CASE No. 47

THE HOSTAGES TRIAL

TRIAL OF WILHELM LIST AND OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG

p.38

8TH JULY, 1947, TO 19TH FEBRUARY, 1948 The accused were all former high-ranking German army officers and they were charged with responsibility for offences committed by troops under their command during the occupation of Greece, Yugoslavia, Albania and Norway, these offences being mainly so-called reprisal killings, purportedly taken in an attempt to maintain order in the occupied territories in the face of guerrilla opposition, or wanton destruction of property not justified by military necessity. The accused were charged with having thus committed war crimes and crimes against humanity.

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

A. OUTLINE OF THE PROCEEDINGS

1. THE ACCUSED AND THE INDICTMENT

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

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

p.3

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

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

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

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

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

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

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

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

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

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

The accused pleaded not guilty.

2. THE EVIDENCE BEFORE THE TRIBUNAL

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

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

The Tribunal continued :

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

p.37

authenticity and, in many cases where it is secondary in character, without proof of the usual conditions precedent to the admission of such evidence. This is in accordance with the provisions of Article VII, Ordinance No. 7, Military Government, Germany (Footnote 1: See Vol. III of these Reports, pp. 114 and 118. In general, for the United States law and practice on war crime trials, *see* that volume, pp. 103-20.), which provides ' The tribunals shall not be bound by technical rules of procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges, affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require.' This Tribunal is of the opinion that this rule applies to the competency of evidence only and does not have the effect of giving weight and credibility to such evidence as a matter of law. It is still within the province of the Tribunal to test it by the usual rules of law governing the evaluation of evidence. Any other interpretation would seriously affect the right of the defendants to a fair and impartial trial. The interpretation thus given and consistently announced throughout the trial by this Tribunal is not an idle gesture to be announced as a theory and ignored in practice-it is a substantive right composing one of the essential elements of a fair and impartial adjudication.

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

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

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

p.38

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

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

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

(1) *List*

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

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

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

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

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

p.39

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

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

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

“ The following directives are to be applied here : (a) Each incident of insurrection against the German Wehrmacht, regardless of individual circumstances, must be assumed to be of communist origin. (b) In order to stop these intrigues at their inception, severest measures are to be applied immediately at the first appearance, in order to demonstrate the authority of the occupying power, and in order to prevent further, progress. One must keep in mind that a human life frequently counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such a case the death penalty for 50 to 100 communists must in general be deemed appropriate as retaliation for the life of a German soldier. The manner of execution must increase the deterrent effect. The reverse procedure-to proceed at first with relatively easy punishment and to be

satisfied with the threat of measures of increased severity as a deterrent does not correspond with these principles and is not to be applied."

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

" The male population of the territories to be mopped up of bandits is to be handled according to the following points of view :
" Men who take part in combat are to be judged by court martial.
" Men in the insurgent territories who were not encountered in battle, are to be examined and- -.

p.40

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

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

After the issuance of the foregoing orders, the shooting of innocent members of the population increased and a large number of reprisals against the population were carried out on the basis of the 100 to 1 order. Among the evidence appeared facts relating to a reprisal shooting at a village near Topola, to which the Tribunal made reference in its judgment.(Footnote 1: *See* pp. 65-6) This instance of shooting was carried out by the orders of General Boehme issued on 4th October, 1941, and on 9th October, 1941. General Boehme informed the defendant List as follows : " Execution by shooting of about 2,000 Communists and Jews in reprisal for 22 murdered of the Second Battalion of the 421st Army Signal Communication Regiment in progress." Several reports of reprisal shootings were also made to List by the Security Police and S.D.

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

met with counter-directives and orders by Hitler and Keitel to accomplish it by a campaign of terrorism and intimidation of the population was also established.

(ii) *Kuntze*

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

p.41

June 1942 but remained in the position until the arrival of General Loehr on 8th August, 1942.(Footnote 1: In its Judgment the Tribunal pointed out that October, 1941 " exceeded all previous monthly records in killing innocent members of the population in reprisal for the criminal acts of unknown persons," and added : " It seems highly improbable that Kuntze could step into the command in the Southeast in the midst of the carrying out and reporting of ' these reprisal actions without gaining knowledge and approval.".) Reports made to the defendant Kuntze, which were shown in the evidence, revealed that on 29th October, 1941,76 persons were shot in reprisal in Serbia ; on 2nd November, 1941, 125 persons were shot to death at Valjevo ; and on 27th November, 1941, 265 Communists were shot as a reprisal measure at Valjevo. Under date of 31st October, 1941, the Commanding General in Serbia, General Boehme, recapitulated the shootings in Serbia in a report to Kuntze as follows : " Shootings : 405 hostages in Belgrade (total up to now in Belgrade, 4,750). 90 Communists in Camp Sebac. 2,300 hostages in Kragujevac. 1,700 hostages in Kraljevo." In a similar report under date of 30th November, 1941, General Boehme reported to Kuntze as follows : " Shot as hostages (total) 534 (500 of these by Serbian Auxiliary Police)." Many other similar shootings were shown to have taken place.

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

Although he was advised of these killings of innocent persons in reprisal for the actions of bands or unknown members of the population, Kuntze not only failed to take steps to prevent their recurrence but urged more severe action upon his subordinate commanders.

In many cases persons were shot in reprisal who were being held in collecting camps without there being any connection whatever with the crime committed, actual, geographical or otherwise. Reprisal orders were not grounded on judicial findings.

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

group of Jews and Gypsies. He had knowledge that troops subordinate to him were collecting and transporting Jews to collecting camps, and it was not shown that the defendant acted to stop such practices. There was evidence that the offences proved against Kuntze were ordered by his superiors and that, like List, he was impeded by the operations within his area of command of organizations receiving their orders direct from Berlin.

(iii) Foertsch

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

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

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

It was the testimony of Foertsch that the Keitel Order of 16th September, 1941, fixing reprisal ratios from 50 up to 100 to 1, was the basic order under which reprisal measures were carried out in the Southeast. On the other hand the evidence showed many reprisal measures to have been executed prior to the Keitel order, on the reports of which appeared the signature or initials of Foertsch. For all practical purposes, the accused had

the same information as the defendants List and Kuntze during their tenures as Wehrmacht Commanders Southeast. He knew of all the incidents described earlier in the outline of evidence dealing with the defendants List and Kuntze. The defendant Foertsch did not, however, participate in any of them. He gave no orders and had no power to do so had he so desired.

