resolve to vindicate the rule of international law was tainted by their decision to focus exclusively on offenses committed by enemy forces. In addition, by vesting jurisdiction over war crimes in national courts, the Versailles Treaty failed to establish that such offenses were directed against the international community rather than against individual countries.

### B. *The Nuremberg Trial*

The promise of Versailles was fulfilled at Nuremberg. On September 30, 1945, the International Military Tribunal at Nuremberg convicted nineteen high-echelon German leaders of Crimes Against Peace, War Crimes and Crimes Against Humanity.<sup>25</sup>

20. Judgment in Case of Karl Neumann (RGSt June 4, 1921) (Germany), reprinted in 16 AM. J. INT'L L. 704, 706-07 (1922).

21. Judgment in the Case of Emil Muller (RGSt May 30, 1921) (Germany), reprinted in 16 AM. J. INT'L L. 684, 696 (1922).

22. Lippman, *supra* note 1, at 11.

23. See Judgment In Case of Dithmar and Boldt (RGSt July 16, 1921) (Germany), reprinted in 16 AM. J. INT'L L. 708 (1922). On the Leipzig trials see generally Gordon Battle, *The Trials Before the Leipsic Supreme Court of Germans Accused of War Crimes*, 8 VA. L. REV. 1 (1921-22).

24. Lippman, *supra* note 1, at 12.

25. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 588-89 (1948) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS]. Seven defendants were sentenced to prison terms ranging from ten years to life (Doenitz, Funk, Hess, von Neurath and von Schirach) and twelve were sentenced to death by hanging (Borman who was tried in absentia, Frank, Frick, Goering, Jodl, Kaltenbrunner, Keitel, Rosenberg, Sauckel, Seyss-Inquart, Streicher and von Ribbentrop).

The Tribunal determined that its jurisdiction was based upon the law of the Nuremberg Charter.<sup>26</sup> According to the Tribunal, the Allies clearly possessed the right to legislate for those occupied territories which were under their control. The provisions of the Charter were not an arbitrary exercise of power. They were an "expression of international law existing at the time of [the Charter's] creation."<sup>27</sup>

The Tribunal did not directly address whether the war of aggression charge violated the legal maxim *nullum crimen sine lege, nulla poena sine lege* (no punishment without a law). It recognized that although the prohibition on *ex post facto* punishment was a general principle of justice, it was not a restraint on the sovereign prerogative of States.<sup>28</sup> The Tribunal proposed that in this instance, it was not unjust to punish those who "in defiance of treaties and assurances" have attacked neighboring states without warning.<sup>29</sup> The defendants were clearly aware

Three were acquitted: Schacht, von Papen, and Fritzche. *Id.* at 588-89.

Article 6(a) of the Nuremberg Charter defined Crimes Against Peace:

(a) Crimes against peace: Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 284, *reprinted in* 39 AM. J. INT'L L. 258 (Supp. 1945 art. 6(a)) [hereinafter Nuremberg Charter] and *cited in* Matthew Lippman, *Reflections on Non-Violent Resistance and the Necessity Defense*, 11 Hous. J. INT'L L. 277, 284 n.59 (1989).

Article 6(b) of the Nuremberg Charter defined War Crimes:

(b) War crimes: Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Nuremberg Charter, *supra*, art. 6(b).

Article 6(c) of the Nuremberg Charter defined Crimes Against Humanity:

(c) Crimes against humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.

Nuremberg Charter, *supra*, art. 6(c).

26. TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 25, at 461.

27. *Id.*

28. *Id.* at 462.

29. *Id.*

of the treaties signed by Germany outlawing the recourse to war for the settlement of international disputes. Therefore, they must have known that their actions were "wrong, and so far from it being unjust to punish [them], it would be unjust if [their] wrong were allowed to go unpunished."<sup>30</sup>

The Tribunal rejected that international law was solely concerned with actions of sovereign states and provided no punishment for individuals. It proclaimed that the proposition that "international law imposes duties and liabilities upon individuals as well as upon states has long been recognized."<sup>31</sup> In addition, the requirements of international law take precedence over the demands of domestic law. The "very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state."<sup>32</sup> The Tribunal rejected the act of state defense and held that individuals are criminally liable under international law regardless of their station or rank. It was held that "[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state, if the state in authorizing action moves outside its competence under international law."<sup>33</sup> The Tribunal also held that superior orders did not constitute a defense. However, such orders would mitigate punishment where an individual was under the threat of imminent harm.<sup>34</sup>

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30. *Id.* The Kellogg-Briand Pact of 1928 was signed by 63 states including Germany. Article 1 required States to settle their disputes by pacific means. Article 2 condemned the recourse to war for the solution of international disputes. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Peace Pact]. The Pact did not include a penal provision. The Tribunal, however, argued that the solemn denunciation of war as an instrument of national policy necessarily involves the proposition that an aggressive war is illegal under international law. TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 25, at 463. In the absence of an international legislature, the Tribunal contended that international law must be interpreted in a dynamic fashion. "[The] 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." *Id.* at 464.

31. TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 25, at 465.

32. *Id.* at 466.

33. *Id.*

34. *Id.*

That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the

Thus, the Tribunal clearly held that individuals may not shield themselves behind the requirements of international law. The Tribunal next elaborated upon the substantive offenses punishable under the Charter.

Article 6(a) defined Crimes Against Peace defined in Article 6(e) of the Nuremberg Charter.<sup>35</sup> The aggressive war charge was the foundation for the Nuremberg trial. It is "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."<sup>36</sup> The consequences of a war of aggression are not merely confined to the belligerents, but "affect the whole world."<sup>37</sup> However, the Tribunal provided little guidance on the amount, duration and character of the force which must be deployed to constitute a war of aggression in violation of international law. It merely noted that the "aggressive designs of the Nazi Government were not accidents arising out of the immediate political situation in Europe and the world; they were a deliberate and essential part of Nazi foreign policy."<sup>38</sup> Involvement in the planning, implementation and waging of a war of aggression or administration of occupied territories constituted liability under the aggressive war charge.<sup>39</sup>

The Tribunal rejected the contention that any significant participation in the affairs of the Nazi Party or Government was evidence of participation in a criminal plan or conspiracy to wage an aggressive war. It ruled that only those who participated in the formulation or refinement of a concrete plan to wage a war of aggression were liable

criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

*Id.*

35. *See supra* note 25, art. 6(a).

36. TRIALS OF THE MAJOR WAR CRIMINALS, *supra* note 25, at 427.

37. *Id.* A State's view that its deployment of force was an act of self-defense is not controlling. The Tribunal noted that this was a question to be determined through "investigation and adjudication." *Id.* at 450.

38. *Id.* at 427.

The Tribunal has decided that certain of the defendants planned and waged aggressive wars against twelve nations, and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail or even to consider at any length the extent to which these aggressive wars were also wars in violation of international treaties, agreements, or assurances.

*Id.* at 459.

39. *See generally id.* at 539-40 (discussing the criminal liability of Rosenberg), 544-45 (discussing the criminal liability of Frick), and 556-57 (discussing the criminal liability of Donitz).

for participation in a criminal conspiracy.<sup>40</sup> Knowledge of these plans or involvement in the economic preparation for wars of aggression did not result in criminal liability for a common plan or conspiracy.<sup>41</sup>

Article 6(b) of the Nuremberg Charter defined War Crimes.<sup>42</sup> The Tribunal ruled that when the Nuremberg Charter was drafted, these acts were punishable under the Hague Convention of 1907.<sup>43</sup> According to the Tribunal, by 1939, these rules had been recognized as binding by all civilized nations and were regarded as declaratory of the laws and customs of war.<sup>44</sup> The Tribunal required that the evidence "sufficiently" connect a defendant to the planning, ordering, inciting, or commission of war crimes to sustain a conviction under the War Crimes count.<sup>45</sup> Mere knowledge of crimes or communication of orders was not sufficient to sustain a conviction.<sup>46</sup>

Crimes Against Humanity were enumerated in Article 6(c) of the Nuremberg Charter.<sup>47</sup> The Tribunal did not elaborate on the concept of Crimes Against Humanity; however, it stated that acts prior to 1939 did not constitute Crimes Against Humanity. Only those acts committed following the beginning of the war in 1939 fell within the terms of the Charter. The Tribunal stated that to the extent that inhumane acts charged in the Indictment and committed after the beginning of the war did not constitute War Crimes, they constituted Crimes Against Humanity.<sup>48</sup>

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40. *Id.* at 467-68.

41. *Id.* at 541-42 (discussing the criminal liability of Frank), 549-50 (discussing the criminal liability of Funk), and 552-56 (discussing the criminal liability of Schacht).

42. *See* Nuremberg Charter, *supra* note 25, art. 6(b).

43. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (entered into force for the United States, Jan. 26, 1910).

44. TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 25, at 497. The Tribunal rejected that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war because Germany had completely subjugated and incorporated them into the German Reich. However, the Tribunal ruled that these territories were not part of the Reich as long as an army in the field was contesting German occupation. Neither Bohemia nor Moravia were incorporated into the Reich. *Id.* at 497-98.

45. *See id.* at 529 (finding that the evidence did not sufficiently connect Hess with the commission of war crimes to sustain a guilty verdict on that count).

46. *See id.*

47. *See* Nuremberg Charter, *supra* note 25, art. 6(c).

48. TRIALS OF THE MAJOR WAR CRIMINALS, *supra* note 25, at 498.



Under Article 9 of the Charter, the Tribunal had the discretion to declare a defendant a member of a "criminal" group or organization.<sup>49</sup> Article 10 permitted the competent national authority of any signatory to bring individuals to trial before national, military, or occupation courts for the crime of membership in a criminal organization. In any such case, Article 10 also provided that the criminal nature of the group or organization need not be provided *de novo* in subsequent war crimes trials.<sup>50</sup>

The Tribunal ruled that a criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. In order to be declared criminal, a group must have been formed or used in connection with the commission of crimes denounced by the Charter. The Tribunal determined that membership alone was not sufficient to impose criminal liability upon individuals. Any declaration of criminality would exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were conscripted into the organization, unless they were personally implicated in the commission of criminal acts.<sup>51</sup>

The Nuremberg trials provided the precedent relied upon by all subsequent post-World War II war crimes trials.<sup>52</sup>

### III. THE OTHER NUREMBERG

A second International Military Tribunal was anticipated for the purpose of prosecuting Nazi industrialists. However, it was determined that all subsequent proceedings would be heard by Allied national courts within occupied Germany.<sup>53</sup>

The Allied Control Council of Germany issued Control Council Law No. 10 which was intended to "establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military

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49. Nuremberg Charter, *supra* note 25, art. 9.

50. *Id.* at art. 10.

51. TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 25, at 500. The Tribunal issued declarations of criminality against the Leadership Corps (administrative branch) of the Nazi Party, *id.* at 501-05; the Gestapo (internal political police) and the SD (intelligence agency of the security police), *id.* at 505-11; and the SS (internal security police), *id.* at 512-17. It declined to issue such a finding against the SA (Nazi Party militia), *id.* at 517-19; the Reich Cabinet, *id.* at 519-20; and the General Staff and High Command of the German Armed Forces, *id.* at 520-23.

52. *See generally, infra* note 55 and accompanying text.

53. Zeck, *supra* note 3, at 350-51.

Tribunal.”<sup>54</sup> Article II recognized the Nuremberg offenses of Crimes Against Peace, War Crimes, Crimes Against Humanity and membership in groups or organizations which had been declared criminal by the International Military Tribunal.<sup>55</sup> Individuals involved in these acts were liable as principals<sup>56</sup> or accessories or for ordering or abetting<sup>57</sup> or consenting to such a crime.<sup>58</sup> The Law also imposed sweeping liability on those connected with plans or enterprises involved in the commission of Nuremberg crimes<sup>59</sup> and on those who were members of any organization or group connected with the commission of any such crime.<sup>60</sup> Criminal culpability for Crimes Against Peace also was explicitly extended to individuals holding high political, civil or military positions in Germany or in one of its allies, or those who held high positions in the financial, industrial or economic life of any such country.<sup>61</sup> Those found guilty under Control Council Law No. 10 might be punished with death, life imprisonment, hard labor, fine, forfeiture of property, restitution or deprivation of civil rights.<sup>62</sup>

Control Council Law No. 10, like the Nuremberg Charter, abrogated the act of state doctrine<sup>63</sup> and rejected superior orders as a defense.<sup>64</sup> The accused were also prohibited from raising a statute of limitations defense for the period from January 1933 to July 1, 1945. Prosecution was also not barred by any amnesty, immunity or pardon which may have been granted by the Nazi regime.<sup>65</sup> Other provisions dealt with arrangements for the extradition of offenders and witnesses.<sup>66</sup>

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54. PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY, CONTROL COUNCIL LAW NO. 10 (December 20, 1945), *reprinted in VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 XVII* (1952);

55. *Id.* art. II, para. 1(a)-(d). Article I incorporated the Nuremberg Charter and, by implication, the Nuremberg judgment interpreting the Charter, as part of Control Council Law No. 10. *Id.* art. I.

56. *Id.* art. I, para. 2(a).

57. *Id.* art. II, para. 2(b).

58. *Id.* art. II, para. 2(c).

59. *Id.* art. II, para. 2(d).

60. *Id.* art. II, para. 2(e).

61. *Id.* art. II, para. 2(f).

62. *Id.* art. II, para. 3(a)-(f).

63. *Id.* art. II, para. 4(a).

64. *Id.* art. II, para. 4(b). Superior orders may be recognized in mitigation of punishment. *Id.*

65. *Id.* art. II, para. 5.

66. *Id.* arts. III-IV. See also ORGANIZATION AND POWERS OF CERTAIN MILITARY TRIBUNALS, ORDINANCE NO. 7 (OCTOBER 18, 1946) *reprinted in VI TRIALS OF WAR*

Trials under Control Council Law No. 10 centered on defendants who were variously involved in Nazi economic, political, racial, medical and legal policies.<sup>67</sup> These provisions of Control Council Law No. 10 provided the basis for American prosecutions of German war criminals following World War II.<sup>68</sup>

#### A. *The Economic Cases*

The International Military Tribunal at Nuremberg established that governmental officials involved in developing and directing the German

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CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 XXXIII (1952), *amended by* Ordinance No. 11 *reprinted in id.* at XXIX (establishing the composition and procedure of United States war crimes tribunals).

67. *See Trials of War Criminals Before Nuernberg Military Tribunals, VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 IX (1952).*

A total of twelve indictments [were] filed. These may be classified as denoting the activities of (a) Industrialists, (b) Military Leaders, (c) The SS and its affiliates and (d) The Reich Ministries. Falling under group (a) and generally considered as the most politically significant cases, are the trials of the Directors and Officials of the I.G. Farben Chemical Trust, the Krupp Munitions Trust, and the Flick Combine which dominated the coal, iron and steel industries. In group (b), Field Marshal Ehrhart Milch, Goering's Deputy in charge of the German Luftwaffe, was tried for the use and misuse of slave labor and for inhumane medical experiments performed upon Jews and Poles. Also prosecuted were a group of military officers headed by Field Marshal Wilhelm List, charged with responsibility for the murder of hostages and civilians in the Balkans, and another group of Field Marshals and Generals charged generally with preparing, planning and waging aggressive war. Under group (c) are included the trials of medical doctors and surgeons for war crimes and crimes against humanity committed in the performance of so-called "medical experiments" upon human beings; the Main Economic and Administrative Department of the SS, commonly known as the W.V.H.A. which supervised the operations and administration of concentration camps; the R.S.H.A. or Race and Resettlement Division, and the Einsatz Commandos, who were special SS extermination units. Under group (d) or Ministries cases, a number of judges and prosecutors who were officials of the Ministry of Justice and the notorious People's court and Special Courts, were prosecuted in a single trial which resulted in significant convictions of lawyers and judges who committed miscellaneous war crimes by perverting the German legal and court system.

Zeck, *supra* note 3, at 352-53.

68. For an example of reliance on the Nuremberg decision, *see infra* notes 69-71 and accompanying texts.

armaments industry were not liable for conspiracy to wage or for waging an aggressive war. Albert Speer was appointed in 1942 as Reich Minister for Armaments and Munitions. He was later named Plenipotentiary General for Armaments and a member of the Central Planning Board.<sup>69</sup> The Tribunal acquitted Speer and ruled that Speer's

activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war.<sup>70</sup>

The Speer precedent guided post-Nuremberg tribunals in their adjudication of German industrialists.<sup>71</sup> The Americans conducted three major trials of corporate leaders. These involved the executives of the chemical firm I.G. Farben,<sup>72</sup> the steel and armament giant Krupp<sup>73</sup> and the Flick conglomerate.<sup>74</sup>

The tribunals explicitly proclaimed that international criminal law bound both civilians and the military.

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 criminals 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

69. TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 25, at 576-77.

70. *Id.* at 577. *See also id.* at 552-56 (disposition of Schacht).

71. *See* Roehling Case-Indictment, Judgment And Judgment On Appeal, *reprinted in* XIV TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW No. 10 106 (1952).

72. *United States v. Carl Krauch*, VIII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1081 (1950) [hereinafter Farben Case].

73. *United States v. Alfried Krupp*, IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1327 (1950) [hereinafter Krupp Case].

74. *United States v. Friedrich Flick*, VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1187 (1950) [hereinafter Flick Case].

international law to individuals is no novelty. . . . There is no justification for a limitation of responsibility to public officials.<sup>75</sup>

In the *Farben Case*, the defendants were indicted for conspiracy to wage and participate in the planning, preparation and waging of a war of aggression.<sup>76</sup> I.G. Farben knowingly participated in a secret armament program designed to "achieve a degree of military might which would make Germany invincible."<sup>77</sup> The firm cooperated with the Reich in developing a broad raw material base to permit the waging of aggressive war. It planned and operated huge plants and facilities for the production of synthetic gasoline, oil, buna rubber, nitrogen and light metals. However, the Tribunal ruled that participating in the rearmament of Germany was not a crime unless carried out, or participated in, with knowledge that it was part of a plan or was intended to be used in waging aggressive war.<sup>78</sup>

The Tribunal ruled that there was no general knowledge in Germany that Hitler was planning a series of aggressive wars. The defendants thus could not be presumed to have been aware of Hitler's military aspirations.<sup>79</sup> The "average citizen of Germany, be he professional man, farmer, or industrialist, could scarcely be charged by these events with knowledge that the rulers of the Reich were planning to plunge Germany into a war of aggression."<sup>80</sup> The *Farben* tribunal also rejected the argument that the defendants should have been alerted to Germany's military plans by the pace of German rearmament. The defendants were not military experts and could not be expected to distinguish between the amount of armaments required for a defensive as opposed to an aggressive war.<sup>81</sup> The Tribunal thus concluded that the defendants did not possess "specific knowledge" of Hitler's plans.<sup>82</sup>

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75. *Id.* at 1192.

76. *Farben Case*, *supra* note 72, at 1096-97. The lead defendant was Carl Krauch who was a leading Farben executive. *Id.* at 1108. Krauch later was appointed to the staff of Hermann Goering and in 1938 he was appointed Plenipotentiary General for Special Questions of Chemical Production. *Id.* at 1108-10.

77. *Id.* at 1216 (Hebert, J., concurring).

78. *Id.* at 1216-17.

79. *Id.* at 1113.

80. *Id.* at 1106.

81. *Id.* at 1113. The Tribunal noted that "[e]ffective armament is relative. Its efficacy depends upon the relative strength with respect to the armament of other nations against whom it may be used either offensively or defensively." *Id.*

82. *Id.* at 1304 (Hebert, J., concurring).

The evidence falls far short of establishing beyond a reasonable doubt that their endeavors and activities were undertaken and carried out with the knowledge that they were thereby preparing Germany for participation in an aggressive war or wars that had already been planned either generally or specifically by Adolf Hitler and his immediate circle of Nazi civil and military fanatics.<sup>83</sup>

The *Farben* panel commented that the International Military Tribunal fixed the "standard of participation high among those who lead their country into war."<sup>84</sup> Consequently, it is not a crime under international law for ordinary citizens of a State which has launched an aggressive attack to support their country's military efforts. The Tribunal feared that extension of liability to ordinary citizens would "lead far afield."<sup>85</sup> There would be no practical limitation on criminal responsibility that would not include, "on principle, the private soldier on the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces, or the housewife who conserved fats for the making of munitions."<sup>86</sup> Under such a principle, "the entire manpower of Germany could, at the uncontrolled discretion of the indicting authorities, be held to answer for waging wars of aggression. This would, indeed, result in the possibility of mass punishment."<sup>87</sup> Once having initiated such prosecutions, "it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people."<sup>88</sup> Such a precedent would require ordinary citizens to comprehend the complexity of international law and to determine in the heat of moment whether their country was in violation

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Despite strong inferences to be drawn from much of the evidence as applied to some of the individual defendants, as to intent and knowledge, the extraordinary standard of proof which probably should be exacted in this stage of the development of the crime against peace is not clearly met and, for this reason, I concur in the acquittals under count one to charges of planning and preparation of aggressive war. Criminal connection with the decisions of the Nazi regime to initiate aggressive wars has likewise not been established.

*Id.*

83. *Id.* at 1123.

84. *Id.* at 1126.

85. *Id.* at 1124.

86. *Id.* at 1124-25.

87. *Id.* at 1125.

88. *Id.* at 1126.

of international law. This would place individuals in the untenable position of choosing between patriotism and treason.<sup>89</sup>

Given that the *Farben* defendants did not participate in the planning nor knowingly participate in the preparation and initiation of the waging of a war of aggression, the Tribunal ruled they could not be held liable for involvement in a "common plan or conspiracy to do these same things."<sup>90</sup>

Industrialists were also charged with plunder and spoilation of occupied territories in contravention of the laws of war.<sup>91</sup> The *Krupp* panel noted that the laws of war place strict limitations on a belligerent's right to appropriate such private and public assets based on the rationale that a country's economic resources should not be used to assist the enemy.<sup>92</sup> The existing property relations in a country must be respected.<sup>93</sup> The major exception to this prohibition on the appropriation of resources of an occupied territory is that such resources may be seized to support the army of occupation. The requisition of goods such as houses and equipment, however, may not supersede the excess economic capacity of the occupied territory.<sup>94</sup> An occupying power may also expropriate property in order to maintain public order and safety.<sup>95</sup>

In the *Krupp Case* it was noted that acts of plunder of the occupied territories were committed in various fashions.

Many of the acts of plunder were committed in a most manifest and direct way, namely, through physical removal of machines and materials. Other acts were committed through changes of corporate property, contractual transfer of property rights, and the like. It is the results that count, and though the results in the latter case were achieved through "contracts" imposed upon others, the illegal results, namely, the deprivation of property, was achieved just as though materials had been physically shipped to Germany.<sup>96</sup>

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89. *Id.*

90. *Id.* at 1128. 13 of the 17 defendants were convicted. *Id.* at 1205-09.

91. *See id.* at 1153-67.

92. *Krupp Case*, *supra* note 73, at 1341.

93. *Id.* at 1343.

94. *Id.* at 1342.

95. *Id.* at 1343.

96. *Id.* at 1346-47. The Tribunal reported that Alfred Krupp and three other industrialists were gathered around a table listening to a radio broadcast of the advances of the German Wehrmacht through Belgium and consolidation of control over Holland.

