LAW REPORTS OF TRIALS OF WAR CRIMINALS

Selected and prepared by

THE UNITED NATIONS WAR CRIMES COMMISSION

VOLUME IX

LONDON

PUBLISHED FOR
THE UNITED NATIONS WAR CRIMES COMMISSION
BY HIS MAJESTY'S STATIONERY OFFICE

1949

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COMMISSION

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

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

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

continued inside back cover

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CONTENTS

FOREWORD

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

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

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

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

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

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

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

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

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

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

WRIGHT.

London, *November*, 1948.

CASE No. 48

THE FLICK TRIAL

TRIAL OF FRIEDRICH FLICK AND FIVE OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG

20TH APRIL–22ND DECEMBER, 1947

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

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

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

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

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

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

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

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

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

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

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

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

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

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

2. THE INDICTMENT

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

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

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

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

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

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

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

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

(1) Hochofenwerk Luebeck A.G. and its affiliated company, Rawack and Gruenfeld A.G.

(2) The extensive brown coal properties and enterprises in central and south-eastern Germany owned, directly or indirectly, in substantial part by members of the Petschek family, many of whom were citizens of foreign nations, including Czechoslovakia.

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

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

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

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

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

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

3. THE EVIDENCE BEFORE THE TRIBUNAL

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

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

(i) *Evidence Regarding the Flick Organisation*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There was no contention that the accused in any way participated in the Nazi persecution of Jews other than taking advantage of the so-called aryanisation programme by seeking and using State economic pressure to obtain from the owners, not all of whom were Jewish, the four properties in question. All these transactions were in fact completed before the outbreak of the war.[1]

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

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

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

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

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

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

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

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

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

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

4. THE JUDGMENT OF THE TRIBUNAL

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

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

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

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

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

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

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

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

As to the substantive law administered, the Tribunal declared:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[1] See pp. 52–4.

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

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

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

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

> ' (*b*) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.'

" In our opinion, it is not intended that these provisions are to be employed to deprive a defendant of the defence of necessity under such circumstances as obtained in this case with respect to defendants Steinbrinck, Burkart, Kaletsch and Terberger. This Tribunal might be reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defence of necessity here urged in their behalf. This principle has had wide acceptance in American and English courts and is recognised elsewhere.

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

> ' Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil.'

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

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

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

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

" Further on in the argument, it was said:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> " ' Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.
>
> " ' Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.
>
> " ' Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.'

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

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

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

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

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

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

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

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

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

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

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

The judgment then continues:

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

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

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

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

" It was stated in the beginning that responsibility of an individual for infractions of international law is not open to question. In dealing with property located outside his own State, he must be expected to ascertain and keep within the applicable law. Ignorance thereof will not excuse guilt but may mitigate punishment. The Tribunal will find defendant Flick guilty in respect to the Rombach matter but will take fully into consideration in fixing his punishment all the circumstances under which he acted.

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

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

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

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

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

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

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

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

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

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

The judgment states:

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

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

> " ' The Moscow Declaration of 30th October, 1943, " Concerning Responsibility of Hitlerites for Committed Atrocities " and the London Agreement of 8th August, 1945, " Concerning Prosecution and Punishment of Major War Criminals of the European Axis " are made integral parts of this Law.'

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

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

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

(1) See p. 14.

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

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

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

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

The judgment then continues:

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

The judgment continues:

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

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

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

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

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

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

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

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

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

The Tribunal added:

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

(vi) *Membership of Criminal Organisations*

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

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

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

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

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

The judgment states:

" Relying upon the I.M.T. findings above quoted the Prosecution took the position that it devolved upon Steinbrinck to show that he remained a member without knowledge of such criminal activities. As we have stated in the beginning, the burden was all the time upon the Prosecution. But in the face of the declaration of I.M.T. that such knowledge was widespread we cannot believe that a man of Steinbrinck's intelligence and means of acquiring information could have remained wholly ignorant of the character of the S.S. under the administration of Himmler."(1)

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

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

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

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

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

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

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

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

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

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

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

(viii) *The Findings of the Tribunal*

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

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

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

(ix) *The Sentences*

The accused Flick, Steinbrinck and Weiss were sentenced to imprisonment for 7, 5 and $3\frac{1}{2}$ years respectively.

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

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

B. NOTES ON THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) See Vol. VI, pp. 35–36.

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

(4) See Vol. VI, p. 35.

(5) *Ibid*, p. 41.

(6) *Ibid*, p. 43.

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

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

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

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

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(1) See Vol. VI, p. 45.

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

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

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

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

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

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

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

The Tribunal which conducted the *Justice Trial* added that " the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field ".(5) The extent to which the Tribunal did regard the rule as applicable in international law may be judged from the following words from its judgment:

" As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organised system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught. Whether it be considered codification or substantive legislation, no person who knowingly committed the acts made punishable by Control Council Law No. 10 can assert that he did not know that he would be brought to account for his acts. Notice of intent to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the Governments of the States at war with Germany. Not only were the defendants warned of swift

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

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

(3) *Ibid*, p. 36.

(4) *Ibid*, pp. 36–37.

(5) *Ibid*, p. 41.

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

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

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

" In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances *the attacker must know that he is doing wrong*, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants, or *at least some of them must have known of the treaties signed by Germany, outlawing recourse to war* for the settlement of international disputes; they must have known that *they were acting in defiance of all international law* when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts."(2)

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

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

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

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(1) See Vol. VI, p. 44.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Again, Professor Hans Kelsen has written:

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

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

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

(1) *The Nuremberg Trial and Aggressive War*, New York, 1946, pp. 38–45. The Judgment in the *Krupp Trial* tacitly recognised that novel situations must necessarily cause the courts to make legal decisions which in effect amount to the creation of new law. In speaking of the defence of necessity the Judgment said: "As the Prosecution says, most of the cases where this defence has been under consideration involved such situations as two ship-wrecked persons endeavouring to support themselves on a floating object large enough to support only one: the throwing of passengers out of an overloaded lifeboat: or the participation in crime under the immediate and present threat of death or great bodily harm. So far as we have been able to ascertain with the limited facilities at hand, the application to a factual situation such as that presented in the Nuremberg trials of industrialists is novel ".

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

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

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

4. OFFENCES AGAINST PROPERTY AS WAR CRIMES

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

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

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

(3) See pp. 59–74.

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

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

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

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

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

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(1) See pp. 3 and 30.
(2) See pp. 21 and 23.
(3) See p. 23.
(4) See p. 11.
(5) See p. 22.
(6) See pp. 12 and 23.

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

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

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

(iii) Flick's guilt may at first sight be thought to resemble in some ways that of persons found guilty in several French war crime trials of the offence of receiving stolen goods.(1) On the other hand it will be recalled that the Rombach plant included much real property, in addition to moveables and that the Tribunal ruled that the proving of the offence did not depend upon the original seizure having been unlawful.

(iv) The Tribunal which tried Flick and others ruled that *State property* like the Vairogs and Dnjepr Stahl plants " may be seized and operated for the benefit of the belligerent occupation for the duration of the occupancy ". The enemy occupant has " a usufructuary privilege ".(2)

In this respect public property is treated on a different footing from private property, as instanced by the Rombach plant in whose operations by Flick without consent it will be noted, the rights of an individual person were infringed. Regarding this question the Prosecution had made the following submissions which throw some light on the meaning of " usufructuary privilege ":

" As far as plunder in Russia is concerned, we will assume in favour of the defendants that, in the Soviet Union, we have to deal with public property only, though it may well be questioned whether it was all public property within Article 55 of the Hague Regulations. In any event, the Hague Convention provides in Article 55:

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

(1) See pp. 62 and 65.
(2) See pp. 12–13 and 24.

" What is meant by the words ' administrator and usufructuary ' does not call for any elaborate definition since the word ' usufructuary ' has been taken over from private law and there the basic conception is quite clear and common to both Anglo-Saxon and Continental law systems. To quote from the *Encyclopedia Americana*, 1945 (Vol. 27, p. 608), usufruct in law is:

> " ' . . . the right to use and enjoy the things of another person, and to draw from them profit, interest or advantage, *without reducing or wasting them*. . . . It may be established in any property which is capable of being used *as far as is compatible with the substance not being destroyed or injured*.' (Emphasis supplied.)

" The conclusion follows that, wherever the occupying power acts or holds itself out as owner of the public property owned by the occupied country, Article 55 is violated. The same applies if the occupying power or its agents who took possession of public buildings or factories or plants, assert ownership, remove equipment or machinery, and ship it to their own country, or make any other use of the property which is incompatible with usufruct. The only exception to the public property rule that the occupying power, or its agents, is limited by the rules of usufruct is the right to " take possession of " certain types of public property under Article 53.(1) But the exception applied only with respect to certain named properties and ' all moveable property belonging to the State which may be used for military operations ', and thus is not applicable to such properties as means of production."

(v) In finding Steinbrinck not guilty under Count Two, the Tribunal rejected the following argument of the Prosecution:

" The unlawful nature of Steinbrinck's activities as Plenipotentiary-General for both coal and steel are, we submit, wholly clear under Articles 46 and 52 of the Hague Regulations and the decision of the International Military Tribunal. Steinbrinck's control of production and allocation of output constituted ' requisitions in kind and services ' which were enforced not merely ' for the needs of the army of occupation ' but for the benefit of German domestic economy and the over-all German war effort. And his activities fall squarely within the language of the judgment of the International Military Tribunal:

> " ' In some of the occupied countries in the East and the West, this exploitation was carried out within the framework of the existing economic structure. The local industries were put under German supervision, and the distribution of war materials was rigidly controlled. The industries thought to be of great value to the German war effort were compelled to continue, and most of the rest were closed down altogether.' "

(vi) The rule of international law forbidding *the destruction of public monuments*, which has received expression in Articles 56 and 46 of the Hague

(1) Article 53 (paragraph 1): " An army of occupation can only take possession of cash, funds and realisable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all moveable property belonging to the State which may be used for military operations ".

Convention, was enforced by a French Military Tribunal in the trial of Karl Lingenfelder.(1)

(vii) *The wanton destruction of inhabited buildings* by fire and explosives, a clear case of a war crime, was punished by a French Military Tribunal in, for instance, the trial of Hans Szabados.(2)

(viii) *The theft of personal property* has been treated as a war crime in numerous French trials.(3)

(ix) The rules of international law regarding *illegal requisitioning* of private property, which were crystallised in Article 52 of the Hague Regulations, were applied by a French Military Tribunal in the trial of Philippe Rust; the accused was found guilty of having requisitioned vehicles (and men) without paying or delivering receipts in lieu of immediate payment.(4)

(x) In several French war crime trials offences coming within the French municipal law conception of *abuse of confidence* have been treated as war crimes.(5) Roughly speaking, these offences consisted of the misappropriation of private property given into the care of the wrongdoer by way of hire, for use free of charge or for safe keeping.

The application of the relevant detailed provisions of French law in these cases illustrates the process whereby the international law of war crimes is elaborated, and it is submitted that, like the finding of guilty passed on Flick for his acts relating to the Rombach plant, it demonstrates the increasing unsuitability of applying any portmanteau expression such as " pillage " or " spoliation " to the diverse offences against property which are now recognised as war crimes.

(xi) In connection with those acts which have been regarded as war crimes, a word should be said relating to the degree of connection between an accused and a crime which has been regarded as necessary to make that accused guilty of that crime.

The French trials reported upon in the present volume do not illustrate this problem, since the finding that certain accused were too young to be guilty of war crimes(6) depended upon a different consideration. In the *Flick Trial*, however, the accused Weiss, Burkart and Kaletsch were found not guilty under Count Two apparently on the ground mainly that, while they supplied information and even advice to Flick relating to the Rombach plant (and presumably must be said to have had knowledge of the offence committed), they were merely Flick's salaried employees and had no power to make decisions.(7)

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(1) See p. 67.
(2) See p. 61.
(3) See, for instance, pp. 61, 62 and 69.
(4) See pp. 72–74.
(5) See pp. 69–71.
(6) See p. 66.
(7) See p. 24.

5. CRIMES AGAINST HUMANITY

(i) On the question of crimes against humanity the Tribunal which conducted the *Flick Trial* (Tribunal IV of the United States Tribunals in Nuremberg) came to three important decisions.

(*a*) In the first place, the Tribunal laid down ([1]) that the omission from Law No. 10 of the Allied Control Council of the words " in execution of or in connection with any crime within the jurisdiction of the Tribunal "([2]) did not serve to extend the scope of that law to cover crimes against humanity occurring before 1st September, 1939; the Tribunal's main argument was that the Charter of the International Military Tribunal, which had been made an integral part of Law No. 10([3]), had been interpreted by the latter tribunal in such a way that crimes against humanity committed before the above-mentioned date were excluded from the scope of the Charter.([4])

The Tribunal thus overruled the submission made by the Prosecution that " Law No. 10 covers crimes against humanity committed prior to the attack on Poland in 1939, and at least as far back as the Nazi seizure of power on 30th January, 1933. This is the interpretation most consistent with the obvious purposes of Law No. 10 as an enactment for the administration of justice in Germany. But, again, the provisions of the law itself leave no room for doubt. Article II of Law No. 10 provides (in paragraph 5) that:

> " ' In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation

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([1]) See p. 25.

([2]) Article 6(*c*) of the Charter proscribes " *Crimes against humanity:* namely, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated ". Article II(*c*) of Law No. 10 on the other hand runs as follows: " *Crimes against humanity.* Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhuman acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated ".

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

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

> in respect of the period from 30th January, 1933, to 1st July, 1945, nor shall any immunity, pardon, or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.'

" This provision has no application to war crimes, since the rules of war did not come into play, at the earliest, before the annexation of Austria in 1938. Nor, so far as we know, were there any German municipal laws recognising or punishing crimes against peace, to which statutes of limitations might have applied, or any Nazi amnesties or pardons with respect thereto. This provision is clearly intended to apply primarily to crimes against humanity, and explicitly recognises the possibility of their commission on and after 30th January, 1933. . . .

" Acts properly falling within the definition in Law No. 10 are, we believe, punishable under that law *when viewed as an occupational enactment*(1) whether or not they were connected with crimes against peace or war crimes. No other conclusion can be drawn from the disappearance of the clause " in execution of or in connection with any crime within the jurisdiction of the Tribunal ". And no other conclusion is consonant with the avowed purposes of the occupation as expressed at the Potsdam Conference, cardinal among which are the abolition of the gross and murderous racial and religious discriminations of the Third Reich, and preparation:(2)

> " ' . . . for the eventual reconstruction of German political life on a democratic basis, and for eventual peaceful co-operation in international life by Germany.'

" These purposes cannot possibly be fulfilled if those Germans who participated in these base persecutions of their fellow nationals during the Hitler regime go unpunished. Were sovereignty in Germany presently exercised by a democratic German Government, such Government would perforce adopt and enforce legislation comparable to these provisions of Law No. 10. Much better it would be if this legislation were German and enforced by German courts, but there is as yet no central German Government, old passions and prejudices are not yet completely dead, the judicial tradition is not yet fully re-established and the American authorities have not, as yet, seen fit to exercise their discretionary power to commit the enforcement of Law No. 10, as between Germans, to German courts."

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

" The evidence to be later reviewed established that certain inhuman acts charged in Count Three of the Indictment were committed in execution of, or in connection with, aggressive war and were, therefore, crimes against humanity even under the provisions of the I.M.T. Charter, but it must be noted that Control Council Law No. 10 differs materially from the Charter.

(1) Italics inserted. Elsewhere the Prosecution stressed " Law No. 10's dual nature as an occupational enactment and as a declaration of principles of the law of nations ".

(2) " Joint Report on the Anglo-Soviet-American Conferences, Berlin, 2nd August, 1945, part III, paragraphs 3 and 4."