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

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

p.43

answer to similar actions by the enemy in contravention of International Law. It was not shown that the defendant knew that this order was in fact carried out in the territory in which he served. (Footnote 1: According to the Tribunal's judgment, " By this order, issued by Hitler in person, all sabotage troops generally referred to as commandos, were to be shot immediately upon capture." A text of the Order is reproduced in Vol. I of these Reports, pp. 32-3.)

(iv) *von Geitner*

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

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

that the approval of the form of such orders was the full extent of his participation in the issuing and distributing of reprisal orders.

(v) *Rendulic*

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

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

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

p.44

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

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

The reports of the corps commanders subordinate to the defendant revealed that many acts of reprisals were taken in fact against the population by the 173rd and 187th Reserve

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

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

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

p.45

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

The defendant was also shown to have passed on to troops subordinate to him the Führer Order of 6th June, 1941, providing that all Commissars captured must be shot, when he was in command of the 52nd Infantry Division on the Russian Front. He admitted that the legality and correctness of this order was discussed in army circles and that it was generally considered illegal. He testified that he considered the order as a reprisal measure, the purpose of which was unknown to him. (Footnote l: *See* p.46, note 2)

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

(vi) *Dehner*

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

The 173rd and 187th Reserve Divisions, which have been mentioned above in the section setting out the evidence relating to the defendant Rendulic, were directly subordinated to Dehner. (Footnote 2: *See* p.44) Numerous other and similar offences were committed by troops under his command and the defendant appeared to have made no effort to require reports showing that hostages and reprisal prisoners were shot in accordance with International Law. The defendant attempted to excuse his indifference to these killings by saying that they were the responsibility of the division commanders. Dehner had knowledge of the offences; on the other hand, there was evidence of attempts on his part to correct certain irregularities connected with the taking of reprisals ; for example in an order of 19th December, 1943, his corps headquarters stated : " Measures of the unit have repeatedly frustrated propaganda for the enemy as planned by the unit leadership. It must not happen that bandits who arrive at the unit with leaflets asking them to desert and which should be valid as passes, are shot out of hand. This makes any propaganda effort in this direction nonsensical. . . ."

p.46

(vii) *von Leyser*

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

There was evidence that innocent members of the civilian populations were killed in reprisal for attacks on troops and acts of sabotage committed by unknown persons by troops subordinate to the defendant von Leyser, who admitted that he knew of many such killings. He denied that he ever issued an order to carry out any specific reprisal measure, and contended that this was the responsibility of divisional commanders in conjunction with Croatian government authorities. The record disclosed, however, that on 10th

August, 1944, the defendant issued an order containing the following :“ In case of repeated attacks in a certain road sector, Communist hostages are to be taken from the villages of the immediate vicinity, who are to be sentenced in case of new attacks. A connection between these Communists and the bandits may be assumed to exist in every case." (Footnote 1: Of this order the Tribunal said : “ This order is, of course, not lawful. Reprisals taken against a certain race, class or group irrespective of the circumstances of each case, sounds more like vengeance than an attempt to deter further criminal acts by the population. An assumption of guilt on the part of a particular race, class or group of people in all cases also contravenes established rules. This is a matter which a judicial proceeding should determine from available evidence.”)

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

The evidence also showed that the 269th Infantry Division, commanded by the defendant von Leyser in Russia, killed Commissars pursuant to the Commissar Order.(Footnote 2: The Tribunal said : “ This was a criminal order and all killings committed pursuant to it were likewise criminal. We find the defendant guilty on this charge.” The charge referred to was said to be one of “ issuing the Commissar order of 6th June, 194l,.and causing the same to be carried out while he was in command of the 269th Infantry Division in Russia in 1941.” It would appear from an examination of the Indictment, and of the Tribunal’s summary thereof, that allegations regarding offences committed in Russia would, technically, fall outside its terms.)

p.47

(viii) *Felmy*

The defendant Felmy was appointed Commander Southern Greece at about the middle of June 1941, and continued in the position until August 1942. During this period he had three battalions of security and police troops subordinate to him. On 10th May, 1943 the defendant became commander of the LXVIIIth Corps and continued in that position until the corps withdrew from Greece, an operation which was completed on 22nd October,

1944. In addition thereto on 9th September, 1943, he assumed command of Army Group Southern Greece. He had subordinate to him the 1st Panzer Division, 117th Rifle Division, and a number of fortress battalions. Until the collapse of Italy, two Italian divisions were subordinate to him. The defendant admitted having ordered reprisal measures but denied that they were unlawful. Many other reprisal actions on the part of his troops were brought to his notice in reports made to him.

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

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

p.48

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

(ix) *Lanz*

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

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

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

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

(x) *Speidel*

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

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

3. THE JUDGMENT OF THE TRIBUNAL

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

p.49

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

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

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

The judgment then continued :

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

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

such a source of International Law would be applied to an insane defendant ? Obviously he would not be subjected to trial during his incompetency. Clearly, such a holding would be based upon a fundamental principle of criminal law accepted by nations generally. If

the rights of nations and the rights of individuals who become involved in international relations are to be respected and preserved, fundamental rules of justice and right which have become commonly accepted by nations must be applied. But the yardstick to be used must in all cases be a finding that the principle involved is a fundamental rule of justice which has been adopted or accepted by nations generally as such."

(ii) *The Plea of Superior Orders*

The Judgment then continued

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

" It cannot be questioned that acts done in time of war under the military authority of an enemy, cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates International Law and outrages fundamental concepts of justice. In the German War Trials (1921), the German Supreme Court of Leipzig in The Llandovery Castle case (Footnote 1: See the notes to the Stalag *Luft III Trial* report, in Vol. XI.) 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 many cases have no protection at all against criminal excesses ordered by superiors.

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

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. Inasmuch as a substantial conflict exists among the nations whether superior order is a defence to a criminal charge, it could only result in a further finding that the basis does not exist for declaring superior order to be a defence to an International Law crime. But, as we have already stated,. army regulations are not a competent source of International Law when a fundamental rule of justice is concerned. This leaves the way clear for the Court to affirmatively declare that superior order is not a defence to an International Law crime if it finds that the principle involved is a fundamental rule of justice and for that reason has found general acceptance.

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

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

The following paragraphs set out the attitude of the Tribunal to the plea that Control Council Law No. 10 violated-the *ex post facto* principle: (Footnote 1: The Tribunal's treatment of this point may be regarded as complementary to that of the Tribunal before which the *Justice Trial* was held. See Vol. VI, pp. 41-5. See also the notes to the *Flick Trial* in Vol. IX.)

