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Belligerent Occupation – Killing, Torture, Ill-treatment and Deportation of Civilian Inhabitants – Hostages and Reprisals – War Crimes as Reprisals – Resistance Movement and Guerrilla Warfare in Occupied Territory – Fundamental Principles of Justice as Part of International Law – Principle of Nullum Crimen Sine Lege – Rules of Warfare and the Legality of War – Plea of Military Necessity – Wanton Devastation of Property in Occupied Territory During Retreat of Occupying Armed Forces – Plea of Superior Orders – Responsibility of Military Commander in Occupied Territory.

In re LIST AND OTHERS (HOSTAGES TRIAL).

United States Military Tribunal at Nuremberg.
February 19, 1948.

THE FACTS. – The ten accused were high-ranking officers in the German armed forces. They were charged with, *inter alia*, responsibility for the following crimes alleged to have been committed by troops under their command: (I) the execution, torture and ill-treatment without trial of large numbers of innocent civilian inhabitants and hostages in Greece, Yugoslavia and Albania as reprisals for attacks by lawfully constituted enemy forces and unknown persons against German troops and installations; (2) the plunder and looting of public and private property, the wanton destruction of cities, towns and villages and other acts of devastation in the occupied territories of Norway, Yugoslavia and Albania; (3) the drafting and distribution of orders directing that quarter must be refused

to enemy troops; that the latter should be denied the status and rights of prisoners of war; and that prisoners of war should be summarily executed; (4) the employment of civilian inhabitants on the construction of military fortifications and entrenchments to be used by German forces; (5) the deportation to slave labour of a large part of the civilian population of Greece, Yugoslavia and Albania.

The prosecution alleged that such acts were part of a deliberate scheme of terror and intimidation wholly unwarranted by military necessity and in flagrant violation of the laws and usages of war.

Held: that eight of the accused were guilty.[1] The two other accused were acquitted. The Tribunal said:

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

(I) *Fundamental Principles of Justice as Part of International Law*. – The Tribunal said:

"The tendency has been to apply the term 'customs and practices accepted by civilized nations generally', as it is used in International Law, to the laws of war only. But the principle has no suchrestricted meaning. It applies as well to fundamental principles of justice which have been accepted and adopted by civilized nations generally. In determining whether such a fundamental rule of justice is entitled to be declared a principle of International Law, an examination of the municipal laws of states in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law its declaration as a rule of International Law would seem to be fully justified. There is convincing evidence that this not only is but has been the rule. The rules applied in criminal trials regarding burden of proof, presumption of innocence, and the right of a defendant to appear personally to defend himself, are derived from this source. Can it be doubted that such a source of International Law would be applied to an insane defendant? Obviously he would not be subjected to trial during his incompetency. Clearly, such a holding would be based upon a fundamental principle of criminal law accepted by nations generally. If the rights of nations and the rights of individual who become involved in international relations are to be respected and preserved, fundamental rules of justice and right which have become commonly accepted by nations must be applied. But the yardstick to be used must in all

[1] List and seven other accused were sentenced to terms of imprisonment ranging from life imprisonment to imprisonment for seven years.

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cases be a finding that the principle involved is a fundamental rule of justice which has been adopted or accepted by nations generally as such."

(2) *Control Council Law No. IO and the Principle of "Nullum Crimen Sine Lege"*. – "It is urged that Control Council Law No. IO is an *ex post facto* act and retroactive in nature as to the crime charged in the indictment. The act was adopted on 20th December, 1945, a date subsequent to the dates of the acts charged to be crimes. It is a fundamental principle of criminal jurisprudence that one may not be charged with crime for the doing of an act which was not a crime at the time of its commission. We think it could be said with justification that Article 23 (*h*) of the Hague Regulations of 1907 operates as a bar to retroactive action in criminal matters. In any event we are of the opinion that a victorious nation may not lawfully enact legislation defining a new crime and make it effective as to acts previously occurring which were not at the time unlawful. It therefore becomes the duty of a Tribunal trying a case charging a crime under the provisions of Control Council Law No. IO, to determine if the acts charged were crimes at the time of their commission and that Control Council Law No. IO is in fact declaratory of then existing International Law.