The latter defines crimes against humanity as inhumane acts, etc., committed '. . . in execution of, or in connection with, any crime within the jurisdiction of the tribunal . . . ', whereas in Control Council Law No. 10 the words last quoted are deliberately omitted from the definition."(1)

It will be recalled that in the *Justice Trial* the only Count in the Indictment which charged offences committed before 1939 was Count One (Common Design and Conspiracy).(2) The Tribunal ruled that it had " no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offence ", but added: " This ruling must not be construed as denying to either Prosecution or Defence the right to offer in evidence any facts or circumstances occurring either before or after September, 1939, if such facts or circumstances tend to prove or to disprove the commission by any defendant of war crimes or crimes against humanity as defined in Control Council Law No. 10."(3)

Elsewhere the Tribunal threw some further light on its attitude to the question. It said: " We direct our consideration to the issue of guilt or innocence after the outbreak of the war in accordance with the specific limitations of time set forth in Counts Two, Three and Four of the Indictment ". Immediately before reviewing the evidence relating to the changes to the German legal system made under Nazi rule from 1933 onwards, the Tribunal said: " . . . though the overt acts with which the defendants are charged occurred after September, 1939, the evidence now to be considered will make clear the conditions under which the defendants acted *and will show knowledge, intent and motive* on their part, for in the period of preparation some of the defendants played a leading part in moulding the judicial system which they later employed ".(4)

The Tribunal thus left open the question whether it would have considered evidence of offences committed before 1939 had they been charged in Counts Two, Three and Four. It will be noted that in holding itself bound by the " limitations of time set forth in Counts Two, Three and Four of the Indictment ", the Tribunal chose to put aside any possible argument that a residuum of charges of the committing " between January, 1933, and April, 1945 ", of war crimes and crimes against humanity were still facing the accused under Count One, after the Tribunal had rejected the conspiracy element in the Count as a result of the following paragraph in its ruling:

" Count One of the Indictment, in addition to the separate charge of conspiracy, also alleged unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. *We therefore cannot properly strike the whole of Count One from the Indictment,* but, in so far as Count One charges the commission of the alleged crime of conspiracy as a separate substantive offence, distinct from any war crime or crime against humanity, the Tribunal will disregard that charge."(5)

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(1) See Vol. VI of this series, pp. 40–41 and 83.
(2) *Ibid,* p. 2.
(3) *Ibid,* pp. 5–6.
(4) *Ibid,* pp. 73 and 90. (Italics inserted).
(5) *Ibid,* p. 5. (Italics inserted).

On the other hand, the judgment in the *Einsatzgruppen Trial*[1] conducted by Tribunal II, included the following explicit declaration:

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

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

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

The Tribunal which conducted the *Flick Trial* appears to have been on sounder ground when it said that " crimes committed before the war *and* having no connection therewith were not in contemplation "[5] than when it declared that, " In the I.M.T. trial the Tribunal declined to take jurisdiction of crimes against humanity occurring before 1st September, 1939 ". This latter phrase does not seem to represent the complete picture, and here it is useful to quote the words of an eminent authority in which he comments upon the statement of the International Military Tribunal quoted above:[6]

" In the opinion of the Tribunal, all the crimes formulated in Article 6(*c*) are crimes against humanity only if they were committed in execution of or in connection with a crime against peace or a war crime.

" The scope of the phrase ' before or during the war ' is therefore considerably narrowed as a consequence of the view that, although the time when a crime was committed is not alone decisive, the connection with the war must be established in order to bring a certain set of facts under the notion of a crime against humanity within the meaning of Article 6(*c*). As will be seen later, *this statement does not imply that no crime committed before 1st September*, 1939, *can be a crime against humanity*. The Tribunal recognised some crimes committed prior to 1st September, 1939 as crimes against humanity in cases where their connection with the crime against

(1) Trial of Otto Ohlendorf and others, United States Military Tribunal, Nuremberg, September, 1947, to April, 1948.

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

(3) See p. 4.

(4) See p. 25,

(5) See p. 26. (Italics inserted.)

(6) See p. 44, note 4.

peace was established. Although in theory it remains irrelevant whether a crime against humanity was committed before or during the war, in practice it is difficult to establish a connection between what is alleged to be a crime against humanity and a crime within the jurisdiction of the Tribunal, if the act was committed before the war. . . .

" As pointed out, the International Military Tribunal, in interpreting the notion of crimes against humanity, lays particular stress on that provision of its Charter according to which an act, in order to come within the notion of a crime against humanity, must have been committed in execution of or in connection with any crime within the jurisdiction of the Tribunal, which means that it must be closely connected either with a crime against peace or a war crime in the narrower sense. Therefore the Tribunal declined to make a general declaration that acts committed before 1939 were crimes against humanity within the meaning of the Charter. This represents, however, only the general view of the Tribunal and did not prevent it from treating as crimes against humanity acts committed by individual defendants against German nationals before 1st September, 1939, if the particular circumstances of the case appeared to warrant this attitude. The verdict against the defendant Streicher is a case in point, but even in his case the *causal nexus* has been pointed out between his activities and the crimes committed on occupied Allied territory and against non-German nationals, and the most that can be said is that he was also found guilty of crimes against humanity committed before 1st September, 1939, in Germany against German nationals. It cannot be said in the case of any of the defendants that he was convicted only of crimes committed in Germany against Germans before 1st September, 1939.

" The restrictive interpretation placed on the term ' crimes against humanity ' was not so strictly applied by the Tribunal in the case of victims of other than German nationality. With respect to crimes committed before 1st September, 1939, against Austrian nationals, the Tribunal established their connection with the annexation of Austria, which is a crime against peace and came, therefore, to the conclusion that they were within the terms of Article 6(*c*) of the Charter. This consideration is particularly evident in the reasons concerning the case of Baldur von Schirach and, though expressed less precisely, in the case of the defendant Seyss-Inquart. The same applies *mutatis mutandis* to crimes committed in Czechoslovakia before 1st September, 1939, as illustrated in the verdicts on the defendants Frick and von Neurath."(1)

Indeed the International Military Tribunal could hardly have decided that no crime against humanity could possibly have been committed before the war, because Article 6(*c*) of the Charter includes the words " before or during the war " which govern at least the first part of that provision.(2)

(*b*) The Tribunal acting in the *Flick Trial* also came to an important conclusion regarding the extent to which offences against property could be

(1) Egon Schwelb, in *British Year Book of International Law*, 1946, pp. 204–205. (Italics inserted.)

(2) See p. 44, note 2. It has been argued that the words quoted cover the whole Article since " persecutions " must fall within the description " inhumane acts ". This seems to be the opinion of Professor Schick in *The Nuremberg Trial and Future International Law: American Journal of International Law*, October, 1947, p. 787.

regarded as crimes against humanity and here also took the definition of the law on such crimes a step beyond the stage reached in the *Justice Trial.*

It was laid down in the judgment in the trial now under review that offences against industrial property could not constitute crimes against humanity. " *In this case,*" said the Tribunal, " we are only concerned with industrial property. . . . We believe that the proof does not establish a crime against humanity recognised as such by the law of nations when defendants were engaged in the property transactions *here under scrutiny.* . . . It nowhere appears in the judgment that I.M.T. considered, much less decided, that a person becomes guilty of a crime against humanity merely by exerting anti-semitic pressure to procure by purchase, or through State appropriation, industrial property owned by Jews."([1])

In the *I.G. Farben Trial,*([2]) the Tribunal was faced with the same question and decided to " adopt the interpretation expressed by Military Tribunal IV in its judgment in the case of the United States of America *vs.* Friedrich Flick *et al.*, concerning the scope and application of the quoted provision([3]) in relation to offences against property."

The same trend of thought is visible in the following passages taken from the judgment delivered in the *Einsatzgruppen Trial*:([4])

" *Murder, torture, enslavement and similar crimes* which heretofore were enjoined only by the respective nations now fall within the prescription of the family of nations. . . .

" Despite the gloomy aspect of history, with its wars, massacres and barbarities, a bright light shines through it all if one recalls the efforts made in the past in behalf of distressed humanity. President Theodore Roosevelt in addressing the American Congress, said in 1903:

> " ' There are occasional crimes committed on so vast a scale and of *such peculiar horror* as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it.'

" President William McKinley in April, 1898, recommended to Congress that troops be sent to Cuba ' in the cause of humanity ',

> " ' . . . and to put an end to the *barbarities, bloodshed, starvation and horrible miseries* now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. . . . '

" Crimes against humanity are acts committed in the course of wholesale and systematic *violation of life and liberty.* . . .

" At the VIIIth Conference for the Unification of Penal Law held on 11th July, 1947, the Counsellor of the Vatican defined crimes against humanity in the following language:

> " ' The essential and inalienable rights of man cannot vary in time and space. They cannot be interpreted and limited by the social conscience of a people or a particular epoch for they are essentially

([1]) See pp. 26 and 27. (Italics inserted.)
([2]) Trial of Carl Krauch and others by a United States Military Tribunal in Nuremberg. See Vol. X of these Reports.
([3]) Article II(*c*) (*Crimes against Humanity*) of Control Council Law No. 10.
([4]) See p. 47.

immutable and eternal. Any injury . . . done with the intention of *extermination, mutilation or enslavement* against the *life, freedom of opinion . . . the moral or physical integrity of the family . . . or the dignity of the human being*, by reason of his opinion, his race, caste, family or profession, is a crime against humanity.' "(1)

The judgment in the *Flick Trial* declared that " A distinction could be made between industrial property and the dwellings, household furnishings and food supplies of a persecuted people ",(2) and thus left open the question whether such offences against personal property as would amount to an assault upon the *health and life* of a human being (such as the burning of his house or depriving him of his food supply or his paid employment) would not constitute a crime against humanity. Even the examples quoted by the Prosecution in its Rebuttal statement, from the judgment of the International Military Tribunal, could refer to acts of economic deprivation of this more personal type:

" The Defence has also argued that persecutions on racial, religious and political grounds must be physical acts directed against the person of a member of the persecuted group analogous to murder, torture, rape, etc. This argument has been made before and has been rejected by the I.M.T. For example, in its enumerations of the crimes of the Leadership Corps of the Nazi Party the I.M.T. states that that group had ' played its part in the persecution of the Jews. It was involved in the economic and political discrimination against the Jews which was put into effect shortly after the Nazis came into power ' (I.M.T. judgment, p. 259). Likewise in its enumeration of the criminal activities of Seyss-Inquart the I.M.T. stated that " One of Seyss-Inquart's first steps as Reich Commissioner of the Netherlands was to put into effect a series of laws imposing economic discriminations against the Jews ' (I.M.T. judgment, p. 329). Likewise as to the crimes of Walther Funk the I.M.T. stated that he ' had participated in the early Nazi programme of economic discrimination against the Jews ' (I.M.T. judgment, p. 305). In the enumeration of the crimes of Frick the I.M.T. stated that he ' drafted, signed and administered many laws designed to eliminate Jews from German life and economy ' (I.M.T. judgment, p. 300)."(3)

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(1) Italics inserted.

(2) See p. 26.

(3) Compare the Tribunal's attitude to this argument put forward by the Prosecution, see p. 27. Speaking of the Charter of the I.M.T., Article 6(*c*), in his article *Crimes against Humanity* in *British Year Book of International Law*, 1946, pp. 178–226, Dr. Schwelb states: " If the English rule of interpretation, known as the *eiusdem generis* rule, could be applied to Article 6(*c*) the words ' other inhumane acts ' would cover only serious crimes of a character similar to murder, extermination, enslavement and deportation. Then, offences against property would be outside the scope of the notion of crimes against humanity. But even quite apart from the *eiusdem generis* rule, this view appears to be supported by the fact that, while the exemplative enumeration of Article 6(*b*) contains such items as ' plunder of public or private property ', ' wanton destruction of cities, towns or villages, or devastation not justified by military necessity ', there is no indication in the text that similar offences against property were in the minds of the Powers when agreeing on Article 6(*c*) ". While admitting this, however, Dr. Schwelb continues: " It is, however, doubtful whether this is a sound interpretation. As Professor Lauterpacht has said, ' it is not helpful to establish a rigid distinction between offences against life and limb, and those against property. Pillage, plunder and arbitrary destruction of public and private property may, in their effects, be no less cruel and deserving of punishment than acts of personal violence. There may, in effect, be little difference between executing a person and condemning him to a slow death of starvation and exposure by depriving him of shelter and means of sustenance '. (This Year Book, 21 (1944), p. 79.) "

The same comment could be made of two passages from the judgment of the International Military Tribunal which the Prosecution did not quote: " Goering persecuted the Jews, particularly after the November, 1938, riots, and not only in Germany where he raised the billion mark fine as stated elsewhere, but in the conquered territories as well. His own utterances then and his testimony now show this interest was primarily economic, how to get their property and how to force them out of the economic life of Europe ",(1) and " As Reich Governor of Austria, Seyss-Inquart instituted a programme of confiscating Jewish property. Under his regime Jews were forced to emigrate, were sent to concentration camps and were subject to pogroms."(2)

(*c*) Finally, the Tribunal concurred in the finding of the Tribunal acting in the *Justice Trial* that " crimes against humanity as defined in Control Council Law No. 10 must be strictly construed to exclude isolated cases of atrocities or persecution. . . . "(3) Although the Tribunal did not give its reasons, it held that on these grounds alone the charge of crimes against humanity made in the *Flick Trial* would fail. The Tribunal must be taken to have rejected the claims made in the Prosecution's Rebuttal statement that, " It is unnecessary to labour the obvious point that the crimes charged against the defendants were not isolated episodes but were an integral part of a programme of persecution ".

(ii) The related opinion expressed by the Tribunal in the *Justice Trial*(4) that proof of systematic governmental organisation of the acts alleged is a necessary element of crimes against humanity seems to be reflected in certain words which appear in the judgment in the *Einsatzgruppen Trial*:(5)

" It is to be observed that in so far as international jurisdiction is concerned the concept of crimes against humanity does not apply to offences for which the criminal code of any well-ordered State makes adequate provision. They can only come within the purview of this basic code of humanity because the State involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals."

(iii) Although the present pages are not intended to be an exhaustive analysis of the concept of crimes against humanity, it may be added that, according to the judgment in the *Milch Trial*,(6) the words " or nationals of Hungary and Rumania " could be added to the possible victims in the dictum of the Military Tribunal which conducted the *Justice Trial*, that crimes against humanity may be committed by German nationals against German nationals or *Stateless persons*.(7) It has been seen(8) that, according to the judgment in the *Einsatzgruppen Trial*, Law No. 10, when it deals with crimes against humanity, is not restricted as to the nationality of the victim.

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(1) British Command Paper, Cmd. 6964, p. 85.
(2) *Ibid*, p. 121.
(3) See pp. 47 and 79–80 of Vol. VI and p. 28 of the present volume.
(4) See Vol. VI, pp. 47 and 79–80.
(5) See p. 47.
(6) See Vol. VII, p. 40.
(7) See Vol. VI, pp. 40 and 79.
(8) See p. 47.

In its opening statement in the *Flick Trial*, the Prosecution made the same claim in the following words:

" . . . the definition of crimes against humanity certainly comprehends such crimes when committed by German nationals against other German nationals. It is to be observed that all the acts (murder, imprisonment, persecution, etc.) listed in the definition of crimes against humanity would, when committed against populations of occupied countries, constitute war crimes. Consequently, unless the definition of crimes against humanity applies to crimes by Germans against Germans, it would have practically no independent application except to crimes against nationals of the satellite countries such as Hungary and Rumania.(1) Surely a major category of crimes would not have been created for so relatively trivial a purpose. But the matter is put quite beyond doubt by Article III of Law No. 10, which authorises each of the occupying powers to arrest persons suspected of having committed crimes defined in Law No. 10, and to bring them to trial ' before an appropriate tribunal '. Article III further provides that:(2)

> " ' 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 authorised by the occupying authorities.'

" This constitutes an explicit recognition that acts committed by Germans against other Germans are punishable as crimes under Law No. 10 according to the definitions contained therein, since only such crimes may be tried by German courts, in the discretion of the occupying power. If the occupying power fails to authorise German courts to try crimes committed by Germans against other Germans (and in the American Zone of occupation no such authorisation has been given) then these cases are tried only before non-German tribunals, such as these Military Tribunals."