" It is urged that Control Council Law No. 10 is an ex *post facto* act and retroactive in nature as to the crime charged in the indictment. The act was adopted on 20th December, 1945, a date subsequent to the dates of the Acts charged to be crimes. It is a fundamental principle of criminal jurisprudence that one may not be charged with crime for the doing of an act which was not a crime at the time of its commission. We think it could be said with justification that Article 23 *(h)* of the Hague Regulations of 1907 operates as a bar to retroactive action in criminal matters. In any event, we are of the opinion that a victorious nation may not lawfully enact legislation defining a new crime and make it effective as to acts previously occurring which were not at the time unlawful. It therefore becomes the duty of a Tribunal trying a case charging a crime under the provisions of Control Council Law No. 10, to determine if the acts charged were crimes at the time of their commission and that Control Council Law No. 10 is in fact declaratory of then existing International Law.

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

p.53

in its judgment entered on 1st October, 1946. Similar provisions appearing in the Charter creating the International Military Tribunal and defining the crimes over which it had jurisdiction were held to be devoid of retroactive features in the following language : ' The Charter is not an arbitrary exercise of power on the part of the victorious nations, but

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

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

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

truce and similar matters. Many of these prohibitions had been enforced long before the date of the Convention ; but since 1907 they have certainly been crimes ; punishable as offences against the laws of war ; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and

punished individuals guilty of violating the rules of land warfare laid down by this Convention. . . . The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.'

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

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

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

times place persons in power who are not, for one reason or another, inclined to punish the offenders. The captor belligerent is not required to surrender the alleged war criminal when such surrender is equivalent to a passport to freedom. The only adequate remedy is the concurrent jurisdictional principle to which we have heretofore adverted. The captor belligerent may therefore surrender the alleged criminal to the state where the offense

was committed, or, on the other hand, it may retain the alleged criminal for trial under its own legal processes.

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

The Tribunal then proceeded to reject a defence argument that the former had no jurisdiction to hear the case which could " only be properly tried in accordance with the international principles laid down in Article 63 of the Geneva Convention of 1929 relative to the treatment of prisoners of war." It was pointed out that the Convention " applies only to crimes and offences committed while occupying the status of a prisoner of war and confers no jurisdiction over a violation of International Law committed prior to the time of becoming such," and the opinion of the United States Supreme Court in the *Yamashita Trial* was cited in support of this ruling. (Footnote 1:*See* Vol.IV of this series, p. 78.)

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

The Judgment continued :

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

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

" The evidence shows that the invasion of Yugoslavia was commenced on 6th April, 1941. Nine days later the Yugoslav government capitulated and on 16th April, 1941, large scale military operations had come to an end. The powers of government passed into the

hands . of the German Armed Forces and Yugoslavia became an occupied country. The invasion of Yugoslavia followed through into Greece. On 22nd April, 1941, the Greek Armed Forces in the north were forced to surrender, and on 28th April, 1941, Athens fell to the invader. On and after that date Greece became an occupied country within the meaning of existing International Law.

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

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

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

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

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

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

“ The status of an occupant of the territory of the enemy having been achieved, International Law places the responsibility upon the commanding general of preserving order, punishing crime and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsibility. But he is definitely limited by recognised rules of International Law, particularly the Hague Regulations of 1907. Article 43 thereof imposes a duty upon the occupant to respect the laws in force in the country. Article 46 protects family honour and rights, the lives of individuals and their private property as well as their religious convictions and the right of public worship. Article 47 prohibits pillage. Article 50 prohibits collective penalties. Article 51 regulates the appropriation of properties belonging to the state or private individuals which may be useful in military operations. There are other restrictive provisions not necessary to mention here. It is the alleged violation of these rights of the inhabitants thus protected that furnish the basis of the case against the defendants.“ The evidence is clear that during the period of occupation in Yugoslavia and Greece, guerrilla warfare was carried on against the occupying power. Guerrilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities

p.58

by harassing the enemy with unorganised forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured, may be shot because the . belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applies to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other

way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured. The rule is based on the theory that the forces of two states are no longer in the field and that a contention between organised. armed forces no longer exists. This implies that a resistance not supported by an organised government is criminal and deprives participants of belligerent status, an implication not justified since the adoption of Chapter I, Article 1, of the Hague Regulations of 1907. In determining the guilt or innocence of any army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence.

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

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

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

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

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

The Judgment states :

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

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

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

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

specific provisions control over general theories, however reasonable they may seem. We concur in the views expressed in the following text on the subject : ' Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, and must be done by the belligerents themselves in making war against each other; and as between the belligerents and neutral States. This is so, even if the declaration of war is *ipso facto* a violation of International Law, as when a belligerent declares war upon a neutral State for refusing passage to its troops, or when a State goes to war in patent violation of its obligations under the Covenant of the League or of the General Treaty for the Renunciation of War. To say that, because such a declaration of war is *ipso facto* a

violation of International Law, it is ‘ inoperative in law and without any judicial significance,’ is erroneous. The rules of International Law apply to war from whatever cause it originates. Oppenheim’s *International Law,* II Lauterpacht, p.174.”

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

The Judgment continued :

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

The Tribunal delimited its field of enquiry as follows :

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

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

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

“ The question of hostages is closely integrated with that of reprisals. A reprisal is a response to an enemy’s violation of the laws of war which would otherwise be a violation on one’s own side. It is a fundamental rule that a reprisal may not exceed the degree of the criminal act it is designed to correct. Where an excess is knowingly indulged, it in

turn is criminal and may be punished. Where innocent individuals are seized and punished for a violation of the laws of war which has already occurred, no question of hostages is involved. It is nothing more than the infliction of a reprisal. Throughout the evidence in the present case, we find the term hostage applied where a reprisal only was involved.

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

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

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

The Judgment then expressed the following opinion :

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

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

p.62

to secure order and tranquility before resort may be had to the taking and execution of hostages. Regulations of all kinds must be imposed to secure peace and tranquility before the shooting of hostages may be indulged. These regulations may include one or more of

the following measures : (1) the registration of the inhabitants, (2) the possession of passes or identification certificates, (3) the establishment of restricted areas, (4) limitations of movement, (5) the adoption of curfew regulations, (6) the prohibition of assembly, (7) the detention of suspected persons, (8) restrictions on communication, (9) the imposition of restrictions on food supplies, (10) the evacuation of troublesome areas, (11) the levying of monetary contributions, (12) compulsory labour to repair damage from sabotage, (13) the destruction of property in proximity to the place of the crime, and any other regulation not prohibited by International Law that would in all likelihood contribute to the desired result.