"This very question was passed upon by the International Military Tribunal in the case of the *United States v. Hermann Wilhelm Goering* in its judgment entered on Ist October, 1946. Similar provisions appearing in the Charter creating the International Military Tribunal and defining the crimes over which it had jurisdiction were held to be devoid of retroactive features in the following language: 'The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in [the] view of the Tribunal, as will be shown, it is the expression of International Law existing at the time of its creation; and to that extent is itself a contribution to International Law'. We adopt this conclusion. Any doubts in our mind concerning the rule thus announced go to its application rather than to the correctness of its statement. The crimes defined in Control council Law No. IO which we have quoted herein, were crimes under pre-existing rules of International Law – some by conventional law and some by customary law. It seems clear to us that the conventional law such as that exemplified by the Hague Regulations of 1907 clearly makes the War Crimes herein quoted, crimes under the proceedings of that convention. In any event, the practices and usages of war which gradually ripened into recognized customs with which belligerents were bound to comply, recognized customs with which belligerents were bound to comply, recognized the crimes specified herein as crimes subject to punishment. It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognized customs and usages of

war, or the general principles of criminal justice common to civilized nations generally. If the acts charged were in fact crimes under International Law when committed, they cannot be said to be *ex post facto* acts or retroactive pronouncements. The crimes specified in the London Charter and defined in Control council Law No. IO which have heretofore been set forth and with which these defendants are charged, merely re-state the rules declared by the Hague Regulations of 1907 in Articles 43, 46, 47, 50 and 23 (*h*) of the Regulations annexed thereto….

"We conclude that pre-existing International Law has declared the acts constituting the crimes herein charged and included in Control Council Law No. IO to be unlawful, both under the conventional law and the practices and usages of land warfare that had ripened into recognized customs which belligerents were bound to obey. Anything in excess of existing International Law therein contained is a utilization of power and not of law. It is true, of course, that courts authorized to hear such cases were not established nor the penalties to be imposed for violations set forth. But this is not fatal to their validity. The acts prohibited are without deterrent effect unless they are punishable as crimes. This subject was dealt with in the International Military Trial in the following language: 'But it is argued that the pact does not expressly enact that such (aggressive) wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes punishable as offences against the laws of war: yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention….The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.'

It is true, of course, that customary International Law is not static. It must be elastic enough to meet the new

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

"An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen. Some war crimes, such as spying, are not common law crimes at all; the being pure war crimes punishable as such during the war and, in this particular case, only if the offender is captured before he rejoins his army. But some other crimes, such as mass murder, are punishable during and after the war. But such crimes are also war crimes because they were committed under the authority or orders of the belligerent who, in ordering or permitting them, violated the rules of warfare. Such crimes are punishable by the country where the. crime was committed or by the belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent. There are many reasons why this must be so, not the least of which is that war is usually followed by political repercussions and upheavals which at times place persons in power who are not, for one reason or another, inclined to punish the offenders. The captor belligerent is not required to surrender the alleged war criminal when such surrender is equivalent to a passport to freedom. The only adequate remedy is concurrent jurisdictional principle to which we have heretofore adverted. The captor belligerent may therefore surrender the alleged criminal to the state where the offence was committed, or, on the other hand, it may retain the alleged criminal for trial under its own legal processes."

(3) *Rules of Warfare and the Legality of War*. – "The Prosecution advances the contentions that since Germany's wars against Yugoslavia and Greece were aggressive wars, the German occupation troops were there unlawfully and gained no rights whatever as an occupant. It is further asserted as a

corollary, that the duties owed by the populace to an occupying power which are normally imposed under the rules of International Law, never became effective in the present case because of the criminal character of the invasion and occupation. For the purposes of this discussion, we accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act is a crime or that any and every act undertaken by the population of the occupied country against the German occupation forces thereby became legitimate defence. The Prosecution attempts to simplify the issue by posing it in the following words: 'The sole issue here is whether German forces can with impunity violate law by initiating and waging wars of aggression and at the same time demand meticulous observance by the victims of these crimes of duties and obligations owed only to a lawful occupant'.

"At the outset, we desire to point out that International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.