An examination of the judgment in the *Justice Trial* reveals that the Tribunal in that case quoted Article III of the Law No. 10 and did not feel called upon to elaborate the scope of the concept of crimes against humanity to any greater degree.(3)

6. ENSLAVEMENT AND DEPORTATION TO SLAVE LABOUR

It will be recalled that Count One of the Indictment made charges of enslavement and deportation to slave labour. In their closing statement, the Prosecution claimed that:

" The defendants used impressed foreign labour and concentration camp labour in enterprises under their control or management, and they did so

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(1) A footnote to the statement here runs as follows: " Even the crimes in Bohemia and Moravia were war crimes under the Tribunal's decision. Judgment of the International Military Tribunal, Vol. I, *Trial of the Major War Criminals*, p. 334. The Tribunal apparently held that all persecutions, etc., committed after 1939, were crimes against humanity no matter where committed and were also war crimes if committed in a country where the laws of war were applicable. *Id.*, pp. 254–255, 259. Military Tribunal II, in its opinion and judgment in *United States* v. *Erhard Milch* (16th April, 1947), held that Law No. 10 is applicable to crimes against humanity committed by Germans against nationals of the Axis satellites ".

(2) " In paragraph 1, sub-paragraph (*d*)."

(3) See Vol. VI, p. 40.

with knowledge of the character of such labour. There can be no doubt, therefore, of their guilt of the crime of enslavement under Control Council Law No. 10. The criminal nature of the mere utilisation of slave labour clearly appears, moreover, from the judgment of the International Military Tribunal. In finding Speer guilty of war crimes and crimes against humanity, the Tribunal pointed out that he ' was also directly involved in the utilisation of forced labour as chief of the organisation Todt ', that he ' relied on compulsory service to keep it (the organisation Todt) adequately staffed ', and that he ' used concentration camp labour in the industries under his control '. The record here contains a story of confinement, suffering, malnutrition and death. But enslavement need involve none of these things. As stated by Tribunal II:

> " ' Slavery may exist even without torture. Slaves may be well fed and well clothed and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation and beating and other barbarous acts, but the admitted fact of slavery . . . compulsory uncompensated labour . . . would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery. . . . '(1)

" The defendants are also guilty of the crime of deportation, and of the murders, brutalities and cruelties committed in connection therewith. The German slave-labour programme, as found by the International Military Tribunal, involved criminal deportation of many millions of persons, recruited often by violent methods, to serve German industry and agriculture. The utilisation of the forced labour by defendants make them participants in the crimes committed under such programme. As already demonstrated, the defendants obviously knew of the slave-labour programme and had ample information to put them on notice as to the methods adopted in its execution."

The Judgment did not attempt an analysis of the law on these points. Similar charges were made in the *Milch Trial*, and the notes to that trial appearing in Vol. VII of these Reports have included a commentary on the words of the Tribunal acting in that trial on the questions of deportation and enslavement of Allied civilians and prisoners of war.(2) What can safely be said here of the present trial is that an examination of the evidence as summarised by the Tribunal shows that the offences found by the latter to have been proved was that of voluntarily employing forced civilian labour from occupied territories and that of voluntarily employing prisoners of war on work " bearing a direct relation to war operations ". The Tribunal was willing to admit, however, that it was possible for an accused to set up a successful plea of necessity if he employed such labour only because it was supplied to him by the State authorities and if refusal to use it would have resulted in sufficiently serious consequences to himself.(3) The accused Flick and Weiss were found guilty on Count One because instances had been

(1) This quotation is from the Judgment in the *Pohl Trial*. See Vol. VII of this series, p. 49.

(2) See Vol. VII, pp. 53–61.

(3) See pp. 18–20.

proved of their having *voluntarily* participated in the Reich slave-labour programme.(1) It will be noted that nothing more than " knowledge and approval " of Weiss's acts on the part of Flick is mentioned in the Judgment, but it seems clear that the decision of the Tribunal to find him guilty was an application of the responsibility of a superior for the acts of his inferiors which he has a duty to prevent.(2)

The effect of the decisions of the Tribunals which conducted the *Milch* and *Flick Trials* was to overrule the submission that deportation and enslavement were not war crimes since they were not specifically mentioned in the Hague Convention; the Defence in the *Flick Trial* claimed that, on this matter, " The Indictment is based on two provisions, one of which has no connection at all and the other one only a very limited connection with this question, that is, to Articles 46 and 52. Article 46 of the Hague Land Warfare Convention states:

> " ' The honour and the rights of the family, the life of the citizens and private property, as well as religious faith and religious services, are to be respected.' "

Counsel continued: " I can see no connection whatsoever between this regulation and the conscription of labour. Article 52 says:

> " ' Contributions in kind and services can only be demanded from communities or inhabitants for the requirements of the occupation army. These must be in proportion to the resources of the country and must be of such a kind that they do not oblige the population to take part in military operations against their native country.'

" Two restrictions result from this regulation for the compulsory demand of services: firstly, ' only for the requirements of the occupation army ', and secondly, ' no participation in military operations '. What is not shown by this Article is a veto to employ these workers outside the occupied territory. On the contrary, if it is practical for the belligerent nation to have the work for the requirements of the occupation army performed in its home country, there is nothing in Article 52 which opposes the compulsory use of workers from the occupied territory for this purpose. This interpretation I base on the aforementioned principle, that exceptions to the unrestricted use of violence in war must be clearly formulated and proved by those who refer to it."

7. THE INTER-RELATION BETWEEN THE INTERNATIONAL MILITARY TRIBUNAL AND THE UNITED STATES MILITARY TRIBUNALS IN NUREMBERG, AND BETWEEN THE LATTER TRIBUNALS THEMSELVES(3)

The *Justice Trial* (trial of Altstötter and others)(4) was the first and the *Flick Trial* the most recent to be treated in this series of Reports of the trials which have been held in Nuremberg, before United States Military

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(1) See pp. 20–21.
(2) See further on this point Vols. IV, pp. 83–96, VII, pp. 61–64, VIII, pp. 88–89, and the Report upon the *High Command Trial* (Trial of Von Leeb and others), in Vol. XII.
(3) See p. 2, footnote 1.
(4) See Vol. VI of these Reports, pp. 1–110.

Tribunals acting under Control Council Law No. 10 and Ordinance No. 7 of the Military Government of the United States Zone of Germany. It may be of interest to write a brief note on the relationship between these trials and their forerunner, also held at Nuremberg, the trial before the International Military Tribunal of Goering and others (to which trial they have been said to constitute " subsequent proceedings ").

Certain non-legal similarities exist. For instance, in war crime trials before British Military Courts and United States Military Commissions it has not been the rule either for the Prosecution to file detailed indictments or for the courts to pronounce reasoned judgments, despite some rare exceptions in the practice of both. In the " Subsequent Proceedings " trials, however, indictments have been filed which have been somewhat reminiscent in their detail and often also in their form of the indictment drawn up against Goering and others(1), while Article XV of Ordinance No. 7 makes it compulsory for the Tribunals which act under its authority to " give the reasons " on which their judgment as to guilt or innocence are based,(2) and the result has been the pronouncement of detailed reasoned judgments which provide the Tribunals' evidential and legal reasons for their findings as did that of the International Military Tribunal.

How far is the latter judgment binding upon the United States Military Tribunals ? In the absence of any special legal provision the decisions of a court such as the International Military Tribunal would not bind other courts,(3) but the United States Military Tribunals are required to apply Article X of Ordinance No. 7 which provides:

" *Article* X. The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except in so far as the participation therein or knowledge thereof by any particular persons may be concerned. Statements of the International Military Tribunal in the judgment of Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."(4)

This provision may appear to differentiate between " the determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred ", and other statements of fact; the first being binding " except in so far as the participation therein or knowledge thereof

(1) The relevant part of Article IV(*a*) of Ordinance No. 7 simply provides that: " The indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offences charged ".

(2) See Vol. III of this series, p. 120.

(3) " There is no rule of general international law conferring upon the decision of any international tribunal the power to render binding precedents ": Professor Hans Kelsen, *Will Nuremberg Constitute a Precedent?* in *International Law Quarterly*, Vol. I, No. 2, pp. 162–163. The same learned writer claims that: " The Judgment rendered by the International Military Tribunal in the Nuremberg Trial cannot constitute a true precedent because it did not establish a new rule of law, but merely applied pre-existing rules of law laid down by the International Agreement concluded on 8th August, 1945, in London, for the Prosecution of European Axis War Criminals . . . " (*Ibid*, p. 154).

(4) See Vol. III of this series, p. 118.

by any particular person may be concerned ", and the latter being binding " in the absence of substantial new evidence to the contrary ".

It is, however, possible to interpret the words " the determination of the International Military Tribunal . . . may be concerned " as signifying that the decisions of the International Military Tribunal thus made binding on the United States Military Tribunals included not merely decisions that certain acts were committed or omissions made *but also decisions that such acts or omissions were criminal.* This seems to have been the interpretation placed on the phrase by, for instance, the Prosecution in the *Flick Trial*; their closing brief on Count Two includes these words:

" In view of the Charter definition of war crimes the I.M.T. judgment amounts to a determination that a ruthless ' systematic " plunder of public and private property " ' occurred and that was in violation of the Hague Regulations. Determinations by the I.M.T. that crimes occurred are binding on Tribunal IV and ' shall not be questioned except in so far as participation therein or knowledge thereof by any particular person may be concerned '. Thus, the charge amounts to, and it need only be proved, that the defendants participated in the systematic plunder of property which was held to be in violation of the Hague Regulations. It is, therefore, necessary to determine what the I.M.T. included in its judgment that ' a systematic plunder of public or private property ' occurred."

The advantage of such an interpretation is that it explains why Article X makes two separate and different provisions regarding certain decisions of the International Military Tribunal. On the other hand, it is difficult to regard the reference to " invasions " and " atrocities or inhumane acts " as signifying anything more than questions of fact, particularly since " aggressive wars " and " crimes ", which do have a legal significance, are mentioned separately.

The Nuremberg Military Tribunals have not thrown conclusive light on this particular problem, even when making reference to Article X([1]). They have, however, often quoted or referred to passages from the judgment of the International Military Tribunal, without making reference to Article X. In the *Pohl Trial*,([2]) the judgment refers back to the latter judgment specifically on a question of fact:

" The story of systematic pillage of occupied countries is related in the judgment of the International Military Tribunal (pp. 238–243, official edition) which this Tribunal adopts as findings of fact in this case."

In the judgment in the *Milch Trial*, there appears a lengthy passage from the judgment of the International Military Tribunal dealing with the use of slave labour in the Reich, and after quoting this the Tribunal does acknowledge the binding force of Article X:

" Under the provisions of Article X of Ordinance No. 7, these determinations of fact by the International Military Tribunal are binding upon this Tribunal ' in the absence of substantial new evidence to the contrary '. Any new evidence which was presented was in no way contradictory of the findings

([1]) See, for instance, Vol. VI of this series, p. 28.

([2]) See p. 53 and Vol. VII, p. 49.

of the International Military Tribunal, but on the contrary, ratified and affirmed them."

According to Article I of Law No. 10, the Charter of the International Military Tribunal is made an integral part of the Law, while Article I of Ordinance No. 7 provides: "The purpose of this Ordinance is to provide for the establishment of Military Tribunals which shall have power to try and punish persons charged with offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes".

The United States Military Tribunals are therefore bound by the provisions of the *Charter* of the International Military Tribunal. On the other hand, they are bound by the *decisions* of the International Military Tribunal *on points of law* beyond doubt in one respect only. Article II(*d*) of Law No. 10 provides that "Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal" shall be "regarded as a crime". The Charter of the International Military Tribunal, which binds the United States Military Tribunals, makes a provision of which the second sentence is the significant one in this connection:

> "*Article* 10. In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned."

The Military Tribunals are therefore obliged to accept the decisions of the International Military Tribunal as to the criminality or otherwise of groups and organisations.(1)

On other legal questions (with the possible exception created by Article X of Ordinance No. 7) the decisions of the International Military Tribunal are not binding on the later Tribunals, and that which conducted the *Flick Trial*, while bound by the provisions of the *Charter* of the International Military Tribunal, was strictly speaking not bound by the *decisions* of the latter on the question of crimes against humanity.(2) The judgment is, nevertheless, strongly persuasive and has been constantly followed on points of law in the "Subsequent Proceedings" trials; for instance, in the judgments delivered in the *I.G. Farben Trial* and the *Krupp Trial* close attention was paid to the decisions of the International Military Tribunal on the question of crimes against peace.(3)

Turning to the legal inter-relation between the United States Military Tribunals themselves, it is safe to say that they are in no way able to bind one another. As the *Flick Trial* judgment states, there is "no similar mandate" to that contained in Article X of Ordinance No. 7 "either as to findings of fact or conclusions of law contained in the judgments of

(1) This topic is further explored in the notes to the *Greifelt Trial* to be reported in Vol. XIII.

(2) See pp. 25 and 44.

(3) See Vol. X of these Reports.

(4) See p. 17.

Co-ordinate Tribunals". The judgment concluded that " The Tribunal will take judicial notice of the judgment but will treat them as advisory only ".(4) As has been seen the Tribunals have arrived at different conclusions on one aspect of the law relating to crimes against humanity.(1)

During the delivery of the closing speeches in the *Flick Trial* the President of the Tribunal asked General Telford Taylor, Chief of Counsel War Crimes, how far the doctrine of precedent applied between the several United States Military Tribunals. The following interchange ensued:

"GENERAL TAYLOR: Well, your honour, there are special provisions about this question in the amendment to Ordinance No. 7, called Ordinance No. 11.

THE PRESIDENT: I know the provision about the courts meeting when there are different rulings.

GENERAL TAYLOR: I should suppose that it follows, from those provisions, that the decisions of the other tribunals are entitled to the same weight that you would give to a co-ordinate decision at home, which is that it is not binding but that it is respectfully treated.

THE PRESIDENT: Yes, it is the judgment of a learned body.

GENERAL TAYLOR: Quite.

THE PRESIDENT: Well, that is as I thought."

As an example of concurrence of opinion between the Tribunals, it may be remarked that, in the *Krupp Trial*,(2) the judgment relates that: " The law with respect to the deportation from occupied territory is dealt with by Judge Phillips in his concurring opinion in the United States *vs.* Milch decided by Tribunal II.(3) We regard Judge Phillip's statement of the applicable law as sound, and accordingly adopt it. . . . "

Ordinance No. 11 of the United States Military Government, to which General Taylor made reference, states in its Article II:

" Ordinance No. 7 is amended by adding thereto a new Article following Article V to be designated Article V(B), reading as follows:

" (*a*) A joint session of the Military Tribunals may be called by any of the presiding judges thereof or upon motion, addressed to each of the Tribunals, of the Chief of Counsel for War Crimes or of Counsel for any defendant whose interests are affected, to hear argument upon and to review any interlocutory ruling by any of the Military Tribunals on a fundamental or important legal question either substantive or procedural, which ruling is in conflict with or is inconsistent with a prior ruling of another of the Military Tribunals.

" (*b*) A joint session of the Military Tribunals may be called in the same manner as provided in subsection (*a*) of this Article to hear argument upon and to review conflicting or inconsistent final rulings contained in the decisions or judgments of any of the Military Tribunals on a fundamental or important legal question, either substantive or procedural. Any motion with respect to such final ruling shall be filed within ten (10) days following the issuance of decision or judgment.

(1) See pp. 44–8.
(2) See Vol. X of these Reports.
(3) See Vol. VII, pp. 45–47.

" (*c*) Decisions by joint sessions of the Military Tribunals, unless thereafter altered in another joint session, shall be binding upon all the Military Tribunals. In the case of the review of final rulings by joint sessions, the judgments reviewed may be confirmed or remanded for action consistent with the joint decision.

" (*d*) The presence of a majority of the members of each Military Tribunal then constituted is required to constitute a quorum.

" (*e*) The members of the Military Tribunals shall, before any joint session begins, agree among themselves upon the selection from their number of a member to preside over the joint session.

" (*f*) Decisions shall be by majority vote of the members. If the votes of the members are equally divided, the vote of the member presiding over the session shall be decisive."