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

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

p.63

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

The Tribunal continued as follows :

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

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

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

have coincided, no fault can be found in so far as International Law is concerned. But where legality of action is absent, the shooting of innocent members of the population as a measure of reprisal is not only criminal but it has the effect of destroying the basic relationship between the occupant and the population. Such a condition can progressively

degenerate into a reign of terror. Unlawful reprisals may bring on counter reprisals and create an endless cycle productive of chaos and crime. To prevent a distortion of the right into a barbarous method of repression, International Law provides a protective mantle against the abuse of the right.

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

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

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

p.65

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

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

The following remarks on the Keitel Order of 16th September, 1941,(Footnote 1: *See* p.39) and its outcome will serve to illustrate the attitude taken by the Tribunal to the specific instances of reprisals which came before it :

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

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

" The reprisal measures taken for the Topola incident were unlawful for another reason. The reprisal prisoners killed were not taken from the community where the attack on the German soldiers occurred. The record shows that 805 Jews and Gypsies were taken from the collection camp at Sabac and the rest from the Jewish transit camp at Belgrade to be

shot in reprisal for the Topola incident. There is no evidence of any connection whatever, geographical, racial or otherwise, between the persons shot and the attack at Topola. Nor does the record disclose that judicial proceedings were held. The order for the killing in reprisal appears to have been arbitrarily issued and under the circumstances shown is nothing less than plain murder."

(ix) *The Plea of Military Necessity*

The Judgment dealt with this plea as follows :

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

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

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

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

" The record shows that after the capitulation of Yugoslavia and Greece, the defendant List remained as the commanding general of the occupied territory. As the resistance

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

Of the accused Rendulic, however, it was said :

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

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

p.68

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 impassible for all practicable purposes.

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

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

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

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

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

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

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

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

" We have 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 SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent or approval of these defendants. But this cannot be a defence for the commanding general of occupied territory. The duty and

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

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

A little later, the Tribunal made the following ruling :

" An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. (Footnote 1: Of the accused Kuntze, the Tribunal later ruled that : " The collection of Jews and Gypsies in collection or concentration camps merely because they are such, is likewise criminal. The defendant claimed that he never heard of any such action against Jews or Gypsies in the Southeast. The reports in the record which were sent to him in his capacity as Wehrmacht Commander Southeast, charge him with knowledge of these acts. He cannot close his eyes to what is going on around him and claim immunity from punishment because he did not know that which he is obliged to know.") Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during war time. No doubt such occurrences result occasionally because of unexpected contingencies, but they are the unusual. With reference to statements that responsibility is lacking where temporary absence from headquarters for any cause is shown, the general rule to be applied is dual in character. As to events occurring in his absence resulting from orders, directions or a general prescribed policy formulated by him, a military commander will be held responsible in the absence of special circumstances. As to events, emergent in nature and presenting matters for original decision, such commander will not

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

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

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

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

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

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

In the course of its judgment, the Tribunal discussed the position of the Italian officers who were executed after resisting the Germans at Split.(Footnote 1: *See* p.45.)

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

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

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

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

In dealing with the case against the accused von Leyser, formerly commander of the XXIst German Mountain Corps,(Footnote 1: *See* p. 45.) the Tribunal made the following remarks concerning the so-called independent state of Croatia :

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

administration with Dr. Ante Pavelitch at its head. Dr. Pavelitch was brought in from Italy along with others

p. 73

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

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

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

involved an occupied country and that all the acts performed by it were those for which the occupying power was responsible. (Footnote 1: Compare a similar attitude adopted by the Tribunal which conducted the Milch Trial, towards the Vichy Government. *See* Vol. VII, pp. 38 and 46.) ”

Of the accused’s claim that the disposition of the men captured as a result of “ Operation Panther ” (Footnote 2: *See* p.46.) was a matter for the “ Croatian Government and not his concern,” the Tribunal ruled as follows :

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

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

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

“ Throughout the course of this opinion we have had occasion to refer to matters properly to be considered in mitigation of punishment. The degree of mitigation depends upon many factors including the nature of the crime, the age and experience of the person to whom it applies, the motives for the criminal act, the circumstances under which the crime was committed and the provocation, if any, that contributed to its commission. It must be observed, however, that mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defence. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings of the Court with reference to the degree of magnitude of the crime.”

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

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

superior orders were known by his subordinate commanders, a situation that made it difficult for him to act. That the defendant recognised certain injustices and irregularities and attempted to correct them is evident from the record. . . . Such examples of conscientious efforts to comply with correct procedure warrant mitigation of the punishment." (Footnote1: The Tribunal dealt with the plea of superior orders more fully earlier in its Judgment. *See* pp. 50-2.)

4. THE FINDINGS OF THE TRIBUNAL

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

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

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

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

List was also found not guilty of " any crime in connection with the Commissar Order."(Footnote 2: *See* p. 40.) He was, however, found guilty on Counts One and Three as a whole.

Kuntze and Rendulic were found guilty on Counts One, Three and Four.

Of Foertsch, the Tribunal concluded that " the nature of the position of the defendant Foertsch as Chief of Staff, his entire want of command

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

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

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

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

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

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

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

B. NOTES ON THE CASE

1. THE LAW RELATING TO HOSTAGES AND REPRISALS

The most interesting passages in the Judgment of the Tribunal (Footnote l: *See* pp.55-56) are those dealing with the law concerning the taking and killing of hostages and the question of reprisals.

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

many of whose members were victims of the accused's acts, were not lawful belligerents within the terms of Article 1 of the Convention, (Footnote l: Article 1 provides : " The laws, rights and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions : (1) they must be commanded by a person responsible for his subordinates ; (2) they must have a fixed distinctive sign recognizable at a distance ; (3) they must carry arms openly ; and (4) they must conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it they are included under the denomination ' armv '.") but guerrillas liable to be shot on capture.

It would seem that in the Tribunal's opinion, it would be possible for a fighting group to be entitled to belligerent status under Article 1 of the Convention, even though not " supported by an organised government "; and " where room exists for an honest error in judgment," the opposing commander " is entitled to the benefit thereof by virtue of. the presumption of his innocence." (Footnote 2: *See* p.58)

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

Turning to the question of hostages and reprisals, the Tribunal pointed out that it restricted its enquiry to " the right to take hostages from the innocent civilian population of occupied territory as a guarantee against attacks by unlawful resistance forces, acts of sabotage and the unlawful acts of unknown persons and the further right to execute them if the unilateral guarantee is violated"; the taking of hostages to compel armed forces to respect the laws of war would not be discussed. (Footnote 3: In the next paragraph, the Tribunal said that it was concerned only with hostages taken " to ensure against unlawful acts by enemy forces or people." This second reference to " enemy forces " must, however, be taken to mean guerrilla units not falling within the category of the legal belligerents.)