Krupp, for instance, "considered occupied France as a hunting ground for . . . equipment which was either shipped to the French enterprises operated by the Krupp firm or directly sent to Krupp establishments in Germany."<sup>97</sup> Some of these machines were removed from "booty depots," others were confiscated from French firms and others were purchased at modest prices with the assistance of German authorities.<sup>98</sup> Krupp engaged in the same type of exploitation in the Netherlands where plunder occurred "in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy."<sup>99</sup> The fact that Krupp claimed that it was acting as an agent of the German government, according to the Tribunal, did not absolve the firm from liability.<sup>100</sup>

The concept relied upon by the defendants—namely: that an aggressor may first over-run enemy territory, and then afterwards industrial firms from within the aggressor's country may swoop over the occupied territory and utilize property there—is utterly alien to the laws and customs of warfare . . . and is clearly declared illegal by them because . . . requisitions may be made only for the needs of, and on the authority of, the army of occupation.<sup>101</sup>

The Tribunal rejected the contention that these acts of spoilation could be justified as an emergency measure. The laws and customs of war, according to the Tribunal, are designed to regulate "all phases of war."<sup>102</sup> The claim that these laws "can be wantonly—and at the sole discretion of anyone belligerent—disregarded when he considers

*Id.* at 1347-48.

At the conclusion of the broadcast the four men talked excitedly and with great intensity. They pointed their fingers to certain places on the map indicating villages and factories. One said, "This one is yours, that one is yours, that one we will have arrested, he has two factories." They resembled, as the witness Ruemann put it, "vultures gathered around their booty." One of the men (Lipps) telephoned his office to contact the competent military authority to obtain passports to Holland for two of them the following day.

*Id.* at 1348.

97. *Id.* at 1361.

98. *Id.*

99. *Id.* at 1370 (quoting I TRIAL OF THE MAJOR WAR CRIMINALS 239 (1948)).

100. *Id.* at 1346.

101. *Id.* at 1345-46.

102. *Id.* at 1347.



his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely."<sup>103</sup> Thus, those Krupp executives involved in plunder and spoilation were held liable for war crimes.<sup>104</sup>

Industrial executives were also charged with the use of involuntary labor from concentration camps<sup>105</sup> and occupied territories.<sup>106</sup> The Krupp firm, according to the Tribunal, eagerly sought such labor to compensate for the scarcity of workers in Germany.<sup>107</sup> These workers were severely punished in order to maintain discipline.<sup>108</sup> The *Krupp* Tribunal described labor conditions for concentration camp workers at the firm's "Bertha Works":

It took them 50 minutes to walk from the camp to work in the Bertha Works shops in the footgear furnished by the SS, consisting of either broken wooden clogs, or rags wrapped around the feet. The inmates worked without any morning meal, and for 12 hours with only one bowl of soup which they received at noon. Their food was so poor that they sought remains of food and begged for scraps of food. They fought each other for the left-over soup, which the other foreign workers had left or rejected despite the limited amount of food made available to them. . . . The inmates were also beaten because they did not properly perform the work to which they were assigned, as a result of not knowing how to work the machines. The beatings administered to them by the supervisors was [sic] with a whip made of iron with rubber. Conferences were had between the competent plant managers and the members of the SS during which the matter of punishing the concentration camp inmates was discussed. The housing furnished to the concentration camp inmates was most inadequate, and the lives of the inmates were in danger as the plant was not furnished with proper air raid shelters for the workers. During air raids, the concentration camp inmates had to remain in the plant while other employees were permitted to leave it.<sup>109</sup>

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103. *Id.* The *Farben* Tribunal rejected the argument that the duties of belligerent occupation had been abrogated by the concept of "total war." *Farben* Case, *supra* note 72, at 1137-38.

104. *Krupp* Case, *supra* note 73, at 1373.

105. *See id.* at 1412.

106. *Id.* at 1400.

107. *Id.* at 1412.

108. *See id.* at 1401, 1409-10, 1412.

109. *Id.* at 1422.

The defendants in the *Krupp Case* contended that production quotas were established by the Reich and that given the labor shortage, they were forced to make use of prisoners of war, concentration camp inmates and involuntary labor from the occupied territories. They argued that had they "refused to do so, they would have suffered dire consequences at the hands of the government authorities who exercised rigid supervision over their activities, in every respect."<sup>110</sup>

The defendants in the *Krupp Case* unsuccessfully sought to rely on the defense of necessity to justify their use of forced labor.<sup>111</sup> The Tribunal ruled that the defendants were not acting under compulsion: "the competent and credible evidence leaves no doubt that in committing the acts here charged as crimes, the guilty individuals were not acting under compulsion or coercion exerted by the Reich authorities within the meaning of the law of necessity." The Krupp firm not only demonstrated a "willingness but . . . [an] ardent desire to employ forced labor." Its executives acted out of a patriotic "sense of duty" rather than out of "necessity" and made it clear to the Reich that Krupp was eager to deploy slave labor.<sup>112</sup>

The Tribunal conceded that executives who regularly failed to meet their production quotas risked losing their position or industrial property.<sup>113</sup> However, it noted that it was doubtful whether Krupp or his executives would have suffered such punishment. The Krupp firm was a vital factor in the war effort and Gustav Krupp was a personal friend of Hitler. He contributed large sums to the Nazi Party and persuaded other influential industrialists to support Hitler.<sup>114</sup> The Tribunal cited three instances in which Krupp was able to defy the Reich successfully: the firm's support for a doctor who refused to abort "eastern workers,"<sup>115</sup> its continued production of peacetime goods,<sup>116</sup> and its sale of war bonds.<sup>117</sup> In any event, the Tribunal questioned whether the fear

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110. *Id.* at 1435.

111. Under necessity, "the contemplated compulsion must actually operate upon the will of the accused to the extent he is thereby compelled to do what otherwise he would not have done." *Id.* at 1439. Defendants relying upon necessity must demonstrate that their criminal act was committed to avoid serious and irreparable harm; and that their criminal act did not result in greater harm than that they sought to avoid. *Id.* at 1443.

112. *Id.* at 1438-43.

113. *Id.* at 1444.

114. *Id.* at 1445.

115. *Id.* at 1446.

116. *Id.* at 1446-47.

117. *Id.* at 1447-48.

of losing one's position or property justified the employment and abuse of involuntary convict labor.

If we may assume that as a result of opposition to Reich policies, Krupp would have lost control of his plant and the officials their positions, it is difficult to conclude that the law of necessity justified a choice favorable to themselves and against the unfortunate victims who had no choice at all in the matter. Or, in the language of the rule, that the remedy was not disproportionated to the evil. In this connection it should be pointed out that there is a very respectable authority for the view that the fear of the loss of property will not make the defense of duress available.<sup>118</sup>

Liability for the use of slave labor thus rested on the defendants' state of mind—whether they voluntarily complied with Nazi policies or were compelled to do so. Those viewed as having been forced to deploy slave labor were successful in invoking the necessity defense. A defendant's state of mind, of course, was difficult to determine. As a result, the tribunals litigating the culpability of German industrialists only denied the necessity defense to those who clearly took the initiative in deploying slave labor.<sup>119</sup> For instance, plant managers who quietly cooperated in the slave labor program invariably were determined to have acted out of necessity.<sup>120</sup>

The defendants in the *Flick Case* utilized workers from occupied territories and prison camps. Yet the Tribunal determined that the defendants did not want to employ such labor. Most of the firm's executives were portrayed as having no choice but to accept the use of such workers. The Tribunal emphasized that the defendants were keenly aware that it would be "both futile and dangerous to object to the allocation of such labor."<sup>121</sup> Any act that could be viewed as hindering or retarding the war economy programs of the Reich would be considered as "sabotage and would be treated with summary and severe penalties, sometimes resulting in the imposition of death sentences."<sup>122</sup>

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118. *Id.* at 1445.

119. *Farben Case*, *supra* note 72, at 1187, 1192.

120. *Id.* at 1192-95. All twelve of the defendants were convicted. *Id.* at 1149-52.

121. *Flick Case*, *supra* note 74, at 1197. Defendants Flick and Weiss were described as having taken the initiative in employing such labor and were denied the defense of necessity. *Id.* at 1198, 1202.

122. *Id.* at 1197. Defendant Friedrich Flick and his assistant Otto Steinbrick

The defendants in *Farben* were also charged with War Crimes and Crimes Against Humanity because the company provided large quantities of Zyklon B gas to concentration camps. This poison gas was used to exterminate those interned in the camp. The Tribunal determined that there was no probable cause to believe that the members of the firm's executive board were aware of the deadly deployment of the gas. The industrialists reasonably could have believed the insecticide was used to maintain hygiene in the crowded camps.<sup>123</sup>

Moreover, the defendants in *Farben* were charged with providing various deadly pharmaceuticals for use in experimentation upon persons interned in concentration camps. Internees were deliberately infected with typhus. Then they were administered drugs produced by Farben to test the efficacy of the drugs. A substantial number died during these experiments.<sup>124</sup> The Tribunal failed to find beyond a reasonable doubt that the defendants were aware of this criminal practice.<sup>125</sup> It noted that there is "always danger of an epidemic of this disease where a large number of persons are thrown together amid unsanitary conditions, such as are frequently found on army fronts and in concentration camps."<sup>126</sup> The Tribunals also determined that Farben discontinued forwarding drugs to these physicians as soon as the doctors' "improper conduct was suspected."<sup>127</sup> Thus, as to the provision of both the Zyklon B and typhus vaccine, the Tribunal required the prosecution to meet a high standard of proof in order to prove guilty knowledge. Absent such proof, it interpreted the defendants' behavior benignly.

### B. *The Medical Cases*

In *United States v. Brandt*<sup>128</sup> and *United States v. Milch*,<sup>129</sup> American war crimes tribunals adjudicated the guilt of those involved in the medical experimentation and slave labor programs.

were charged and convicted of being accessories to War Crimes and Crimes against Humanity based upon their having contributed money to the SS. *Id.* at 1217, 1220. Steinbrick also was convicted of knowingly being a member of the SS, a criminal organization. *Id.* at 1221-22. Three of the six defendants were convicted. *Id.* at 1223.

123. *Farben Case*, *supra* note 72, at 1168-69.

124. *Id.* at 1170.

125. *Id.* at 1171.

126. *Id.* at 1170.

127. *Id.* at 1172. The reports submitted to Farben by testing physicians during the experiments used the German term "Versuch" or "experiment." The defendants argued that "Versuch," as used in this context, means "test" and that the application of new drugs on sick persons under such circumstances would have been entirely appropriate. *Id.*

128. *United States v. Brandt*, II TRIALS OF WAR CRIMINALS BEFORE THE NUERN-

German doctors performed a number of medical experiments on concentration camp internees who were forced to participate in research trials. The tests were intended to have military applications such as determining how best to treat those exposed to infections and disease or sailors stranded in chilly ocean waters. Countless internees were injured and killed in the course of these scientifically dubious exercises.<sup>130</sup>

The high-altitude experiments were carried out in a low-pressure chamber in which the pressures prevailing at high altitudes were duplicated. The simulated altitude gradually was raised to test the limits of human endurance. In the medical tests involving freezing temperatures, the subjects were forced to remain in a tank of ice water for periods of up to three hours. In other instances, subjects were kept outdoors without clothes for many hours at below-freezing temperatures. Other experiments involved infecting internees with malaria, jaundice, spotted fever, poison and exposing them to mustard gas or subjecting them to phosphorus burns from incendiary bombs. The effectiveness of various vaccines and treatments then were tested. Another set of procedures involved the transplantation of bones, muscles and nerves from one subject to another.<sup>131</sup>

At the Ravensbrueck concentration camp, inmates were wounded and infected with streptococcus, gangrene and tetanus. Circulation of blood was interrupted by tying off blood vessels at both ends of the

BERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 171 (1950) [hereinafter Medical Case].

129. United States v. Milch, II TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 773 (1950) [hereinafter Milch Case].

130. Medical Case, *supra* note 128, at 175-78. Judge Michael A. Musmanno reported the conclusions of doctors conducting freezing experiments:

If one is to have his feet in icy water, he should wear warm, waterproof boots. If he is to dip his head in the icy water, then his head should also be protected! This, then, is the weighty conclusion of so-called scientists sacrificing human lives for an observation that is obvious to a ten-year-old child.

Milch Case, *supra* note 129, at 845 (Musmanno, J., concurring). Judge Musmanno later noted:

In the year 1942, in the name of science, in the name of progress, men trained in medicine calmly and deliberately froze the blood in the arteries and veins of human beings to the point of death to proclaim warm clothing for low temperatures, and re-warming and medicine for those who have succumbed to coldness.

*Id.* at 846 (Musmanno, J., concurring).

131. Medical Case, *supra* note 128, at 175-79.

wound to create a condition similar to a battlefield wound. The infections were aggravated by forcing wood shavings and ground glass into the wounds. The infections then were treated with sulfanilamide and other drugs to determine their effectiveness.<sup>132</sup>

The Dachau concentration camp tests involved the study of various methods of making sea water drinkable. Subjects were deprived of food and were forced to subsist on chemically processed sea water. Between March 1941 and January 1945, sterilization experiments were conducted at Auschwitz and Ravensbrueck. The purpose was to develop a method of sterilization suitable for rendering millions of people sterile as efficiently and quickly as possible. In this process, thousands were sterilized by means of X-rays, surgery and various drugs.<sup>133</sup>

Countless others were needlessly killed and tortured. One hundred and twelve Jews were selected to complete a skeleton collection for the Reich University of Strasbourg. Their photographs and anthropological measurements were taken and they were then murdered. The corpses later were sent to Strasbourg where they were defleshed. The euthanasia program involved the systematic execution of Germans in medical institutions—the aged, crippled, infirm, insane and incurably ill by lethal injection, gas and other means. These persons were regarded as ““useless eaters”” and were considered a burden on the German war machine. Their relatives were told that they had died of natural causes. This program served as the first step towards the wholesale extermination of Jews, Gypsies and Slavic populations. Between May 1942 and January 1944, tens of thousands of Polish internees who allegedly were infected with tuberculosis were executed in order to ensure the public health and welfare.<sup>134</sup>

The Tribunal ruled that medical experiments on human beings must conform to various ethical standards.<sup>135</sup> Most importantly, the subjects must voluntarily consent to the procedure and there must be a reasonable belief that the experiment will contribute to the welfare of society.<sup>136</sup> The Nazi experiments failed to satisfy any of the standards established by the Tribunal:

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132. *Id.* at 176.

133. *Id.* at 177.

134. *Id.* at 179.

135. *Id.* at 181.

136. *Id.* at 182. The Tribunal listed ten ethical principles which must be observed in order to satisfy moral, ethical and legal requirements. These include: subjects must voluntarily consent to the experiment; the experiment should be expected to yield fruitful results for the good of society; the experiment should be based upon prior

In every single instance appearing in the record, subjects were used who did not consent to the experiments; indeed, as to some of the experiments, it is not even contended by the defendants that the subjects occupied the status of volunteers. In no case was the experimental subject at liberty of his own free choice to withdraw from any experiment. In many cases experiments were performed by unqualified persons, were conducted at random for no adequate scientific reason, and under revolting physical conditions. All of the experiments were conducted with unnecessary suffering and injury and but very little, if any, precautions were taken to protect or safeguard the human subjects from the possibilities of injury, disability, or death. In every one of the experiments the subjects experienced extreme pain or torture, and in most of them they suffered permanent injury, mutilation, or death, either as a direct result of the experiments or because of lack of adequate follow-up care.<sup>137</sup>

The Tribunal ruled that those high medical officials who possessed both knowledge of the experiments and the authority to modify or halt them were criminally liable.<sup>138</sup> For instance, in the medical field, Karl Brandt was only subordinate to Hitler and he was aware of various experiments. The judicial panel in the *Medical Case* held that Brandt had a duty to intervene to ascertain whether those involved in the tests were being treated humanely. Yet, it concluded that Brandt failed to take any steps to check upon the medical experiments.

Occupying the position he did, and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments

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tests and existing scientific knowledge; the experiment should avoid all unnecessary pain, injury and death; the risk involved should not exceed the expected benefits; the experiment should be conducted by scientifically qualified personnel; the human subject and scientist should be at liberty to halt the experiment at any time if there is a risk of injury or death. *Id.* at 181-82.

137. *Id.* at 183.

138. *Id.* at 193. The defendants were charged with being principals in, accessories to, ordering, abetting, taking a consenting part in, and being connected with plans and enterprises involving medical experiments without the subjects' consent in the course of which experiments the defendants with others perpetrated murders, brutalities, cruelties, tortures, atrocities, and other inhuman acts.

Medical Case, *supra* note 128, at 175.

which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps.<sup>139</sup>

The Tribunal also rejected the contention that medical programs, such as euthanasia, were mandated by German law and thus were legally justifiable. The Tribunal ruled that the "Family of Nations is not obligated to give recognition to such legislation when it manifestly gives legality to plain murder and torture of defenseless and powerless human beings of other nations."<sup>140</sup>

Thus, those governmental officials with knowledge of the experiments and authority over the doctors conducting those procedures who failed to exercise control over their subordinates were charged with a duty to intervene. Had they fulfilled this responsibility, the Tribunal concluded, "great numbers of non-German nationals would have been saved from murder." On the other hand, mere knowledge of these experiments was not sufficient to constitute criminal liability. Defendant Paul Rostock was Dean of the Medical Faculty of the University of Berlin and Brandt's deputy in charge of medical science and research. He coordinated research to avoid duplication and to ensure that vital problems were given priority. Nevertheless, the Tribunal determined that Rostock neither directed nor was directly involved in the medical experiments. Most importantly, "[n]o experiments were conducted by any person or organization which was to the least extent under Rostock's control or direction."<sup>141</sup>

The defendants pointed out that only those condemned to death were subjected to the experiments. The implication was that those who died would have been killed in any event.<sup>142</sup> This, however, was not invariably the case. Gypsies, for instance, often were promised that if they voluntarily transferred from Auschwitz to Dachau they would be able work in a labor battalion. However, when they arrived at Dachau, they were assigned to the seawater experimental station without their consent.<sup>143</sup>

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139. *Id.* at 193-95. *See also id.* at 207 (conviction of Siegfried Handloser, Chief of the Wehrmacht Medical Service).

140. *Id.* at 198. The Tribunal determined that it was unnecessary "[w]hether or not a state may validly enact legislation which imposes euthanasia upon certain classes of its citizens." *Id.* *See also id.* at 271.

141. *Id.* at 207-10.

142. *Id.* at 224.

143. *Id.* at 216.



It is true that political prisoners condemned to death—such as members of the Polish Resistance—were disproportionately singled out for participation in medical experimentation. The Tribunal, however, refused to hold that the detainees' death sentence permitted the Germans to subject them involuntarily to medical testing. These individuals had not been subjected to a trial and it was not certain that they were guilty of capital offenses. In any event, the internees had not consented to participate in the experiments. In short,

assuming for the moment that they had been condemned to death for acts considered hostile to the German forces in the occupied territory of Poland, these persons still were entitled to the protection of the laws of civilized nations. While under certain specific conditions the rules of land warfare may recognize the validity of an execution of spies, war rebels, or other resistance workers, it does not under any circumstances countenance the infliction of death or other punishment by maiming or torture.<sup>144</sup>

Nor was it recognized as a defense to act pursuant to superior orders. Wilhelm Beiglboeck was a captain in the medical department of the German Air Force and received orders to carry out seawater experiments at Dachau. Roughly, forty gypsies of various nationalities were deprived of water and then ordered to drink sea water. The Tribunal determined the subjects had been "treated brutally" and many had "endured much pain and suffering." The Tribunal rejected Beiglboeck's superior orders defense, ruling that such a claim "will be considered, if at all, only in mitigation of sentence."<sup>145</sup>

Defendant Wolfram Sievers argued that his involvement in war crimes was justified by his involvement in an underground resistance movement. Sievers, who was not a doctor, served on Himmler's personal staff. His main responsibility was to act as Reich Business Manager of the Ahnenerbe Society, which funded research on the culture and heritage of the Nordic race. He directly reported to Himmler and devoted his efforts to providing the funds, materials and equipment, and occasionally the subjects, required by researchers, and he monitored the research process and results.<sup>146</sup>

Sievers attempted to justify his actions insofar as he was a member of a secret resistance movement which plotted to assassinate Hitler and

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144. *Id.* at 224.

145. *Id.* at 290-92.

146. *Id.* at 254-55.

Himmler and overthrow the Nazi regime. Sievers allegedly assumed and remained in his position in order to observe Himmler's movements and to obtain information of value to the resistance organization. The Tribunal, however, rejected the contention that "a resistance worker can commit no crime, and least of all, against the very people he is supposed to be protecting." The fact remains that "murders were committed with cooperation of the Ahnenerbe upon countless thousands of wretched concentration camp inmates."<sup>147</sup>

It also was not a defense that a doctor proposed an allegedly more humane, but equally effective procedure to sterilize internees. Defendant Pokorny was a medical officer in the German army.<sup>148</sup> He wrote Himmler suggesting that sterilization could be more efficiently carried out through drugs rather than through relying upon castration and other techniques.<sup>149</sup> The Tribunal rejected Pokorny's defense that his proposal was intended to sabotage rather than to further the sterilization program. However, he was acquitted because as "monstrous and base as the suggestions in the letter are, there is not the slightest evidence that any steps were ever taken to put them into execution by human experimentation. We find, therefore, that the defendant must be acquitted—not because of the defense tendered, but in spite of it."<sup>150</sup>

The companion case involved the prosecution of Field Marshal Erhard Milch, second in command to Herman Goering in the German Luftwaffe. Milch's prosecution grew out of his membership on the Central Planning Board which directed and controlled German war production.<sup>151</sup> He was charged with being a principal in, accessory to, ordering, abetting, and taking a consenting part in, medical experiments without the subjects' consent.<sup>152</sup>

The Tribunal concluded that there was no evidence that Milch instituted the experiments or that they were conducted or continued under his specific direction or command. He did order that a low-pressure chamber should be sent to Dachau, but the Tribunal determined that the chamber was capable of legitimate scientific use. To the extent that the defendant was aware that experiments were to be launched, "it cannot be said that the evidence shows any knowledge

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147. *Id.* at 263.

148. *Id.* at 292.

149. *Id.* at 293.

150. *Id.* at 294. Sixteen of the twenty-three defendants were convicted. *Id.* at 299-300.