"It must not be overlooked that International Law is prohibitive law. Where the nations have affirmatively acted, as in the case of the Hague Regulations, 1907, it prohibits conduct contradictory thereto. Its specific provisions have control over general theories, however reasonable they may seem. We concur in the views expressed in the following text on the subject: 'Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral States. This is so even if the declaration of war is *ipso facto* a violation of International Law, as when a belligerent declares war upon a neutral State for refusing passage to its troops or when a states goes to war in patent violation of its obligations under the Covenant of the League or of the General Treaty for the Renunciation of War. To say that, because such a declaration of war is *ipso facto* a violation of International Law, it is "inoperative in law and without any judicial significance", is erroneous. The rules of International Law apply to war *from whatever cause it originates*.' Oppenheim's *International Law*, II, Lauterpacht, p. 174."

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(4) *The Distinction between Invasion and Belligerent Occupation. The Status of Yugoslavia, Greece and Norway, and of the Partisan Groups operating there.* – "It is essential to a proper understanding of the issues involved in the present case, that the status of Yugoslavia, Greece and Norway be determined during the periods that the alleged criminal acts of these defendants were committed. The question of criminality in many cases may well hinge on whether an invasion was in progress or an occupation accomplished. Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.

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

"The evidence shows that the population remained peaceful during the spring of 1941. In the early summer following, a resistance movement began to manifest itself. It increased progressively in intensity until it assumed the appearance of a military campaign. Partisan bands, composed of members of the population, roamed the territory, doing much damage to transportation and communication lines. German soldiers were the victims of surprise attacks by an enemy which they could not engage in open combat. After a surprise attack, the bands would hastily retreat or conceal their arms and mingle with the population with the appearance of being harmless members thereof. Ambushing of German troops was a common practice. Captured German soldiers were often tortured and killed. The terrain was favourable to this type of warfare and the inhabitants most adept in carrying it on. It is clear that the German Armed Forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any tie they desired assume physical control of any part of the country. The

control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant.

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

"It is the contention of the defendants that after the respective capitulations a lawful belligerency never did exist in Yugoslavia or Greece during the period here involved. The Prosecution contends just as emphatically that it did. The evidence on the subject is fragmentary and consists primarily of admissions contained in the reports, orders and diaries of the German army units involved. There is convincing evidence in the record that certain band units in both Yugoslavia and Greece complied with the requirements of International Law entitling them to the status of a lawful belligerent. But the greater portion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent. The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents.

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

"The evidence is clear that during the period of occupation in Yugoslavia and Greece, guerrilla warfare was carried on against the occupying power. Guerrilla warfare is said to exist

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where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities by harassing the enemy with unorganized forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applies to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still the remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured. The rule is based on the theory that the forces of two states are no longer in the field and that a contention between organized armed forces no longer exists. This implies that a resistance not supported by an organized government is criminal and deprives participants of belligerent status, an implication not justified since the adoption of Chapter I, Article I, of the Hague Regulations of 1907: In determining the guilt or innocence of any army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision, and if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence.

We think the rule is established that a civilian who aids abets or participates in the fighting is liable to punishment as a war criminal under the laws of war. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.

"It is contended by the prosecution that the so-called guerrillas were in fact irregular troops. A preliminary discussion of

the subject is essential to a proper determination of the applicable law. Members of militia or a volunteer corps, even though they are not a part of the regular army, are lawful combatants if (*a*) they are commanded by a responsible person, (*b*) if they possess some distinctive insignia which can be observed at a distance, (*c*) if they carry arms openly, and (*d*) if they observe the laws and customs of war. See Chapter 1, Article 1, Hague Regulations of 1907. In considering the evidence adduced on this subject, the foregoing rules will be applied. The question whether a captured fighter is a guerrilla or an irregular is sometimes a close one that can be determined only by a careful evaluation of the evidence before the Court. The question of the right of the population of an invaded and occupied country to resist has been the subject of many conventional debates. (Brussels Conference of 1874; Hague Peace Conference of 1899.) A review of the positions assumed by the various nations can serve no useful purpose here for the simple reason that a compromise (Hague Regulations, 1907) was reached which has remained the controlling authority in the fixing of a legal belligerency. If the requirements of the Hague Regulations, 1907, are met, a lawful belligerency exists; if they are not met, it is an unlawful one."