In the opinion of the Tribunal the taking and shooting of hostages in order to guarantee the peaceful conduct in the future of the populations of occupied territories, may in certain circumstances be legal under International Law. The Tribunal based its opinion upon the " available evidence," which was said earlier to consist of " certain rules of customary law and certain inferences legitimately to be drawn from existing conventional law."(Footnote 4: *See* pp.60 and 61.) At a later point (Footnote 5: *See* p.63.) the Tribunal drew attention to the fact that the British *Manual of Military Law* permitted the taking of reprisals against a civilian population (putting to death is not mentioned), and the United States *Basic Field Manual* (*Rules of Land Warfare*) even the putting to death of hostages; and claimed that the killing of hostages was not prohibited under international agreement: but added : " The taking of reprisals against the civilian population by killing members thereof in retaliation for hostile acts against the armed forces or military operations of the occupant seems to have been originated by Germany in modern times. It has been invoked by Germany in the France-Prussian War, World War I and in World War II. No other nation has resorted to the killing of members

p.78

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

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

" Article 50. No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which it cannot be regarded as collectively responsible."

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

(i) the step should be taken only " as a last resort " and only after regulations such as those elaborated by the Tribunal (Footnote l: *see* p. 62.) had first been enforced;

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

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

(The Tribunal did not define the nature of " active " or " passive " participation, but stated that " some connection " must be shown " between the population from whom the hostages are taken and the crime committed." (Footnote 2: Elsewhere, however, the

Tribunal pointed out that there was " nothing to infer that the population of Topola [from whom certain hostages had been taken and shot] supported or shielded the guilty persons." *See* p. 65.))

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

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

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

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

(vii) " Unless the necessity for immediate action is affirmatively shown, the execution of hostages or reprisal prisoners without a judicial hearing is unlawful."(Footnote 3: *See* pp. 64-5.)

(It was not stated on what charges hostages would be tried and what would be the nature of proceedings taken against them; a passage in the judgment, however, suggests that what was meant was not a trial in the

p.79

usual sense but " a judicial fiding that the necessary conditions exist and the essential steps have been taken to give validity to such action." (Footnote 1: *See* p.64l)

The Tribunal next turned its attention to the taking and killing of "reprisal prisoners " whom it defined as " those individuals who are taken from the civilian population to be killed in retaliation for offences committed by unknown persons within the occupied area." It may be thought that, according to the stress placed by the Tribunal, such prisoners differ from hostages in that they are killed after, and not in anticipation of, offences on the part of the civilian population;(Footnote 2: *See* p.61) but, in practice, the difference is not likely to be great, since reprisals are essentially steps taken to prevent future illegal acts, just as are the taking and killing of hostages according to the Tribunal's definition. (Footnote 3: *See* p.61) Indeed the latter pointed out that " the most common reason for holding them [i.e., reprisal prisoners] is for the general purpose of securing the good behaviour and obedience of the civil population in occupied territory," (Footnote 4: *See* p.63) and spoke of the deterrent effect of the shooting of reprisal prisoners, (Footnote 4: *See* p.63-4) and the conditions under which, according to the Tribunal, it is legal to take and shoot hostages on the one hand and reprisal prisoners on the other are much the same. (Footnote 6: Compare pp. 61-2 with pp. 63-6.) In fact, the only practical difference between " hostages " and " reprisal prisoners " seems to be that

the former are taken into custody before, and the latter only after, the offences as a result of which they are executed.

It will be noted that, in its investigation of the question of the legality of the shooting of hostages and reprisal prisoners, the Tribunal preferred to express an opinion on the position as it appeared to it to exist under customary International Law, and left out any reference to Control Council Law No. 10 and the Charter of the Nurenberg International Military Tribunal, both of which include " killing of hostages " in their definition of " war crimes." On the other hand, an examination of the judgment shows that the Tribunal's conclusion that the killing of hostages and reprisal prisoners may in certain circumstances be legal has not been the reason for a finding of not guilty regarding any of the accused in the trial with the possible exception of the defendant von Leyser, of whom the Tribunal said : " The evidence concerning the killing of hostages and reprisal prisoners within the corps area is so fragmentary that we cannot say that the evidence is sufficient to support a finding that the measures taken were unlawful. The killing of hostages and reprisal prisoners is entirely lawful under certain circumstances. The evidence does not satisfactorily show in what respect, if any, the law was violated. This is a burden cast upon the prosecution which it has failed to sustain." This accused was, therefore, found not guilty under Count One of the Indictment, but guilty on other counts.

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

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

" In the Southeast Case, United States v. Wilhelm List, *et al* (Case No. 7), the Tribunal had occasion to consider at considerable length the law relating to hostages and reprisals. It was therein held that under certain very restrictive conditions and subject to certain rather extensive safeguards, hostages may be taken, and after a judicial finding of strict compliance with all preconditions and as a last desperate remedy hostages may even be sentenced to death. It was held further that similar drastic safeguards, restrictions, and judicial pre-conditions apply to so-called ' reprisal prisoners '. If so inhumane a measure as the killing of innocent persons for offences of others, even when drastically safeguarded and limited, is ever permissible under any theory of international law, killing without full compliance with all requirements would be murder. If killing is not permissible under any circumstances, then a killing with full compliance with all the mentioned prerequisites still would be murder.
" In the case here presented, we find it unnecessary to approve or disapprove the conclusions of law announced in said Judgment as to the permissibility of such killings. In the instances of so-called hostage taking and killing; and the so-called reprisal killings with which we have to deal in this case, the safeguards and pre-conditions required to be observed by the Southeast Judgment were not even attempted to be met or even suggested as necessary. Killings without full compliance with such pre-conditions are merely terror murders. If the law is in fact that hostage and reprisal killings are never

permissible at all, then also the so-called hostage and reprisal killings in this case are merely terror murders.")

the Tribunal apparently considered that sufficient uncertainty existed in the law relating to hostages and reprisals to justify its ruling that the killing of hostages could be legal in certain circumstances and it took the opportunity to make clear its regret that the matter had not been dealt with by international agreement. (Footnote 2: *See* p. 63.) In this it was echoing the sentiments expressed in Oppenheim-Lauterpacht, International Law, Volume II, Sixth Edition, at page 461, as a result of the experiences of the first World War :

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

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

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

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

The Tribunal has thus performed a service by pointing out the need for international regulation on the question of the taking of reprisals and the killing of hostages. It would

be useful for any conference or other body called upon to perform that task to be supplied with a statement of the authorities upon which the Tribunal relied in coming to its decision as far as those can be ascertained. As has been seen, (Footnote 1: *See* p.77) the Tribunal itself did not state in detail what its authorities were; it would have been particularly useful to know the authorities on which the Tribunal relied in laying down the detailed conditions on which hostages or reprisal prisoners may be killed.