151. Milch Case, *supra* note 129, at 869 (Phillips, J., concurring).

152. *Id.* at 773.

on his part that unwilling subjects would be forced to submit to them or that the experiments would be painful and dangerous to human life." The defendant did not concern himself with the details of the experiments. His priority was to procure labor and materials for the manufacture of airplanes. The Tribunal determined that the experiments fell "naturally and almost exclusively" within one of his subordinate departments and naturally engaged his attention "only perfunctorily, if at all." Some question remained on whether the defendant had the power to halt the experiments. The Tribunal determined that the SS likely would have continued the procedures under their own auspices had the defendant intervened.<sup>153</sup>

The Tribunal determined that in his role as a member of the Central Planning Board and as chair of the Jaegerstab, which was concerned with meeting the material needs of the Luftwaffe, Milch was involved in conferences at which it was agreed that laborers should be involuntarily deported from the occupied territories to work in the Reich.<sup>154</sup> Milch also was well aware that cruel and barbarous methods were employed to force these civilians into slave labor and he was cognizant that prisoners of war were being employed in airplane factories.<sup>155</sup>

The Tribunal ruled that the defendant was not passive. It determined that he actively encouraged and urged the procurement of additional labor.<sup>156</sup>

Instances could be multiplied in which the defendant not only listened to stories of enforced labor from eastern civilians and other prisoners of war and thereby became aware of the methods used in procuring such labor, but in which he himself urged more stringent and coercive means to supplement the dwindling supply of labor in the Luftwaffe.<sup>157</sup>

Milch claimed he was told it was lawful to employ prisoners of war in armament industries. The Tribunal, however, ruled Milch, as an "old and experienced" soldier who was "well acquainted" with the provisions of the Geneva and Hague Treaties, should have had "grave suspicions" concerning this advice. The defendant's contention that many of the Russian prisoners of war volunteered to serve in the war

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153. *Id.* at 776-77.

154. *Id.* at 783.

155. *Id.* at 785.

156. *Id.* at 787.

157. *Id.*

industries, does not serve as a defense to the charge that "hundreds of thousands of Polish prisoners of war were cast into concentration camps and parceled out to the various war factories, nor that thousands of French prisoners of war were compelled to labor under the most harrowing conditions for the Luftwaffe."<sup>158</sup>

Milch also pointed out that the French government agreed to provide workers to the Reich. He contended that any coercion was exerted by the French rather than by the Nazi government. According to the Tribunal, this argument overlooks that the Vichy government, a creation and creature of the Germans, took its orders from Berlin. The "transports which brought Frenchmen to Germany were manned by German armed guards and that upon their arrival they were kept under military guard provided by the Wehrmacht or the SS."<sup>159</sup>

The Tribunal further rejected the defendant's contention that the vast hordes of Slavic Jews who worked in German war industries were voluntary workers. These Jewish workers were "slaves, nothing less—kidnapped, regimented, herded under armed guards, and worked until they died from disease, hunger, and exhaustion." The treatment of non-Jewish workers was only marginally better. They lived under the "sign-marks of slavery, not free employment under contract." To the extent that "any decent human consideration was shown these workers, it was merely to maintain their productivity and did not stem from any humanitarian considerations."<sup>160</sup>

On another count, Milch offered the defense that he was a German soldier who was complying with his obligation to follow the orders and policies established by Adolf Hitler. The Tribunal pointed out that Milch had joined the Nazi Party as early as 1933 and had been present at the meeting at which Hitler had outlined his plans for invading Poland. The defendant thus made his choice and "elected to ride with the tyrant."<sup>161</sup> The Tribunal concluded that the defendant had an "opportunity to join those who refused to do the evil bidding of an evil master, but he cast it aside and his professed repentance now

158. *Id.* at 788.

159. *Id.*

160. *Id.* at 789-90.

161. *Id.* at 791-92. The Tribunal further noted:

Others with more courage and higher principles and with more loyalty to the ancient German ideals rebelled and withdrew from the brutal crew. . . . [T]hese men in high positions had the character to repudiate great evil, and if in so doing they took risks and made sacrifices, nevertheless, they made their choice to stand with decency and justice and honor.

*Id.* at 793.

comes too late.”<sup>162</sup> As determined by the Tribunal, Milch was aware of the requirements of the law of nations. Nevertheless, he urged his subordinates to ignore the requirements of international law and directed them to subject those forced to work in German armaments factories to brutal and harsh treatment.<sup>163</sup>

When foreign forced laborers refused to work, the defendant ordered that they be shot. When they attempted to revolt the defendant directed that some of their numbers be killed, regardless of their personal guilt or innocence. In the case of prisoners of war who attempted to escape, the defendant ordered that these prisoners be shot and later hanged in the factory for all to see.<sup>164</sup>

The Tribunal also rejected the argument that the use of involuntary labor drawn from the population of occupied territories was justified on the basis of the Nazi theory of total warfare. It determined that while military necessity, at times, may justify the incidental victimization of noncombatants, it does not mean that an occupying power may strip the indigenous population of their civil rights and subject them to forced labor, torture and death.<sup>165</sup> Even assuming that international law recognizes the concept of total war, it cannot be persuasively argued that this theory “justifies the abandonment of every restriction and authorizes the combatants to use all manners and means to win the conflict.”<sup>166</sup>

In sum, there was clear evidence of Milch’s involvement in the involuntary labor program. As Inspector General of the Air Force, Milch was in charge of the office which authorized research and medical experiments conducted on behalf of the Air Force. However, the Tribunal determined that he did not possess control or knowledge of the abuses which transpired during these procedures. There was a swirl of debate, discussion and memorandums concerning the use of human subjects in perilous high altitude experiments. However, the Tribunal was unable to find any concrete evidence of Milch’s involvement or knowledge of what transpired during these medical trials and refused to find him guilty based upon circumstantial evidence. It concluded

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162. *Id.* at 793.

163. *Id.* at 850 (Musmanno, J., concurring).

164. *Id.* at 873.

165. *Id.* at 849-50.

166. *Id.* at 850.

that guilt "cannot be founded on a set of facts from which arguments are equally convincing as to guilt and as to innocence."<sup>167</sup>

The Tribunal thus refused to interpret the factual record liberally in order to convict Milch. It clearly was concerned with documenting the barbarities of the Nazi regime. The panel noted that no future German leader would be able to deny the justifiability of the Allied military effort or to portray Germany as a victim of a Western conspiracy.<sup>168</sup> The Tribunal stressed that any compromise of due process principles would interfere with the Allies' goal of inculcating into

the thinking of the German people an appreciation of, and respect for, the principles of law which have become the backbone of the democratic process. . . . If the level of civilization is to be raised throughout the world, this must be the first step. Any other road leads to tyranny and chaos.<sup>169</sup>

### C. *The Ethnic Cases*

In the so-called ethnic cases, the Court again addressed the abuse of individuals based upon their nationality and race.<sup>170</sup> *United States v. Pohl* involved the prosecution of members of the Economic and Administrative Main Office (WVHA), one of the twelve main departments of the SS.<sup>171</sup> The WVHA, in turn, was divided into several *Amtsgruppen* or office groups. WVHA was headed by defendant Oswald Pohl and his deputies, August Frank and Georg Loerner.<sup>172</sup> The latter, along with fifteen other high-level administrators, were charged with perpetrating atrocities and offenses against persons and property.<sup>173</sup> The

167. *Id.* at 855-57 (Musmanno, J., concurring).

168. *Id.* at 858-59.

169. *Id.* at 778.

170. See *United States v. Otto Ohlendorf*, VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 411 (1950) [hereinafter *Einsatzgruppen Case*]; *United States v. Greifelt*, V TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 88 (1950) [hereinafter *RuSHA Case*]; *United States v. Oswald Pohl*, V TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 958 (1950) [hereinafter *WVHA Case*].

171. WVHA Case, *supra* note 170. The *Schutzstaffel*, or state security police, was headed by Heinrich Himmler.

172. *Id.* at 962. The office groups or divisions were: Budget Law and Administration; Supply, Billeting and Equipment; Work and Buildings; Concentration Camps; and Economic Enterprises. *Id.* at 966.

173. *Id.* at 963-64.

activities of the WVHA often appeared mundane, but were nonetheless integral to the commission of atrocities. The WVHA was involved in the construction and administration of concentration camps, the assignment of labor and the administration of confiscated goods and industries within the occupied territories.<sup>174</sup>

The defendants were charged with acting as part of a common plan to perpetrate atrocities. Those who administered the camps were obviously guilty. According to the Tribunal, their guilt was shared equally by those who supplied, constructed and planned the death camps.<sup>175</sup> The judicial panel stressed that:

It is not claimed by the prosecution that . . . any of the defendants in this case, physically manhandled Jews, or other detainees of the Reich. But it is maintained with reason that the systematic persecution, impoverishment, confinement, and eventual slayings of these persecutees [those in concentration and POW camps] could not have been possible without the vast machinery of the SS, of which the WVHA was one of the most important parts.<sup>176</sup>

The Tribunal rejected the contention by the defense that the commitment of individuals to the concentration camps was preceded by an informal trial conducted by the Gestapo. The detainment of individuals was not based upon individual conduct but was part of a broad "categorical Nazi political policy." Villages and groups were deported en masse. The Tribunal sarcastically queried, "[c]ould any rational person believe that this [a trial] or any comparable procedure accompanied the annihilation of the ghetto at Warsaw?" Even accepting the dubious proposition that the roughly five million involuntary workers were treated well, the Tribunal observed that "[t]here is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery."<sup>177</sup>

There was no question that criminal medical experiments were performed in the camps. In addition, those who were "economically valueless" were arbitrarily executed. This program was gradually expanded to include the incurables, the elderly, the idle, habitual criminals, political dissidents and members of various ethnic and religious groups. The Jews, of course, were singled out and "six million human

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174. *Id.* at 966-67.

175. *Id.* at 993.

176. *Id.* at 1047.

177. *Id.* at 968-70.

beings were deliberately exterminated by a civilized state whose only indictment was that its victims had been born in the wrong part of the world of forbears whom the murderers detested. Never before in history has man's inhumanity to man reached such depths." Following these killings, "the victim's personal effects, including the gold in his teeth, were shipped back to the concentration camp, and a report of 'death from natural causes' was made out." Those who were spared death and who were forced to work may have come to envy the dead. The SS "resorted to practices which would shame the most primitive race of savage barbarians." The "endless hours of exhausting labor, the beatings and killings, the starvation, the degradation . . . this has become stale from retelling."<sup>178</sup>

The territories to be incorporated into the Reich were spared plunder. The others were stripped of agriculture, food, raw materials, cultural artifacts, manufactured goods and machinery. The indigenous population was left to starve.<sup>179</sup> Action Reinhardt was a program in which the real and personal property of the Jews was seized and shipped to the WVHA warehouses where it was inventoried, appraised and distributed.<sup>180</sup> The defendant Frank listed as received as of April 30, 1943:

94,000 men's watches, 33,000 women's watches, and 25,000 fountain pens. Currency and precious metals seized reached a total value of 60,000,000 Reichsmarks. About 2,000 carloads of textiles reached Germany as a result of this plunder, and in all a grand total of over 1000 million Reichsmarks in personal property was acquired.<sup>181</sup>

The defendants advanced the defense that they were ignorant of the events which transpired behind the barbed wire and the factory walls. Hitler had ordained that complete secrecy should be maintained. The press was censored, it was illegal to listen to foreign broadcasts and those released from the camps were sworn to silence. The Tribunal accepted that millions of "obscure and unimportant" Germans may have been unaware of the Nazi barbarities. However, the fact that millions were being systematically murdered could not have been a surprise to these defendants who were so intricately involved in the functioning of the death camps. They witnessed the public rallies, read

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178. *Id.* at 971-74.

179. *Id.* at 976.

180. *Id.* at 977.

181. *Id.* at 978.



the publications denouncing the Jews, heard the stories told by those returning from Poland and the Soviet Union and must have seen and smelled the smoke wafting from the camps. The Tribunal thus was "convinced that the ignorance professed by many of the defendants is the ignorance of convenience."<sup>182</sup>

Pohl's deputy, August Frank, also plead ignorance.<sup>183</sup> He alleged that he believed that the property transported to WVHA warehouses came from Jews who had died from natural causes in the camps or from stockpiles seized during the invasion of European countries.<sup>184</sup> The Tribunal dismissed this as a fanciful notion:

It is difficult to imagine a convoy of Jews from the East, packed so tightly into freight cars that many died, carrying with them for their comfort and convenience such items as electric razors, feather beds, umbrellas, thermos jugs, and baby carriages. . . . It is fair to assume that prisoners who froze to death or who died from exhaustion and exposure were not equipped with feather beds, quilts, and woolen blankets. Nor can it be believed that before being herded off to Auschwitz or Lublin they were given an opportunity to gather up their collections of old coins and stamps with which to amuse themselves during their idle time.<sup>185</sup>

Defendant Pohl was administrative head of the SS for eleven years, with authority over 1,700 employees. He directed and administered the fiscal affairs of the entire SS as well as the infrastructure and personnel of the concentration camps. He was head of the state-owned industries in the occupied territories. He was not involved in selecting, transporting or exterminating inmates.<sup>186</sup> In all other matters, however, Pohl possessed primary authority over twenty concentration and one hundred and sixty five labor camps. He established the hours of work for inmates, the extent and mode of punishment, and assigned commanders to the camps.<sup>187</sup> The WVHA designed and constructed the crematories and

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182. *Id.* at 978-80. The Tribunal cautioned that such knowledge should be established rather than presumed. The German penchant for organization and impressive titles may result in an exaggeration of the authority and importance of various bureaucrats. *Id.*

183. *Id.* at 992.

184. *Id.* at 996.

185. *Id.*

186. *Id.* at 980-81.

187. *Id.* at 983.

Pohl visited the camps when they were installed. The Tribunal concluded that there was "doubtless no other one person in Germany who knew as much about all the details of the concentration camps as Pohl. . . . Pohl stands . . . as an admitted slave driver on a scale never before known."<sup>188</sup>

Nearly every . . . chief . . . reported frequently to Pohl, in person, concerning events and problems arising in his immediate sphere. According to his own testimony and correspondence, he kept a running inventory, classified as to nationalities, of the labor supply of inmates in every camp. He knew how many prisoners died; he knew how many were unfit for work; and he knew what mass transfers were made from camp to camp. . . . Pohl knew that hundreds of thousands of men and women had been cast into concentration camps and compelled to work, without remuneration and under the most rigid confinement, for the country which had devastated their homelands and abducted them into bondage. When these slaves died from exhaustion, starvation, or from the abuse of the SS overseers, Pohl cannot escape from the fact that he was the administrative head of the agency which brought about these tragedies.<sup>189</sup>

Pohl also provided inmates for medical experiments at Dachau.<sup>190</sup> He visited Dachau, observed the high-altitude experiments and knew that roughly forty different experiments, including sterilization, which was his great passion, were being performed.<sup>191</sup>

The WVHA also was the clearinghouse for property confiscated from the Jews. Pohl, according to the Tribunal, was aware of the source of this booty and distributed it to the appropriate agencies. Money, for instance, was routed to the Reich Bank, where it was deposited under the assumed name of Max Heiliger. Pohl did not actually remove or transport the stolen goods. However, his "active participation even in the afterphases of the action make him *particeps criminis* in the whole affair." Pohl also was head of Eastern Industries

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188. *Id.* at 984.

189. *Id.* Pohl also performed a central role in the destruction of the Warsaw Ghetto. He was responsible for utilizing prison labor to raze the 800 acre ghetto and to erect a concentration camp from which Jews were deported to their death. *Id.* at 985-86.

190. *Id.* at 986.

191. *Id.* at 987.

(OSTI), a companion program to Action Reinhardt. In this capacity, he administered all the non-removable Jewish property seized in the occupied territories.<sup>192</sup>

Others convicted were involved in recruiting, appointing and promoting camp personnel;<sup>193</sup> disbursing budgetary funds for activities such as medical experiments;<sup>194</sup> administering the slave labor program;<sup>195</sup> designing, planning and overseeing the construction of concentration camp facilities, knowing that inmate labor would be deployed;<sup>196</sup> and administering the dental program and the extraction of gold fillings.<sup>197</sup> Georg Loerner, among his other duties, was charged with supplying food and clothing to the armed units of the SS and to the concentration camp inmates.<sup>198</sup> According to the Tribunal, Loerner was aware that the internees lacked sufficient clothing and that he had a duty to insure the inmates were supplied with adequate clothing.<sup>199</sup>

Those bureaucrats in the WVHA who had knowledge of the War Crimes and Crimes Against Humanity and who neither furthered these illegal activities nor possessed authority to halt them, were not held liable. Josef Vogt was chief of the office of audits. He scrutinized and was aware of the type of activities which were being funded by the WVHA. Yet, he remained silent. Nevertheless, no evidence indicated that he took any affirmative acts in furtherance of these criminal activities and he was not held liable for taking a consenting part in or being connected to these illegalities.<sup>200</sup>

He did not furnish men, money, materials, or victims for the concentration camps. He had no part in determining what

192. *Id.* at 988-90. Pohl also was convicted of membership in a criminal organization. *Id.* at 992.

193. *Id.* at 998 (Heinz Karl Fanslau)

194. *Id.* at 1000-01 (Hans Loerner).

195. *Id.* at 1008 (Georg Loerner).

196. *Id.* at 1020-21 (Max Kiefer).

197. *Id.* at 1035-40 (Hermann Pook).

198. *Id.* at 1004-05.

199. *Id.* at 1009.

200. *Id.* at 1001-02. Vogt was neither a principal in, or an accessory to, the actual mistreatment or enslavement of the concentration camp inmates. The most that was claimed is that because of his position he must have known about them and therefore took a consenting part in and was connected with them. The Tribunal, however, held that the phrase "being connected with" a crime means something more than possessing knowledge. In the case of a person who has power or authority to either start or stop a criminal act, knowledge of the fact coupled with silence could be interpreted as consent. But Vogt was not such a person. *Id.* at 1002.

the inmates should eat or wear, how hard they should work, or how they should be treated. . . . The most that can be said is that he knew that there were concentration camps and that there were inmates. His work cannot be considered any more criminal than that of the bookkeeper who made up the reports which he audited, the typist who transcribed the audit report, or the mail clerk who forwarded the audit to the Supreme Auditing Court.<sup>201</sup>

Vogt possessed no authority over the camps and was not charged with an affirmative duty to intervene to prevent the commission of atrocities.

Again, the Tribunal is impelled to ask, what should he have done? Unless we are willing to resort to the principle of group responsibility and to charge the whole German nation with these war crimes and crimes against humanity, there is a line somewhere at which indictable criminality must stop. In the opinion of the Tribunal, Vogt stands beyond that line.<sup>202</sup>

In the end, fifteen of the eighteen defendants in *Pohl* were convicted.<sup>203</sup>

*United States v. Greifelt* involved the prosecution of fourteen defendants who served as high-echelon bureaucrats in four organizations involved in the resettlement of ethnic populations—the Reich Commission for Strengthening Germanism, the Staff Main Office (Staff Main Office of RKFDV), the Repatriation Office for Ethnic Germans (VOMi), the SS Race and Resettlement Main Office (RuSHA) and the Well of Life Society (Lebensborn). These organizations were under the supervision and direction of Reich Leader SS Heinrich Himmler, who served as Reich Commissioner for the Strengthening of Germanism. The goal of these various organizations was to insure that those territories which had been incorporated into the Reich were inhabited by a racially pure population. The first territories subjected to the Nazis' population policies were the Incorporated Eastern Territories of Poland and the remaining Polish lands which were known as the Government General.<sup>204</sup>

201. *Id.* at 1002.

202. *Id.* at 1004.

Mere knowledge of crime without the power to interfere carries no moral or legal condemnation. But knowledge of crime and participation in the system which makes that crime possible dissipates the concept of unblemished innocence.

*Id.* at 1159 (Musmanno, J., concurring).

203. *Id.* at 1062-64.

204. RuSHA Case, *supra* note 170, at 89-90.

The Staff Main Office of RKFDV headed by Ulrich Greifelt was in charge of the Germanization program and coordinated the activities of the other agencies. Greifelt's responsibilities included overseeing the expulsion of populations; the Germanization of foreign nationals; the deportation of foreigners to Germany as slave labor; the kidnapping of children; and the plunder and confiscation of the property of enemy nationals. VOMi, headed by Werner Lorenz, was mainly involved with the expulsion, deportation and transfer of populations. RuSHA was involved in the racial examination and categorization of individuals. It was authorized to determine which individuals would be grouped as "undesirable racial stock" and subjected to expulsion, slave labor and abortions, and which would be entitled to German citizenship based upon their "Aryan racial purity." The Lebensborn Society operated a maternity home which placed foreign children in foster homes in Germany.<sup>205</sup>

Nazi policy towards non-Aryans in the occupied territory was designed to harness the existing population as slave labor while limiting their reproduction and growth.<sup>206</sup> These "undesirables" were to be evacuated into areas such as western Poland. Those territories which were incorporated into the Reich were to be resettled by foreign and indigenous ethnic Germans.<sup>207</sup> The overall Nazi policy was set forth in a 1939 document which proclaimed the Nazis' intent to Germanize the eastern territories.

Our Germanization policy has the aim to extract the Nordic groups from the remaining population and to Germanize them, and, on the other hand, to keep the racially foreign Polish strata on a low cultural level and to deport them from time to time to central Poland.<sup>208</sup>

This Germanization policy, according to the Tribunal, was implemented by "drastic and oppressive measures," including:

Deportation of Poles and Jews; the separation of family groups and the kidnapping of children for the purpose of training them in Nazi ideology; confiscation of all property of Poles and Jews for resettlement purposes; the destruction of the economic and cultural life of the Polish population; and the

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205. *Id.* at 99-102.

206. *Id.* at 112.

207. *Id.* at 125.

208. *Id.* at 93.

hampering of the reproduction of the Polish population.<sup>209</sup>

This general policy was implemented in twelve of the countries overrun by the Reich.<sup>210</sup>

The most appalling aspect of Nazi policy in the occupied territory was an extensive campaign of kidnapping foreign children. Although initially confined to ethnic Germans, the program was extended to all children of "good racial characteristics."<sup>211</sup> Related to this program was a policy which encouraged and, in some cases required, abortions for so-called Eastern female workers. In cases where a racially "valuable result" was expected, the women were required to carry their child to term.<sup>212</sup> These children were sent to Germany for adoption by Aryan foster parents.<sup>213</sup> Strict rules were promulgated and enforced by RuSHA concerning intercourse between foreign workers employed in the Reich and Germans. For example, Soviet males were executed while the females were sent to concentration camps.<sup>214</sup>

Within Poland and other territories, the Reich developed a German People's List (DVL). The population was categorized according to their ethnic background and, in the case of Germans, based upon their cultural orientation. Marriage across categories was prohibited and marriage between Eastern workers was restricted by such measures as establishing a minimum marital age of twenty-five for women and twenty-eight for men.<sup>215</sup>

The most far-reaching and perhaps most cruel policies involved the evacuation and resettlement of incorporated territories such as eastern Poland.<sup>216</sup> By January 1944, hundreds of thousands of Poles had been involuntarily deported to the Government Territory in the West or to the Reich. As the Poles were deported, a corresponding number of resettlers were situated on the evacuated land.<sup>217</sup> During this process, individuals were often expelled from their homes in the middle of the night and left to freeze to death on transport trains. Those who survived the trip West were interned in camps where they were separated from their families and forced to engage in manual

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209. *Id.* at 96.

210. *Id.*

211. *Id.* at 102.

212. *Id.* at 109-10.

213. *Id.* at 110.

214. *Id.* at 117-18.

215. *Id.* at 120-21.

216. *Id.* at 126.