(5) *Hostages*. – " The major issues involved in the present case gravitate around the claimed right of the German Armed Forces to take hostages from the innocent civilian population to guarantee the peaceful conduct of the whole of the civilian population and its claimed right to execute hostages, members of the civil population, and captured members of the resistance forces in reprisal for armed attacks by resistance forces, acts of sabotage and injuries committed by unknown persons…. "We wholly exclude from the following discussions of the subject of hostages the right of one nation to take them, to compel the armed forces of another nation o comply with the rules of war or the right to execute them if the enemy ignores the warning. We limit our discussion to the right to take hostages from the innocent civilian population of occupied territory as a guarantee against attacks by unlawful resistance forces, acts of sabotage and the unlawful acts of unknown persons and the further right to execute them if the unilateral guarantee is violated.

"Neither the Hague Convention of 1907, nor any other conventional law for that matter, says a word about hostages in the sense that we are to use the term in the following discussion. But certain rules of customary law and certain inferences legitimately to be drawn from existing conventional law lay down the rules applicable to the subject of hostages. In former times prominent persons were accepted as hostages as a means of ensuring observance of treaties, armistices and other agreements, the performance of which depended on good faith.

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This practice is now obsolete. Hostages under the alleged modern practice of nations are taken (*a*) to protect individuals held by the enemy, (*b*) to force the payment of requisitions contributions, and the like, and (*c*) to ensure against unlawful acts by enemy forces or people We are concerned here only with the last provision. That hostages may be taken for this purpose cannot be denied.

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

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

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

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

The occupant may properly insist upon compliance with regulations necessary to the security of the occupying forces and for the maintenance of law and order. In the accomplishment of this objective, the occupant may, only as a last resort, take and execute hostages.

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

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

" It is essential to a lawful taking of hostages under customary law that procla-mation be made, giving the names and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason…the hostages will be shot.The number of hostages shot must not exceed in severity the offences the shooting is designed to deter. Unless the foregoing requirements are met, the shooting of

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hostages is in contravention of International Law and is a war crime in itself. Whether such fundamental requirements have been met is a question determinable by court martial proceedings. military commander may not arbitrarily determine such facts. An order of a military commander for the killing of hostages must be bottomed upon the finding of a competent court martial that necessary conditions exist and all preliminary steps have been taken which are essential to the issuance of a valid order. The taking of the lives of innocent persons arrested as hostages is a very serious step. The right to kill hostages may be lawfully exercised only after a meticulous compliance with the foregoing safeguards against vindictive or whimsical orders of military commanders."

(6) *Reprisals*. – "We are also concerned with the subject of reprisals and the detention of members of the civilian population for the purpose of using them as the victims of subsequent reprisal measures. The most common reason for holding them is for the general purpose of securing the good behaviour and obedience of the civil population in occupied territory. The taking of reprisals against the civilian population by killing members thereof in retaliation for hostile acts against the armed forces or military operations of the occupant seems to have been originated by Germany in modern times. It has been invoked by Germany in the Franco-Prussian War, World War I and in World War II. No other nation has resorted to the killing of members of the civilian population to secure peace and order in so far as our investigation has revealed. The evidence offered in this case on that point will be considered later in the opinion. While American, British and French manuals for armies in the field seem to permit the taking of such reprisals as a last resort, the provisions do not appear to have been given effect. The American manual provides in part: ' The offending forces or populations generally may lawfully be subjected to appropriate reprisals. Hostages taken and held for the declared purpose of ensuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed.' FM 27.10 *Rules of Land Warfare*, 1940, Sec. 358d. The British field manual provides in part: ' Although collective punishment of the population is forbidden for the acts of individuals for which it cannot be identified'. British Military Hand Book, Article 458.

"In two major wars within the last thirty years, Germany has made extensive use of the practice of killing innocent members of the population as a deterrent to attacks upon its troops and acts of sabotage against installations essential to its military operations. The right to so do has been recognized by many nations including the United States, Great Britain,

France and the Soviet Union. There has been complete failure on the part of the nations of the world to limit or mitigate the practice by conventional rule. This requires us to apply customary law. That international agreement is badly needed in this field is self-evident.