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

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

It was added that, although the Hague Convention contained no " express provisions concerning either the taking or the execution of hostages in occupied territory " and even if Articles 43 and 46 thereof did not explicitly forbid such practices, " full account must be taken of the preamble to the Convention which declared that ' until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.' " The Prosecution continued : " The majority of the text writers in the field of International Law,' ancient and modern, have determined, either from the unwritten usages of war, or by clear implication from the language of the Hague Convention, that the killings of hostages, under the circumstances and for the purposes with which we are here concerned, is unlawful, and that the continued confinement of hostages is as far as the occupying

power is permitted to go. For example, Oppenheim sanctions the taking of hostages by the occupying power only ' provided that he does not kill them.' The classical statement by Grotius that ' hostages should not be put to death unless they have themselves done wrong ' is in accordance with the views of other old authorities and has been echoed in more recent times not only by Oppenheim but by Garner, and others. As might be expected, in view of the German propensity for occupying the territory of neighbouring countries, and the sustained practice of the German Army in recent decades, German scholars take the contrary view, and defend the execution of hostages as a necessary measure in the event of continued civil disturbances, dangerous to the security of the occupying forces. A few English and American writers have expressed agreement with this view and argue, theoretically rather than practically, that there is a fundamental absurdity in taking hostages if they cannot be executed." In dealing with the provisions of the British and United States Military Manuals on this point, the Prosecution observed

that while " the American manual states that ' hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed '," it added " that ' when a hostage is accepted, he is treated as a prisoner of war ' and that ' reprisals against prisoners of war are expressly forbidden by the Geneva Convention of 1929 '."

It was also pointed out by the Prosecution that " 'The London Charter', in Article 6 (b), and Control Council Law No. 10, in paragraph 1 (b) of Article II, both recognise the ' killing of hostages ' as a war crime. The opinion of the International Military Tribunal makes repeated reference to the. killing of hostages as a war crime. . . .(Footnote 1: *See* British Command Paper, Cmd. 6964, pp. 48 and 49-50) The provisions of Law No. 10 are not only binding upon the Tribunal, but are in accordance with the views which most authorities in the field have held for decades past."

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

Much of the arguments of the Defence were devoted to showing that the persons, on account of whose activities against the German army reprisal action was taken, were not entitled to recognition as legitimate belligerents. As has been seen,(Footnote 2: *See* pp.55-9) the Tribunal decided that, while certain forces were active in the areas in question which were entitled to such recognition, they did not include the guerrilla forces whose activities were relevant in this trial.

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

(i) The Defence claimed the authority of, among others, Professor Lauterpacht for claiming that certain acts of reprisal were legal under International Law and could not therefore be regarded as war crimes.(Footnote 3: *See* pp. 3-4 of this volume. The Defence also quoted the passages from the British and United States Military Manuals which the Tribunal cited. *See* p. 63.)

p.83

Such legal acts of reprisal included acts taken by an occupying power with a view to forcing the civilian population to desist from illegal conduct. At a later point, Defence Counsel quoted a statement made by the Judge Advocate in the ***Kesselring Trial*** (Footnote l: *See* pp. 12-13.) that : " It cannot be excluded entirely that innocent persons may be shot by way of reprisals ; the International Law is very flexible."

Counsel added that : " neither in the London Statutes nor in the Control Council Law No. 10 is the killing of persons by way of reprisal designated as a war crime although this problem had no lesser practical importance during World War II than the problem of killing hostages." The position of the Defence was that the killing of hostages which was

prohibited by the Charter of the International Military Tribunal and Law No. 10, as by paragraph 461 of the British Manual, to which Counsel also made reference, (Footnote 2: " 461. The practice of taking hostages as a means of securing legitimate warfare was in former times very common. To ensure the observance of treaties, armistices and other agreements depending on good faith, hostages were given or exchanged, whose lives were held responsible for any perfidy. This practice is now obsolete, and if hostages are nowadays taken at all they have to suffer in captivity, and not death, in case the enemy violates the agreements in question. The Hague Rules do not mention hostages, and it must be emphasized that in modern times it is deemed preferable to resort to territorial guarantees instead of taking hostages.") was the execution of hostages in the old sense of prisoners held as a guarantee of the observance of treaties, armistices or other agreements, or of persons taken by an occupying power as security for requisitions and contributions and not the killing of inhabitants of occupied territories with the aim of ensuring the observance of good order in such territories. (Footnote 3: The prosecution replied that it was inconceivable that, since thousands of hostages were executed in reprisal for hostile acts during the last two wars, this was not precisely the practice which the Charter and Control Council Law condemned. If these statutes were held not to include the execution of all kinds of hostages, they would be completely anachronistic and meaningless.) Of the latter, Counsel claimed : " In the modern hostage form, however, the killing or other punishment of the hostages are at least preponderantly reprisals, that is, compulsory measures adopted against acts of the civilian population or the enemy forces committed contrary to International Law in order to force them to abide by martial law. The Prosecutor already said in his opening statement that ' the purpose of taking hostages is to place oneself into a position of being able to adopt retaliatory measures.' The nature of reprisals of the modern hostage practice has been recognised especially clearly in composing the American *Rules of Land Warfare* as follows from the incorporation of No. 358 (d), which deals with hostages, into the rules on reprisals." It was prisoners of the former type, according to the Defence, who were entitled to prisoner of war rights and were guaranteed such rights by paragraph 359 of the United States Military Manual, *Rules of Land Warfare,* according to which ". . . when a hostage is accepted he is treated as a prisoner of war."

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

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

The Tribunal set out a detailed list of the steps which must be taken before shooting hostages or reprisal prisoners, in an attempt to secure the cessation of offences. (Footnote

1: *See* p. 62.) These steps were not suggested in the pleas of Counsel, but it was perhaps open to the Tribunal to take judicial notice of the fact that certain courses were open to the administrator of occupied territory faced with attacks from illegal belligerents.

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

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

> " ' Reprisals have to be such as not to fail to impress those who are the authors and instigators of the excess in question.'
> " Territorial connection between hostages and perpetrators might have played a part in earlier days when acts of resistance and sabotage against the occupation forces mostly emanated from a limited circle of persons. However, it was of no importance, whatsoever, in Yugoslavia and Greece, where the resistance activity emanated from forces which reached beyond all local frontiers. In such a situation only the spiritual connection between hostages and perpetrators could be taken into account, such as it becomes apparent from the membership in or support of the illegal resistance forces, or merely from the fact of a common national basis."