217. *Id.* at 127.

labor.<sup>218</sup> Those Poles remaining in the incorporated territories were often subjected to vigilante attacks and mass extermination.<sup>219</sup> The amount of property confiscated is indicated by a report from Greifelt to Himmler which listed 626,642 farms as having been confiscated which comprised more than 13,000,000 acres.<sup>220</sup>

The defendants insisted that they were not responsible for their actions. However, the Tribunal refused to accept this contention in those cases in which "the words of a defendant absolutely refute the contentions now urged."<sup>221</sup> The Tribunal stressed that:

It is no defense for a defendant to insist, for instance, that he never evacuated populations when orders exist, signed by him, in which he directed that the evacuation should take place. While in such a case the defendant might not have actually carried out the physical evacuation in the sense that he did not personally evacuate the population, he nevertheless is responsible for the action, and his participation by instigating the actions is more pronounced than that of those who actually performed the deed.<sup>222</sup>

The defendants also urged that certain territories, such as the Incorporated Eastern Territories of Poland and parts of Luxembourg, Alsace, and Lorraine were incorporated into the Reich and thereby became part of Germany. It was contended that these areas were part of Germany and were not subject to the laws and customs of war. The Tribunal, however, ruled that any purported annexation of the territories of a foreign nation which occurred while opposing armies were still in the field was invalid and ineffective. Such territories, according to the Tribunal, never became part of the Reich and, as a matter of international law, remained under German occupation. The Tribunal also noted that even if certain territories had been incorporated into the Reich this was largely irrelevant. "[A]ctions similar to those occurring in the area attempted to be annexed also occurred in areas which Germany never professed to have incorporated into the Reich."<sup>223</sup>

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218. *Id.* at 128.

219. *Id.* at 129. So-called ethnic Germans in the occupied territories often were forced into the German military.

220. *Id.* at 148.

221. *Id.* at 153.

222. *Id.*

223. *Id.* at 154.

All fourteen defendants were adjudged guilty.<sup>224</sup> Greifelt, for instance, was convicted based upon his participation in the kidnapping of alien children; hampering the reproduction of enemy nationals; forced evacuations and resettlement of populations; compulsory Germanization of enemy nationals; the utilization of enemy nationals as slave labor; and the plunder of public and private property.<sup>225</sup>

In the *Einsatzgruppen Case*,<sup>226</sup> the defendants were charged with the destruction of over one million individuals. According to the Court, they were in "the field actively superintending, controlling, directing, and taking an active part in the bloody harvest."<sup>227</sup>

If what the prosecution maintains is true, we have participation in a crime of such unprecedented brutality and of such inconceivable savagery that the mind rebels against its own thought image and the imagination staggers in the contemplation of a human degradation beyond the power of language to adequately portray. The crime did not exclude the immolation of women and children, heretofore regarded the special object of solicitude even on the part of an implacable and primitive foe.<sup>228</sup>

One must visualize not one million people but only ten persons—men, women, and children, perhaps all of one family—falling before the executioner's guns. If one million is divided by ten, this scene must happen [a] hundred thousand times, and as one visualizes the repetitious horror, one begins to understand the meaning of the prosecutions words, "It is with sorrow and with hope that we here disclose the deliberate slaughter of more than a million innocent and defenseless men, women, and children."<sup>229</sup>

How did these murders occur? As the German armies crossed the Polish frontier and charged into Russia, they were followed by a unique organization known as the *Einsatzgruppen*. The Tribunal noted that as an "instrument of terror in the museum of horror, it would be difficult to find an entry to surpass the *Einsatzgruppen* in its blood-freezing potentialities." It chillingly noted that no writer or dramatist "can ever expect to conjure up from his imagination a plot which will

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224. *Id.* at 165-67.

225. *Id.* at 154-55.

226. *Einsatzgruppen Case*, *supra* note 170, at 411.

227. *Id.* at 412.

228. *Id.*

229. *Id.* at 413.



shock sensibilities as much as will the stark drama of these sinister bands."<sup>230</sup>

The Einsatzgruppen were formed through an agreement between RSHA (Reich Security Main Office), the OKW (Armed Forces High Command) and the OKH (Army High Command). The four Einsatzgruppen units, each comprised of between 800 and 1,200 men, were assigned to various geographic areas within the Soviet Union.<sup>231</sup> In May 1941, Reinhard Heydrich, Chief of the Security Police and the SD (the party police) and head of the Einsatzgruppen, transmitted the infamous Fuehrer Order to the Einsatzgruppen commanders. Under the guise of insuring the political security of the conquered territories, the Einsatzgruppen were instructed to liquidate all the opponents of National Socialism.<sup>232</sup> According to the Fuehrer's Order:

Whole categories of people were to be killed without truce, without investigation, without pity, tears, or remorse. Women were to be slain with the men, and the children also were to be executed because, otherwise, they would grow up to oppose National Socialism and might even nurture a desire to avenge themselves on the slayers of their parents.<sup>233</sup>

Among the special targets were the Jews and other ethnic groups suspected of having "Jewish blood," as well as gypsies, the "insane" (so-called useless eaters), Asians (so-called Asiatic inferiors), Communist functionaries and those designated as "asocials."<sup>234</sup> A number of euphemisms were used to describe the execution of these people including "rendered harmless," "special treatment," and "appropriately treated."<sup>235</sup> When one of these phrases appeared in a report, "only one person could be of service to the person taken care of, and that was the grave digger."<sup>236</sup>

The Einsatzgruppen typically would enter a village and assemble a group of Jewish leaders who would be ordered to compile a roster of Jews in the vicinity. The Jews on the list were commanded or forced

230. *Id.* at 414.

231. *Id.* Einsatzgruppe A operated in the vicinity of central Latvia, Lithuania and Estonia. Einsatzgruppe B was based in the Moscow area. Einsatzgruppe C operated in the Ukraine. Einsatzgruppe D controlled the southern Ukraine and the Crimean peninsula. It later took over the Caucasus area. *Id.*

232. *Id.* at 415.

233. *Id.*

234. *Id.* at 416.

235. *Id.* at 419.

236. *Id.*

to assemble and to board German transport. They were then typically driven to the woods and shot. The last step was to return to the town and to kill the Jewish leaders.<sup>237</sup> Others were ghettoized or fled into the hinterlands where they often died of exposure, malnutrition, starvation, lack of medical care and exhaustion.<sup>238</sup>

Defendant Paul Blobel, whose unit killed between ten and fifteen thousand people, described how he divided his shooting squads into groups of thirty soldiers. Each squad took turns shooting for roughly an hour. A mass grave was dug in the woods and the victims were ordered to kneel at the edge or enter the grave. They were then shot at close-range in the head.<sup>239</sup>

Many of those involved in the shooting squads were unable to distance themselves from the execution of women and children and experienced emotional trauma. In order to eliminate their distress, gas vans were introduced. Women and children were lured into the vans with the promise of resettlement and eventual reunification with their husbands and fathers. Once inside the carbon trucks, the doors were sealed and as the trucks accelerated, monoxide gas from the engine streamed into the van. By the time the van had reached the burial ditch, the occupants were dead.<sup>240</sup>

The defendants offered a number of defenses: lack of jurisdiction, self-defense and necessity, selective prosecution, superior orders, non-involvement and reprisal.<sup>241</sup>

The defendants argued that Control Council Law No. 10 was void based on the argument that on August 23, 1939, Russia had signed a secret treaty with Germany agreeing to a division of Poland. Control Council Law No. 10, to which Russia was a signatory, was therefore irrevocably tainted and was a nullity. The Tribunal rejected this argument and warned the defendants that Germany's aggression against Poland was not excused by the contention that "someone else may also have been at fault." Most importantly, the defendants were ignoring the determination of the International Military Tribunal that Germany had initiated an aggressive war against Russia. Russia thus was an aggrieved party and its "participation in the Allied Council which formulated Law No. 10 was legal and correct and in entire accordance with international law."<sup>242</sup>

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237. *Id.* at 425.

238. *Id.* at 433.

239. *Id.* at 443-45.

240. *Id.* at 448-49.

241. *Id.* at 455.

242. *Id.* at 456-57.

In addition, the Tribunal noted that the defense counsel's argument overlooked that the Allies were not prosecuting Germany "as a nation." Instead, they were prosecuting individuals accused of specific crimes under Law No. 10 which, like the Nuremberg Charter, was an expression of existing international law. This was not, as claimed by the defendants, a retrospective code. All nations recognized that they are bound by the rules or laws of war which, without exception, "condemn the wanton killing of noncombatants." These defendants were charged with murder and "[c]ertainly no one can claim with the slightest pretense at reasoning that there is any taint of *ex post factoism* in the law of murder." "[I]t cannot be said that prior to Control Council Law No. 10, there existed no law against murder. The killing of a human being has always been a potential crime which called for explanation."<sup>243</sup>

According to the Court, the lack of a pre-existing Tribunal was not controlling. Rather, it queried whether the "matter of some one million nonmilitary deaths [was] to be denied judicial inquiry because a Tribunal was not standing by, waiting for the apprehension of the suspects?" The Court noted that nations historically had prosecuted enemy belligerents charged with war crimes before their own domestic military courts. It argued that "if a single nation may legally take jurisdiction in such instances, with what more reason may a number of nations agree, in the interests of justice, to try alleged violations of the international code of war?" Russia certainly had the right to try the alleged violations of the rules of war committed against her citizens on her territory: "And if Russia may do this alone, certainly she may concur with other nations who affirm that right."<sup>244</sup>

The Tribunal also rejected as fallacious the proposition that international obligations apply only to the "abstract entities called states."<sup>245</sup> Nations can only act through "human beings" and each combatant is charged with an obligation to respect international law.<sup>246</sup> According to the Tribunal, this was not a trial of the vanquished by the victors.

In war there is no legal entity such as a "defeated individual" just as there is no concept of a "victorious individual." The defendants are in court not as members of a defeated nation but because they are charged with crime. They are being tried

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243. *Id.* at 457-59.

244. *Id.* at 460.

245. *Id.*

246. *Id.*

because they are accused of having offended against society itself, and society, as represented by international law, has summoned them for explanation. The doctrine that no member of a wronged community may try an accused would for all practical purposes spell the end of justice in every country. It is the essence of criminal justice that the offended community inquires into the offense involved.<sup>247</sup>

The defendants also claimed that they erroneously believed they were acting justifiably to protect Germany against the foreign threat posed by those executed. However, the Tribunal noted that the argument that individuals are entitled to abrogate the law of war in order to safeguard the national interest would render the humanitarian law of war a nullity. That this "astounding proposition is advanced in all seriousness demonstrates how desperate is the need for a further re-valuation of the sacredness of life and for emphasizing the difference between patriotism and murder."<sup>248</sup>

The defendants maintained that the Jews were killed based on their adherence to and advocacy of bolshevism. However, they made no attempt to demonstrate how the Jews they killed constituted an attack on Germany. Even if their contention that all Jews were bolsheviks were true, individuals cannot be executed for their political beliefs and opinions. The fact remains, however, that "when it came to a Jew, it did not matter whether he was a member of the Communist Party or not. He was killed simply because he was a Jew."<sup>249</sup>

The defendants next raised selective prosecution. They claimed that they should be exonerated since the allies had arbitrarily killed civilians in their bombing attacks on German cities. The Tribunal, however, noted that the bombings of Berlin, Dresden, Hamburg, Cologne and other German cities were in retaliation for the German bombings of London, Coventry, Rotterdam, Warsaw and other Allied cities. The Tribunal also contended that there was no "parallelism" between an act of legitimate warfare such as the bombing of a city and the premeditated killing of all of the members of certain groups within the civilian population of an occupied territory. A city is bombed for tactical purposes—to destroy communications, railroads, ammunition plants and military facilities. During the course of these operations, nonmilitary persons inevitably are killed. These civilians, however, are

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247. *Id.* at 462.

248. *Id.* at 463.

249. *Id.* at 464.

not individually targeted. This is "entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women, and children and shooting them." The purpose of a bombing attack is to effect the surrender of the bombed nation. Once a nation surrenders, the bombing ceases and the killing is ended. In contrast, the Tribunal pointed out that the killing of the Jews by the Einsatzgruppen had nothing to do with achieving military victory. It was solely designed to exterminate the Jews as a race.<sup>250</sup>

Those defendants who admitted participation in the mass killings plead that they acted pursuant to military orders. They contended that they were trained to obey orders and that they merely were responding to the Fuehrer's command to kill. Therefore, they "had no will of their own" and lacked a criminal intent.<sup>251</sup> The defendants argued they had no idea that these orders to kill were illegal.<sup>252</sup> They pointed out that since 1920 they had been exposed to a steady barrage of Nazi propaganda directed against the Jews.<sup>253</sup> They came to accept the Nazis' claims of Slavic and Jewish inferiority and pestilence.<sup>254</sup> The Tribunal observed that the order to kill civilians was manifestly illegal and that the defendants certainly should have grasped its criminality. The Tribunal illustrated the fatuousness of the defendants' defense by analogizing the Jews to a hypothetical grey-eyed population which had been excoriated by the Nazi regime. The Tribunal observed that the defendants clearly would have considered a program of extermination directed against the grey-eyed population as misguided and wrong. Yet, "how can they less denounce a slaughter which did occur and under circumstances no less harrowing than the one pictured only for the purpose of illustration?"<sup>255</sup>

Analogous to the plea that they were just following orders, the defendants said they obeyed those orders under duress. The Tribunal agreed that no law required that an innocent forfeit his life or suffer serious harm to avoid committing a crime. The Tribunal, however, held that the threat must be "imminent, real, and inevitable." The Tribunal determined that in this case the defendants did not confront an imminent threat of harm if they failed to execute the killing orders.

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250. *Id.* at 466-67.

251. *Id.* at 470.

252. *Id.* at 473.

253. *Id.* at 474-76.

254. *Id.*

255. *Id.* at 476.

The Nazis were primarily concerned with the efficient execution of their policies. As a result, the Tribunal concluded that it is likely that had they failed to carry out the order to kill, the Einsatzgruppen leaders would have been sent back to Germany and assigned to another task. The only conclusion is that the defendants voluntarily engaged in mass slaughter.<sup>256</sup>

Some defendants said that it was pointless to ask to be released and therefore, they did not even attempt to be excused. The Tribunal rejected this claim: "Exculpation is not so easy as that. No one can shrug off so appalling a moral responsibility with the statement that there was no point in trying."<sup>257</sup> The Tribunal concluded that the defendants in making no attempts to withdraw suggest that they either endorsed the killings or that they were motivated by racial animus or by a desire to gain acceptance or to earn a promotion.<sup>258</sup> The Tribunal also rejected the defendants' argument that had they failed to carry out the order to kill, others would have willingly taken their place. The Tribunal stressed that a defendant cannot know what others might do. Had they objected, the Nazi authorities may have reconsidered their program of extermination. At the very least, no execution would have taken place on the day that the defendants pronounced that they would not fire their weapons.<sup>259</sup>

In addition, the Tribunal held that a defendant may not plead duress if the illegal order was the logical and foreseeable extension of the policy of an organization which the defendant had voluntarily joined. From 1920, when the Nazi Party's anti-semitic policy was announced, until 1941, "when the liquidation order went into effect, the ever-mounting severity of Jewish persecution was evidence to all within the Party and especially to those charged with its execution." Once having embarked on the Nazi's criminal enterprise, the Tribunal held that the defendants certainly should have anticipated "what the enterprise [would] logically lead to."<sup>260</sup>

Nor was there any indication that an investigation, let alone a trial, was conducted prior to the executions.<sup>261</sup> In fact, the Einsatzgruppen leaders were "not only empowered but encouraged to execute

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256. *Id.* at 480-81.

257. *Id.* at 482.

258. *Id.* at 482-83.

259. *Id.* at 485.

260. *Id.* at 480-81.

261. *Id.* at 552.

a man more on his looks than on evidence."<sup>262</sup> The killing of individuals also could not be legitimized by labelling captives as partisans. Organized partisans who wear fixed and distinctive emblems and who openly carry their arms were entitled to protection as combatants.<sup>263</sup> If captured, they were required to be treated as prisoners of war.<sup>264</sup>

The Tribunal also rejected the defendants' plea that the killings were legitimate reprisals.<sup>265</sup> While the persons who were victimized by reprisals were generally innocents who were not responsible for the initial illegality, there "must at least be such close connection between these persons and these acts as to constitute a joint responsibility."<sup>266</sup>

Thus when, as one report says, 859 out of 2,100 Jews shot in alleged reprisal for the killing of 21 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 21 deaths only further magnifies the criminality of this savage and inhuman so-called reprisal.<sup>267</sup>

Even if those shot were partisans, the Tribunal stressed that the defendants must demonstrate that the partisans were not engaged in legitimate acts of reprisal against the wrongs perpetrated by the Nazis. 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-defense."<sup>268</sup>

#### D. *The Military Cases*

A Tribunal also adjudicated the criminal liability of various members of the German High Command in two related cases.<sup>269</sup>

262. *Id.* at 489.

263. *Id.* at 492.

264. *Id.* at 493.

265. *Id.* Reprisals in war involve the commission of acts which, although illegal in themselves, may under the specific circumstances of the given case, become justified. This justification rests on the adversary himself behaving illegally. The retaliatory action is to be taken as a last resort in order to deter the adversary from behaving illegally in the future. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 493-94.

269. *United States v. Wilhelm von Leeb*, XI TRIALS OF WAR CRIMINALS BEFORE

The defendants in the *High Command Case* were charged with participation in the planning, preparing, initiation and waging of aggressive wars.<sup>270</sup> The Tribunal rejected the defendants' argument that only Hitler was responsible for launching a war of aggression. It emphasized that Hitler depended on others to formulate, prepare, plan and wage his wars of aggression.<sup>271</sup> The Tribunal held that criminal liability required actual knowledge that an aggressive war was "intended and if launched it . . . [would] be an aggressive war."<sup>272</sup> It added that mere knowledge is not sufficient to constitute culpability. The defendant must also be in a position to shape or influence the planning, initiation or continuance of the war. The Tribunal ruled it immaterial whether a defendant gained knowledge of a conflict's illegality after the plans to initiate and wage the war were formulated. The focus was on whether the defendant could influence the course of events.<sup>273</sup> In order to avoid liability, those in positions of authority must have demonstrated their lack of criminal intent by presenting evidence that they attempted to hinder or prevent the war effort to the extent of their ability.<sup>274</sup>

Thus, it is a defendant's power to shape or influence State policy rather than rank or status which determines a defendant's criminality under the charge of Crimes Against Peace.

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

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THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 462 (1950) [hereinafter *High Command Case*]; *United States v. Wilhelm List*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1230 (1950) [hereinafter *Hostage Case*].

270. *High Command Case*, *supra* note 269, at 485.

271. *Id.* at 486.

Somewhere between the Dictator and Supreme Commander of the Military Forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it. Control Council law No. 10 does not definitely draw such a line.

*Id.*

272. *Id.* at 488.

273. *Id.* at 488-89.

274. *Id.* at 488.



of the policy makers. Anybody who is on the policy level and participates in the war policy is liable to punishment. But those under them cannot be punished for the crimes of others.<sup>275</sup>

The Tribunal explained that the limitation of guilt to policy-makers rests on their ability to deploy the great mass of soldiers in support of their decisions. Those below this level, such as the field commanders in the *High Command Case* are legally obligated and trained to assist their country in time of war. Nevertheless, the Tribunal stressed that it would have been "eminently desirable" had the defendants refused to implement the policy of the Third Reich.<sup>276</sup> This would have been the "honorable and righteous thing," and had "they done so they would have served their fatherland and humanity also."<sup>277</sup>

But however much their failure is morally reprimandable, we are of the opinion and hold that international common law, at the time they so acted, had not developed to the point of making the participation of military officers below the policy making or policy influencing level into a criminal offense in and of itself.<sup>278</sup>

The defendants who were members of the German High Command were responsible for directing the military land forces of the Reich.<sup>279</sup> They were involved in fulfilling Hitler's military ambitions by planning and waging military campaigns. They, however, were not on the highest policy level. Their role was to implement the plans formulated by others. According to the Tribunal, this did not "constitute the planning, preparation, initiation, and waging of war or the initiation of invasion that international law denounces as criminal."<sup>280</sup>

The defendants were also charged with War Crimes including murder, torture and ill-treatment of prisoners of war. The defendants' treatment of civilians allegedly was "replete with horror. Never in the history of man's inhumanity to man have so many innocent people suffered so much." Millions of Jews, Soviets, Gypsies and Poles were killed. Other inhabitants of the occupied territories were deported and

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275. *Id.* at 489.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 501-07.

280. *Id.* at 491.

enslaved, starved, tortured, executed and had their property plundered and destroyed.<sup>281</sup>

The Tribunal first dealt with the superior orders defense. It observed beginning in 1938 that Hitler was Commander in Chief of the Armed Forces and was the supreme civil and military authority in the Third Reich whose personal decrees had the force and effect of law. As a result, the Court noted that to recognize superior orders as a defense to the crimes enumerated in Control Council Law No. 10 would be in "practical effect to say that all the guilt charged in the indictment was the guilt of Hitler alone. . . . [T]o recognize such a contention would be to recognize an absurdity."<sup>282</sup>

As soldiers, the defendants contended they were bound to obey the orders of their superior. However, the Tribunal reminded the defendants that they were not obligated to obey orders to commit illegal acts. The acts set forth in Control Council Law No. 10 are criminal "not because they are therein set forth as crimes but because they then were crimes under international common law." The Tribunal stressed that international common law "must be superior to and, where it conflicts with, take precedence over national law or directives issued by any national governmental authority." A directive to violate international criminal law therefore is "void and can afford no protection to one who violates such law in reliance on such a directive."<sup>283</sup>

The purpose of international law is to control and direct the conduct of nations. Since nations act through individuals, the actions of nations can only be affected by the imposition of liability upon those individuals who shape and carry out State policies. It would be an "utter disregard of reality and but legal shadow-boxing to say that only the state, the inanimate entity, can have guilt, and that no guilt can be attributed to its animate agents who devise and execute its policies."<sup>284</sup>

The Tribunal refused to permit Hitler to be a "scapegoat on whom the sins of all his governmental and military subordinates are wished" and to rule that with his death "all the sins and guilt of his subordinates shall be considered to have been destroyed with him." Hitler, of necessity, depended upon the cooperation of others. The defendants were placed in a difficult position, "but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defense." The defense

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281. *Id.* at 491-96.

282. *Id.* at 507-08.

283. *Id.* at 508.

284. *Id.*

of coercion or necessity requires that a reasonable person would "apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong." However, the Tribunal concluded that no such situation had been demonstrated.<sup>285</sup>

The novel issue presented by the *High Command Case* was whether various defendants were criminally liable for their role in drafting or transmitting the illegal orders of their superiors. The Tribunal held that the intermediate administrative function of transmitting an order directed by a superior authority to subordinate units does not constitute the implementation of an order and carries no criminal liability. Such transmittal is a routine function which in many instances is handled by a commander's staff.<sup>286</sup>

Military discipline depends upon obedience to orders. Without it, no army can be effective and, according to the Tribunal, it is not "incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality."<sup>287</sup> He has the right to assume that the orders of his superiors are in "conformity with international law."<sup>288</sup> In this case, many of the defendants were field commanders and were charged with heavy responsibilities in combat. They were not lawyers, but soldiers who, given the pressure that they were under, could not be expected to comprehend subtle points of law. The Tribunal thus concluded that military commanders in the field with military responsibilities ordinarily cannot be charged under international law with criminal participation in transmitting orders which "they are not shown to have known to be criminal under international law." A field commander has the right to presume that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a "mere error in judgment as to disputable legal questions."<sup>289</sup> However, liability was extended to commanders who passed on illegal orders which the Tribunal adjudged to be criminal on their face.<sup>290</sup>

285. *Id.* at 508-09.