It will be recalled that a joint session of the Military Tribunals was held to decide the question whether conspiracy to commit war crimes and crimes against humanity could be regarded as a separate offence.[1] It should be noted that the convening of a joint session is within the discretion of the presiding judges and it is not obligatory that a joint session should be held upon a motion being received from Counsel. On the other hand, decisions reached by joint sessions are binding for the future on the individual tribunals, unless altered by a subsequent joint session.

CASE No. 49

TRIAL OF HANS SZABADOS

PERMANENT MILITARY TRIBUNAL AT CLERMONT-FERRAND
JUDGMENT DELIVERED ON 23RD JUNE, 1946

Putting to death of Hostages—Destruction of property by arson—Pillage

A. OUTLINE OF THE PROCEEDINGS

The accused, a former German non-commissioned officer of the 19th Police Regiment, who had been stationed at Ugine, Haute-Savoie, during the occupation of France, was charged with " complicity in murder, arson of inhabited buildings, pillage in time of war and wanton destruction of inhabited buildings, by means of explosives " on two different occasions.

On 5th June, 1944, at about 8 a.m., unknown members of the French Resistance Movement had blown up part of the road in the district of the railway station at Ugine, killing nine German soldiers and wounding several others. It was shown that the accused, in the absence of his superiors, Captain Schultz and Lieutenant Rassi, had surrounded the whole area with men of his regiment and arrested a number of local inhabitants and passers-by found on the road. They were detained by the accused as hostages. Upon

[1] See Vol. VI, p. 104.

the arrival of the two superior officers, 28 hostages were shot at about 11.30 a.m. on the same day. All the victims except one were duly identified. It was further shown that the accused ordered the inhabitants of several houses in Ugine, regarded as harbouring " terrorists ", to leave the premises, whereupon three houses were set on fire. The accused personally threw hand-grenades into the houses and did so while the inhabitants were still removing their belongings, thus endangering their lives.

The following day, 6th June, the accused took part in the destruction by dynamite of a block of three more houses which it was found difficult to set on fire. During these events property of the dwellers was looted. The accused personally took all radio sets.

As a result 421 inhabitants remained without shelter and total damages of 21,000,000 francs were inflicted. The accused claimed to have taken part in the above destruction and looting upon the orders of his superiors.

On the 15th June, 1944, a detachment of the same regiment under the command of Lieutenant Rassi and the accused was passing through Puisot, a hamlet in the area of Annecy. The accused maintained that several shots were fired on the detachment. It was shown that when the officer resumed his journey the accused surrounded the hamlet with his detachment. All the houses were set on fire, several inhabitants shot and their bodies thrown into the fire, including a youth of 16, and food, belongings and other articles of property were looted. Here also, the accused invoked the plea of superior orders.

The accused was found guilty on all Counts, but was not held responsible for the killings which took place at Puisot on the 15th June, 1944. The Tribunal passed the sentence of hard labour for life.

B. NOTES ON THE CASE

1. THE COURT

The trial was held by the Permanent Military Tribunal at Clermont-Ferrand, whose competence, like that of the Tribunals before which the other French trials reported in this volume were held, was based on the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes.(1)

2. THE NATURE OF THE OFFENCE

(a) Putting to death of hostages

The court established that the accused had taken part in the killing of hostages at Ugine, and passed judgment on this count on the basis of Art. 2, para. 4 of the Ordinance of 28th August, 1944, and Art. 296 of the French Penal Code. Art. 2, para. 4 provides that " Premeditated murder, as specified in Art. 296 of the Penal Code, shall include killing as a form of reprisal ". Under Art. 296, in conjunction with Arts. 302 and 304 of the Penal Code, premeditated murder is punishable by death or hard labour for life. The accused was found guilty of the crime as an accomplice and in circumstances warranting the life sentence only. In the

(1) For the French law relating to the punishment of war crimes, see Vol. III of this series, Annex II, pp. 93–101.

field of international law the provision quoted touches upon the important questions of reprisals and of the permissibility of killing persons detained as hostages. Both questions are given special consideration in Vol. VIII, pp. 76–88 and in Vol. XIV (*Trial of A. Rauter*).

(*b*) *Arson and Destruction of Inhabited Buildings by Explosives*

The wanton destruction of inhabited buildings by fire and explosive was regarded by the Court in its judgment as being a crime under Article 434 of the French Penal Code. This article prescribes the heaviest penalty, death, for anybody who " wantonly sets fire to buildings, vessels, boats, shops, works, when they are inhabited or used as habitations, and in general to places inhabited or used as habitations ".

The specific provision of the laws and customs of war which covers such a type of destruction is Article 23(*g*) of the Hague Regulations of 1907. It forbids the " destruction or seizure of enemy property " *unless* it is " imperatively demanded by the necessities of war ". It is generally understood that " imperative demands of the necessities of war " can exist only in the course of active military operations, which was not the case with the circumstances of the trial.

Such cases of destruction were regarded as criminal by the 1919 Commission on Responsibilities and were described in item XVIII of its list of war crimes as " wanton devastation and destruction of property ".

(*c*) *Pillage*

The looting of personal belongings and other property of the civilians evicted from their homes prior to their destruction was found by the Court to be provided against by the terms of Article 440 of the French Penal Code, which deals with pillage. In applying this Article the Court appears to have preferred it to Article 221 of the French Code of Military Justice, which deals specifically with pillage by military personnel. One of the differences between the two provisions is that in violation of the Military Code, pillage entails, as a rule, a heavier penalty than pillage contrary to the Penal Code, that is, hard labour for life instead of for a maximum of 20 years. This, however, had no practical effect upon the sentence passed in this case, the accused having been found guilty of other crimes permitting and justifying life sentence. Pillage is included in the list of war crimes of the 1919 Commission on Responsibilities and is expressly forbidden by Article 47 of the Hague Regulations of 1907.

3. PLEA OF SUPERIOR ORDERS

The accused's plea that he had acted on the orders of his superiors was not admitted. The Court applied the rule that superior orders do not in themselves exonerate the perpetrator from responsibility when the orders are illegal, as provided in Article 3 of the Ordinance of 28th August, 1944.[1]

[1] See Vol. III of this series, pp. 54–55. For the development of rules concerning the plea of superior orders as evidenced in the municipal law of other countries as well as in instruments of international law, see Vol. I of this series, pp. 18–20, and 31–33; and (particularly) Vol. V, pp. 13–22.

CASE No. 50

TRIAL OF ALOIS AND ANNA BOMMER AND THEIR DAUGHTERS

PERMANENT MILITARY TRIBUNAL AT METZ
JUDGMENT DELIVERED ON 19TH FEBRUARY, 1947

Theft and receiving stolen goods as war crimes—Civilians as war criminals—Responsibility of minors

A. OUTLINE OF THE PROCEEDINGS

The accused were a German family of five members, Alois and Anna Bommer and their three unmarried daughters, Elfriede, Maria and Hilde. They were charged with theft of, and receiving, stolen goods belonging to French citizens.

The accused pleaded not guilty. Alois and his wife declared that they had had an inventory made of the property and that they had purchased the furniture and the other objects concerned from the German custodian in charge of the deported Lorrainer's farm. They were, however, unable to prove the point by producing the inventory and the receipt; neither was such evidence found at Maxe. Alois and his wife were prosecuted and convicted for both theft and receiving stolen goods. They were sentenced to 18 months imprisonment each. Two daughters, Maria and Hilde, were prosecuted and convicted on the second Count only, and were sentenced to four months' imprisonment each. The third daughter, Elfriede, who was less than 16 years of age at the time of the offences, was acquitted of the charge of receiving stolen goods on the ground of having " acted without judgment " (sans discernement) on account of her age.

B. NOTES ON THE CASE

1. THE NATURE OF THE OFFENCES

The main point of interest in regard to the offences tried is that acts representing theft and receiving stolen goods under French municipal law were treated by the Court as amounting at the same time to war crimes.

The relevant provisions under which the two principal accused, Alois and Anna Bommer, were convicted, were Article 401 of the Penal Code relating to theft, and Article 460 of the same Code relating to receiving stolen goods.

Article 401 concerns any theft, as defined in Article 379 of the Penal Code, which does not fall within any of the specific cases provided in Articles 380–400 of the Code, such as theft at night or with violence. Theft is

defined in Article 379 as " fraudulent removal " (soustraction frauduleuse) of someone else's goods and, when not committed in the circumstances covered by Articles 380–400, is punishable with imprisonment of from 1–5 years and/or with a fine of from 200–6,000 francs.

Receiving stolen goods is defined in Article 460 as " knowingly receiving things taken, misappropriated or obtained by means of a crime or delict", and is punishable with the same penalties as theft under Article 401.

When passing sentence under these provisions, the Court also made reference to the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes. According to Article 2, paragraph 8 of this Ordinance, " the removal or export by any means from French territory of goods of any nature, including moveable property and money " is likened to pillage as provided in Article 221 *et seq* of the French Code of Military Justice. The latter deals with pillage by military personnel and, like Article 440 of the Penal Code covering pillage by any person, its definition of the offence is based on the element of the use of violence in taking away property. The description of violence in the Penal Code is couched in general terms and defined as " open force " (force ouverte), whereas in the Code of Military Justice it is elaborated in more detail and linked with and, at the same time, restricted to deeds of military personnel. The requisite element of violence consists either in the use of " arms or open force ", or in the " breaking of doors or external enclosures ", or in " violence against persons " by military personnel.

In the case of Alois and Anna Bommer there was no use of violence whatever, but, by virtue of the foregoing provision of the Ordinance of 28th August, 1944, the mere fact of their having removed French property from France to Germany was sufficient to fall within the notion of pillage as extended by the said Ordinance. It should be emphasised that, while likening such removal to pillage, the Ordinance did not restrict its definition to military personnel, but made it applicable to any perpetrator of the offence, including civilians.

In the judgment of the French Court, however, stress was laid on provisions of the Penal Code. It would appear that in face of the extension of the concept of pillage as effected by the above-mentioned Ordinance, there was, strictly speaking, no need for the Court to apply the general provisions of the Penal Code in addition to those of the Ordinance, specifically prescribed for war crimes. This was done apparently because of the deeply-rooted tradition of the French courts that they deal with war crimes on the basis of common penal law.

Another feature of the trial in respect of the offences committed, is that both Alois and Anna Bommer were convicted of having received stolen goods in addition to having committed theft. It is not clear why the Court proceeded on this Count, as the objects concerned were included in the property for which both had been found guilty as thieves. That is to say they were found guilty of receiving the same horses, furniture and linen as they themselves had stolen, with the exception of the silverware, jewellery and money. Neither is the reason for this distinction apparent from the judgment. It may have been that the evidence could not show

which of the various objects had been stolen by each of the two spouses, or that they had stolen *every* object as joint perpetrators or accomplices, in which case serious doubt remained that for some goods each of the two was guilty as a thief, and that both were thus mutually recipients of the goods stolen by the other.

Be this as it may, the main point in their trial is that relating to theft as a war crime, technically distinct from pillage but likened to it and emerging as one of its varieties in the laws and customs of war as understood by one nation. According to Article 47 of the Hague Regulations of 1907 " pillage is expressly forbidden ". Violations of this rule, at any rate since the findings of the 1919 Commission on Responsibilities, have been regarded as war crimes entailing procedure and punishment devised for war criminals. They are included in the list of war crimes drawn up by the Commission, under item XIII. The French law and jurisprudence are now evidence that to pillage in the traditional sense, that is as misappropriation committed with the use of violence, is added ordinary theft or " fraudulent removal " of property, where there is, or need be, no violence. It would appear that, in a sense, there is no extension of the hitherto recognised laws and customs of war. The latter, as contained particularly in the Hague Regulations of 1907, are not limited to the violations defined therein, and are therefore not restricted to pillage in the technical sense. Express reference to this was made in the preamble to the IVth Hague Convention, which includes the said Regulations, in the following terms:

> " Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the laws of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience."

It has not been disputed that the " principles of the laws of nations derived from the usages established among civilised peoples " include general principles of penal law, and there is no doubt that according to these principles theft committed in war-time conditions may be a war crime in the same manner as pillage.

The case against the daughters of the Bommer couple is an illustration of how receiving stolen goods may, under the same principles, equally constitute a war crime. In their case there was no evidence that they were accomplices to the theft committed by their parents, but it was shown that they accepted and kept for their own use some of the stolen goods knowing them to be stolen. This was a clear case of receiving stolen property, so that their being held penally responsible for it as a war crime in the circumstances of the theft was legally justifiable.

It would thus appear that, with regard to the state of the laws and customs of war as authoritatively described in the preamble of the IVth Hague Convention, the findings of the Court concerning theft and receiving stolen goods as war crimes were no legal innovation. They should rather be regarded as a recognition of the principle already admitted that the field of

war crimes is not limited to violations enumerated in the Hague Conventions, or in the itemised list of war crimes of the 1919 Commission on Responsibilities, or in any other existing document relating to the laws and customs of war. This has been expressly recognised in the most recent instruments of international law. Thus, the Nuremberg Charter defines war crimes as violations including but not limited to the offences which are enumerated in its relevant provision.(1)

Theft and receiving stolen goods have emerged as war crimes in many other trials held by French courts, which have thus created a firm jurisprudence on the subject. The following can serve as further illustrations:

In the case against August Bauer, a German gendarme, the accused was convicted for stealing a sewing machine and other objects, which he took to Germany during the retreat from France. He was also convicted for removing and using furniture, which his predecessor in the gendarmerie post had stolen from a French inhabitant and which the accused knew belonged to this Frenchman. The conviction on this latter case was for receiving stolen goods.(2)

In another case the accused, Willi Buch, a paymaster (Oberzahlmeister) during the occupation of France, was convicted of receiving stolen goods through purchase. The German Kommandantur at Saint-Die had siezed silverware which a French doctor had left behind in crates before leaving the locality. The goods were sold at an auction by the Kommandantur and part of it bought by the accused.(3)

In a case similar to that of the Bommers, a German couple named Benz had come during the war to settle in Metz. When going back to Germany at the end of the war they took with them various moveable properties belonging to French inhabitants, including that of the owner of the flat they occupied in Metz. The husband was convicted for theft and the wife for receiving stolen goods.(4)

Finally, in the trial of Elisabeth Neber,(5) another German settler in France (Lorraine), the accused was found guilty of receiving crockery stolen by her nephew from a French woman, which she took with her when returning to Germany towards the end of the war.

In all these trials conviction was imposed on the basis of the Penal Code and the Ordinance of 28th August, 1944.

2. CIVILIANS AS WAR CRIMINALS

The trial of the Bommer family is a confirmation of the principle that laws

(1) See Article 6(*b*) of the Nuremberg Charter.
(2) Judgment of the Permanent Military Tribunal at Metz, 10th June, 1947.
(3) Judgment of the Permanent Military Tribunal at Metz, 2nd December, 1947.
(4) Judgment of the Permanent Military Tribunal at Metz, 4th November, 1947.
(5) Judgment of the Permanent Military Tribunal at Metz, 6th April, 1948.

and customs of war are applicable not only to military personnel, combatant or acting as members of occupying authorities, or, generally speaking, to organs of the State and other public authorities, but also to any civilian who violates these laws and customs. As German settlers in occupied France the Bommers were under the obligation to respect the rights of inhabitants of the occupied territory, and by violating this obligation they had committed breaches punishable under rules of international law respecting the protection of the population placed under the authority of their own State as a consequence of war.

3. RESPONSIBILITY OF MINORS

Of the Bommer daughters, two were over 16 and under 18, and one, Elfriede, was under 16 at the time of the offence. Sentences in their respect were passed according to Articles 66 and 67 of the French Penal Code. These provide that, in the case of minors above 13 and under 18 the court has a choice between a reprimand or committal of the accused's person to his parent's care(1) and a penal conviction, having regard to the circumstances and the accused's personality. In the latter case, if the accused is under 16, the fact of being a minor is considered in itself as an extenuating circumstance and the punishment provided by the Code for the offence tried is reduced to a considerable extent. Capital punishment and hard labour are excluded and the only penalty is imprisonment, the maximum duration of which can in no case exceed 20 years. In the case of a minor above 16 and under 18, the court is at liberty to disregard minority as an extenuating circumstance, and penalties are then governed by the general provisions of the Penal Code. These also contain a rule concerning extenuating circumstances (Article 463) which are applicable to adults and which permit, in the case of unqualified or ordinary theft and of receiving stolen goods, a reduction of penalty to as little as one day's imprisonment.(2)

It is under Articles 66 and 67 of the Penal Code that the two daughters between the age of 16 and 18 were condemned to four months' imprisonment each. In both cases the Court passed sentence while admitting that there were extenuating circumstances. As to the third daughter under 16, the Court used its discretionary power to free her from responsibility on account of her age. It directed that she be given to her parents' care.