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

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

> " Illegal acts of warfare justifying reprisals may be committed by a government, by its military commanders, or by a community or
>
> p.85
> individuals thereof, *whom it is impossible to apprehend, try, and punish*." (Footnote 1: Italics inserted [in original])
> Article 458 of the British *Manual of Military Law* makes the same proviso.(Footnote 2: *See* p. 63.)

(vi) Defence Counsel claimed that hostages could be shot " if the unlawful acts are committed by the opposite side in spite of warnings "(Footnote 3: Counsel made reference to para. 358 (*d*) of the United States *Manual*, which speaks of " Hostages taken and held for the *declared* purpose of insuring against unlawful acts by the enemy forces or people.") and as has been seen the Tribunal also pointed out the necessity to give the populace due warning that, if illegal acts continued, reprisal action would be taken.

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

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

(viii) The Tribunal's ruling that reprisal action may only follow a judicial proceeding could not, on the other hand, have been suggested by anything which Counsel said. The Defence claimed that there was no rule laying down that a commander less than a division commander may not order reprisals. Counsel referred to paragraph 358 (b) of the United States *Manual* according to which, if immediate action is demanded, as a matter of military necessity, " a subordinate commander may order appropriate reprisals upon his own initiative." (Footnote 4: *See* pp.1-8.)

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

Among others, three trials reported in this present volume apart from the *Hostages Trial* are relevant in this connection: the *Trial of Von Mackensen and Melzer*, (Footnote 4: *See* pp. 1-8) the *Trial of Kesselring,* (Footnote 5: *See* pp. 9-14) and the *Trial of Franz Holstein and 23 Others*. (Footnote 6: *See* pp. 22-23)

The Judge Advocate acting on the second of these three trials expressed the opinion that there was " nothing which makes it absolutely clear that in no circumstances-and especially in the circumstances which 1 think are agreed in this case-that an innocent person properly taken for the purpose of a reprisal cannot be executed." Nevertheless, the British Military Courts which conducted the first two trials mentioned above must be taken, in finding the accused guilty, to have rejected the plea of legitimate reprisals on the facts of the two cases, and the confirming officer did not upset the findings of guilty passed on the accused. Nor did the accused in the third trial, which was conducted before a French Military Tribunal, benefit from any consideration that their acts might be justifiable as legitimate reprisals,

for here again the offences proved to have taken place went beyond what could be considered as legitimate even taking into account the unsettled state of the law on this point.

Two further trials may be mentioned. The *Dostler case,* illustrates the rule laid down in Article 2 of the Geneva Prisoners of War Convention, that there can be no legitimate reprisals against a prisoner of war. (Footnote l: *See* Vol. I of this series, pp. 28-31) The *Trial of Bruns and two others* provides evidence that, since the purpose of reprisal action is to coerce an adversary (or, it may be added, an inhabitant of occupied territory) to observe International Law, it is one test of the *bonâ fides* of such action that its being taken should be publicly announced (Footnote 2: *See* Vol. III, pp. 21-2). Finally, it is of interest to quote the contents of the section headed *Reprisals* of the Judgment in the *Einsatzgruppen Trial* (Footnote 3: *See* p. 90). It will be noted that the Tribunal which conducted this case had no hesitation in regarding Article 50 of the Hague Regulations as being applicable to the taking of reprisals and consequently ruled that reprisals may only be taken against persons who can be regarded as jointly responsible for the acts complained of:

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

" Article 50 of the Hague Regulations states unequivocally :

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

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

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

" 'A belligerent which is contemptuous of conventional or customary prohibitions is *not* in a position to claim that its adversary when responding with like for like, lacks the requisite excuse.'
"If it is assumed that some of the resistance units in Russia or members of the population did commit acts which were in themselves

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

" Reprisals, if allowed, may not be disproportionate to the wrong for which they are to retaliate. The British *Manual of Warfare*, after insisting that reprisals must be taken only in last resorts, states :
" ' 459 . . . Acts done by way of reprisals must not, however, be excessive and must not exceed the degree of violation committed by the enemy.'

" Similarly, Article 358 of the American *Manual* states :
" ' (b) When and how employed :
Reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from illegitimate practices. . . .
(c) Form of reprisals :
The acts resorted to by way of reprisals. . . should not be excessive or exceed the degree of violations committed by the enemy.'

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

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

The remark that " under International Law, as in domestic law, there can be no reprisal against reprisal " (since a legal reprisal cannot create the grounds for a legal counter-reprisal) suggests that the inhabitant of an occupied territory is not always bound to refrain from hostile acts against the occupying power and is reminiscent of a paragraph from an article by two learned authors which states that :

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

occupant and the civilian, the Germany have created a reign of terror." (Footnote l: Ellen Hammer and Marina Salvin, "The Taking of Hostages in Theory and Practice," in *American Journal of International Law*, January, 1944, pp. 20-33)

p.88

The judgment in the *Hostages Trial* includes a similar passage. (Footnote l: *See* p.64)

The attitude taken to the question of the shooting of hostages and reprisal prisoners by the Tribunals which tried on the one hand the *Hostages Trial* and on the other the *Einsatzgruppen Trial* can be reconciled if the statement of the former, that the population against whom action is taken must be a party to the offences whose cessation is aimed at, is interpreted strictly, so as to ensure observance of Article 50 of the Hague Convention. (Footnote 2: Persons who hid or otherwise shielded illegal belligerents could probably be regarded as parties to their offences.) This provision received no treatment in the judgment in the *Hostages Trial ;* except in so far as it was said that the Convention made no provision regarding hostages (Footnote 3: *See* p. 60) and, since the great bulk, if not the entirety, of the killings of hostages or reprisal prisoners which were proved to have taken place were held by the Tribunal to fall outside the range of legal executions, there is no indication of the degree of connection between the victims of the killings and the original or the feared offences which the Tribunal would have regarded as sufficient to make these victims " parties " to those offences.

On the other hand, if persons are jointly responsible for an offence, action may be taken against them irrespective of any law of reprisals, and this suggests that if a law of reprisals in occupied territories is to be preserved at all, (Footnote 4: There is a feeling that the possibility of the taking of some kind of reprisals is such a strong weapon in the hands of an administrator of occupied territories that to abolish it altogether is impracticable. *See* Hammer and Salvin, *op cit.*, p.33) three possible courses are open to the codifying agent :-

(i) to insist that the victims be in some way connected with the offences but not necessarily so closely as to make them " parties " in the usual legal sense;

(ii) to insist that the strict rules as to complicity should apply but to permit more severe action to be taken where the complicity was trivial than would have been permissible but for a law of reprisals; or

(iii.) to rule that in no event may actual executions appear among the reprisal acts taken against persons not " parties " to the offences in the strict sense of the word.