286. *Id.* at 509-10.

287. *Id.* at 510-11.

288. *Id.* at 511.

289. *Id.*

It is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal.

*Id.*

290. *Id.* at 512.

Certain orders of the Wehrmacht and the German army were obviously criminal. No legal opinion was necessary to determine the illegality of such orders. By any standard of civilized nations they were contrary to the customs of war and accepted standard of humanity. Any commanding officer of normal intelligence must see and understand their criminal nature. Any participation in implementing such orders, tacit or otherwise, any silent acquiescence in their enforcement by his subordinates, constitutes a criminal act on his part.<sup>291</sup>

The Tribunal also extended criminal liability to those staff officers who prepared or directed the preparation of clearly illegal orders or who personally distributed illegal orders to subordinate units.

If the basic idea is criminal under international law, the staff officer who puts that idea into the form of a military order, either himself or through subordinates under him, or takes personal action to see that it is properly distributed to those units where it becomes effective, commits a criminal act under international law.<sup>292</sup>

The Tribunal stressed that Hilter, Keitel (the highest executive officer in the administration of the armed forces) and Jodel (the head of armed forces operations) depended upon others to draft and implement their orders. It noted that while many of the "evil and inhumane acts" committed during the war may have originated in the minds of these men, their staff officers were "indispensable . . . and cannot escape criminal responsibility for their essential contribution to the final execution of such orders on the plea that they were complying with the orders of a superior who was more criminal." Surely the staff officers of the military command did not hold their high ranks and positions and did not "bask in the bright sunlight of official favor of the Third and Thousand Year Reich by merely impeding and annulling the wishes of the Nazi masters whom they served."<sup>293</sup>

Hitler issued a number of orders which were clearly illegal under international law. The Commissar Order called for the murder of captured Russian political functionaries. Hitler viewed these individuals as constituting an impediment to the pacification of conquered territories. The defendants did not directly resist the order. Instead, they

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291. *Id.*

292. *Id.* at 513.

293. *Id.* at 515.

“sought a surreptitious sabotaging and evasion of its enforcement.” Nevertheless, the Tribunal observed that a large number of reports indicate that that commissars were executed by units subordinate to various of the defendants.<sup>294</sup>

Clearly, it was criminal for the defendants to pass the Commissar Order down to their subordinate units. The defendants knew or should have known that the order was being carried out. The Tribunal stressed that the superior “cannot absolve himself by the plea that his character was so well known that his subordinates should have had the courage to disobey the order which he himself in passing it down showed that he lacked. Such a plea is contemptible and constitutes no defense.”<sup>295</sup>

The so-called Barbarossa Jurisdiction Order was issued in 1941 by Field Marshal Wilhelm Keitel, Hitler’s highest-ranking executive officer in the administration of the armed forces.<sup>296</sup> The order permitted the punishment without trial of partisans, enemy civilians who attacked German forces and all other civilians. Where punishment was not immediately carried out, those suspected of such offenses were to be brought before an officer who was authorized to determine whether they should be shot.<sup>297</sup> Collective punishment was to be meted out where the circumstances did not permit a quick identification of the perpetrators.<sup>298</sup> The Barbarossa Jurisdiction Order also stated that it was not obligatory to prosecute members of the Wehrmacht for offenses committed against enemy civilians.<sup>299</sup>

The Tribunal recognized no rule of international law which required that guerillas be brought to trial. However, the “allowing of such summary proceedings in the discretion of a junior officer, in the case of the wide variety of offenses that were left open to him, is considered criminal.” The broad authority to inflict collective punishment was also clearly illegal. The Tribunal added that the provision

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294. *Id.* at 517-20.

295. *Id.* at 520-21.

296. *Id.* at 521.

297. *Id.*

298. *Id.* at 521-22. The laws, rights and duties of war apply to armies and militia and volunteer corps who are commanded by a person responsible for his subordinates; have a fixed distinctive emblem recognizable at a distance; openly carry arms; and who conduct their operations in accordance with the laws and customs of war. The inhabitants of a territory which has not been occupied who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war. *Id.* at 529.

299. *Id.* at 522.

that those members of the German militia who were guilty of offenses against the enemy population were not to be prosecuted appears to violate the duty of a military commander to protect the civilian population. While this protection may be provided by disciplinary measures short of formal prosecution, the order certainly "opened the door to serious infractions of discipline."<sup>300</sup>

The Tribunal held the field commanders liable for the transmission of the Barbarossa order. It ruled that the defendants must accept criminal responsibility for the order's "misapplication within subordinate units to which they transmitted it." They were liable, within the areas of their commands, for the summary punishment of persons who were "merely suspects" or those who were not terrorists such as the nineteen-year-old girl executed for writing a "song derogatory of the German invader of her country."<sup>301</sup>

The Court also held the so-called Commando Order criminal. The Order permitted the execution of uniformed and non-uniformed enemy troops on operations behind enemy lines. Another of Hitler's orders which the Tribunal adjudged to be illegal under international law was the Night and Fog Decree. This decree authorized the arrest, secret transport to Germany and execution without trial of those in the occupied territories suspected of resistance to the Reich.<sup>302</sup>

The defendants justified the legality of these orders on the grounds that they generally were applied against partisans who were not entitled to protection under the laws of war. However, the Tribunal concluded that the evidence suggested that Germans broadly interpreted the term partisan to justify the execution of all who opposed or in any way impeded the imposition of German rule. Uniformed members of the Red Army at times were labelled as partisans and executed, as were those who were considered "'partisan suspect[s].'" The conclusion was inescapable according to the Tribunal that the label of partisan was "a mere cloak under which innocent persons were eradicated." The Tribunal concluded that those who gave, drafted or passed down the orders which permitted such arbitrary and illegal executions must bear legal responsibility for the implementation of such orders by their subordinate units.<sup>303</sup>

The Tribunal confronted a daunting task in attempting to establish the knowledge, authority and actions of various German field com-

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300. *Id.* at 523-24.

301. *Id.* at 525.

302. *Id.* at 525-28.

303. *Id.* at 530-31.

manders. Eleven of the thirteen defendants were convicted.<sup>304</sup> Field Marshal Wilhelm von Leeb was Commander of Army Group North in the campaign against Russia until he resigned in January 1942.<sup>305</sup> Von Leeb was present at the meeting when Hitler announced the Commissar Order. He protested to Field Marshal Walter von Brauchitsch, Commander in Chief of the German Army, that the order was illegal and senseless.<sup>306</sup> He continued his protest following the issuance of the order.<sup>307</sup> To circumvent the opposition of the field commanders, the Commissar Order was directly transmitted to armies in the field.<sup>308</sup> Von Leeb, however, met with his subordinate commanders, informed them of his opposition and encouraged them to ignore the order. Nevertheless, the reports indicate that many political functionaries were murdered.<sup>309</sup>

Von Leeb was acquitted under the Command Order count. The Tribunal queried,

[w]hat other action was open to him? He could not revoke this order coming as it did from his superiors, even from the head of the state. Had he undertaken to do so, this would have been a flagrant disobedience of orders. . . . He did not disseminate the order. He protested against it and opposed it in every way short of open and defiant refusal to obey it. If his subordinate commanders disseminated it and permitted its enforcement, that is their responsibility and not his.<sup>310</sup>

Von Leeb, however, was held liable for implementing the Barbarossa order. No evidence indicated that he made any effort to prevent his subordinate units from carrying out the order. "Coming directly through him in the chain of command, it carried the weight of his authority as well as that of his superiors. . . . Having set this instrument in motion, he must assume a measure of responsibility for its illegal application."<sup>311</sup> As the Tribunal noted:

We are of the opinion that command authority and executive power obligate the one who wields them to exercise them for

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304. *Id.* at 695-97.

305. *Id.* at 553.

306. *Id.* at 555.

307. *Id.* at 556.

308. *Id.* at 556-57.

309. *Id.* at 557.

310. *Id.* at 557-58.

311. *Id.* at 560-61.

the protection of prisoners of war and the civilians in his area; and that orders issued which indicate a repudiation of such duty and inaction with knowledge that others within his area are violating this duty which he owes, constitute criminality. The record shows orders by the defendant, knowledge, approval, and acquiescence in acts by troops under his authority, and by agencies within his area which violated the most elementary duty and obligations owed to prisoners of war and the civilian population by the commander of any occupying army, having command authority and executive power.<sup>312</sup>

In the *Hostage Case*, various field commanders were charged with unlawfully, willfully and knowingly committing war crimes and crimes against humanity. The defendants allegedly were principals in and accessories to the murder of thousands of civilians in Greece, Yugoslavia, Norway and Albania between September 1939 and May 1945.<sup>313</sup>

The Court followed the other tribunals in rejecting the superior orders defense. It emphasized that the rule against using superior orders as a defense to a criminal act is a principle of fundamental criminal justice which has been overwhelmingly adopted by civilized nations and must be recognized as a rule of international law. The Tribunal observed that members of the militia are only bound to obey lawful orders and they are criminally liable for complying with orders which violate international criminal law. However, it noted that if a soldier did not know and could not reasonably have known that an order was illegal, that individual would be considered to lack criminal intent and not be held criminally liable.<sup>314</sup>

The Court recognized that it was placing a military commander in the position of choosing 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." However, "[t]o 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 defense." The Tribunal conceded that this rule places an officer in the position of risking the consequences of disobedience. Nevertheless, it was essential that the superior orders defense not be recognized. Otherwise, "the opposing army would in

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312. *Id.* at 632.

313. *Hostage Case*, *supra* note 269, at 1230.

314. *Id.* at 1236.



many cases have no protection at all against criminal excesses ordered by superiors."<sup>315</sup>

The Tribunal in the *Hostage Case*, like the other panels, emphasized that the defendants were not being subjected to retroactive punishment. Crimes charged and included in Control Council Law No. 10 were declared unlawful both under existing conventions and under the practices of land warfare that have ripened into recognized customs that belligerents are bound to obey. The punishment of these offenses could not be left to the offenders' home state since it was not likely to punish those who were risking their lives in its defense. As a result, concurrent jurisdiction of necessity must be vested in the State where the crime was committed as well as in any belligerent State that has possession of the offenders. The Tribunal thus concluded that "[i]t cannot be doubted" that the occupying powers which defeated the Reich and whose belligerents were victims of war crimes possessed jurisdiction to prosecute these criminals for crimes against the law of nations.<sup>316</sup>

The central events in the *Hostage Case* occurred in the Balkans. By the end of April 1941, German troops had occupied and were in control of Yugoslavia and Greece. During that summer, partisan bands began to ambush, torture and kill German combatants. Following their attacks, the partisans retreated and melded into the population. While some of the partisans complied with the requirements of the law of war, qualified as lawful belligerents, and were entitled to prisoner of war status, most did not. They generally wore civilian clothes rather than military uniforms; did not display fixed insignias which were distinguishable from a distance; did not openly carry their arms; and were not under a centralized command.<sup>317</sup>

The prosecution argued that since Germany had illegally invaded Yugoslavia and Greece, the German occupation troops were not entitled to the respect accorded to a military occupant under international law. The Tribunal ruled that international law does not distinguish between a lawful and an unlawful occupant in regard to the respective duties of the occupant and the population. As a result, those Yugoslav and Greek partisans who did not comply with the rules of the law of war were not entitled to the status of lawful belligerents.<sup>318</sup>

The major issue involved in the *Hostage Case* concerned the claim that the German armed forces were entitled to hold civilians hostage

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315. *Id.* 1236-37.

316. *Id.* at 1240-42.

317. *Id.* at 1243-44.

318. *Id.* at 1246-47.

in order to guarantee the peaceful conduct of the civilian population. The Germans also claimed the right to execute hostages and captured members of the resistance forces in reprisal for armed attacks and sabotage.<sup>319</sup>

The Court condemned the law of hostages as a "barbarous relic of ancient times." Nevertheless, it recognized that hostages may be taken and executed in order to guarantee the peaceful conduct of the population of an occupied territory. The inhabitants owed a duty to cooperate with the occupying authorities and to refrain from attacks against the occupying forces. The utilization of hostages was justified as a mechanism for the occupying power to maintain security, law and order.<sup>320</sup>

However, there must be some connection between the population from which the hostages are taken and the crime committed. Hostages may not be seized from a population which explicitly or tacitly lent support to an armed attack upon the occupying power. The occupying power must also issue a proclamation which recites the names and addresses of the hostages taken. The notice must alert the population that the reoccurrence of armed attacks will result in the execution of hostages. The number to be shot must be proportionate to the severity of the attack. In addition, hostages may only be shot as a last resort when all other measures have failed to quell the violence of insurgents. An order of a military commander to kill hostages must be approved by a competent court martial which will determine that all the necessary preconditions have been satisfied.<sup>321</sup> The Tribunal also addressed the

319. *Id.* at 1248-49.

A reprisal is a response to any 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. . . . For the purposes of this opinion the term "hostages" will be considered as those persons of the civilian population who are then 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 offenses committed by unknown persons within the occupied area.

*Id.*

320. *Id.* at 1249.

321. *Id.* at 1250. Measures which may be taken to insure peace and tranquility include: the registration of inhabitants; the possession of passes or identification cer-

topic of reprisals—the shooting of members of the civilian population in retaliation for hostile acts taken against the armed forces of the occupying power.<sup>322</sup>

It bemoaned that international law had not outlawed this “barbarous practice.”<sup>323</sup> The same prerequisites apply to reprisals and to the execution of hostages. In both cases, if the perpetrators are apprehended, there is no right to kill innocent members of the population. Excessive reprisals, like the killing of a disproportionate number of hostages, are criminal and guilt attaches to those responsible for their commission.<sup>324</sup>

The Tribunal observed that the Germans viewed “terrorism and intimidation” as the “accepted solution” to any and all opposition to the German will. The evidence recites a record of “killing and destruction seldom exceeded in modern history.” Thousands of innocent inhabitants lost their lives by means of a “firing squad or hangman’s noose, people who had the same inherent desire to live as do these defendants.”<sup>325</sup>

The defendants, as commanding generals of German field forces, were well aware of these activities. 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.” The Tribunal ruled that army commanders were charged with knowledge of reports sent to them at their headquarters. Commanders also were assumed to have knowledge of the criminal activities carried out by troops within the area of their command. Military commanders were also held responsible for events occurring in their absence resulting from their orders, directives and general policies.<sup>326</sup>

The Tribunal rejected the notion that the rules of war had changed and that the wholesale execution of hostages and the arbitrary reprisals were part of the new concept of total war. The defendants contended

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tificates; the establishment of restricted areas; limitations of movement; the adoption of curfew regulations; the prohibition of assembly; the detention of suspected persons; restrictions on communication; the imposition of restrictions on food supplies; the evacuation of troublesome areas; the levying of monetary contributions; compulsory labor to repair damage from sabotage; 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. *Id.*

322. *Id.* at 1251.

323. *Id.* at 1252.

324. *Id.*

325. *Id.* at 1254-55.

326. *Id.* at 1256.

that the atomic bombings of Hiroshima and Nagasaki and the Allies' aerial raid over Germany had afforded "a pattern for the conduct of modern war and a possible justification for the criminal acts of these defendants." The Tribunal maintained that Germany and Japan were the ones to set this "unfortunate pattern" of violence into motion when they launched their attacks against Rotterdam, Warsaw, Belgrade, Coventry and Pearl Harbor. It observed that the defendants cannot unilaterally alter the humanitarian law of war.<sup>327</sup>

Eight of the ten defendants in the *Hostage Case* were convicted.<sup>328</sup> The lead defendant, Wilhelm List, was the fifth ranking field marshal in the German Army. He was the Commander in Chief of the Twelfth Army during the invasions of Yugoslavia and Greece. In addition, in June 1941, he became Armed Forces Commander Southeast with jurisdiction over the Balkans.<sup>329</sup> The Tribunal determined that there was "conclusive" evidence that within List's command a large number of reprisals against the populations of occupied territories were carried out on the ratio of one hundred-to-one for each German killed by insurgents and fifty-to-one in the case of each German wounded.<sup>330</sup> For the most part, those who were shot were Communists,<sup>331</sup> Jews, democrats and nationalists,<sup>332</sup> and Gypsies.<sup>333</sup> The Tribunal also found clear evidence that List distributed an order from Field Marshal Wilhelm Keitel, Chief of the High Command of the Armed Forces, which authorized the "killing of hostages and reprisal prisoners to an extent not permitted by international law."<sup>334</sup>

The judicial panel in the *Hostage Case* ruled that there was little question that an order to take reprisals at an "arbitrarily fixed ratio under any and all circumstances" was illegal. Such practice was motivated by revenge rather than by deterrence and was carried out even when the local population was not involved in supporting or shielding terrorists. Most of those executed were arbitrarily selected from internment camps without judicial proceedings. Under these circumstances, the Tribunal concluded that the Germans' actions were "nothing less than plain murder."<sup>335</sup>

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327. *Id.* at 1317.

328. *Id.* at 1318-19.

329. *Id.* at 1262-63.

330. *Id.* at 1269.

331. *Id.* at 1264.

332. *Id.* at 1266.

333. *Id.* at 1268.

334. *Id.* at 1269.

335. *Id.* at 1269-70.

List, as noted by the panel in the *Hostage Case*, was not duty bound to follow orders. Certainly, a field marshal of the German Army with more than forty years of experience as a professional soldier knew or ought to have known that the execution of innocents under these circumstances was criminal. List claimed he was absent from headquarters at the time the reprisals were reported. However, the Tribunal stressed that as the commanding general of an occupied territory, List was charged with the duty to protect the lives and property of the inhabitants. His own dereliction of duty or absence from headquarters did not relieve him of the responsibility for acts committed in accordance with a policy which he instituted or in which he acquiesced.<sup>336</sup>

List never condemned these reprisals as unlawful. His failure to terminate these illegal killings and to take adequate steps to prevent their recurrence constitutes a "serious breach of duty and imposes criminal responsibility." According to the Tribunal, instead of taking corrective measures, List "complacently permitted thousands of innocent people to die before execution squads of the Wehrmacht and other armed units operating in the territory." The primary responsibility for the prevention and punishment of such crimes lies with the commanding general. List "cannot escape responsibility by a claim of want of authority."<sup>337</sup>

The Tribunal rejected the defendants' claim that such actions were justified under the German theory of expediency and military necessity (*Kriegsraison geht vor Kriegsmanier*) which superseded established rules of international law. It emphasized that international law must be followed even if this results in the loss of a battle or war. Expedience or necessity cannot justify the violation of the law of war. If adequate troops were not available to control the population and if all lawful measures had failed, List should either have limited his military operations or withdrawn, in whole or in part, from the occupied territories. As the Germans escalated their reprisals, they engendered a counter-reaction which initiated an escalating cycle of violence. The resulting chaos provided "adequate proof for the necessity of enforcing the laws of war if torture and barbarity are to be restrained."<sup>338</sup>

In sum, the judges in the *Hostage Case* stressed that those convicted were guilty of blatant illegal activity. As the Tribunal recounted in discussing the guilt of defendant Hubert Lanz:

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336. *Id.* at 1271.

337. *Id.* at 1272.

338. *Id.* at 1272-74.

Many villages were destroyed and the civilian inhabitants shot without any logical reason at all except to wreak vengeance upon the population generally. According to the reports in evidence, court martial proceedings were not held. . . . [D]efendant[s], with full knowledge of what was going on, did absolutely nothing about it. Nowhere does an order appear which has for its purpose the bringing of the hostage and reprisal practice within the rule of war.<sup>339</sup>

### E. *The Legal Case*

*United States v. Altstoetter*, the so-called *Justice Case*, involved the prosecution of Nazi prosecutors, judges and officials in the Ministry of Justice.<sup>340</sup>

The Tribunal initially ruled that its jurisdiction was based on the Allies' assumption of sovereign jurisdiction over Germany. It noted that Germany had unconditionally surrendered and that the Allies had completely occupied Germany and had assumed supreme governmental power.<sup>341</sup> The Tribunal observed that this was distinct from an invading army's occupation of enemy territory during armed hostilities. In the latter case, the occupying power is subject to the limitations imposed by the laws and customs of war. The Allies were not subject to these limitations. By reason of the "complete breakdown of government, industry, agriculture, and supply, they were under an imperative humanitarian duty of far wider scope to reorganize government and industry and to foster local democratic governmental agencies throughout the territory."<sup>342</sup>

The Tribunal concluded that it drew its "sole power and jurisdiction from the will and command of the four occupying powers."<sup>343</sup>

339. *Id.* at 1311.

340. *United States v. Altstoetter*, III TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1954 (1951) [hereinafter *Justice Case*].

341. *Id.* at 960-61. The rules of land warfare apply to the conduct of a belligerent in occupied territory so long as there is an army in the field attempting to resist the occupation. These rules do not apply when belligerency is ended, there is no longer an army in the field and, as in the case of Germany, the military conquest is complete. *Id.* at 962.

342. *Id.* at 960.

343. *Id.* at 964. Judge Mallory B. Blair argued that the Tribunal's jurisdiction was based solely on the right of a belligerent to prosecute those in their custody who have violated the laws of war. *Id.* at 1194 (Blair J., dissenting in part and concurring in part).

Control Council Law No. 10 did not go beyond established principles of international law;<sup>344</sup> it merely provided a procedural mechanism for enforcing these principles.<sup>345</sup> The significance of the Nuremberg Charter, judgment and the Control Council Law No. 10 is that they constitute an "authoritative recognition of principles of individual penal responsibility in international affairs."<sup>346</sup>

One of the central questions addressed by the panel in the *Justice Case* was whether international law, as incorporated into Control Council Law No. 10, authorized the prosecution of the defendants for Crimes Against Humanity committed against German nationals.<sup>347</sup> It noted that war crimes were intended to cover acts in violation of the laws and customs of war directed against non-Germans and did not include atrocities committed by Germans against their own nationals. The Court went on to argue that Control Council Law No. 10 explicitly authorized prosecution for Crimes Against Humanity directed "against any civilian population."<sup>348</sup> The latter phrase, by implication, includes victims of German citizenship or nationality.<sup>349</sup> Control Council Law No. 10 also explicitly anticipated that Allied courts would bring to trial German citizens or nationals accused of committing crimes against persons of German citizenship or nationality.<sup>350</sup> The Tribunal, however, clarified that Crimes Against Humanity did not encompass an "isolated crime"

344. *Id.* at 966.

345. *Id.* at 970-71.

346. *Id.* at 968.

347. *Id.* at 971-72.

348. *Id.* at 972.

349. *Id.* It is significant that that the Nuremberg Charter defined "crimes against humanity as inhumane acts, etc., committed, 'in execution of, or in connection with, any crime within the jurisdiction,' whereas in C.C. Law 10 the words last quoted are deliberately omitted from the definition." *Id.* at 974. Thus, Control Council Law No. 10, according to the Tribunal, did not require that Crimes Against Humanity have an international character.

350. *Id.* at 973.

Article III of C.C. Law 10 clearly demonstrates that acts by Germans against German nationals may constitute crimes against humanity within the jurisdiction of this Tribunal to punish. That article provides that each occupying authority within its zone of occupation shall have the right to cause persons suspected of having committed a crime to be arrested and "(d) shall have the right to cause all persons so arrested . . . to be brought to trial. . . . Such Tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German court, if authorized by the occupying authorities.