"International law is prohibitive law and no conventional prohibitions have been invoked to outlaw this barbarous practice. The extent to which the practice has been employed by the Germans exceeds the most elementary notions of humanity and justice. They invoke the plea of military necessity, a term which they confuse with convenience and strategical interests. Where legality and expediency has coincided no fault can be found in so far as International Law is concerned. But where legality of action is absent, the shooting of innocent members of the population as a measure of reprisal is not only criminal but it has the effect of destroying the basic relationship between the occupant and the population. Such a condition can progressively degenerate into a reign of terror. Unlawful reprisals may bring on counter reprisals and create an endless cycle productive of chaos and crime. To prevent a distortion of the right into a barbarous method of repression, International Law provides a protective mantle against the abuse of the right.

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

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

"It is a fundamental rule of justice that the lives of persons may not be arbitrarily taken. A fair trial before a judicial body affords the surest protection against arbitrary, vindictive or whimsical application of the right to shoot human beings in reprisal. It is a rule of International Law, based on these fundamental concepts of justice and the rights of individuals,

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that the lives of persons may not be taken in reprisal in the absence of a judicial finding that the necessary conditions exist and the essential steps have been taken to give validity to such action. The possibility is great, of course, that such judicial proceedings may become ritualistic and superficial when conducted in wartime but it appears to be the best available safeguard against cruelty and injustice. Judicial responsibility ordinarily restrains impetuous action and permits principles of justice and right to assert their humanitarian qualities. We have no hesitancy in holding that the killing of members of the population in reprisal without judicial sanction is itself unlawful. The only exception to this rule is where it appears that the necessity for the reprisal requires immediate reprisal action to accomplish the desired purpose and which would be otherwise defeated by the invocation of judicial inquiry. Unless the necessity for immediate action is affirmatively shown, the execution of hostages or reprisal prisoners without a judicial hearing is unlawful. The judicial proceeding not only affords a measure of protection to innocent members of the population, but it offers, if fairly and impartially conducted, a measure of protection to the military commander charged with making the final decision.

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

(7) *Plea of Military Necessity.* – "Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by thee armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of International Law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful

To destroy railways, lines of communication or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit of wanton devastation of a district or the wilful infliction of suffering upon its inhabitants for the sake of suffering alone….

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

(8) *Wanton Destruction of Public and Private Property in Occupied Territory during Retreat of Occupying Armed Forces.* – " The defendant (Rendulic) is charged with the wanton destruction of private and public property in the province of Finnmark, Norway, during the retreat of the XXth Mountain Army commanded by him. The defendant contends that military necessity required that he do so as he did in view of the military situation as it then appeared to him.

"The evidence shows that in the spring of 1944 Finland had attempted to negotiate a peace treaty with Russia without success. This furnished a warning to Germany that Finland might at any time remove itself as an ally of the Germans. In June, 1944, the Russians commenced an offensive on the southern Finnish frontier that produced a number of successes and depressed Finnish morale. On 24th June, 1944, the defendant Rendulic was appointed commander-in-chief of the XXth Mountain Army in Lapland. This army was committed from the Arctic Ocean south to the middle of Finland along its eastern frontier. Two army corps were stationed in central Finland and one on the coast of the Arctic Ocean. The two groups were separated by 400 kilometres of terrain that was impassable for all practicable purposes.

"On 3rd September, 1944, Finland negotiated a separate peace with Russia and demanded that the German troops withdrew from Finland within fourteen days, a demand with which it was impossible to comply. The result was that the two army corps to the south were obliged to fight their way out of Finland. This took three months' time. The distance to the Norwegian border required about 1.000 kilometres of travel over very poor roads at a very inopportune time of year. The Russians attacked almost immediately and caused the Germans much trouble in extricating these troops. The XIXth

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Corps located on the Arctic coast was also attacked in its position about 150 kilometres east of Kirkenes, Norway. The retreat into Norway was successful in that all three army corps with their transport and equipment arrived there as planned. The difficulties were increased in middle October when the four best mountain divisions were recalled to Germany, thereby reducing the strength of the army by approximately one-half.

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

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

"There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although, when viewed in retrospect, the danger did not actually exist.