All three minors were prosecuted and tried as war criminals, and the two convicted were condemned on the same ground.(3)

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(1) Other alternatives, where there are no parents or the latter are not suitable, are committal to the minor's guardian or to an educational institution.

(2) Article 463 in conjunction with Article 40 of the Penal Code.

(3) In the Belsen Trial, which was conducted by a British Military Court, several of the accused were under age at the time of the offence, and were all convicted to various penalties. Such was, for instance, the case with accused Irma Grese, Heinrich Schrierer and Ilse Forster. See Vol. II of this series.

CASE No. 51

TRIAL OF KARL LINGENFELDER

PERMANENT MILITARY TRIBUNAL AT METZ
JUDGMENT DELIVERED ON 11TH MARCH, 1947

Destruction of Monuments as a War Crime

A. OUTLINE OF THE PROCEEDINGS

The accused, Karl Lingenfelder, a German from Mussbach, came to France as a settler in the first days of occupation and took possession of a farm called " Bello " at Arry, Moselle, whose owners had been expelled by the German authorities. He was charged with destruction of public monuments and with pillage.

It was shown that, in May, 1941, the accused, acting upon the order of a German official, Buerkel, used four horses to pull down the monument erected by the inhabitants to fellow citizens who died during the war of 1914–1918, destroyed the marble slabs bearing the names of the dead, and broke the statue of Joan of Arc. It was also shown that in September, 1944, the accused left Arry for Germany, and removed with him four horses and two vehicles belonging to the French farm he had occupied during the war.

As alleged by the Prosecution, the accused confessed to the charges and admitted that the order given him by Buerkel was made without threats and that he was under no obligation to render account of its execution.

The Court passed a sentence of imprisonment for one year, while admitting extenuating circumstances.

B. NOTES ON THE CASE

The pulling down and partial destruction of the monument erected to the memory of the inhabitants who died during the 1914–1918 war and the destruction of the statue of Joan of Arc, are clear violations of the laws and customs of war, punishable as war crimes.

Under Article 56 of the Hague Regulations, 1907, the property of local authorities in occupied territory, as well as that of institutions dedicated to " public worship, charity, education and to science and art ", even if owned by the State, is regarded as private property. The consequence is that, by virtue of Article 46 of the Hague Regulations, such property must be " respected " by the occupying authorities. Violations of this rule are dealt with in the following terms in Article 56:

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

It is on the ground of this rule that the 1919 Commission on Responsibilities included the above offence in its list of war crimes, under Item XX, which it described as " wanton destruction of religious, charitable, educational and historic buildings and monuments ".

The accused was charged and convicted under the terms of Article 257 of the French Penal Code, which punishes the same type of offence, and thus covers in French municipal law the case dealt with in Article 56 of the Hague Regulations. It runs as follows:

" He who destroys, pulls down, mutilates or damages monuments, statues or other objects dedicated to public utility or embellishment, and erected by public authority, or with their permission, shall be punished with imprisonment from one month to two years, and with a fine of 1,200 to 6,000 francs."

In respect of the removal of horses and vehicles belonging to the owner of the farm " Bello ", the Court came to the conclusion that it did not amount to pillage, as provided against in Article 221 of the Code of Military Justice and Article 2, paragraph 2, of the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes, but constituted a case of theft falling under the terms of Articles 379 and 401 of the Penal Code.(1) The punishment to be imposed was therefore limited to a term of imprisonment instead of hard labour. As is the case with all French judgments, no reasons were given for such findings in this case. It may well be that the decision was reached on the basis of the fact that no violence was used by the accused when removing the horses and vehicles. The fact that he did not belong to the category of military personnel, to whom Article 221 of the Code of Military Justice is restricted, may have also been relevant.(2)

CASE No. 52

TRIAL OF CHRISTIAN BAUS

PERMANENT MILITARY TRIBUNAL AT METZ
JUDGMENT DELIVERED ON 21ST AUGUST, 1947

Theft and " Abuse of Confidence " as War Crimes

A. OUTLINE OF THE PROCEEDINGS

The accused, Christian Baus, a German transport contractor from Neuenkirchen, the Saar, was, in 1940, appointed by the German authorities

(1) Regarding the distinction between theft and pillage in French law, see p. 63.
(2) On the question how theft is or may be regarded as a war crime in addition to pillage, see p. 64.

land superintendent (Bauerfuehrer) in occupied France, at Tragny, Moselle. He was charged with theft and " abuse of confidence " (abus de confiance).

The accused's assignment was to control the management of a number of French farms in the area. He himself managed one farm and supervised the management of five other estates. From the indictment and judgment it appears that some of the moveable property from one of these farms had been given him by the owner, Joseph Hocquart, for his personal use during his assignment. This included pieces of furniture, crockery and bed linen. It was shown that, before going back to Germany as a result of the German retreat, Baus discovered at the farm run by him and at that of Hocquart, hidden places containing various belongings of the two farms' owners. It was further shown that during the retreat he took with him to Germany a large amount of the property, including that lent him by Hocquart. Most of it was found at his home in Germany.

The accused confessed to the charges, but alleged in his defence that part of the furniture had been given him by the German custodian in charge of the farms, and that he had been under the obligation to pay damages in case of loss of the furniture. He alleged that some German soldiers occupying Hocquart's house had told him to take away two pieces of furniture belonging to Hocquart and used by him with Hocquart's consent, and had said that otherwise it would have to be destroyed. He was, however, unable to prove either point.

The Court passed a sentence of two years' imprisonment.

B. NOTES ON THE NATURE OF THE OFFENCE

The first Count on which the accused was convicted, was that of theft under the terms of Articles 379 and 401 of the French Penal Code. In regard to the goods stolen by him, the accused was also found guilty under Article 2, paragraph 8, of the Ordinance of 28th August, 1944, which treats as pillage any " removal " of goods from French territory in time of war. A comment on these two offences and their place within the field of war crimes has already been made in connection with another trial.[1]

The second Count on which the accused was found guilty was that of " abuse of confidence " (abus de confiance) as covered by Article 406–408 of the Penal Code. The Code provides for several different types and cases of " abuse of confidence ". Under Article 408 the offence is committed when a person " misappropriates or dissipates " belongings, goods, moneys or documents entailing financial rights or obligations which were entrusted to him on the basis of various legal acts or contracts, such as for hire, for use free of charge, for legal representation, for safe-keeping, whereby the recipient was under an obligation to return the object or to make a definite use of it. In French penal law whenever such " misappropriation or dissipation " takes place the perpetrator is guilty of abusing the confidence of the

[1] See pp. 62–65.

person who gave him any of the above objects for the purpose agreed between the parties. The maximum penalty in such cases is two years' imprisonment and/or a fine not exceeding 120,000 francs; in certain cases, involving public confidence, the penalty can be increased to a maximum of 10 years and/or a fine of up to 600,000 francs.

In the case of Baus, the offence was committed in respect of the goods lent to him by Hocquart, for which he could not, in the circumstances, have been prosecuted as a thief. The decision of the Court on this Count is an illustration of how offences of this nature may fall within the purview of war crimes. Technically speaking, in French law their formal link with war crimes is established in the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes. Under Article 2, paragraph 8, any " removal " of French property from France in time of war, be it as a result of theft, " abuse of confidence " or any other act, is treated as pillage. This rule was applied by the Court not only in respect of the goods technically " stolen " by Baus, but also in respect of those misappropriated by " abusing the confidence " of their owner. Consequently, in French law the case against Baus under this Count was only a case of " pillage " in the wider sense, brought within the terms of the Penal Code as having been committed by abusing the confidence of the victim of the crime. From the viewpoint of international law, it amounts to a specific type of pillage as developed by the laws and jurisprudence of one nation.

The interesting point, however, is that when passing sentence, the Court did not apply the penalty provided for pillage(1) but that for " abuse of confidence ". This procedure would tend to indicate that the Court had taken the view that misappropriation by abuse of confidence was in itself a war crime, and that, consequently, the accused would have been held responsible even if he had not removed the property from French territory. In such case the trial would evidence a further illustration of war crimes against property, and of the laws and customs of war as understood by one nation. A justification for such a legal approach could then be founded on the terms of the preamble of the IVth Hague Convention and the claim made that it amounted to no innovation but only to the application of the general principles of penal law.(2) On the other hand it may well be that such a decision was due only to the French courts' tradition of subjecting war crimes to provisions of common penal law, instead of satisfying itself with implementing special war crimes legislation, as do certain other nations.

Sentences passed against war criminals for " abuse of confidence " are to be found in a number of other trials held by French courts.

In one case, the accused, Heinrich Weber, a German farmer who settled in France during the war, was charged with having abused his lodger's confidence by removing the latter's wireless set to Germany. He was convicted under Article 408 of the Penal Code and Article 2, paragraph 8,

(1) Article 2, paragraph 8, of the Ordinance of 28th August, 1944, prescribes the penalty provided in Article 221 of the French Code of Military Justice, dealing with pillage in time of war. The penalty is hard labour and not imprisonment, as provided for " abuse of confidence " under Article 408 of the Penal Code.

(2) See p. 64.

of the Ordinance of 28th August, 1944, the penalty being a short term of imprisonment as provided in the Penal Code (six months).(1)

In a similar case,(2) the accused, Elisa Kespar, wife of a German settler in France, removed to Germany the furniture of the French family whose dwelling she occupied with her husband. She was convicted for abuse of confidence and sentenced to imprisonment for four months.

In another case the accused was a German engineer who rented a French enterprise. He was convicted for abusing the owner's confidence by selling a horse belonging to the enterprise and " dissipating " the money received from the sale. Here again the conviction was made under Article 408 of the Penal Code and Article 2, paragraph 8, of the Ordinance of 28th August, 1944, the sentence being, as in the previous case, set out in the Penal Code (six months' imprisonment).(3)

CASE No. 53

TRIAL OF PHILIPPE RUST

PERMANENT MILITARY TRIBUNAL AT METZ
JUDGMENT DELIVERED ON 5TH MARCH, 1948

Illegal and Abusive Requisitioning

A. OUTLINE OF THE PROCEEDINGS

The accused, Philippe Rust, an S.S. Obersturmfuehrer serving in occupied France, district of Moselle, was charged with " abusive and illegal requisitioning " of French property and with " employing French subjects on military works ".

It was alleged by the Prosecution that in September, 1944, a local inhabitant, Marcel Schmitt, was ordered and forced by the accused to supply horses and vehicles with which he had to carry German ammunition, and that he was compelled to repair German military bicycles, motor-cycles and electrical installations. It was also alleged that several other French civilians had been subjected to the same treatment, and that the acts of requisitioning were illegally effected in that no receipts were delivered to the owners of horses and vehicles.

The accused pleaded not guilty. He claimed to have acted under superior orders and to have omitted to deliver receipts because the requisitions were in conformity with " usages ".

(1) Judgment of the Permanent Military Tribunal at Metz, delivered on 21st August, 1947.
(2) Judgment of the Permanent Military Tribunal at Metz, delivered on 6th April, 1948.
(3) Judgment of the Permanent Military Tribunal at Metz, delivered on the 25th November, 1947.

The accused was found guilty of " abusing powers conferred upon him to requisition men and vehicles by refusing to deliver receipts ". He was condemned to imprisonment for one year.

B. NOTES ON THE NATURE OF THE OFFENCE

The Prosecution had charged the accused on two Counts. The first Count of " abusive and illegal requisitioning " of property was regarded as a case of pillage in time of war, as covered by Article 221 of the French Code of Military Justice and Article 2 of the Ordinance of 28th August, 1944. This was done in accordance with the latter provision which, in its paragraph 8, explicitly says that " abusive or illegal requisitioning " is treated as pillage, within the terms of Article 221 of the Code of Military Justice. This in turn deals generally with pillage committed by military personnel. The second Count of " using French subjects on military works " of the enemy was treated by the Prosecution as falling under Article 334 of the Penal Code and being a case of " illegal restraint of persons ". This was done in accordance with Article 2, paragraph 6, of the Ordinance of 28th August, 1944, which expressly includes under the notion of " illegal restraint " the use of civilians or prisoners of war on military works.

When dealing with these charges the Court made alterations in respect of the offences and the relevant provisions of substantive law. No specific reasons for these alternatives were given in the judgment, but from the questions put by the President to the members of the Tribunal and their answers, it appears that, in view of the evidence, the Court found the accused not guilty of the charges as submitted by the Prosecution. It dismissed the charge that the accused had committed requisitions of property amounting to pillage, and also the charge that civilians were used on military works. Instead, the Court found the accused guilty in respect of both property and civilian labour, of the following offence:

> " Abusing powers conferred upon him for the purpose of requisitioning men and vehicles by refusing to deliver receipts for such requisitions."

In this respect the Court applied Article 214 of the Code of Military Justice. This punishes " any military person who abuses powers conferred upon him " in regard to requisitioning or " who refuses to deliver receipts " for such requisitions. These alterations affected the penalty to be imposed. Whereas the offence of illegal requisitioning amounting to pillage under Article 2, paragraph 8, of the Ordinance of 28th August, 1944, and Article 221 of the Code of Military Justice, and the offence of " restraining " civilians by forcing them to perform military work as provided in Article 2, paragraph 6 of the Ordinance and Article 344 of the Penal Code, both entail hard labour, as a rule for life, the punishment for an offence under Article 214 of the Code of Military Justice is limited to imprisonment for from two months to two years.

It should be noted that in the findings of the Court as quoted above, the objects requisitioned were specifically stated to comprise not only property but also manpower or labour. It equally follows from the same findings that the abuse for which the accused was found guilty consisted in the requisition being made without due delivery of receipts concerning the property and labour requisitioned.

The alteration of relevant provisions of substantive law was effected by the Court in accordance with a rule of procedure contained in Article 88 of the Code of Military Justice. Under this provision the findings of the Military Tribunal are reached by means of questions put by the President to the Judges, in which he sums up the issues at stake as deriving from the indictment. In this connection whenever the President finds that the main offence may be regarded as an act entailing a different punishment or representing an offence against common penal law, he is entitled to submit to the Court subsidiary questions to this effect and obtain a decision on the alternatives. It is on the basis of this rule that the Tribunal rejected the charges and provisions invoked by the Prosecution and replaced them by findings of its own.

The charges of the Prosecution and the decision of the Court were centred around the concept of illegal or abusive requisitioning of property and labour. The issue is dealt with in Article 52 of the Hague Regulations, 1907, respecting the Laws and Customs of War on Land, which reads:

> " Requisitions in kind and services shall not be demanded from local authorities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.
>
> " Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.
>
> " Contributions in kind shall as far as possible be paid for in ready money; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible."

Violations of this rule were included by the 1919 Commission on Responsibilities in its list of war crimes under Item XV and described therein as " exaction of illegitimate or of exorbitant contributions and requisitions ". It will be noted that the phraseology used in the previously quoted provision of the French Ordinance of 28th August, 1944, concerning the Suppression of War Crimes, Article 2, paragraph 8, which used the terms " illegal or abusive contributions ", is in full accord with both Article 52 of the Hague Regulations and with the 1919 list of war crimes. So also is Article 214 of the French Code of Military Justice, under which the accused was found guilty and convicted. It speaks of " abusive requisitioning ", which term is similar to that of " exorbitant " requisitions mentioned in the 1919 list, and treats as " illegal " and criminal the fact of omitting or refusing proper receipt, as required by the Hague Regulations.