*Id.*

by a private individual nor an "isolated crime" perpetrated by the German Reich against a private individual.<sup>351</sup> The provision is "directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of government."<sup>352</sup>

The Tribunal stressed that the violations of the laws and customs of war committed against enemy populations are not the only offenses recognized by common international law. International law, according to the Court, protected individuals against gross atrocities committed by their own government.

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.<sup>353</sup>

The Tribunal rejected the defendants' contention that they were being subjected to retroactive punishment. It held that the prohibition on punishment of acts which were committed prior to the adoption of a criminal statute is not a barrier to prosecution in the international sphere. No world authority was authorized to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It is analogous to the common law which grows on a case-by-case basis. The application of the retroactive principle to judicial decisions under Control Council Law No. 10 would "strangle the law at birth." At any rate, the Nazi defendants certainly knew that their actions were wrong. They did not engage in atrocities because they believed that they were just, but because they believed that the strength of Germany insulated them from legal punishment.<sup>354</sup>

The essence of the charge in the *Justice Case* was that the Nazi regime converted the criminal justice system into an instrument of repression and terror. The defendants argued that they were required to obey German law, even when it conflicted with international law. The Tribunal rejected this contention.<sup>355</sup> It held that

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351. *Id.* at 973.

352. *Id.*

353. *Id.* at 979.

354. *Id.* at 974-76.

355. *Id.* at 984.



[t]he very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crime and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime.<sup>356</sup>

Under the Weimar Republic, the Germans developed a civilized and enlightened system of jurisprudence. The Constitution provided that international law was binding on German courts and provided for an array of civil liberties. Under the Nazi regime, "substantially every principle of justice which was enunciated in the . . . laws and constitutional provisions was after 1933 violated by the Hitler regime." On February 28, 1933, a decree was promulgated over the signature of President von Hindenburg and Chancellor Hitler which suspended most of the constitutional guarantees of civil and political liberties.<sup>357</sup>

A series of additional enactments over the course of the next six years further centralized legal power in the executive. As a result, the entire judicial system was "transformed into a tool for the propagation of National Socialist ideology, the extermination of opposition . . . and the advancement of plans for aggressive war and world conquest." The defendants acted with "knowledge, intent and motive . . . in molding the judicial system which they later employed." Beginning in 1933, the Ministry of Justice and the courts were equipped for "terroristic functions in support of the Nazi regime." Statutes were drafted which criminalized a broad range of seemingly innocent conduct and the "power of life and death was ever more broadly vested in the courts."<sup>358</sup>

The Tribunal illustrated the broad discretion which was vested in the judiciary by pointing to the "Law to Change the Penal Code," promulgated on June 28, 1935, by Adolf Hitler. This decree was a complete repudiation of the rule that criminal sanctions should be definite and certain. It directed that an act should be punished regardless of whether a specific penal law can be directly applied to the act so long as it "deserves punishment according to the fundamental idea of a penal law and the sound concept of the people." According to the Tribunal, under this statute, "[p]arty political ideology and influence

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356. *Id.*

357. *Id.* at 985-86. Article 48 of the Weimar Constitution authorized the suspension of certain constitutional provisions if the public safety and order of the German Reich are disturbed or threatened. *Id.*

358. *Id.* at 987-88.

were substituted for the control of law as the guide to judicial decision."<sup>359</sup>

A number of special courts were established to administer justice in political cases.<sup>360</sup> The procedure in these courts became more "summary and severe" as the Reich began to experience military defeats.<sup>361</sup> At the same time, the criminal law was extended to encompass acts which constituted fairly minor threats to the social order. The deliberate listening to foreign radio stations was punishable by hard labor. Individuals who intentionally spread reports from foreign radio stations with the intent of undermining German military efficiency were subject to punishment by hard labor and, in severe cases, by death.<sup>362</sup> The Nazi regime also adopted a series of laws which discriminated against "non-Aryans" and political dissidents living within the Reich. These included restrictions on marriage, sexual relations, property ownership and employment.<sup>363</sup> Such statutes were extended to the occupied territories where they were directed with particular harshness against Jews and Poles.<sup>364</sup> Conversely, members of the Nazi Party were accorded favored treatment under the law.<sup>365</sup>

The German legal system was based on the so-called "Fuehrer principle." This rested on a view that Hitler had absolute and incontestable power. Hitler not only was the "supreme legislator, he also was the "supreme judge." He claimed the right to remove from office or to punish those who failed to render unqualified obedience to the Reich.<sup>366</sup>

Judges were viewed as an extension of Hitler and were obligated to "judge like the Fuehrer."<sup>367</sup> Hitler did not hesitate to intervene to dictate their decisions and sentences or to order the execution of those sentenced to prison.<sup>368</sup> The Ministry of Justice also exerted "constant pressure upon judges in favor of more severe or more discriminatory administration of justice."<sup>369</sup> The Ministry called the judges' attention to their brethren's decisions which allegedly reflected undue solicitude

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359. *Id.* at 990.

360. *Id.* at 999, 1004.

361. *Id.* at 1004.

362. *Id.* at 991.

363. *Id.* at 993-94.

364. *Id.* at 995-96.

365. *Id.* at 997.

366. *Id.* at 1110-12.

367. *Id.* at 1013.

368. *Id.* at 1014-16.

369. *Id.* at 1017.

for Jews or which were viewed as an embarrassment to the Reich.<sup>370</sup> Jewish and independent judges were removed.<sup>371</sup>

Pressure also was placed on prosecutors to zealously pursue subversives and Jews while defense attorneys were admonished against criticizing the administration of justice or zealously defending their clients.<sup>372</sup> It was continually stressed to judges and lawyers that adherence to the letter of the law was less important than insuring that those who posed a threat to the regime were imprisoned or executed.<sup>373</sup>

In addition to being subject to political interference and pressure from Hitler and the Ministry of Justice, prosecutors and the judiciary received pressure from party functionaries and police officials.<sup>374</sup> The Tribunal ruled that in view of the "sinister influences" which were in "constant interplay between Hitler, his ministers, the Ministry of Justice, the Party, the Gestapo and the courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity."<sup>375</sup> The doctrine that judges are not personally liable for their judicial decisions is based on the concept of an independent judiciary which autonomously formulates its decisions.<sup>376</sup> In Germany, however, the Nazi courts were judicial only in a "limited sense."<sup>377</sup> They "more closely resembled administrative tribunals acting under directives from above in a quasi-judicial manner" than independent judicial tribunals.<sup>378</sup>

According to the Tribunal, judges under the Nazi regime fell into one of two categories. Those who insisted on maintaining their judicial independence continued to administer justice with a "measure of impartiality and moderation." Their judgments were usually set aside on appeal by prosecutors. Those they sentenced were invariably turned over to the Gestapo on the completion of their prison terms and then were shot or sent to a concentration camp. These judges were subjected to criticism and threats and were eventually removed from office. In the other category were those judges who fanatically enforced the dictates of the Nazi Party. There was no need to exert pressure on these judges.

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370. *Id.* at 1018.

371. *Id.* at 1021.

372. *Id.* at 1019.

373. *Id.* at 1021-22.

374. *Id.* at 1023.

375. *Id.* at 1024.

376. *Id.*

377. *Id.* at 1024-25.

378. *Id.* at 1025.

They were content to impose the death penalty in "thousands of cases."<sup>379</sup>

The Tribunal refused to condemn the Nazis' provision of the death penalty for various offenses. It observed that it was "unable to say . . . that life imprisonment for habitual criminals is a salutary and reasonable punishment in America in peace times, but that the imposition of the death penalty was a crime against humanity in Germany when the nation was in the throes of war." The Tribunal observed that the same considerations applied in the case of looting and to a lesser extent to hoarders and violators of war economy decrees. Anyone who has observed "the utter devastation of the great cities of Germany must realize that the safety of the civilian population demanded that the werewolves who roamed the streets of the burning cities, robbing the dead, and plundering the ruined homes should be severely punished." The Nazis' limitations on freedom of speech were characterized by the Tribunal as "revolting." However, it noted that even under the Constitution of the United States, a citizen is not wholly free to attack the Government or to interfere with the Government's military aims in a time of war. The Court queried: "[c]an we then say that in the throes of total war and in the presence of impending disaster those officials who enforced these savage laws in a last desperate effort to stave off defeat were guilty of crimes against humanity?"<sup>380</sup>

These statutes and decisions were not tainted by the fact that Germany was waging a war of aggression. There was no evidence that the defendants were aware that the war which they were supporting was in violation of international law. However, the extension of liability to judicial officials for waging a war of aggression would dangerously expand the scope of criminal liability.<sup>381</sup>

If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement

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379. *Id.* at 1025.

380. *Id.* at 1026.

381. *Id.*

of guilt in any case would become a mere formality.<sup>382</sup>

The Tribunal did condemn the action of Reich prosecutors who perverted the law to charge defendants with high treason for acts such as attempting to escape from the Reich. The indictments in the latter cases alleged that the defendants had attempted to detach the (illegally) annexed Polish territory from the Reich. Under such a theory, "every Polish soldier from the occupied territories fighting for the restoration to Poland of territory belonging to it would be guilty of high treason against the Reich and on capture, could be shot. The theory of the Reich prosecutors carries with it its own refutation." The prosecution for high treason in such cases constituted a War Crime and a Crime Against Humanity. The wrong was not "merely in misnaming the offense of attempting to escape from the Reich; the wrong was in falsely naming the act high treason and thereby invoking the death penalty for a minor offense." The defendants were also charged with participation in the execution of the Night and Fog Decree (*Nacht und Nebel Erlass* or NN). Under the Night and Fog program civilians in occupied countries who were allegedly involved in resistance activities against the German occupying forces were seized, furtively deported and secretly prosecuted before special courts. The location and fate of the deportees were kept secret. After serving their sentence, the deportees were handed over to the Gestapo and thousands were subjected to ill-treatment, murder and torture.<sup>383</sup>

The Night and Fog Decree was part of a plan by Hitler to combat resistance movements in the occupied territories. Its "enforcement brought about a systematic rule of violence, brutality, outrage, and terror against the civilian populations of territories overrun and occupied by the Nazi armed forces."<sup>384</sup> A number of the defendants with

full knowledge of the illegality of the plan or scheme under international law of war and with full knowledge of the intended terrorism, cruelty, and other inhumane principles of the plan or scheme became either a principal, or aided and abetted, or took a consenting part in, or were connected with the execution of the illegal, cruel, and inhumane plan or scheme.<sup>385</sup>

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382. *Id.* at 1027.

383. *Id.* at 1028-32.

384. *Id.* at 1033.

385. *Id.* at 1034.

No record was kept of Night and Fog cases. It appears that roughly one-half of those who were seized were executed.<sup>386</sup> The trials of the accused "did not approach even a semblance of fair trial or justice."<sup>387</sup> The defendants were held incommunicado and, in many instances, they were denied the right to introduce evidence, to be confronted by the witnesses against them, or to present witnesses in their own behalf. They were secretly tried and denied the right to counsel of their own choice and occasionally were not provided with any counsel. In many instances, no indictment was served and the accused only learned of the nature of the charged offense a few moments prior to trial. The entire proceeding and record were secret.<sup>388</sup>

The Tribunal concluded that the evidence provides "undeniable and positive proof" of the "ill-treatment" of those seized under the Night and Fog Decree. It observed that those who respect human rights and dignity can "hardly believe that the Nazi judicial system could possibly have been so cruel and ruthless in their treatment of the population of occupied areas and territories."<sup>389</sup>

A further charge against the defendants was carrying out a Nazi plan for the persecution and extermination of Jews and Poles. Some of the defendants enacted laws and decrees which were intended to facilitate the extermination of Poles and Jews in Germany and throughout Europe. Others enforced these laws while those who served as judges "distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behavior."<sup>390</sup> Jews were excluded from every activity and their property was confiscated. Jews and Poles convicted of common crimes were subject to harsher punishment than was imposed on Germans for the same offense. Their rights in court were severely circumscribed and judges were empowered to impose death sentences on Jews and Poles even where such punishment was not prescribed by law.<sup>391</sup> These defendants also

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386. *Id.* at 1043.

387. *Id.* at 1046.

388. *Id.* at 1046-47. The deportation of inhabitants from the occupied territories in order to spread uncertainty and terror among the population constitutes a violation of the laws and customs of war. *Id.* at 1057. The distress created in families by the disappearance of those arrested constituted cruel mental punishment. *Id.* at 1058. The Night and Fog Decree violated the Nazi obligation to respect the law in force in occupied territories and to preserve public order and safety. *Id.* at 1060.

389. *Id.* at 1061.

390. *Id.* at 1063.

391. *Id.* at 1063-64.

had a restricted right of self-defense and appeal, and they could not challenge a German judge for prejudice.<sup>392</sup>

The Ministry of Justice played a minor role in the extermination of Jews and Poles as compared to those who administered the concentration camps. Nevertheless, the Tribunal observed that legal personnel substantially contributed to the final solution. In 1942, for instance, over sixty thousand people were convicted under special procedures applicable to Poles and Jews.<sup>393</sup> Judicial officials were aware that political prisoners sentenced to prison were transferred to the custody of the SS<sup>394</sup> and interned in concentration camps where they were tortured and murdered.<sup>395</sup>

The defendants contended that they remained in the Ministry of Justice because they feared that if they resigned the judicial system would be taken over by Himmler and the Gestapo. This defense, according to the Tribunal, could not have relieved the defendants of responsibility for having perpetrated war crimes in the occupied territories as well as crimes against humanity in Germany and abroad.<sup>396</sup>

Nine of the ten defendants were convicted.<sup>397</sup> Defendant Franz Schlegelberger was a judge and later pursued a career in the Ministry of Justice. He was placed in charge of the Ministry in 1941.<sup>398</sup> Schlegelberger was an ardent proponent of the Reich legal theory that an act should be punished despite the fact that it was not legally proscribed so long as it was contrary to the "basic concepts of criminal law and the sound instincts of the people."<sup>399</sup> Under this conception of the law, the judge could exercise his discretion to decide what constituted a criminal offense. This "destroyed the feeling of legal security and created an atmosphere of terrorism."<sup>400</sup>

Schlegelberger signed the order of February 1942 under which the Ministry of Justice assumed responsibility for the prosecution, and disposition of the victims of Hitler's Night and Fog Decree. He was also the architect of the racially discriminatory 1941 law against Poles and Jews which provided for martial law in the occupied territories as

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392. *Id.* at 1070.

393. *Id.* at 1079.

394. *Id.* at 1072-73.

395. *Id.* at 1079-80.

396. *Id.* at 1079-81.

397. *Id.* at 1199-1201.

398. *Id.* at 1082.

399. *Id.*

400. *Id.* at 1083.

well as for the summary trial of civilians before special courts.<sup>401</sup> In addition, Schlegelberger intervened on the request of Hitler to impose death sentences on Jews who had received what were considered to be improperly lenient sentences.<sup>402</sup> He also quashed proceedings brought against government officials for misconduct.<sup>403</sup>

Schlegelberger's defense was that he feared that if he resigned, a Nazi zealot was likely to be appointed as head of the Ministry of Justice. In fact, his fears were valid. His successor, Otto Georg Thiereck permitted the police to "usurp the functions of the administration of justice and murdered untold thousands of Jews and political prisoners." Nevertheless, the Tribunal rejected Schlegelberger's claim. Schlegelberger and the other defendants who raised this defense "took over the dirty work which the leaders of the State demanded, and employed the Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of occupied countries, and wiping out political opposition at home." This "prostitution of a judicial system" involves an element of "evil" which is more damaging to the legitimacy of the State than results from "frank atrocities which do not sully judicial robes."<sup>404</sup>

In the end, Schlegelberger resigned his post. Despite his criminal activities, the Tribunal noted that he bore an "unmerited reputation as the last of the German jurists." Although Schlegelberger "loathed the evil" for which he was responsible, the Tribunal castigated him for selling his intellect and ability to Hitler for a "mass of political pottage and for the vain hope of personal security."<sup>405</sup>

The defendant Rudolf Oeschey was imprisoned for life.<sup>406</sup> Oeschey joined the Nazi Party in 1931 and in 1939, he was appointed to the office of senior judge of the district court at Nuremberg. He was later appointed district court director of the same court and presided over the Special Court at Nuremberg.<sup>407</sup>

In February 1945, as Germany faced imminent defeat, a law was passed establishing civilian court martial within Germany. Oeschey, who at the time was serving in the German military, was appointed as chief judge of the Nuremberg court. The first case to be tried was that of

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401. *See generally id.* at 1002-04, 1009.

402. *Id.* at 1085.

403. *Id.* at 1085-86.

404. *Id.* at 1086.

405. *Id.* at 1087.

406. *Id.* at 1201.

407. *Id.* at 1159.



Count Montgelas. At the time of his trial, Montgelas was in the sick ward and was being detained in solitary confinement. On April 5, Montgelas was summoned before a court martial, sentenced to death and was shot the next day. Montgelas' crime was that he allegedly remarked to a woman in a hotel that Hitler's name actually was Schickelgruber. Montgelas also purportedly expressed approval of the assassination attempt on Hitler's life. Despite assurances that he would be informed of his client's trial, Montgelas' lawyer was not contacted. The woman with whom Montgelas conversed was not permitted to appear as a rebuttal witness on behalf of Montgelas. The only prosecution witness was an SS officer who had been shadowing the Count for several days in an attempt to secure evidence against him. The officer allegedly was able to overhear the conversation from an adjoining room through the use of a mechanical listening device.<sup>408</sup>

The Tribunal noted that Montgelas' prosecution for remarks hostile to the Nazi regime did not constitute a violation of Control Council Law No. 10. However, it observed that Montgelas was not convicted for undermining the security of the weakened Reich. Instead, the "law was deliberately invoked . . . and enforced by Oeschey as a last vengeful act of political prosecution."<sup>409</sup>

This was only one of many instances in which Oeschey enforced the law in an "arbitrary and brutal manner shocking to the conscience of mankind." Prosecutors characterized Oeschey as a brutal judge who was overtly discriminatory towards Poles. He frequently admonished Polish defendants during trial that they deserved to be exterminated.<sup>410</sup>

Oswald Rothaug was director of the district court in Nuremberg from April 1937 to May 1943. His rabidly anti-Polish and anti-Jewish attitudes were reflected in his decisions<sup>411</sup> and he candidly encouraged judges to discriminate against such defendants.<sup>412</sup>

In the cases over which he presided, Rothaug interpreted the facts and flexibly applied procedures so as to insure the conviction of defendants.<sup>413</sup>

In 1942, Rothaug sentenced Leo Katzenberger, a sixty-eight year old Jewish merchant to death for racial pollution. Katzenberger allegedly

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408. *Id.* at 1161-64.

409. *Id.*

410. *Id.* at 1165-68.

411. *Id.* at 1144-45.

412. *Id.* at 1145.

413. *Id.* at 1146-50.

engaged in sexual relations with a young German photographer. The photographer denied having had sexual relations with Katzenberger and stated that he was a father-like figure in her life. The photographer then was charged with perjury, which precluded her from continuing to testify in Katzenberger's defense.<sup>414</sup>

A medical examiner failed to find evidence of sexual intercourse. Rothaug observed that this was irrelevant since it was sufficient that a German woman had sat on the defendant's lap. Based on this act alone the examiner stated that he planned to sentence Katzenberger to death.<sup>415</sup>

Rothaug also ruled, without supporting evidence, that Katzenberger had visited the photographer during air raid blackouts while her husband was at the military front. This resulted in Katzenberger's conviction for exploiting the conditions of warfare.<sup>416</sup> Based on Katzenberger and other cases, the Tribunal concluded:

From the evidence it is clear that these trials lacked the essential elements of legality. In these cases the defendant's court, in spite of the legal sophistries which he employed, was merely an instrument in the program of the leaders of the Nazi State of persecution and extermination. That the number the defendant could wipe out within his competency was smaller than the number involved in the mass perceptions and exterminations by the leaders whom he served, does not mitigate his contribution to the program of those leaders. His acts were more terrible in that those who might have hoped for a last refuge in the institutions of justice found these institutions turned against them and a part of the program of terror and oppression.<sup>417</sup>

By his manner and methods he made his court an instrumentality of terror and won the fear and hatred of the population. From the evidence of his closest associates as well as his victims, we find that Oswald Rothaug represented in Germany the personification of the secret Nazi intrigue and cruelty. He was and is a sadistic and evil man. Under any civilized judicial system he could have been impeached and removed from office or convicted of malfeasance in office on

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414. *Id.* at 1150-51.

415. *Id.* at 1152-53.

416. *Id.* at 1153-55.

417. *Id.* at 1155-56.

account of the scheming malevolence with which he administered injustice.<sup>418</sup>

#### F. *The Ministries Case*

The *Ministries Case* involved the prosecution of members of the German diplomatic corps and others involved in international affairs.<sup>419</sup>

The Tribunal in the *Ministries Case* proclaimed that it was not organized for the purpose of “wreaking vengeance upon the conquered” by arbitrarily subjecting the defendants to a “firing squad, the scaffold, or the prison camp.” The Tribunal stressed that it intended to adjudicate the defendants’ guilt justly and that it would not hold the German defendants to “standards of duty and responsibility which are not equally applicable to the officials of the Allied Powers and to those of all nations.” Nor should the Germans be convicted for “acts or conducts which, if committed by Americans, British, French, or Russians would not subject them to legal trial and conviction.”<sup>420</sup>

Still, the Court, like the other post-Nuremberg war crimes tribunals, stressed that the contours of international law were broad and elastic. It stated that in formulating the relevant standards it would rely upon treaties, covenants, treatises and the principles which “lie beneath and back of” these documents. It stressed that it would not “hesitate, after having determined what they are, to apply them to new or different situations. It is by this very means that all legal codes, civil or criminal have developed.”<sup>421</sup>

The Tribunal initially addressed the justifiability of holding those who planned, initiated or waged an aggressive war criminally liable. Either this liability was consistent with the pre-existing principles of international law or it was a new and arbitrary innovation clearly intended to facilitate the prosecution and conviction of the Nazi defendants. The Tribunal stressed that monarchs and States who “considered themselves civilized, have for centuries recognized that aggressive wars and invasions violated the law of nations.”<sup>422</sup>

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418. *Id.* at 1156.

419. United States v. Ernest von Weizaecker, XIV TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 314 (1950) [hereinafter *Ministries Case*].

420. *Id.* at 317.

421. *Id.* at 318.

422. *Id.*

The initiation of wars and invasions with their attendant horror and suffering has for centuries been universally recognized by all civilized nations as wrong, to be resorted to only as a last resort to remedy wrongs already or imminently to be inflicted. We hold that aggressive wars and invasions have, since time immemorial, been a violation of international law, even though specific sanctions were not provided.<sup>423</sup>

Armed force, according to the Tribunal, was only justified in self-defense. This limited exception was necessary since the failure to offer resistance might result in a nation being overrun and occupied before the invasion could be condemned and countered by an international authority.<sup>424</sup>

The Tribunal stressed that once the attack was rebuffed, international law permitted the prosecution of those responsible for initiating the aggression. It further stressed that such individuals no longer should be able to find shelter behind the discarded and disreputable theories that the "King can do no wrong," and that "war is the sport of Kings." In the case of Germany, the Tribunal observed that the guilt of Nazi leaders was not lessened by the fact that the German invasion of Poland was supported by the Soviet Union. It has "never been suggested that a law duly passed becomes ineffective when it transpires that one of the legislators whose vote enacted it was himself guilty of the same practice or that he himself intended, in the future, to violate the law."<sup>425</sup>

The Nazi Regime was charged with launching a series of aggressive wars between March 1938 and December 1941.<sup>426</sup> The defendants claimed that these invasions were not aggressive acts. Instead, they claimed that these were justified attempts to readjust the onerous terms of the Versailles Treaty. However, the Tribunal observed that at some point territorial boundaries must be considered as having been settled. It also noted that Hitler had informed the world that Germany had no claims on other nations and had entered into treaties of peace and

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423. *Id.* at 319.