2. *THE EXTENT OF THE RESPONSIBILITY OF COMMANDING GENERALS*

The passages quoted above (Footnote 5: See pp. 69-71) from the judgment of the Tribunal indicate the attitude of the latter to the extent to which a commanding general in

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

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

The judgment elsewhere reinforced the first principle by stating that a commanding general of occupied territory " cannot escape responsibility by a claim of a want of authority. The authority is inherent in his position as commanding general of occupied territory. The primary responsibility for the prevention and punishment of crime lies with the commanding general, a responsibility from which he cannot escape by denying his authority over the perpetrators." From this rule it follows that a commanding general cannot hide behind a " puppet government " and plead that he is not responsible for their acts; the Tribunal applied this conclusion to the accused von Leyser who was commanding general of a corps area. (Footnote 1: *See* pp. 72-4) Elsewhere, the Tribunal repeated : " We must assert again, in view of the defendant's statement that the responsibility for the taking of reprisal measures rested with the divisional commanders and the Croatian government, that a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about."

The facts of the present case are similar in many respects to those of the *Yamashita Trial* (Footnote 2: *See* Vol IV of this series, pp. 1-96) and the remarks made in the preceding paragraphs on the extent of a commander's responsibility are to be read together with those made on the same topic in the notes to that trial.(Footnote 3: *Ibid*, pp. 83-96) Perhaps the most interesting issue in this connection is the question to what extent the accused's knowledge of offences being committed by his troops must be proved in order to make him responsible for their acts. The task of the Prosecution in the *Hostages Trial* was made easier by the fact that reprisal actions were often reported by lesser officials to various of the accused, and many such reports were quoted in the Judgment, in which appears also the ruling that a commander would not usually be permitted to deny knowledge of such reports. In the *Yamashita Trial* few if any reports of atrocities committed were made to the accused and here it is probable that the widespread nature of the offences proved was an important factor in so far as it may have convinced his judges either that the accused must have known or must be deemed to have known of their

perpetration, or that he failed to fulfil a duty to discover the standard of conduct of his troops.(Footnote 4: *Ibid*., p. 94. On the general question of a commander's responsibility and the element of knowledge, *see also* Vol. VII, pp. 61-4.)

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

A comparison of the evidence relating to the accused Foertsch and von Geitner (Footnote 5: *See* pp. 42-3) and the findings of the Tribunal upon them (Footnote 6: *See* pp. 75-6) indicates the limits beyond which the Tribunal found it impossible to hold a chief of staff liable for the acts of the subordinates of his commander. The Tribunal took the view, for instance, that a chief of staff could not be held responsible

p.90

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

On the other hand, two trials reported in an earlier volume of this series have shown that a Chief of Staff may be held guilty of committing war crimes. (Footnote 1: *See* Vol. V, p.79) Certainly the position of Chief of Staff provides no immunity upon its holder and the responsibility of such a person for war crimes must be judged upon the facts of each case. An examination of the relevant facts of the two trials mentioned above shows that the chiefs of staff who were held guilty took a closer and more willing and active part in the offences charged than did Foertsch and von Geitner. (Footnote 2: *Cf*. Vol. V, pp. 62, 63, 67, 68 and 69 with pp. 42-3 of the present volume.)

4. LIABILITY FOR UNEXECUTED ORDERS

In dealing with the Prosecution's allegation that the accused Rendulic passed on to troops subordinate to him the " Commissar Order " of 6th June, 1941, the Tribunal made the following remark : " The order was clearly unlawful and so recognised by the defendant. He contends, however, that no captured Commissars were shot by troops under his command. This is, of course, a mitigating circumstance but it does not free him of the crime of knowingly and intentionally passing on a criminal order." This constitutes recognition that the mere passing on of an illegal order, even if it is not obeyed, may constitute a crime under International Law; and a rule which applies to an order passed on by a defendant would certainly apply to an order originating with him. This question receives further treatment at other points in these volumes.(Footnote 3: *See* the notes to the reports on the *Moehle Trial* in Vol. IX and the *Falkenhorst Trial* in Vol. XI, and the *High Command Trial* in Vol. XII.)

5. THE PLEA OF SUPERIOR ORDERS

The Tribunal's treatment of the law relating to the plea of superior orders (Footnote 4: *See* pp. 50-2) is interesting as the most exhaustive *judicial* examination of the question so far reported in these volumes. It will be seen that the Tribunal's opinion regarding the extent of effectiveness of the plea corresponds to the approach thereto

which has been generally adopted in war crime trials arising out of the Second World War. (Footnote 5: *See* Vol. V of these Reports, pp. 13-22, and the references to earlier volumes set out on p. 14 thereof, footnote 2.)

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

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

p. 91

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

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

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

Under a heading *Duress needed for Plea of Superior Orders,* the Tribunal expressed the following opinion : " But it is stated that in military law even if the subordinate realises that the act he is called upon to perform is a crime, he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes duress. Let it be said at once that there is no law which requires that an innocent man must forfeit his

life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.

" Nor need the peril be that imminent in order to escape punishment." On the other hand " the doer may not plead innocence to a criminal act ordered by his superior if he is in accord with the principle and intent of the superior. . . . In order successfully to plead the defence of Superior Orders the opposition of the doer must be constant. It is not enough that he mentally rebel at the time the order is received. If at any time after receiving the order he acquiesces in its illegal character, the defence of Superior Orders is closed to him."

The Tribunal added that " superior means superior in capacity and power to force a certain act. It does not mean superiority only in rank. It could easily happen in an illegal enterprise that the captain guides the major, in which case the captain could not be heard to plead Superior Orders in defence of his crime."

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

p.92

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

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

Certain passages from the judgment of the Tribunal on the factors which may be considered in mitigation of punishment have already been quoted; they form a useful summary of the considerations which the Tribunal found relevant in this connection. (Footnote 1: *See* pp. 74-5) It may be added that in dealing with the guilt of the accused List, the Tribunal said : " The failure of the nations of the world to deal specifically with the problem of hostages and reprisals by convention, treaty, or otherwise, after the close of World War I, creates a situation that mitigates to some extent the seriousness of the offence. These facts may not be employed, however, to free the defendant from the responsibility for crimes committed. They are material only to the extent that they bear upon the question of mitigation of punishment."

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