In this manner, the offence of the accused appears to be a clear case of a war crime covered by the laws and customs of war as prescribed both in international and French municipal law. The French law referred to by the Prosecution and the Court is an illustration of how rules of international law, such as the one now contained in Article 52 of the Hague Regulations, have found their way into municipal penal law, and how they complemented each other. Provisions of the Ordinance of 28th August, 1944, and of French penal law speak of " illegal " or " abusive " requisitioning without defining either concept. Elements for a definition are to be found in Article 52 of the Hague Regulations. This provides that requisitionings are to be limited to the " needs of the army of occupation " and that they must, at the same time, " be in proportion to the resources of the country ". The objects requisitioned are defined so as to include property on the one hand (requisitions " in kind ") and manpower or labour on the other (requisitions " in services "). A further legal limitation on acts of requisitioning is that such acts relating to manpower must " not involve the inhabitants in the obligation of taking part in military operations against their own country ". Any violation of these limitations amounts to illegal or abusive requisitioning, or both, and constitutes a war crime.

The offence for which the accused was found guilty eventually amounted to a case of " illegal " requisitioning, that of violating the requirements according to which, unless payment is made " in ready money ", a receipt is to be given in respect of the objects requisitioned. As already stressed, the Court was not satisfied that any other offence had been committed by the accused. It therefore freed him from the charge that civilians were used on " military works " and that, by requisitioning their labour as well as their horses and vehicles, the accused had gone beyond the limitations imposed by Article 52 of the Hague Regulations. Although no reason for this can be found in the judgment, it is safe to assume that such a decision was reached on the merits of the facts and evidence which were made available to the Court. This probably includes the conclusion that the civilians concerned in the trial and their property were used " for the needs of the army of occupation " and were " in proportion to the resources " of the occupied territory. It may well include also the conclusion that repairs of military bicycles, motor-cycles and electrical installations, as charged by the Prosecution, did not involve the inhabitants in taking part in " military operations against their own country " and consequently did not amount to " military works " in the sense required by the laws and customs of war.

In the circumstances of the trial, the question whether and to what extent, generally speaking, the use of civilians on military work, as distinct from prisoners of war, is forbidden, is not answered in the judgment under review. No light is thrown upon the issue as to whether and if so what kind of "military works " amount to " taking part in military operations " against one's own country.(1) This question, however, occurs in other trials which are reported upon in these volumes.(2)

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(1) On the issue at stake, see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, H.M. Stationery Office, London, 1948, Chapter IX, B.

(2) See especially Vol. VII, pp. 53–58.

CASE No. 54

TRIAL OF KARL-HEINZ MOEHLE

BRITISH MILITARY COURT, HAMBURG
15TH TO 16TH OCTOBER, 1946

A. OUTLINE OF THE PROCEEDINGS

1. CHARGE AND THE EVIDENCE

The accused was charged with " Committing a war crime in that he, at Kiel, between September, 1942, and May, 1945, when senior officer of the 5th U-boat Flotilla, in violation of the laws and usages of war, gave orders to commanding officers of U-boats who were due to leave on war patrols that they were to destroy ships and their crews ".

The Prosecution evidence was entirely documentary, consisting of statements made by the accused. The Defence called no witnesses other than the accused himself.

2. COMMON GROUND BETWEEN THE PROSECUTION AND THE DEFENCE

The accused was a Korvetten Kapitan in the German Navy and from September, 1942, to May, 1945, was the officer commanding the 5th U-boat Flotilla at Kiel. In this capacity it fell upon him to brief U-boat commanders prior to their going out on operational patrols. Part of this briefing—though by no means the essential part which was of a technical nature—was to acquaint the U-boat commanders with an order originating from the German U-boat Command. This order, called the " Laconia Order ", was issued on the 17th September, 1942. It was in the nature of a standing order which was read regularly to the U-boat commanders. They were never given to them in writing. According to the accused the order stated:

> " (1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.
>
> " (2) Orders for bringing in captains and chief engineers still apply.
>
> " (3) Rescue the shipwrecked only if their statements would be of importance for your boat.
>
> " (4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities."

The accused agreed that these orders went much further than the previous standing orders which had been issued by the U-boat Command in 1939.

If the U-boat commanders asked no questions, after that briefing, nothing further would be said; if they raised any queries, the accused would give them two examples to elucidate the policy of the Naval High Command. The first example was that of a U-boat reporting in its war log that it had encountered a raft with five British airmen on it in the Bay of Biscay. Being unable to take them on board the U-boat proceeded on its journey. The commander was severely reprimanded by the Commander-in-Chief, U-boats, and it was pointed out that the correct action would have been to destroy the raft since it was highly probable that the airmen would be rescued by the enemy and would once more go into action.

The second example was that of American ships sunk by U-boats off the Caribbean coast. The criticism levelled against the U-boat commanders who had sunk the ships was that the crews were not destroyed but reached the coast and took over new ships. This, according to the U-boat commander, was to be prevented. Ships and crews were to be destroyed.

After giving these two examples, not as his opinion but as the policy of Naval Command, the accused went on to say to the U-boat commanders:

" Officially you cannot get such an order from the U-boat Command. You act in this matter according to the dictates of your conscience. The safety of your own boat must always remain your primary consideration ". The accused estimated that he had read out these orders and made the above comments to 300 or more U-boat commanders during the time he commanded the 5th Flotilla at Kiel. Many commanders after the reading of the order said: " That is quite clear and unequivocal, however hard it may be ".

3. THE ISSUE

Since the Prosecutor and the Defence agreed on the wording of the orders from U-boat Command and the accused admitted having passed them on to all U-boat commanders whom he briefed, the Court had two questions to decide:

(i) What was the true interpretation of these orders ?

(ii) Having put the true interpretation on them, were they contrary to the laws and usages of war ?

(i) *The interpretation of the orders*

The Prosecution's case on this first question was that the orders clearly meant that the U-boat commanders should destroy ships and their crews. Quoting from a statement made by the accused, the Prosecutor said: " So far as concerns the order itself it undoubtedly states, and in particular to those who know the manner in which the Commander-in-Chief U-boats was known to have given his orders, that the High Command regarded it as desirable that not only ships but also their crews should be regarded as objects of attack. German propaganda was continuously stressing the shortage of crews for enemy merchant ships and the consequent difficulties. I, too, put this construction on their order ".

The Defence case was that the orders were ambiguous and that by passing on these ambiguous orders with the final comment that each commander should follow the dictates of his conscience, Moehle had done the utmost he could do as a serving officer. The orders were ambiguous as they contained a prohibition against saving the crews but not an order to kill them.

During the course of the examination of the accused by the Judge Advocate the following exchange took place:

JUDGE ADVOCATE (after reading paragraph 1 of the orders): Do you agree or not that it comes to the same thing (i.e. the killing of the crew) if you send a lifeboat off in the middle of the Atlantic Ocean without a drop of water on board for the people to drink ?

A.: Yes, in its effect it will very often be the same, but the prohibition to save the crew has been issued because of the fact that U-boats whilst trying to save the crews of sunk ships have been attacked. . . . "

Q.: Do you agree that what I have read to you clearly applies to people after they have left the ship ?

A.: Yes, that no safety measure should be undertaken.

Q.: Do you think there was a single U-boat commander in the German Navy who could be in any doubt as to the meaning of that first paragraph ?

A.: No.

Q.: Do you think if you had tried to make it clearer, you could have made it clearer ?

A.: No, the prohibition to undertake rescue measures could not have been explained more explicitly.

Q.: Do you then agree with me that there is no ambiguity whatever in paragraph 1 of that Admiral Doenitz Order ?

A.: I agree with that.

(ii) *The Legality of the Order*

If the order was an order not to rescue survivors because it was dangerous for the U-boat to do so then it was a legal order. If the order was an order to kill survivors, then it was clearly illegal.

The Judge Advocate, summing up, said: " The Prosecution asked you to say that there is no formidable question of international law involved. They say that you should hold that international law is quite clear. After a ship has been sunk there is a duty upon the submarine commander (if he can, in all circumstances) to save the lives of the crew and they invite you to say (whether you accept that contention or not) that the order is directed to that aspect of the case and no further. They ask you to read it and they ask you to say: does it not all deal with the question of rescuing members of ships sunk after that has taken place. I do not think anybody is putting up the

proposition that if it were possible to save the lives of the crew from a ship that it torpedoed that there is not a duty to try and do so. Now I am sure that the naval officer in the Court will tell you what I think you already know and I think we all concede that the real important duty of the submarine commander is to ensure the safety of his own ship, and if it is a question of saving life or saving his ship, then clearly he must save his ship. But the Prosecution are saying here that that order which was distributed to the U-boat commanders is of the widest possible wording. Whether that is right or not is for you to decide ".

4. FINDING AND SENTENCE

The accused Moehle was found guilty and sentenced to five years imprisonment.

B. NOTES ON THE CASE[1]

1. SUBMARINE WARFARE IN GENERAL

Article 16 of Convention No. 10 agreed upon at the Hague in 1907 says: " After every encounter the two belligerents shall as far as military interests permit, take steps to search for the shipwrecked, wounded and sick and protect them (as well as the dead) against pillage and ill-treatment ". This is the general rule of maritime warfare. Its application to submarine warfare was laid down in Article 22 of the Naval Agreement concluded in London in 1930.(2) " In their action with regard to merchant ships, submarines must conform to the rule of international law to which surface vessels are subject; in particular, except in cases of persistent refusal to stop on being duly summoned or active resistance to visit and search a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose, ships boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions by the proximity of land or the presence of another vessel which is in a position to take them on board."

This Naval Agreement was signed by the United States, Great Britain, France, Italy and Japan. When it expired in 1936, the above-mentioned Powers signed in London the " Naval Proctocol "(3) 6th November, 1936, dealing with submarine warfare. This Naval Protocol incorporated the above-mentioned provisions of the London Agreement of 1930, with regard to submarines. Germany acceded to this Protocol in the same year, and this was the position at the outbreak of the second World War in September, 1939. Shortly after the outbreak of war, Germany embarked once more on

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(1) Regarding the British law on war crimes questions, see Vol. I, pp. 105–110.
(2) Treaty Series No. 1 (1931), Cmd. 3758.
(3) Treaty Series No. 29 (1936), Cmd. 5302.

unrestricted submarine warfare against neutral and enemy vessels contrary to the 1936 Naval Protocol. On 27th November, 1939, Great Britain issued an Order in Council pronouncing retaliatory measures on the ground that Germany had violated her obligations under the Naval Protocol. (This Order in Council was modelled on an Order in Council dated 11th March, 1915, protesting against the violation of the Hague Convention by Germany in the first World War.) France and various neutral countries protested against the unrestricted submarine warfare carried out by the German Naval Command as being contrary to international law. Another retaliatory measure adopted by the Allies was the laying of mines in the Skagerrak in April, 1940.

The two main arguments put forward by German writers to justify Germany's conduct are:

(i) That the provisions of the Protocol of 1936 do not apply to attacks on vessels in " operational zones "; by entering such operational zones barred to merchant ships the vessel behaves in a manner which is tantamount to " persistent refusal to stop " and thus puts itself outside the Naval Protocol.(1)

This argument was rejected by the International Military Tribunal at Nuremberg. The Judgment points out that the practice of proclaiming operational zones and sinking of merchant vessels entering those zones was employed by Germany in the 1914–1918 war and adopted in retaliation by Great Britain. The Washington Conference of 1922, the Land and Naval Agreement of 1930 and the Protocol of 1936 were entered into with full knowledge that such zones had been employed in the first World War yet the Protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol.

(ii) That Great Britain, in accordance with the Handbook of Instructions of the Merchant Navy of 1938, armed her merchant vessels and in many cases convoyed them with an armed escort, and that these armed merchantmen had orders to send position reports on sighting U-boats, thus integrating the Merchant Navy into the network of naval intelligence. This argument was entertained by the International Military Tribunal at Nuremberg, and in its judgment the Tribunal said with regard to the accused Doenitz: " In the actual circumstances of this case the Tribunal is not prepared to hold Doenitz guilty of his conduct of submarine warfare against British armed merchant ships ", and " in view of all the facts proved, and in particular of an order of the British Admiralty announced on the 8th May, 1940, according to which all vessels should be sunk at sight in the Skagerrak and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that that nation entered the war, the sentence on Doenitz

(1) " Schmitz Zeitschrift Für Auslandisches Öffentliches Recht und Völkerrecht " 8 (1938), p. 671. Also Oppenheim-Lauterpacht, International Law, 6th edition, Vol. II, p. 385, footnote 2.

is not assessed on the ground of his breaches of the international law of submarine warfare ".(1)

2. THE TREATMENT OF SURVIVORS AFTER A SINKING OF A VESSEL BY SUBMARINE

If a submarine commander can, without danger to his boat, save or succour survivors, he is no doubt under a duty to do so. If, however, by so doing he would endanger his boat he cannot be held responsible if he does not save any such survivors since it is recognised that the safety of his own boat and its crew must be his primary consideration. It is clearly recognised, on the other hand, that the killing of defenceless survivors of a torpedoed ship is a war crime.(2)

The Defence argued that the " Laconia Order " of 1942 was an order to impress upon the U-boat commanders that they should not rescue survivors as doing so endangered their U-boats. The " Laconia Order " was thus a legal order stressing an operational necessity. The Prosecutor argued that the " Laconia Order " was an order to kill survivors and thus against the generally recognised rules of sea warfare. The Judge Advocate left this question—the interpretation of a document, the authenticity of which was agreed by Defence and Prosecution—to the Court, though he suggested in his summing up that the order was an order to kill.

The International Military Tribunal, in their judgment on Admiral Doenitz, found that by the " Laconia Order " Doenitz had not deliberately ordered the killing of survivors of shipwrecked vessels. The Judgment said: " The Tribunal is of the opinion that the evidence does not establish with the certainty required that Doenitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous and deserve the strongest censure ". The finding of the Court in the Moehle case can be reconciled with the Nuremberg judgment. The International Military Tribunal decided that the " Laconia Order " was ambiguous. By commenting on this ambiguous order when passing it on, and by giving examples which undoubtedly must have given the U-boat commanders the impression that the policy of the Naval High Command was to kill ship's crews the accused removed this ambiguity. The order he passed on could be interpreted by a reasonable subordinate only in one way, namely, as an order to kill survivors. Thus, whereas there was a reasonable doubt as to the meaning of Doenitz's order and therefore the benefit of that doubt was given to Doenitz by the International Military Tribunal, there was no such doubt in view of the evidence before this Court on the way in which Moehle had added to this order.

3. THE DEFENCE THAT THE ILLEGAL ORDERS WERE NOT CARRIED OUT

Counsel for the Defence argued that the accused could not be held responsible " because there were no manifest effects of this order and even the Prosecutor has pointed out that no evidence of criminal actions as a result

(1) The Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Cmd. 6964, p. 109.

(2) See summing up by the Judge Advocate in the Peleus Trial, Vol. I, p. 11.

of this order has been given and I may therefore put it to the Court that such crimes were not committed ".

The Judge Advocate's reference to this point in his summing up was this: " Now the Prosecutor has quite clearly told you that he has no evidence to prove and establish that ships were sunk and sailors were drowned by the operations of the U-boat commanders as a result of this order, but generally, you do know that these orders were being repeated over and over again over a period of years, and during that time a great many sailors were killed and it is for you to decide, as service personnel, but do you think it is common sense and quite logical to assume that it is an irresistible inference that such orders and such explanations by the accused must have had some effect upon the ultimate course of conduct of U-boat commanders ? Do you think that a U-boat commander, if he is a good German naval officer wishes to flout the views and directions of his higher command ? That is a matter for you ".

The charge, as laid, charges the accused with giving orders to U-boat commanders " that they were to destroy ships and their crews ". Strictly speaking, therefore, what happened at a later date as a result of these orders is not relevant in deciding the question whether the accused did or did not issue the orders to kill the crews. It may, however, be argued that the question before the Court was how a reasonable U-boat commander would interpret the orders given by the accused and that therefore the way in which U-boat commanders did actually interpret these orders is material.