424. *Id.*

425. *Id.* at 321-23.

426. *Id.* These aggressive incursions include Austria, Czechoslovakia, Poland, United Kingdom and France, Denmark and Norway, Belgium, Netherlands and Luxembourg, Yugoslavia and Greece, Union of Soviet Socialist Republics and the United States. *Id.*

non-aggression with Austria, France, Czechoslovakia and Poland. The subsequent breach of these treaties constituted a violation of international law.<sup>427</sup>

No German could . . . look upon war or invasion to recover part or all of the territories of which Germany had been deprived by the Treaty of Versailles as other than aggressive. To excuse aggressive acts after these treaties and assurances took place is merely to assert that no treaty and no assurance by Germany is binding and that the pledged word of Germany is valueless. It is therefore particularly unfortunate both for the present and future of the German people that such a defense should be raised as it tends to create doubt when, if at all, the nations of the world can place reliance upon German international obligations.<sup>428</sup>

The Tribunal dismissed the defendants' claim that Germany was acting in self-defense as disingenuous. The "robber or the murderer cannot claim self-defense, in attacking the police to avoid arrest or those who, he fears, disapprove of his criminal conduct and hope that he will be apprehended and brought to justice."<sup>429</sup> The panel observed that the invasions had transformed Germany into an "international outlaw and every peaceable nation had the right to oppose it without itself becoming an aggressor, to help the attacked and join with those who had previously come to the aid of the victim."<sup>430</sup>

However, the Tribunal stressed that only those defendants who acted with the knowledge that Germany was acting illegally would be held liable under the aggressive war charge.

Our task is to determine which, if any, of the defendants, knowing there was an intent to so initiate and wage aggressive war, consciously participated in either plans, preparations, initiations of those wars, or so knowing, participated or aided in carrying them on. Obviously, no man may be condemned for fighting in what he believes is the defense of his native land, even though his belief be mistaken. Nor can he be expected to undertake an independent investigation to determine whether or not the cause for which he fights is the result of an aggressive act of his own government. One can be guilty

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427. *Id.* at 324.

428. *Id.* at 324-25.

429. *Id.* at 336.

430. *Id.*

only where knowledge of aggression in fact exists, and it is not sufficient that he have suspicions that the war is aggressive.<sup>431</sup>

The Tribunal added that those who concealed criminal activity or destroyed or suppressed evidence or who manufactured evidence tending to prove their government's innocence would be considered an accessory to war crimes.<sup>432</sup>

The complete blame could not be fairly placed on Hitler. The elaborate and complex Nazi programs of aggression and exploitation were not self-executing, but their success was dependent upon the devotion and skill of men holding positions of authority in the various departments of the Reich government. The defendants claim that they supported Hitler's policies due to coercion or duress was not credible. They could have resigned their positions without suffering any repercussions. But, even when presented with the opportunity, the defendants chose to remain mute and did not express even mild dissent. The fact is, that for varying reasons each said as little as he could, and when he expressed dissent, did so in words which were as soft and innocuous as he could find.<sup>433</sup>

The Tribunal convicted those defendants who had assisted the Nazi Party in Austria to undermine the government,<sup>434</sup> helped to formulate Hitler's aggressive war plans,<sup>435</sup> and developed policies concerning the administration of the occupied territories.<sup>436</sup> Defendant Paul Koerner, who was Goering's deputy in administering the Four Year Plan and a member of the Central Planning Board which directed the war effort between 1942 and 1945, was convicted of planning and preparing wars of aggression. According to the Tribunal, Koerner was aware that the Four Year Plan was intended to prepare Germany for war<sup>437</sup> and was informed of Germany's specific plans to invade various countries.<sup>438</sup>

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431. *Id.* at 337. Knowledge of the aggressive nature of Hitler's wars and invasions is an essential element of guilt under the charge of Crimes Against Peace. However, the Tribunal ruled that intent need not be established in the case of War Crimes and Crimes Against Humanity. They reasoned that measures which result in murder, ill-treatment and other acts are clearly illegal and a criminal intent may be presumed. *Id.* at 339.

432. *Id.* at 338.

433. *Id.* at 338-39.

434. *Id.* at 386-87 (Wilhelm Kepler).

435. *Id.* at 390, 392, 394 (Ernst Woermann).

436. *Id.* at 409 (Hans Lammers).

437. *Id.* at 420, 422, 424.

438. *Id.* at 427-29, 431.

The most difficult judgment involved Ernst von Weizaecker. Von Weizaecker entered the Foreign Office in 1920 and rose in 1938 to the rank of State Secretary. He was second only to Foreign Minister von Ribbentrop. Although von Weizaecker was not present at the conferences at which Hitler announced his plans for aggressive wars, for the most part, he was aware of the Fuehrer's intentions. Von Weizaecker contended that despite his apparent cooperation with the Nazi regime, he continuously opposed and undermined the Government which he served.<sup>439</sup> According to von Weizaecker, he was convinced that Hitler's policies would lead to "death, disaster and destruction."<sup>440</sup> Despite the fact that the price of open opposition was likely to be death, the Tribunal rejected the defense that

good intentions render innocent that which is otherwise criminal, and which asserts that one may with impunity commit serious crimes, because he hopes thereby to prevent others, or that general benevolence toward individuals is a cloak or justification for participation in crimes against the unknown many.<sup>441</sup>

The Tribunal determined that in some cases that von Weizaecker, in fact, was not informed of Hitler's aggressive plans.<sup>442</sup> In other instances, von Weizaecker wrote memoranda to von Ribbentrop opposing the invasions and warned the Allies of the need to act against Germany.<sup>443</sup> However, in the case of Czechoslovakia, the Tribunal determined that he deliberately misled the Western Powers as to Germany's aggressive intent.<sup>444</sup>

Von Weizaecker was also aware of and opposed the plan to invade the Soviet Union. However, when he met with the Russian Ambassador, he did not inform the diplomat of Hitler's plans. The Tribunal ruled that von Weizaecker was not under a duty to inform the Soviets of Germany's plans. The Tribunal stressed that von Weizaecker was not required to cooperate in the "ruin of his own people and the loss of

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439. *Id.* at 340.

440. *Id.* at 341.

441. *Id.* at 341-42.

442. *Id.* at 342-43.

443. *Id.* at 357-58.

444. *Id.* at 354. This finding was later revised by the Tribunal on reconsideration of its judgment. See *Von Weizaecker-Order And Memorandum Of The Tribunal And Separate Memorandum Of Presiding Judge Christianson id.* at 954-56. The Tribunal determined that there was no evidence that von Weizaecker attempted to deceive the Czechs, the British or the French. *Id.* at 955.

its young manhood.” “[T]he failure to advise a prospective enemy of the coming aggression in order that he may make military preparations which would be fatal to those who in good faith respond to the call of military duty does not constitute a crime.”<sup>445</sup>

The defendants were also charged with War Crimes and Crimes Against Humanity committed against civilian populations.<sup>446</sup> These charges involved the extermination of Slavic<sup>447</sup> and Jewish populations.<sup>448</sup> The evidence indicated that the Foreign Office was aware of the activities of the Einsatzgruppen<sup>449</sup> and of the operations of the death camps.<sup>450</sup> It was the responsibility of the foreign office to arrange for these deportations with the governments of Vichy France, Hungary, Slovakia, Bulgaria, Rumania and Croatia. Consent was not required in occupied France, the Low Countries, Poland, the Baltic states, Denmark and the occupied Russian territories. In the latter areas, the Jews were merely seized and deported to the death camps. In these cases, the Foreign Office was responsible for responding to inquiries and protests from the international community.<sup>451</sup>

Those prosecuted under this count participated in every phase of ethnic persecution yet tried to justify their acts as being motivated by lofty goals. These justifications, however, were unacceptable to the Tribunal. Both State Secretary von Weizaecker<sup>452</sup> and Ernst Woermann, Under Secretary of State and head of the Political Department,<sup>453</sup> approved the illegal deportation to Auchwitz of 6,000 “stateless” Jews living in France in 1942.<sup>454</sup> The Tribunal ruled that the defendants had a duty to protest this action.<sup>455</sup> Von Weizaecker explained that he remained in office in order to gather intelligence for opposition groups

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445. *Id.* at 380-83. All defendants were acquitted on the charge of participating in a common plan and conspiracy to wage an aggressive war. *Id.* at 435-36.

446. A number of defendants were convicted of promulgating a decree which declared that captured American and British air crews would not be recognized as prisoners of war. Civilians who summarily executed these individuals were not to be prosecuted. *See id.* at 438-40 (Karl Ritter), 462-63 (Hans Lammers). Others were convicted of concealing, *id.* at 455-61 (Gustav Adolf Steengracht Von Moyland) or participating in the murder of prisoners of war. *Id.* at 447-54 (Gottlob Berger).

447. *Id.* at 468-70.

448. *Id.* at 470-72.

449. *Id.* at 472.

450. *Id.* at 473-75.

451. *Id.* at 475.

452. *Id.* at 475-76.

453. *Id.* at 476.

454. *Id.* at 496.

455. *Id.* at 497-98.



within the Reich and that he was in a position to work for peace.<sup>456</sup> The Tribunal ruled that such lofty motives could not justify involvement in criminal activity.

One cannot give consent to or implement the commission of murder because by so doing he hopes eventually to be able to rid society of the chief murderer. The first is a crime of imminent actuality while the second is but a future hope.<sup>457</sup>

Other defendants were involved in direct attacks upon Jews;<sup>458</sup> the confiscation of Jewish agricultural land, inventory and livestock,<sup>459</sup> and property;<sup>460</sup> the resettlement of Germans on land in the occupied territories;<sup>461</sup> the dissemination of anti-semitic propaganda;<sup>462</sup> and the drafting of anti-semitic legislation.<sup>463</sup>

The defendant Schewerin von Krosigk was Reich Minister of Finance and a member of the cabinet. He was educated at Oxford as a Rhodes Scholar and spent many years as a civil servant. Although he was not an enthusiastic Nazi, the regime retained him in office in order to take advantage of his expertise.<sup>464</sup> Under von Krosigk, the Ministry of Finance was continually engaged in the seizing and disposal of confiscated Jewish property in Germany and throughout the occupied territories.<sup>465</sup>

Von Krosigk was described as “deeply religious . . . , devoted to his wife and family, simple in his tastes . . . , and . . . free [of corruption].”<sup>466</sup> He was not a member of Hitler’s “inner circle” and was conscience-stricken over many of the Nazi programs that were “contrary and abhorrent to what he believed and knew to be right.”<sup>467</sup> He stated that he remained in the Cabinet to raise the “voice of reason and justice” and to “act as a brake.”<sup>468</sup> Nevertheless, as in the case of von Weizsaecker, the Tribunal ruled that:

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456. *Id.* at 497.

457. *Id.* at 497-98.

458. *Id.* at 541-46 (Gottlob Berger).

459. *Id.* at 557 (Richard Darre).

460. *Id.* at 609-21 (Emil Puhl).

461. *Id.* at 578-86 (Wilhelm Keppler).

462. *Id.* at 565-76 (Otto Dietrich).

463. *Id.* at 638-39 (Wilhelm Stuckhart).

464. *Id.* at 671.

465. *Id.* at 675, 678, 680.

466. *Id.* at 671-72.

467. *Id.* at 672.

468. *Id.*

A troubled conscience is not a defense for acts which are otherwise criminal. Nor can we hold that he who signed, cosigned, executed, or administered measures which violate international law, because he thought that acquiescence would enable him to maintain and safeguard the integrity of his department and the career of his officials or even the life or liberty of individuals whose cases came to his attention, but who by his actions condemned the great inarticulate mass to persecution, mistreatment, brutality, imprisonment, deportation, and extermination, escapes responsibility for his conduct.<sup>469</sup>

All nineteen defendants in the *Ministries Case* were convicted<sup>470</sup> and sentenced for terms ranging from roughly four to twenty-five years.<sup>471</sup>

#### IV. THE CONTRIBUTION OF AMERICAN PROSECUTIONS UNDER CONTROL COUNCIL LAW NO. 10 TO INTERNATIONAL LAW

The twelve American prosecutions under Control Council Law No. 10 documented a range of German War Crimes and Crimes Against Humanity. The crimes included the plunder of property,<sup>472</sup> the deportation of civilian populations,<sup>473</sup> the deployment of slave labor<sup>474</sup> and the abuse of both prisoners of war and inmates in concentration camps.<sup>475</sup> Those convicted of these crimes included military leaders<sup>476</sup> and governmental officials,<sup>477</sup> industrialists,<sup>478</sup> and lawyers and judges.<sup>479</sup> The tribunals emphasized that civilians too were criminally liable for the commission of acts contravening the humanitarian law of war. According to the Tribunal in the *High Command Case*, "it would be an

469. *Id.* at 674-75. Defendants were charged and convicted under Count Six of the plunder of public and private property, exploitation, spoliation and other offenses against property. *Id.* at 680-81. Defendants were charged and convicted under Count Seven of the enslavement and deportation of persons for the purpose of slave labor. *Id.* at 794-95.

470. *Id.* at 865.

471. *Id.* at 866-70.

472. *See generally, supra* notes 91-101 and accompanying text.

473. *See generally, supra* notes 216-219 and accompanying text.

474. *See generally, supra* notes 105-122 and accompanying text.

475. *See generally, supra* notes 130-139 and accompanying text.

476. *See generally* High Command Case and Hostage Case, *supra* note 269.

477. *See generally* Ministries Case, *supra* note 419.

478. *See generally* Farben Case, *supra* note 72; Krupp Case, *supra* note 73; Flick Case, *supra* note 74.

479. *See generally* Justice Case, *supra* note 340.

utter disregard of reality and . . . legal shadow-boxing” to rule that the inanimate entity of the state is criminally liable for atrocities while those who “devise and execute” these policies are immune from legal culpability.<sup>480</sup>

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. . . . There is no justification for a limitation of responsibility to public officials.<sup>481</sup>

Thus, international law “may . . . limit the obligations which individuals owe to their states, and create for them international obligations which are binding upon them to an extent that they must be carried out even if to do so violates a positive law or directive of state.”<sup>482</sup> Although consistent with domestic law, medical experiments on concentration camp inmates were adjudged to be contrary to the principles of the law of nations. In the *Medical Case*, the Tribunal convicted those responsible for subjecting inmates to medical experimentation involving brutalities, torture, disability, injury and death. Likewise, in the *Justice Case*, the Tribunal stressed that those judicial officials who participated in the enactment and enforcement of the Nazi decrees were guilty under international law for complicity in a crime against humanity.<sup>483</sup> The prerogatives of members of the military also are restricted by international law. For example, a military commander in an occupied area “under international law and accepted usages of civilized nations . . . [has] certain responsibilities which he cannot set aside or ignore by reason of activities of his own state within his area.”<sup>484</sup> The German defendants generally did not recognize that their activities were immoral or illegal. The tribunals observed that the defendants appeared to have

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480. High Command Case, *supra* note 269, at 508.

481. Flick Case, *supra* note 74, at 1192.

482. High Command Case, *supra* note 269, at 489.

483. Justice Trial, *supra* note 340, at 984.

484. High Command Case, *supra* note 269, at 544.

more compassion for their compatriots who were subjected to the stress and trauma of engaging in mass murder than for the victims.<sup>485</sup>

The Allies too showed compassion for their comrades. The Allies sought retribution for the deaths of those soldiers who paid the ultimate sacrifice in the war against fascism.<sup>486</sup> The *Einsatzgruppen* Tribunal nevertheless stressed that the trial was not an exercise in "victors' justice." According to the Tribunal, the defendants were "in court not as members of a defeated nation but because they are charged with crime. They are being tried because they are accused of having offended against society itself, and society, as represented by international law, has summoned them for explanation."<sup>487</sup> The Allies anticipated that the conviction of the German leadership would deter those who might contemplate lawless behavior in the future.<sup>488</sup> An equally important Allied goal was to educate the German people concerning the excesses of the Nazi regime so that they would appreciate the dangers of totalitarianism. The hope was that this would heighten their vigilance against a repetition of such events.<sup>489</sup>

These trials are not only to render justice in accordance with the rules of law and humanity, but they are also to serve the purpose of acquainting the German people with the true character of the false gods they idolized and blindly followed. The German people must be enlightened on all the arrogance, conceit, pusillanimity, and brutality which went into the SS uniform. The German people must learn what pigmies (sic) rattled about in the big black boots of the Rottenfuehrer, Hauptscharfuehrer, Sturmscharfuehrer, and Obergruppenfuehrer. They will then demand in the future a show of worth, of religion, of honesty, of fundamental decency in a man before accepting him as a leader.<sup>490</sup>

At the conclusion of the *WVHA Case*, the Tribunal concluded with some optimism that "[a]mid her sorrow and wreckage, Germany has learned her lesson never to trust again those who would lead her to felicity over the corpses of decency, dignity, justice, and equality between man and man."<sup>491</sup>

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485. See *Einsatzgruppen Case*, *supra* note 170, at 491.

486. See *Milch Case*, *supra* note 129, at 859.

487. *Einsatzgruppen Case*, *supra* note 170, at 462.

488. *Milch Case*, *supra* note 129, at 859.

489. *WVHA Case*, *supra* note 170, at 1077.

490. *Id.* at 1077.

491. *Id.* at 1163.

The tribunals were aware that they were not only educating a people but setting precedents for future trials:

We must not forget that guilt is a personal matter; that men are to be judged not by theoretical, but by practical standards; that we are here to define a standard of conduct of responsibility, not only for Germans as the vanquished in war, not only with regard to past and present events, but those which in the future can be reasonably and properly applied to men and officials of every nation, those of the victors as well as those of the vanquished. Any other approach would make a mockery of international law and would result in wrongs quite as serious and fatal as those which were sought to be remedied.<sup>492</sup>

The tribunals adopted the guiding principle that in order to establish individual criminal liability, the prosecution was required to demonstrate the intentional commission of a criminal act or the wanton failure to fulfill a legal duty. A defendant was not presumed to be culpable merely because those under his command engaged in criminal conduct. The prosecution was required to demonstrate "personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part." In the *High Command Case* the Tribunal stated that "[a]ny other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations."<sup>493</sup>

Liability for a crime against peace was limited to those at the policy-level who knowingly participated in the preparation, planning, initiation, or waging of an aggressive war. High echelon officials "use[d] the great mass of the soldiers and officers to carry out an international crime." Those below this level, on the other hand, did not possess the power to shape and influence policy. They were described as the mere "instruments" of the policy-makers who, in all fairness, should not be held criminally liable.<sup>494</sup>

The *Farben* panel expressed the fear that the extension of liability for waging a war of aggression below the policy level would inevitably lead to the mass punishment of the German

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492. *Ministries Case*, *supra* note 419, at 527.

493. *High Command Case*, *supra* note 269, at 543-44.

494. *Id.* at 489.

people.<sup>495</sup> The punishment would extend to the “private soldier on the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces, or the housewife who conserved fats for the making of munitions.”<sup>496</sup>

The role of intent in determining the liability of decision-makers for Crimes Against Peace can be seen by contrasting the disposition of defendants Krauch and Koerner. Karl Krauch was one of the top executives in I.G. Farben and supervised the development of the Nazi regime’s chemical production. Despite Krauch’s involvement in rearming the Reich, the judicial panel in the *Farben Case* determined that he lacked the criminal intent to prepare Germany for an aggressive war. He was not a military expert and, according to the Tribunal, may have believed that his activities were designed to help protect Germany against a possible attack by its European neighbors.<sup>497</sup>

The evidence is clear that Krauch did not participate in the planning of aggressive wars. The plans were made by and within a closely guarded circle. The meetings were secret. The information exchanged was confidential. Krauch was far beneath membership in that circle. No opportunity was afforded to him to participate in the *planning*, either in a general way or with regard to any of the specific wars charged in count one.<sup>498</sup>

In contrast, in the *Ministries Case*, defendant Paul Koerner was convicted of preparing for a war of aggression. Koerner coordinated the Reich’s economic Four Year Plan intended to ready the nation for war. The Tribunal emphasized that Koerner held several high governmental positions, participated in high-level discussions of Germany war plans and was aware that his activities were designed to permit the Reich to launch illegal wars of aggression.<sup>499</sup>

The intent requirement was less difficult to establish in the case of War Crimes and Crimes Against Humanity. The American War Crimes tribunals ruled that inhumane acts such as murder, deportation, enslavement and persecution on the basis of racial and religious grounds “shock[ed] the conscience of every decent man” and were obviously illegal. As a result, individuals who participated in such conduct cannot

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495. *Farben Case*, *supra* note 72, at 1126.

496. *Id.* at 1124-25.

497. *Id.* at 1113.

498. *Id.* at 1110.

499. *Ministries Case*, *supra* note 419, at 426.

credibly claim that they did not know that such acts were criminal.<sup>500</sup> Unlike Crimes Against Peace, liability for War Crimes and Crimes Against Humanity was not limited to high-echelon officials. Control Council Law No. 10, which purported to codify the existing principles of international law, extended culpability to individuals who acted as a principle or as an accessory or who ordered or abetted or who were connected with plans or enterprises involving the commission of such offenses.<sup>501</sup> Liability thus attached to all those involved in furthering War Crimes and Crimes Against Peace. The Tribunal in the *WVHA Case* pointed out that:

An elaborate and complex operation, such as the deportation and extermination of the Jews and the appropriation of all their property, is obviously a task for more than one man. Launching or promulgating such a program may originate in the mind of one man or a group of men. Working out the details of the plan may fall to another. Procurement of personnel and the issuing of actual operational orders may fall to others. The actual execution of the plan in the field involves the operation of another, or it may be several other persons or groups. Marshaling and distributing loot, or allocating the victims, is another phase of the operation which may be entrusted to an individual or a group far removed from the original planners.<sup>502</sup>

The tribunals thus broadly interpreted the scope of liability for War Crimes and Crimes Against Humanity. In the *Flick Case*, defendants Friedrich Flick and Otto Steinbrinck were convicted of being accessories to the crimes committed by the SS. Both were members of Himmler's "Circle of Friends" and voluntarily contributed substantial funds to the organization.<sup>503</sup> The Tribunal determined that both Flick and Steinbrinck must have known of the organization's activities and that it is "immaterial whether it was spent on salaries or for lethal gas."<sup>504</sup> Defendant Guenther Joel in the *Justice* trial was attorney general of the court of appeals in Hamm whose jurisdiction encompassed Westphalia.<sup>505</sup> In this capacity, Joel supervised the prosecutors who handled

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500. *Id.* at 339.