"The Hague Regulations prohibited 'The destruction or

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

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

"It cannot be questioned that acts done in time of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a

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

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

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

"The defence relies heavily upon the writings of Prof. L. Oppenheim to sustain their position. It is true that he advocated this principle throughout his writings. As a co-author of the *British Manual of Military Law*, he incorporated the principle there. It seems also to have found its way into the United States *Rules of Land Warfare* (1940). We think Professor Oppenheim espoused a decidedly minority view. It is based upon the following rationale: 'The law cannot require an individual to be punished for an act which he was compelled by law to commit'. The statement completely overlooks the facts that an illegal order is in no sense of the word a valid law which one is obliged to obey. The fact that the British and American armies may have adopted it for the regulation of their own armies as a matter of policy, does not have the effect of enthroning it as a rule of International Law. We point out

that army regulations are not a competent source of International Law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilized nations generally. It is possible however, that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions had been put into general practice. It will be observed that the determination, whether a custom or practice exists, is a question of fact. Whether a fundamental principle of justice has been accepted is a question of judicial or legislative declaration. In determining the former, military regulations may play an important role but, in the latter, they do not constitute an authoritative precedent.

"Those who hold to the view that superior order is a complete defence to an International Law crime, base it largely on a conflict in the articles of war promulgated by several leading nations. While we are of the opinion that army regulations are not a competent source of International Law where a fundamental rule of justice is concerned, we submit that the conflict in any event does not sustain the position claimed for it. If, for example one be charged with an act recognized as criminal under applicable principles of International Law to determine the merits of such a plea. If the Court finds that the army regulations of some members of the family of nations provide that superior order is a complete defence and that the army regulations of other nations express a contrary view, the Court would be obliged to hold, assuming for the sake of argument only that such regulations constitute a competent source of International Law, that general acceptation or consent was lacking among the family of nations. In as much as a substantial conflict exists among the nations whether superior order is a defence to a criminal charge, it could only result in a further finding that the basis does not exist for declaring superior order to be a defence to an International Law crime. But, as we have already stated, army regulations are not a competent source of International Law when a fundamental rule of justice is concerned. This leaves the way clear for the Court to affirmatively declare that superior order is not a defence to an International Law crime if it finds that the principle involved is a fundamental rule of justice and for that reason has found general acceptance. International Law has never approved the defensive plea of superior order as a mandatory bar to the prosecution of war criminals. This defensive plea is not available to the defendants in the present case, although if the circumstances warrant, it may be

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considered in mitigation of punishment under the express provisions of Control Council Law No. 10."

(10) *Responsibility of a Military Commander in Occupied Territory.* – "We have herein before pointed out that it is the duty of the commanding general in occupied territory to maintain peace and order, punish crime and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territory having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain S.S. units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent or approval of these defendants. But this cannot be a defence for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence. The fact is that the reports of subordinate units almost without exception advised these defendants of the policy of terrorism and intimidation being carried out by units in the field. They requisitioned food supplies in excess of their local need an d caused it to be shipped to Germany in direct violation of the laws of war. Innocent people were lodged in collection an concentration camps were they were mistreated, to the everlasting shame of the German nation. Innocent inhabitants were forcibly taken to Germany and other points for use as slave labour. Jews, Gypsies and other racial groups were the victims of systematized murder or deportation for slave labour for no other reason than their race or religion, which is in violation of the express conventional rules of the Hague Regulations of 1907. The German theory that fear of reprisal is the only deterrent in the enforcement of the laws of war cannot be accepted here. That reprisal may be indulged [in] to compel an enemy nation to comply with the rules of war must be conceded. It is not however, an exclusive remedy. If it were, the persons responsible would seldom, if ever, be brought to account. The only punishment would fall upon the reprisal victims who are usually innocent of wrong-doing. The prohibitions of the Hague Regulations of 1907 contemplate no such system of retribution. Those responsible for such crimes by ordering or authorizing their commission, or by a failure to take effective steps to prevent their execution or recurrence, must be held to account if International Law is to be anything more than an ethical code, barren of any practical coercive deterrent....

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

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

[Report: War Crimes Reports, 8 (1949), p. 34.]