By finding the accused guilty the Court held that a military superior who issues orders which are against the laws and usages of war commits a war crime even if these orders were not carried out by his subordinates. Having found the accused guilty of issuing the illegal orders, the results of this order may be a relevant consideration in assessing the punishment.

4. THE RELATION OF THIS TRIAL TO OTHER WAR CRIMES TRIALS

The " Laconia Order " was issued by the German U-boat Command in 1942. It was passed on by Moehle as a commanding officer, 5th Flotilla, continuously from 1942 to 1945. In one case the sinking of the *Peleus* (a Greek ship chartered by the British Ministry of War Transport) by a U-boat, the " Laconia Order " was carried out by a U-boat commander, Heinz Eck.

The indictment against the German Major War Criminals charged the Commander-in-Chief U-boats, Grand Admiral Doenitz, *inter alia*, with the issuing of the " Laconia Order ". In its judgment the International Military Tribunal recorded its opinion that the orders were " undoubtedly ambiguous " but were not deliberate orders for the killing of shipwrecked survivors.(1)

Heinz Eck was tried and convicted by a British Military Court at Hamburg in October, 1945.(2) for firing on and killing shipwrecked members of the crew of the S.S. *Peleus* which he had sunk in the Atlantic Ocean. Eck, though not pleading superior orders in his defence, quoted the " Laconia Order " verbatim when giving his evidence.

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(1) Cmd. 6964, p. 109.

(2) See Vol. I of this series, case No. 1.

These three trials, seen together, deal with three stages of the same order, with the Admiral who originated the order, with the staff officer who passed it on and with the officer at the end of the chain of command who carried it out. Though there was no evidence that Eck had been one of the 300 U-boat commanders briefed by Moehle, he had received the " Laconia Order ".

CASE No. 55

TRIAL OF HELMUTH VON RUCHTESCHELL

BRITISH MILITARY COURT, HAMBURG
5TH TO 21ST MAY, 1947

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

All five charges brought against the accused referred to his conduct when he commanded German armed raiders in the North Atlantic between 1940 and 1942. The charges were of three kinds:

(i) that in two engagements he continued to fire after the enemy had indicated his surrender (first and fifth charges);

(ii) that in two other engagements he sunk enemy merchant vessels without making any provision for the safety of the survivors (second and fourth charges);

(iii) that after the engagement forming the subject of the fourth charge he ordered the firing at survivors on life-rafts (third charge).

The accused pleaded not guilty to all five charges.

2. THE EVIDENCE AND ARGUMENTS

(i) *Charges of prolongation of hostilities after surrender*

(*a*) *The Case of the Davisian (first charge)*

The Prosecution alleged that the *Davisian*, a British merchant vessel, was attacked in daylight, without warning, by a German armed raider commanded by the accused on 10th July, 1940. The attacker destroyed her wireless aerial with his first salvo. He maintained heavy fire for about five minutes and then signalled " use your radio not ". The captain of the *Davisian* stopped his engines, hoisted an answering pennant and acknowledged the signal. In spite of this, the raider's firing continued for 15 minutes, wounding 8 or 10 of the crew of the *Davisian*, whilst they were trying to abandon ship. The crew were later picked up by the raider.

The Defence relied on two members of the crew of the accused's ship, and on the log kept by the accused, to prove that no signal was received by the

raider. The log says: " After seven salvoes I give the order to cease fire. The crew are taking to their boats. No wireless telegraph has been heard ". The defence also contended that there was some movement amidship towards the gun, which caused the accused to re-open fire. The log says (on this point): " Shortly before the boats are put out I see a few men running aft to the gun. I immediately open direct fire on the gun with the 3.7 and 2 cm. The men run back to their boats and lower them to the water ".

The Judge Advocate, summing up, directed the minds of the Court to three questions: (1) " Was the signal ' use your radio not ' hoisted by the raider "; (2) " If so, was it acknowledged by the *Davisian* "; (3) " Was the accused justified in his belief that he saw men running to the gun, or were the crew of the *Davisian* merely sheltering from his fire ? " When considering the last question, the Court had to bear in mind that the raider steamed across to the opposite side of the *Davisian* and the movement on deck of the *Davisian* might have been the natural result of the accused's tactics to spray the deck with anti-aircraft fire in order to hurry the crew in taking to their lifeboats.

(*b*) *The case of the Empire Dawn* (*fifth charge*)

The *Empire Dawn*, a British merchant ship, was attacked in the North Atlantic without warning by a raider commanded by the accused during the night of the 12th September, 1942. The first salvo set the bridge on fire and destroyed the wireless, but though the *Empire Dawn* was rendered powerless by the hit she nevertheless continued to progress, and she was still moving forward when she eventually started to sink. Her captain did not open fire. He signalled by means of a torch that he was abandoning ship.

The Prosecution alleged that in spite of this the fire continued whilst the lifeboats were being lowered, breaking the ropes of one of the lifeboats with the result that it crashed into the sea and several members of the crew were killed. The survivors were eventually picked up and taken aboard the raider.

The Defence argued that it was not proved that the torch worked, that even if it did work a signal made with an ordinary torch against the background of the blazing bridge could not be observed on board the raider as the crew were blinded by the flash of their own guns. The accused gave evidence to the effect that he received no signal from the *Empire Dawn*. He kept up the firing to hurry the crew to their lifeboats as it had been repeatedly observed by the German commanders that whilst some of the crew of a sinking ship had taken to their boats, others would continue to resist.

The questions the Court had to consider were similar to those regarding the first charge : (1) " Was the signal of surrender given"; (2) " If so, was it received"; (3) " If it was not received, did the accused by his conduct prevent himself from receiving any signal ? "

The Judge Advocate advised the Court that even if they found as a fact that no signal was received by the raider, they could still convict the accused if they came to the conclusion " that the accused deliberately or recklessly avoided any question of surrender by making it impossible for the ship to make a signal ".

(ii) *The charges of failing to make provisions for the safety of the survivors after a battle at sea*

(*a*) *The case of the Beaulieu* (*second charge*)

The *Beaulieu* was a Norwegian tanker and was attacked without warning by a raider commanded by the accused on the night of the 14th August, 1940.

The Prosecution's case rested entirely on the log kept by the accused. In this log the accused, after pointing out that the *Beaulieu* was sailing without lights and that that was sufficient proof for him that she was an enemy vessel, recorded that he attacked her at 2050 hours and put her out of action by scoring nine direct hits. The *Beaulieu* had stopped and had put on her navigation lights, her masthead lights and her deck lights. She used no radio and did not fire or attempt to man the gun. The log continued: " There is a boat aft at her stern, with a crew of about 18 or 20 men in it. The cutter on the starboard side was not yet in the water. I again bring the deck under fire at close range so as to be secure against a burst of fire from the enemy from rifles or pistols. The enemy boat disappeared in the darkness. I did not see it again and also did not notice how the second one put off. One cannot and may not worry about boats and wounded at night for one cannot be certain in advance when approaching them whether they are going to start rifle fire. If a boat were to come alongside of its own accord to get help I would never send it away, but apparently the tales about us are so brutal that they would rather set out on the long sea trip than approach a warship. There was much in the procedure that my crew had not understood. I had to make clear to them why the attacks had to take place at night now and why we were taking no more prisoners. I had the feeling that for the first time a sense of the seriousness of war had been brought home to my men and that was good."

The accused eventually moved off at 2328 hours without having made an attempt to rescue the survivors. The distance from the place of the sinking to the nearest shore was approximately 1,200 miles. Four members of the crew were killed by the raider's fire, the remainder were picked up by an Allied vessel after five and a half days at sea in their two boats.

The defence case was that the accused sent a party on board the *Beaulieu* to investigate and any survivors who had stayed on board would have been rescued by this boarding party and that the raider stayed in the vicinity of the abandoned *Beaulieu* for two and a half hours, circling round and by increased look-out and special attention did everything possible to trace survivors. The defendant met the argument that he should have put out lifeboats to search for the survivors by saying that a lifeboat in the Atlantic swell could see less than a great number of people who are on a ship five metres above the water level. He also argued that the reason for not using any searchlights was that his searchlights had been dismantled before the action started as past experience had shown that in view of their blinding effect they did more harm than good. Two expert witnesses (a British captain and a former German admiral) agreed that with regard to lowering lifeboats and the use of searchlights, they would have acted in the same way as the accused did.

The Judge Advocate, summing up, pointed out that the *Beaulieu* had done everything that the accused himself in the course of cross-examination had indicated could be expected as a sign of surrender. The accused had furthermore seen with his own eyes 18 to 20 survivors trying to lower the lifeboat. In spite of this he again brought the whole deck under fire. In view of this conduct, the Judge Advocate said the Court may think " that this story that the survivors were voluntarily preferring to travel the Atlantic instead of surrendering," becomes almost fantastic. The accused could not be expected to look indefinitely for persons who were quite voluntarily taking that course of their own accord, but if you come to the conclusion that they were influenced in their decision by a real fear induced by the savage and (as they thought) unreasonable persistence of the attack, then in my opinion if the accused knew they were being so frightened his duty after the sinking became a very much greater one. If you took that view about the matter, you would, in my opinion, be justified in reaching the conclusion (if you are satisfied that these facts had been proved), that the accused was guilty of the charge ".

(*b*) *The case of the Anglo-Saxon* (*fourth charge*)

On the night of the 21st August, 1940, an armed raider commanded by the accused, attacked the *Anglo-Saxon*, a British merchant vessel, without warning. The first salvo hit the gun and blew up some ammunition, setting the stern ablaze. The raider's log said: " She had stopped and could go no farther ". The *Anglo-Saxon* began to send out distress signals but the raider's wireless succeeded in jamming these signals. The log kept by the accused said: " The flak is in action at ranges of less than 1,000 metres and is firing on direct targets. It can scarcely be checked and is making such a noise that the ' cease fire ' arrives much too late. For just a short time two lights were noticed in the vicinity of the steamer apparently from two boats which at one time kept a short morse traffic which, however, could not be read. Then no more lights or boats were seen. Since no distress messages of any kind were made I did not undertake any further search operations ". One of the survivors of the *Anglo-Saxon* said in an affidavit admitted as evidence by the Court that the raider gave no chance for the launching of lifeboats by keeping up a continuous stream of fire with tracer ammunition. The witness saw two life-rafts signalling to each other, but his own lifeboat tried to avoid the raider's attention in view of the savagery of the attack that had preceded. Only two survivors reached land after 70 days at sea in their lifeboat. All others perished.

The main arguments of the Defence were:

1. That the prolonged spraying of the deck was accidental.

2. That the survivors tried to escape unnoticed, thus making it almost impossible for the raider to rescue them.

3. That, according to the expert witnesses, the place of sinking was on a main shipping route and that persons left in a lifeboat there had a fifty-fifty chance of surviving.

Since the accused must have known that there were survivors who had taken to their boats, the questions to be considered by the Court were:

1. Did circling round a few times after the sinking of a merchant ship constitute necessary provisions for the safety of the survivors ?

2. If not, was the accused's conduct justified by the attitude of the survivors ?

With regard to the first point, the Judge Advocate said: " Do you think or don't you think that knowing that his own flak had gone on much longer than necessary (assuming as is obvious from the log that that was an accident) an armed raider might reasonably have made the most special and exhaustive search for those survivors instead of assuming that since no distress messages of any kind were made, he did not undertake any further search operations ? "

With regard to the second point, the Judge Advocate's advice proceeded on the same lines as in the case of the *Beaulieu*.

(iii) *The charge of attempting to kill survivors by firing on lifeboats (third charge)*

One of the two survivors of the *Anglo-Saxon* alleged in his affidavit that whilst in the lifeboats his party was fired upon by the raider. The accused denied this and his Counsel pointed out that the firing was directed above the heads of the survivors in the lifeboats and the ricochets from the ship could easily create the impression among the survivors that they were being fired upon. As the witness who had sworn the affidavit on which the Prosecution's case rested could not be brought before the Court to give his evidence in person, the Prosecutor indicated that he would not pursue this charge any further.

(iv) *Finding and sentence*

The accused was found not guilty of the third and the fifth charges. The accused was found guilty of the first, second and fourth charges. He was sentenced to 10 years' imprisonment. The confirming officer did not confirm the finding of guilty on the second charge. He reduced the sentence to seven years' imprisonment.

B. NOTES ON THE CASE

(i) *Choice of charges*

The facts underlying all charges are the same in so far as the accused, as commander of various armed raiders, attacked four Allied merchant vessels without warning, and sank them. It was contended by the Prosecution in all four cases that by his methods of attack and by unduly prolonging those attacks after the attacked vessel had surrendered, he had violated the rules of sea warfare. In two cases, however (the case of the *Davisian* and the *Empire Dawn*) he eventually took the survivors on board. In the other two cases (the case of the *Beaulieu* and the case of the *Anglo-Saxon*) he failed to do so. It was apparently felt that the failure to rescue any survivors was the graver offence and that in the two latter cases the lighter offence of unduly

prolonging the attack was merged in the graver offence. The accused was thus charged with the failure to rescue survivors after his attack on the *Beaulieu* and the *Anglo-Saxon*, and with continuing to attack after the surrender in the case of the *Davisian* and the *Empire Dawn*. In no case was he charged with attacking a merchant ship without warning.

2. THE LEGALITY OF THE ATTACK ON A MERCHANT SHIP WITHOUT WARNING

The difference between an attack on a warship on the one hand and on a merchant ship on the other, is thus stated by Lauterpacht in the sixth edition of Oppenheim's *International Law*, Vol. II, paragraph 181: " All enemy men-of-war and other public vessels which are met by a belligerent's men-of-war on the high seas . . . may at once be attacked. . . . Enemy merchantmen may be attacked only if they refuse to submit to visit after having been duly signalled to do so ". Counsel for the Defence contended that by arming a merchantman, the merchantman becomes a warship and can therefore be attacked without warning. Whilst he admitted that British writers do not share this view, Counsel relied on American writers, one of whom, Hyde, says in his work *International Law* (Vol. II, p. 469): " A merchantman armed in such a manner that she can sink or damage a man-of-war can under no circumstances claim the protections of a merchant vessel ". Counsel further argued that by arming her merchantmen and integrating them into the naval intelligence network, Britain forfeited the rights hitherto attached to these ships as merchant vessels. He maintained that the International Military Tribunal at Nuremberg had upheld this view.(1)

The Prosecutor pointed out that the question of the legality of the attack did not arise in this case. The accused was not charged with launching any illegal attack and the Court must therefore presume in his favour that his attacks were legal, but whereas the Nuremberg judgment may be interpreted as holding that the unwarned attack on armed merchantmen was legal, the judgment also stressed the fact that the German Naval Command was bound by the London Naval Protocol of 1936.(2) The Prosecutor argued that whereas the Nuremberg judgment may provide a defence for an accused who had violated the clause of the London Naval Agreement dealing with unwarned attacks on merchantmen, the judgment did in no way affect the other provisions of the London Agreement such as the duty to give quarter and the duty to rescue survivors.

Three propositions seem to emerge, either from the utterances of the Judge Advocate or from the findings of the Court: (1) no war crime is committed if an unwarned attack is made upon a merchantman who by reason of arms and wireless communication is part of the war effort of the opposing belligerent; (2) the impunity of attack without warning on a merchantman in these circumstances forms an exception to the general rules of sea warfare and imposes upon the attacking warship the duty to use only adequate force

(1) Cmd. 6964, p. 109.

(2) The Naval Protocol only applies to submarines, but its provisions are taken from the London Naval Agreement (1930) which applies both to submarine and surface vessels. See p. 78

and not to kill or wound a greater number of the crew than is reasonably necessary to secure the defeat of the attacked vessel; (3) as soon as the attacked merchantman is effectively stopped and silenced, all possible steps must be taken by the raider to rescue the crew.