501. See CONTROL COUNCIL LAW No. 10, *supra* note 54, at art. II(2).

502. WVHA Case, *supra* note 170, at 1173 (Supplemental Judgment of the Tribunal).

503. Flick Case, *supra* note 74, at 1219.

504. *Id.* at 1221.

505. Justice Trial, *supra* note 340, at 1137.

the Night and Fog Decree cases.<sup>506</sup> The Tribunal rejected Joel's contention that he should be acquitted based upon the fact that he did not actually prosecute the cases.

[The] fact that Joel did not actually try the Night and Fog cases himself has no significance. He did supervise the men who tried and had executed some of them and imprisoned others and transferred others who were not guilty of any crime or who had served their sentence, to the Gestapo and concentration camps.<sup>507</sup>

The tribunals also held the defendants liable for the independent actions of those under their command in those cases in which the panels determined that the defendants should have been aware of their subordinates' actions. Karl Mummmenthey was administrator of the commercial enterprises controlled by the SS which deployed concentration camp labor.<sup>508</sup> Mummmenthey denied that he was aware of the harsh conditions in which the workers were forced to work. Nevertheless, he was convicted. The Tribunal ruled that Mummmenthey's "assertions that he did not know what was happening in the labor camps and enterprises under his jurisdiction does not exonerate him. It was his duty to know."<sup>509</sup>

For the most part, however, the tribunals were reluctant to attribute knowledge to defendants absent concrete proof. Farben executives were not held liable for War Crimes and Crimes Against Humanity for supplying large quantities of Zyklon-B gas to the SS concentration camps. The Tribunal noted that there was a need for insecticides wherever large numbers of displaced persons were confined in congested quarters which lacked adequate sanitary facilities.<sup>510</sup> The panel in the *Farben Case* also determined that Farben executives were not aware that the vaccines that they provided were being used in medical experiments on concentration camp inmates.<sup>511</sup>

Those with authority and power who possessed actual or constructive knowledge of criminal activity committed by those under their command were charged with an affirmative duty to prevent such actions. Karl Brandt ranked next to Hitler in the medical field and was in a

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506. *Id.* at 1138.

507. *Id.*

508. WVHA Case, *supra* note 170, at 1051-52.

509. *Id.* at 1055.

510. Farben Case, *supra* note 72, at 1169.

511. *Id.* at 1171-72.



position to intervene on all medical matters. The Tribunal ruled that Brandt possessed a duty to intervene to halt such atrocities.<sup>512</sup>

It does not appear that at any time he took any steps to check medical experiments upon human subjects. During the war he visited several concentration camps. Occupying the position he did, and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps.<sup>513</sup>

In contrast, the tribunals ruled that staff officers lacked command authority over their subordinates and did not incur criminal responsibility for transmitting illegal orders. However, they were culpable if they drafted an illegal military order or made a special effort to insure that the order was distributed to those units who carried it out.<sup>514</sup> Hermann Foertsch served as chief of staff to various generals during the Nazi invasions of Yugoslavia and Greece.<sup>515</sup> In this position, Foertsch passed on various orders instructing subordinate units to take hostages and to exact reprisals.<sup>516</sup> Nevertheless, the tribunal in the *Hostage Case* acquitted him of war crimes.

That he had knowledge of the doing of acts which we have herein held to be unlawful under international law cannot be doubted. . . . 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.<sup>517</sup>

Thus, those who knew of illegal activity, but who lacked authority and power over such actions were not held criminally liable. Defendant von

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512. Medical Case, *supra* note 128, at 193.

513. *Id.* at 193-94.

514. High Command Case, *supra* note 269, at 513.

515. Hostage Case, *supra* note 269, at 1281-82.

516. *Id.* at 1283-85.

517. *Id.* at 1286.

Erdmannsdorff was deputy chief of the Political Division in the Foreign Office under von Ribbentrop.<sup>518</sup> The Tribunal in the *Ministries Case* ruled that von Erdmannsdorff was not liable for War Crimes and Crimes Against Humanity based upon his knowledge of the atrocities directed against the Jews.<sup>519</sup>

That von Erdmannsdorff had knowledge of the crimes against humanity committed against the Jews, and the persecution of the churches, we have no doubt. But a careful examination of the evidence reveals little or nothing more. It is far from enough to justify a conviction. The deputy chief of the Political Division, particularly under the von Ribbentrop regime, had little or no influence. He was subordinated to the Under Secretary of State of the Foreign Office, and he was little more than a chief clerk.<sup>520</sup>

Despite their failure to hold that individuals who lacked power and authority to influence and shape policy were under a legal duty to intervene, the American tribunals were not willing to exculpate such individuals from a moral duty to act:

We do not hesitate to state that it would have been eminently desirable had the commanders of the German armed forces refused to implement the policy of the Third Reich by means of aggressive war. It would have been creditable to them not to contribute to the cataclysmic catastrophe. This would have been the honorable and righteous thing to do; it would have been in the interest of their State. Had they done so they would have served their fatherland and humanity also.<sup>521</sup>

The American war crimes tribunals made a major contribution to clarifying the concept of Crimes Against Humanity. Unlike the Nuremberg Charter, Control Council Law No. 10 did not require that Crimes Against Humanity be "in execution of or in connection with any crime within the jurisdiction of the Tribunal."<sup>522</sup> In the *Justice Case*, the Tribunal noted that this limitation had been "deliberately omitted from the definition."<sup>523</sup> The omission of this phrase permitted

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518. *Ministries Case*, *supra* note 419, at 576.

519. *Id.* at 577-78.

520. *Id.*

521. *High Command Case*, *supra* note 269, at 489.

522. *Flick Case*, *supra* note 74, at 1212-13.

523. *Justice Case*, *supra* note 340, at 974.

the tribunals to assume jurisdiction over acts undertaken against the German people prior to the Nazis' initiation of wars of aggression in 1939.<sup>524</sup>

The Tribunal in the *Justice Case* observed that this extension of international law to encompass acts which traditionally had fallen within States' domestic jurisdiction was a reflection of the "force of circumstances, the grim fact of world-wide interdependence, and the moral pressure of public opinion." Domestic conflicts threaten global stability and no longer are able to be contained within a State's domestic jurisdiction. The judicial panel also noted that international concern with States' treatment of their own citizenry is not a recent phenomenon. The Tribunal cited precedents such as English, French and Russian intervention to halt the commission of atrocities during the Greco-Turkish war in 1827 and President Martin Van Buren's intercession with the Sultan of Turkey in 1840 on behalf of the persecuted Jews of Damascus and Rhodes.<sup>525</sup>

Crimes Against Humanity were limited to the "wholesale and systematic violation of life and liberty."<sup>526</sup> They were not interpreted as including isolated and sporadic acts for which a state's criminal code makes "adequate provision."<sup>527</sup> State involvement also was required. It is the "indifference, impotency or complicity" of the State which necessitates international jurisdiction.<sup>528</sup> International jurisdiction over Crimes Against Humanity was also premised on the enormity of these offenses being such that they were considered to be directed against and pose a threat to humanity rather than against any particular country. The classic example is the crime of genocide<sup>529</sup> and other large-scale and systematic governmental persecutions founded on political, racial, and religious grounds.<sup>530</sup>

The defendants unsuccessfully proffered several theories to justify the commission of War Crimes and Crimes Against Humanity. The Tribunal ruled that because Germany had launched illegal wars of aggression did not relieve it of the obligation to adhere to the hu-

524. *Id.* at 972-73. The tribunal in the *Medical* case suggested that crimes against humanity do not encompass acts directed against a regimes own nationals. *Medical Case*, *supra* note 128, at 198.

525. *Justice Case*, *supra* note 340, at 979-81.

526. *Einsatzgruppen Case*, *supra* note 170, at 498.

527. *Id.*

528. *Id.*

529. *Id.* at 499.

530. *Justice Case*, *supra* note 340, at 972.

manitarian law of war. As noted in the *Hostage Case*, "international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in [an] occupied territory."<sup>531</sup> The Tribunal noted that:

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.<sup>532</sup>

The defendants also argued that the law of war had been rendered largely irrelevant by the new conception of total war. They argued that the atomic bombings of Hiroshima and Nagasaki and the aerial raids upon Dresden in Germany "afford[ed] a pattern for the conduct of modern war and a possible justification for the criminal acts of these defendants."<sup>533</sup> However, the panel in the *Hostage Case* pointed out that Germany and its allies had first breached the limits of the law of war at Rotterdam, Warsaw, Belgrade, Coventry and Pearl Harbor. The defendants' unilateral decision to disregard the law of war did not establish a consensus that international legal restraints on the use of force should be relaxed.<sup>534</sup> This would permit any State to claim that it was justified in disregarding international law.<sup>535</sup> At any rate, the panel in the *Einsatzgruppen Case* noted that there is a significant difference between the incidental killing of civilians during a bombing attack and the deliberate and indiscriminate killing of Jews and Poles.<sup>536</sup>

Nor may a State claim that it may violate the humanitarian law of war based on the violations being necessary to subdue the enemy. "[S]uch a view would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations."<sup>537</sup> The tribunals also rejected the claim that Germany was acting in self-defense in exterminating the Jews who allegedly posed a bolshevist threat to Germany. In the *Einsatzgruppen Case* the panel concluded that

531. *Hostage Case*, *supra* note 269, at 1247.

532. *Id.*

533. *Id.* at 1317.

534. *Id.*

535. *Krupp Case*, *supra* note 73, at 1347.

536. *Einsatzgruppen Case*, *supra* note 170, at 467.

537. *High Command Case*, *supra* note 269, at 541.

the "annihilation of the Jews had nothing to do with the defense of Germany. . . . [t]he argument that the Jews in themselves constituted an aggressive menace to Germany, a menace which called for their liquidation in self-defense, is untenable as being opposed to all facts, logic and all law."<sup>538</sup>

A number of defendants claimed they were merely obeying the orders of their superiors in carrying out Germany's unlawful policies. The tribunals, however, emphasized that only lawful orders bind individuals. No person may escape criminal liability by obeying a command which a reasonable person would realize manifestly violates international law and outrages fundamental concepts of justice. Obedience to an order may mitigate, but cannot justify, the commission of a crime. It may only serve as a defense in those cases in which the defendant could not reasonably have been expected to know of the order's illegality. In such cases, the defendant is not deemed to possess the requisite criminal intent.<sup>539</sup>

Of course, this rule places the combatant in a difficult position, particularly when he is in an army headed by a ruthless dictator. He must 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."<sup>540</sup> Absent this rule, an "opposing army would in many cases have no protection at all against criminal excesses ordered by superiors."<sup>541</sup> Recognition of the superior orders defense also would mean that only those at the top would be held criminally liable while those who carried out their leaders' criminal designs would escape punishment. Why should the arms and legs of the monster escape punishment while only the head is considered guilty.<sup>542</sup>

Hans Bobermin administered the industrial property seized from Poles and Jews in a policy characterized by a panel in the *WVHA Case* as "organized theft."<sup>543</sup> The Tribunal rejected Bobermin's superior orders defense:

The time has passed when the executant of an obviously illegal, unconscionable and inhuman program can take refuge behind

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538. Einsatzgruppen Case, *supra* note 170, at 469-70.

539. Hostage Case, *supra* note 269, at 1236.

540. *Id.* at 1237.

541. *Id.*

542. Milch Case, *supra* 129, at 794.

543. WVHA Case, *supra* note 170, at 1249.

the assertion that it was not he who issued the order. Any one ordered to perform a patently illegal and inhuman act is charged by law to protest the order to the extent of his ability, short of endangering his own security. If he fails to do so he will be required to answer for the execution of the illegal act. Whether it be an order calling for the killing of an innocent people or the taking of property from innocent proprietors, the rule is the same. By the promulgation and enforcement of this rule, some dignity is being restored to the human race.<sup>544</sup>

Defendants also were not entitled to pose as a defense the contention that others would have obeyed the illegal order had they refused to carry it out. A defendant must assume responsibility for his own actions and is not entitled to speculate as to the possible conduct of others.<sup>545</sup> In addition, the tribunals found unconvincing the defendants' claims that they believed that the policies of the Reich were legal.<sup>546</sup> Many were "old and experienced" soldiers who were "well acquainted" with the humanitarian law of war.<sup>547</sup>

The tribunals also ruled that it is no defense to criminal activity that an individual was engaged in resistance activity against the Nazi regime. Defendant Wolfram Sievers was acting head of the Ahnenerbe Society which was devoted to research on racial questions.<sup>548</sup> In this capacity, he funded and supplied those engaged in medical experimentation on concentration camp internees.<sup>549</sup> Sievers claimed that he served as Reich Business Manager of the Ahnenerbe society so that he could be close to Himmler in order to help a secret resistance movement to plot the assassination of both Hitler and Himmler. He allegedly remained in this position on the advice of his resistance leader in order to gain vital information which would hasten the overthrow of the Nazi government. The Tribunal rejected Sievers' contention that his resistance activity justified his criminal activity: "It certainly is not the law that a resistance worker can commit no crime, and least of all, against the very people he is supposed to be protecting."<sup>550</sup> Good

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544. *Id.* at 1250.

545. Einsatzgruppen Case, *supra* note 170, at 485.

546. Milch Case, *supra* note 129, at 788.

547. *Id.*

548. See Medical Case, *supra* note 128, at 188.

549. *Id.* at 255.

550. *Id.* at 263.

intentions do not render innocent that which is otherwise criminal.<sup>551</sup>  
After all:

Others with more courage and higher principles and with more loyalty to the ancient German ideals rebelled and withdrew from the brutal crew. . . . These men . . . had the character to repudiate great evil, and if in so doing they took risks and made sacrifices, nevertheless, they made their choice to stand with decency and justice and honor. The defendant had his opportunity to join those who refused to do the evil bidding of an evil master, but he cast it aside and his professed repentance now comes too late.<sup>552</sup>

The American war crimes tribunals also established the standard for the defense of necessity under international law. The defense may be invoked by an individual who commits a criminal act in order to avoid what they reasonably believe to be a threat of imminent bodily harm or death.<sup>553</sup> This threat must overpower the will of the accused and compel him to commit a crime which he otherwise would not have committed. If the will of the accused is not overpowered, "but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct."<sup>554</sup>

In the *Krupp Case*, the Tribunal determined that the firm's executives who deployed slave labor "acted not from necessity within the meaning of the rule invoked but from what they conceived to be a sense of duty."<sup>555</sup> At any rate, the panel ruled that the threat of losing a plant or a job does not outweigh and justify subjecting thousands of individuals to involuntary servitude under inhumane conditions. Such a crime was clearly disproportionate to the harm confronting the defendants.<sup>556</sup>

In the *Flick Case*, however, four of the defendants were permitted to invoke necessity as a defense to their utilization of slave labor. The Tribunal determined that the defendants confronted a "clear and present danger."<sup>557</sup> The deployment of slave labor was essential to meeting their production quota. A failure to meet their quota likely would have

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551. *Ministries Case*, *supra* note 419, at 341.

552. *Milch Case*, *supra* note 129, at 793.

553. *Krupp Case*, *supra* note 73, at 1436.

554. *Id.* at 1439.

555. *Id.* at 1443.

556. *Id.* at 1445-46.

557. *Flick Case*, *supra* note 74, at 1201.

been construed as sabotage and "treated with summary and severe penalties, sometimes resulting in the imposition of the death sentence."<sup>558</sup> On the other hand, defendants Friedrich Flick and Bernhard Weiss actively sought slave labor in order to increase their plant's production of freight cars and were not permitted to rely upon the defense of necessity.<sup>559</sup> Hans Baier, a defendant in the *WVHA Case*, was head of the SS Main Economic and Administrative Office and administered the slave labor program.<sup>560</sup> The Tribunal rejected Baier's argument that he could not resign without risking life and liberty.<sup>561</sup>

But there is no evidence that he protested his work, nor is there any evidence that he tried to get out of it, or that he did it with lack of enthusiasm. . . . Thus, it is too late for him now to say there was nothing for him to do. Not all the Germans in Germany are in prisoners' docks or felons' cells. The vast population is free. They stayed out of trouble, they did not commit war crimes and crimes against humanity. That possibility was open also to Baier, as it was open to all others, but he chose the fruits and the glory of National Socialism, and as a consequence he finds himself in his present position.<sup>562</sup>

The tribunals also rejected the defendants' contention that they were legally justified in taking and executing hostages from the innocent civilian populations in occupied territories. The defendants' claimed that this was necessary to deter attacks and acts of sabotage by unlawful resistance forces. The tribunals conceded that international law recognized the taking of hostages and the exacting of reprisals could be relied on to ensure that the population of an occupied territory adhered to their obligation under international law to respect the safety of occupying forces. Before taking hostages, however, the occupying power was required to exhaust every other available method to secure order and tranquility. These steps may include the registration of inhabitants; the issuance of passes or identification certificates; the establishment of restricted areas; limitations on movement; the adoption of curfew regulations; the prohibition of assembly; the detention of suspected persons; restrictions on communication; the rationing of food supplies; the

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558. *Id.* at 1197.

559. *Id.* at 1202.

560. *WVHA Case*, *supra* note 170, at 1043.

561. *Id.* at 1208.

562. *Id.*



evacuation of troublesome areas; and compulsory financial levies and labor to repair damage from sabotage.<sup>563</sup>

If terrorist attacks continued despite these measures, and the perpetrators are not apprehended, the occupying force may seize hostages. The hostages must be taken from the geographic area in which the attacks occurred. They may not be taken if the aggression was committed by partisans who were not supported by the local population. Prior to executing the hostages, a proclamation must be issued. The proclamation must recite the hostages' names and addresses and notify the population that any future armed attack will result in the execution of a number of hostages which is proportionate to the severity of the attack. An order to kill hostages must be based upon the finding of a competent court martial that the necessary conditions have been met.<sup>564</sup>

A reprisal is an illegal act undertaken in response to an enemy's violation of the law of war and is designed to deter a repetition of such criminal acts.<sup>565</sup> The tribunals ruled that the killing of innocents in reprisal for violations of the law of war is subject to the same limitations placed on the taking of hostages.<sup>566</sup> The tribunals determined that the German forces failed to adhere to the limitations on the taking and execution of hostages and reprisal prisoners. Instead, they engaged in the indiscriminate killing of civilians in the occupied territories.<sup>567</sup> The Tribunal in the *Hostage Case* concluded that "[t]he guilt of the German occupation forces is not only proved beyond a reasonable doubt but it casts a pall of shame upon a once highly respected nation and its people."<sup>568</sup>

Walter Kuntze, who commanded one of the German armies in the Balkans in October 1941, was convicted of ordering and carrying out unlawful reprisals.<sup>569</sup> Kuntze not only failed to take steps to prevent illegal reprisals, but he urged his subordinates to engage in even more severe acts against the local population.

He directed the burning down of all villages having a Communist administration and the taking of all male inhabitants as hostages. He directed the taking of reprisal measures against the population generally such as the shooting to death of all

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563. *Hostage Case*, *supra* note 269, at 1248-50.

564. *Id.*

565. *Id.* at 1248.

566. *Id.* at 1251-53.

567. *Id.* at 1257.

568. *Id.*

569. *Id.* at 1276.

the male inhabitants of the nearest village on the basis of 100 for each German killed and 50 for each German wounded. 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.<sup>570</sup>

The defendants also unsuccessfully argued that they were being subjected to retroactive punishment. The Tribunal in the *Justice Case* stressed that the prohibition against retroactive punishment was a "principle of justice and fair play" which would be given "full effect." It ruled that, as applied in the field of international law, the prohibition against retroactive punishment 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 organized 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." The Tribunal noted that no person who knowingly committed the acts made punishable by Control Council Law No. 10 may assert that he did not know that he would be brought to account for his acts. It was stressed that the Allies repeatedly proclaimed their intent to punish those Germans responsible for war crimes.<sup>571</sup>

The tribunals ruled that Control Council Law No. 10 merely codified existing international law.<sup>572</sup> It was conceded that the law of nations had not explicitly criminalized the acts for which the defendants were prosecuted in the American post-World War II war crimes trials.<sup>573</sup> The tribunals, however, stressed that it was not essential that an international crime be specifically set forth and punished in a particular "ordinance, statute, or treaty if it [was] made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally."<sup>574</sup> The law of nations, like the common law, traditionally has evolved and adapted to meet the exigencies of the moment.<sup>575</sup>

Nor was it relevant that the panels which adjudicated the cases were not in existence at the time the offenses were committed. The

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570. *Id.* at 1278.

571. *Justice Case*, *supra* note 340, at 977-78.

572. *Id.* at 966.

573. *Id.* at 974-75.

574. *Hostage Case*, *supra* note 269, at 1239

575. *Justice Case*, *supra* note 340, at 966.

defendants cannot credibly contend that the punishment of crimes such as murder was unexpected. It was observed that all nations have held themselves bound to obey the rules or laws of war as they evolved over time. Without exception, "these rules universally condemn the wanton killing of noncombatants. . . . [I]t cannot be said that prior to Control Council Law No. 10, there existed no law against murder. The killing of a human being has always been a potential crime which called for explanation."<sup>576</sup> In fact, most of the offenses with which the defendants were charged were violative of the German penal code and it was viewed as ingenuous for the defendants to contend that they did not appreciate that they were engaged in criminal activity.<sup>577</sup>

The jurisdiction of the tribunals was variously based on the Allies' sovereignty over Germany<sup>578</sup> and on the Soviet Union's ceding of its jurisdiction as an aggrieved belligerent to other States.<sup>579</sup> The Tribunal in the *Hostage Case* rested its jurisdiction on what it considered to be the concurrent jurisdiction of States on whose territory German crimes had been committed and on the right of any belligerent to prosecute offenders over whom they had custody.<sup>580</sup> The latter theory firmly established that violations of the humanitarian law of war are a matter of multilateral concern and that belligerents may claim the right to prosecute enemy combatants charged with offenses against the humanitarian law of war.

## V. CONCLUSION

Following the Nuremberg trial, the United States conducted twelve trials of German war criminals. These trials have received little attention in texts and monographs on international law. Yet, they made an important contribution by affirming that civilians, military officials and military leaders, no matter how exalted their status, are subject to criminal punishment for violations of international law. The trials clearly established that those who act behind the scenes and who draft and issue orders are as guilty as those who carry them out.

The trials also demonstrated that international law provides definite standards of conduct which may be applied by courts in a calm, deliberate and consistent fashion. The application of international law

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576. *Einsatzgruppen Case*, *supra* note 170, at 459.

577. *Justice Case*, *supra* note 340, at 977.

578. *Id.* at 964.

579. *Eizengruppen Case*, *supra* note 170, at 460.

580. *Hostage Case*, *supra* at 269, at 1241-42.

thus does not invariably involve an exercise in power politics rather than in reasoned legal analysis. Even the fate of enemy belligerents who have committed unspeakable horrors may be fairly adjudicated. Of course, it is true that the Allies did not subject their own combatants to prosecution.

These post-Nuremberg trials focused on war crimes and on crimes against humanity and provide an important source of documentation and data on the Nazi horrors. They should serve as a constant reminder of the dangers and consequences of totalitarian rule. The trials also provide an example of America's continuing commitment to the rule of law in international affairs. The question for the future is whether we are willing to subject our own combatants as well as enemy belligerents to the same high standards of conduct as were imposed upon the Germans.