3. THE DUTY TO RESCUE SURVIVORS

The duty to rescue survivors after an engagement is laid down for all naval encounters in Article 16 of the 10th Convention of the Hague, 1907, which says that, " The two belligerents will, as far as military interests permit, take steps to look after the shipwrecked, wounded, etc. ". This duty has been amplified with regard to the sinking of merchantmen by the London Naval Agreement of 1930([1]) which provides that a warship (whether surface vessel or submarine) may not sink a merchant vessel " without having first placed the crew and the ship's papers in a place of safety ", adding that lifeboats are not places of safety for this purpose " unless the safety of the crew is assured in the existing sea and weather conditions by the proximity of land or presence of another vessel which is in a position to take them on board.([2]) Thus, even if an armed merchantman was a warship and not a merchantman, and the London Naval Treaty were therefore not applicable, the chief duty laid down by Article 16 of the Hague Convention for all naval encounters still remains.

With regard to Article 16, the Defence argued that this article says that " both belligerents " must after an engagement search for the shipwrecked and protect them. This, according to Counsel for the Defence, places the duty upon the healthy survivors to look after their wounded comrades and to attract the attention of the enemy so that they may be rescued. If they prefer the hazards of a long sea journey to being taken prisoners and take their wounded with them in an attempt to get away, one cannot hold the raider responsible for not rescuing them.

The Judge Advocate advised the Court in his summing up, that the duty of the accused was higher than the duty generally owed to survivors. if the raider had, by his methods of attack, intimidated the crew of the attacked vessels. Knowing that they were thus intimidated and that they would possibly avoid him, his search should have been even more thorough than is normally required.

The two following propositions seem to emerge: (1) if the raider is aware of survivors who have taken to their lifeboats, he must make reasonable efforts to rescue them; (2) it is no defence that the survivors did not draw attention to their boats if they had reasonable grounds to believe that no quarter was being given.

([1]) Throughout the trial the defence and the prosecution referred with regard to this point to Articles 72–74 of the German Prize Ordinance, but this Ordinance repeats almost verbatim the relevant passages of the London Agreement (1930).

([2]) See p. 78

4. SURRENDER AT SEA: REFUSAL OF QUARTER

Article 23 of the IVth Hague Convention, 1907, says that it is forbidden " to kill or wound an enemy who, having laid down his arms or having no longer means of defence, has surrendered at discretion ". According to modern ideas of warfare, quarter can be refused only when those who ask for it attempt to destroy those who have been showing them mercy (Lawrence, *Principles of International Law*, p. 376). Thus far the law is clear. The question, however, on which there is remarkably little authority is what constitutes unconditional surrender at sea. Oppenheim-Lauterpacht, part 2, paragraph 183, says: " As soon as an attacked or counter-attacked vessel hauls down her flag and therefore signals that she is ready to surrender, she must be given quarter and seized without further firing. To continue to attack, though she is ready to surrender and to sink the vessel and her crew would constitute a violation of customary international law and would only as an exception be admissible in case of imperative necessity or of reprisals ". This passage was relied on as an authority by the Prosecutor and by Defence Counsel. The latter did not plead necessity or reprisals to bring the case within the exception stated by Oppenheim-Lauterpacht. The central question therefore was: are there generally recognised ways of indicating surrender at sea other than hauling down a ship's flag ? Two expert witnesses (a captain in the Royal Navy and a former vice-admiral in the German Navy) gave evidence, *inter alia*, on the customs in this regard of their respective services. The common denominator of their evidence could be thus stated: (1) the attacked ship must stop her engines; (2) if the attacker signals, the signal must be answered—if the wireless is out of action, it must be answered by a signalling pennant by day or by a torch or flashlight by night; (3) the guns must not be manned, the crew should be amidships and taking to the lifeboats; (4) the white flag may be hoisted by day and by night, all the ship's lights should be put on.(1)

The Defence argued that Oppenheim-Lauterpacht does not give any alternative to the hauling down of the flag. If the attacked vessel does not strike the flag and, because the wireless is out of action, cannot tell her attacker *expressis verbis* that she is " ready to surrender ", the decision when to discontinue the attack must be left to the commander of the attacking vessel. Since the safety of his ship must be his primary consideration, he need not stop the attack until he is satisfied that the safety of his own ship is no longer endangered by his opponent. He can thus press home the attack as long as he considers it operationally necessary.

The Judge Advocate in his summing up said that stopping the ship and switching on navigation lights, masthead lights and deck lights after a night attack is an unequivocal indication of surrender. He also advised the Court that if the accused deliberately or recklessly prevented the attacked ship from surrendering by making it impossible for her to convey her readiness to

(1) It was held by the Privy Council in the case of the " Pellworm " (1922 A.C. 292) that hauling down the flag alone is not sufficient indication of surrender if it is accompanied by a change of course. The Privy Council held that " in principle capture consists of compelling the captured vessel to conform to the captor's will. When that is done " Deditio " is complete. The conduct necessary to establish the fact of capture may take many forms. No particular formality is necessary."

surrender, he would be guilty of a violation of the customary rules of sea warfare.

The Court's findings of guilty in the *Davisian* case and of not guilty in the *Empire Dawn* case are in line with the rules of surrender stated by the naval experts. The *Davisian*, after a day attack, stopped, hoisted a reply pennant and the crew took to the lifeboats. (The Court appeared to have disbelieved the accused's evidence that some of the crew of the *Davisian* were running towards the guns.) The *Empire Dawn*, after a night attack, did not stop, did not switch on her lights and the evidence about the signals given by means of a torch was open to doubt. The Court thus seemed to have held that there were generally recognised rules as to what constituted surrender at sea and that a war crime was committed if the attacking vessel continued her attack after her opponent has communicated her surrender in accordance with these rules. The Defence of operational necessity did not avail the accused in this case.

5. UNCORROBORATED EVIDENCE OF AN ABSENT WITNESS

The Prosecution's case with regard to the third charge rested on the affidavit of one of the survivors admitted as evidence by the Court.

On the ninth day of the hearing, the President stated that it had now become clear that the attendance of that witness could not be procured. The Court decided that subject to anything the Prosecutor may have to say, they did not wish to hear any further evidence on that charge. The Prosecutor said that in view of the fact that the third charge rested on uncorroborated evidence of one absent witness, and in view of the gravity of the charge, he did not feel it proper to press that charge any further.

CASE No. 56

TRIAL OF OTTO SKORZENY AND OTHERS

GENERAL MILITARY GOVERNMENT COURT OF THE U.S. ZONE OF GERMANY

18TH AUGUST TO 9TH SEPTEMBER, 1947

A. OUTLINE OF THE PROCEEDINGS

The ten accused involved in this trial were all officers in the 150th Panzer Brigade commanded by the accused Skorzeny. They were charged with participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing upon and killing members of the armed forces of the United States. They were also charged with participation in wrongfully obtaining from a prisoner-of-war camp United States uniforms and Red Cross parcels consigned to American prisoners of war.

In October, 1944, the accused Colonel Otto Skorzeny had an interview with Hitler. Hitler knew Skorzeny personally from his successful exploit in liberating Mussolini and commissioned him to organise a special task force for the planned Ardennes offensive. This special force was to infiltrate through the American lines in American uniform and to capture specified objectives in the rear of the enemy. The German High Command directed all army groups to seek volunteers who spoke English for a secret assignment. These volunteers were concentrated in a training centre where a special task force called the 150th Brigade was formed. It was furnished with jeeps and other American vehicles, part of their weapons and ammunition was American and the members were issued with American documents. They received training in English, American mannerisms, driving of American vehicles, and the use of American weapons. The Chief-of-Staff of the German Prisoner-of-War Bureau was approached by Skorzeny to furnish the Brigade with American uniforms. These uniforms were mainly obtained from booty dumps and warehouses, but some were obtained from prisoner-of-war camps where they were taken from the prisoners on orders from two of the accused. Some Red Cross parcels were also obtained in this manner.

The accused Skorzeny took over the command of the brigade on 14th December. On the 16th December the Ardennes offensive began. The objectives of the three combat groups into which the brigade was divided were the three Maas bridges at Angier, Amee and Huy respectively. The men were dressed in American uniforms and wore German parachute overalls over these uniforms. Their orders were to follow the spearhead of the three panzer divisions to which they were attached and as soon as the American lines were pierced they were to discard their overalls and, dressed in American uniforms, make for the three bridges. They were instructed to avoid contact with enemy troops and if possible to avoid combat in reaching their objectives. The piercing of the enemy lines by the S.S. Armoured Division was not successful, and on 18th December Skorzeny decided to abandon the plan of taking the three Maas bridges and put his brigade at the disposal of the commander of the S.S. corps to which it had been attached, to be used as infantry. He was given an infantry mission to attack towards Malmedy. During this attack several witnesses saw members of Skorzeny's brigade, including two of the accused, wearing American uniforms and a German parachute combination in operational areas, but the evidence included only two cases of fighting in American uniform.

In the first case, Lieutenant O'Neil testified that in fighting in which he was engaged about 20th December his opponents wore American uniforms with German parachute overalls, some of them who were captured by him said " that they belonged to the ' First ', or the ' Adolf Hitler ', or the ' Panzer ' Division ". The second case was contained in an affidavit of the accused Kocherscheid, who elected not to give evidence in the trial. He said in his affidavit that during the attack on Malmedy he and some of his men were engaged in a reconnaisance mission in American uniform when they were approached by an American military police sergeant. Kocherscheid, fearing that they would be recognised, fired several shots at the sergeant.

Skorzeny's brigade was relieved by other troops on 28th December and was subsequently disbanded.

All accused were acquitted of all charges.

B. NOTES ON THE CASE

1. THE USE OF ENEMY UNIFORMS, INSIGNIA, ETC.

It is a generally recognised rule that the belligerents are allowed to employ ruses of war or stratagems during battles. A ruse of war is defined by Oppenheim-Lauterpacht (*International Law*, Vol. II, paragraph 163) as a " deceit employed in the interest of military operations for the purpose of misleading the enemy ". When contemplating whether the wearing of enemy uniforms is or is not a legal ruse of war, one must distinguish between the use of enemy uniforms in actual fighting and such use during operations other than actual fighting.

On the use of enemy uniforms during actual fighting the law is clear. Lauterpacht says: " As regards the use of the national flag, the military insignia and the uniforms of the enemy, theory and practice are unanimous in prohibiting such use during actual attack and defence since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain of who is friend and who is foe ". The Defence, quoting Lauterpacht, pleaded that the 150th Brigade had instructions to reach their objectives under cover of darkness and in enemy uniforms, but as soon as they were detected, they were to discard their American uniforms and fight under their true colours.

On the use of enemy uniforms other than in actual fighting, the law is uncertain. Some writers hold the view that until the actual fighting starts the combatants may use enemy uniforms as a legitimate ruse of war, others think that the use of enemy uniforms is illegal even before the actual attack.

Lawrence (*International Law*, p. 445) says that the rule is generally accepted that " troops may be clothed in the uniform of the enemy in order to creep unrecognised or unmolested into his position, but during the actual conflict they must wear some distinctive badge to mark them off from the soldiers they assault ".

J. A. Hall (*Treatise on International Law*, eighth edition, p. 537), holds it to be " perfectly legitimate to use the distinctive emblem of an enemy in order to escape from him or draw his forces into action ".

Spaight (*War Rights on Land*, 1911, p. 105) disagrees with the views expressed above. He argues that there is little virtue in discarding the disguise after it has served its purpose, i.e. to deceive the enemy. " If it is improper to wear the enemy's uniform in a pitched battle it must surely be equally improper to deceive him by wearing it up to the first shot or clash of arms ".

Lauterpacht observes (*International Law*, Vol. II, p. 335, note 1) that before the second World War " the number of writers who considered it illegal to make use of the enemy flag, ensigns and uniforms, even before the actual attack, was becoming larger ".

Article 23 of the Annex of the Hague Convention, No. IV, 1907, says: " In addition to the prohibitions provided by special conventions it is especially forbidden . . . (*f*) to make improper use of a flag of truce, of the national flag, or of the military insignia or uniform of the enemy, as well as the distinctive badges of the Geneva Convention ". This does not carry the law on the point any further since it does not generally prohibit the use of enemy uniforms, but only the improper use, and as Professor Lauterpacht points out, it leaves the question what uses are proper and what are improper, open.

Wheaton (*International Law*, Vol. II, sixth edition, p. 753), points out that Article 23(*f*) by no means settles the question, and adds that " each case must necessarily be judged on its merit, and determined conformably to the basic principles of war law, special regard being paid to the element of *bona fides* ". (As an example for a *bona fides* use of enemy uniforms, he gives the case where no other uniforms are available to the belligerent army.)

Paragraph 43 of the Field Manual published by the War Department, United States Army, on 1st October, 1940, under the title " Rules of Land Warfare ", says: " National flags, insignias and uniforms as a ruse—in practice it has been authorised to make use of these as a ruse. The foregoing rule (Article 23 of the Annex of the IVth Hague Convention), does not prohibit such use, but does prohibit their improper use. It is certainly forbidden to make use of them during a combat. Before opening fire upon the enemy, they must be discarded ". The American *Soldiers' Handbook*, which was quoted by Defence Counsel, says: " The use of the enemy flag, insignia and uniform is permitted under some circumstances. They are not to be used during actual fighting, and if used in order to approach the enemy without drawing fire, should be thrown away or removed as soon as fighting begins ".

The procedure applicable in this case did not require that the Court make findings other than those of guilty or not guilty. Consequently no safe conclusion can be drawn from the acquittal of all accused, but if the two above-mentioned American publications contain correct statements of international law, as it stands today, they dispose of the whole case for the Prosecution, apart from the two instances of use of American uniforms during actual fighting.

The first case, that of Lieutenant O'Neil, has to be disregarded as the evidence does not seem to disclose with sufficient certainty the connection between the men dressed in American uniform whom Lieutenant O'Neil captured and the 150th Brigade. In the second instance, the case of the accused Kocherscheid who in an affidavit admitted that he fired on an American military police sergeant when dressed in American uniform, the accused stated in his affidavit that he fired several shots at the sergeant, but there was no evidence to show that he killed or even wounded him as was alleged in the charge.

2. ESPIONAGE

Two Counsel in defence of the accused Kocherscheid, argued that he was on an espionage mission in "no man's land" when he met the military police sergeant. He believed, on reasonable grounds, that he and his men were discovered and shot at the military police sergeant to protect his own life and the lives of his men. Counsel argued that as he returned from the espionage mission to his own lines he was protected by Article 31 of the Hague Convention and could therefore not be punished afterwards for his acts as a spy.

Article 29 of the Annex to the Hague Convention, 18th October, 1907, defines espionage as the "act of a soldier or other individual who clandestinely or under false pretences seeks to obtain information concerning one belligerent in the zone of belligerent operations with the intention of communicating it to the other belligerent". According to Article 31 of the same Convention, a spy who is not captured in the act but rejoins the army to which he belongs and is subsequently captured by the enemy, cannot be punished for his previous espionage but must be treated as a prisoner of war.

The argument put forward by Defence Counsel appears to be unsound. Article 31 gives immunity to a spy who returns to his lines in so far as he cannot be punished as a spy. The accused in this case, however, were not tried as spies but were tried for a violation of the laws and usages of war alleged to have been committed by entering combat in enemy uniforms. Articles 29–31 of the Hague Convention have therefore no application in this case and it would appear that the accused Kocherscheid's acquittal was based on lack of sufficient evidence, as he did not give evidence at the trial and the Prosecution's case rested entirely on his pre-trial affidavit.

3. THE TAKING OF UNIFORMS, INSIGNIA, ETC., FROM PRISONERS OF WAR

Article 6 of the Geneva (Prisoner-of-War) Convention, 1929, provides that: "All effects and objects of personal use, except arms, military equipment and military papers, shall remain in the possession of prisoners of war. . . ." The taking of uniforms of prisoners of war is therefore a violation of the Geneva Convention.

Article 37 of the same Convention states that: "Prisoners of war shall be allowed individually to receive parcels by mail containing food and other articles intended for consumption or clothing. Packages should be delivered to the addressees and a receipt given". To appropriate such packages before they reach their addressees is therefore also a violation of the Geneva Convention.

As mentioned above, the Court had not to give any reasons for their findings, but it is possible that having acquitted the accused of the main charge the Court applied the maxim *de minimis non curat lex*, also acquitting the accused of what were lesser violations of the Geneva Convention (cf. Vol. III, p. 70, of this series).

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