## CASE NO. 39

## TRIAL OF ERHARD MILCH.

UNITED STATES MILITARY TRIBUNAL, NUREMBERG
(20TH DECEMBER, 1946—17TH APRIL, 1947)

*Deportation and Use of Forced Labour as War Crimes and Crimes against Humanity. The Characteristics of Illegal Medical Experiments. Limits to the Responsibility of a Superior Officer for the Crimes of his Subordinates.*

Erhard Milch, who during the Second World War had been Inspector-General and a Field-Marshal in the German Air Force, Aircraft Master General, Member of the Central Planning Board and Chief of the Jaegerstab, was accused of responsibility for deportations, forced labour and illegal experiments. The victims were said to be inhabitants of occupied territories, prisoners of war, German nationals and others, and the offences charged amounted to war crimes and crimes against humanity.

The Tribunal found that illegal experiments had been carried on by persons within the accused's command, but that the latter's relation to the offenders and their acts was too remote to make him responsible for their acts. On the other hand, he was found guilty of war crimes and crimes against humanity involving slave labour, deportation of civilian populations for slave labour, cruel and inhuman treatment of foreign labourers, and the use of prisoners of war in war operations by force and compulsion.

Milch was sentenced to imprisonment for life, and his application to the Supreme Court of the United States for leave to file a petition for a writ of habeas corpus was rejected.

### A. OUTLINE OF THE PROCEEDINGS

#### 1. THE INDICTMENT

The indictment filed against Milch contained three Counts, charging the commission of war crimes and crimes against humanity as defined in Control Council Law No. 10.[1]

Count One charged that between September, 1939, and May, 1945, Milch unlawfully, wilfully, and knowingly committed War Crimes as defined by Article II of Control Council Law No. 10, in that he was a principal in, accessory to, ordered, abetted, took a consenting part in, and was connected

[1] For the law relating to United States Military Tribunals, see Volume III of this series, pp. 113-120.

with plans and enterprises involving slave labour and deportation to slave labour of the civilian populations of Austria, Czechoslovakia, Italy, Hungary, and other countries and territories occupied by the German armed forces, in the course of which millions of persons were enslaved, deported, ill-treated, terrorized, tortured, and murdered.

Milch was also charged with a similar participation in " plans and enterprises involving the use of prisoners of war in war operations and work having a direct relation with war operations, including the manufacture and transportation of arms and munitions, in the course of which murders, cruelties, ill-treatment, and other inhumane acts were committed against members of the armed forces of nations then at war with the German Reich and who were in custody of the German Reich in the exercise of belligerent control ".

These acts were said to " constitute violations of international conventions, particularly of Articles 4, 5, 6, 7, 46, and 52 of the Hague Regulations, 1907, and of Articles 2, 3, 4, 6, and 31 of the Prisoner-of-War Convention (Geneva, 1929), the laws, and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and Article II of Control Council Law No. 10".

Count Two charged that " between March, 1942, and May, 1943, the defendant Milch unlawfully, wilfully, and knowingly committed War Crimes as defined in Article II of Control Council Law No. 10, in that he was a principal in, accessory to, ordered, abetted, took a consenting part in and was connected with plans and enterprises involving medical experiments without the subjects' consent, upon members of the armed forces and civilians of nations then at war with the German Reich and who were in the custody of the German Reich in the exercise of belligerent control, in the course of which experiments the defendant Milch, together with divers other persons, committed murders, brutalities, cruelties, tortures, and other inhumane acts . . .

> " The said War Crimes constitute violations of international conventions, particularly of Articles 4, 5, 6, 7 and 46 of the Hague Regulations, 1907, and of Articles 2, 3, and 4 of the Prisoner-of-War Convention (Geneva, 1929), the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and of Article II, of Control Council Law No. 10".

Count Three charged similar participation in crimes against humanity, involving the same unlawful acts as specified in Counts One and Two, but committed against " German nationals and nationals of other countries ".

These alleged crimes against humanity were said to " constitute violations of international conventions, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and Article II of Control Council Law No. 10 ".

2. THE EVIDENCE BEFORE THE TRIBUNAL

(i) *The Official Positions of the Accused*

It was shown that the defendant Erhard Milch was at various times between 1939 and 1945, Field-Marshal in the German Luftwaffe, Inspector-General of the Luftwaffe, State Secretary in the Air Ministry, General Luftzeugmeister, representative of the Wehrmacht on the Central Planning Board and Chief of the Jaegerstab.

(ii) *The Accused's Responsibility for Deportation and the Use of Slave Labour*

Of the charges regarding Slave Labour, Milch claimed that the term " Slave Labour " was a misnomer and that all foreign workmen in Germany during the war were there of their own free will ; that if they did not come voluntarily they were treated humanely and considerately and were not subjected to any ill-treatment either in transportation or while in active employment for the benefit of the Reich ; and that if ill-treatment, fatal or otherwise, of foreign workmen occurred, he was in no way responsible for such ill-treatment.

It was claimed by the prosecution that the defendant's responsibility for the crimes alleged in Count One of the Indictment arose from his activities in three capacities : as Aircraft Master General (General Luftzeugmeister) ; as a member of the Central Planning Board ; and as Chief of the Jaegerstab.

The Central Planning Board was established in 1942, and was charged with the procurement and distribution of all materials necessary for the conduct of the entire German war economy.

The Board consisted of Reich Minister Speer, Under-Secretary Koerner, and the defendant, each formally having equal authority, although in the event Speer and Milch dominated the proceedings. Meetings of the Central Planning Board were held at least weekly and the defendant presided over or was present at a majority of such meetings.

The minutes of those meetings which were offered in evidence showed a constant and unremitting concern with the problem of labour on the part of the Board. Fritz Sauckel was in supreme command of the procurement of labour for the entire war effort, and often appeared before the Central Planning Board to report on the situation as regards the supply of foreign labour. Various other officials came before the Board to express their labour needs in terms of foreign workers.

The minutes of the Central Planning Board showed also that the members of the Central Planning Board knew and discussed the fact that workers from occupied territories were being forcibly taken from their homes without knowledge of their destination, and against their will crowded into box cars without food or water or toilet facilities, deported, and forced to work in factories manufacturing armaments and other necessary items for the prosecution of the war.

The deportees, with few exceptions, were deprived of the right to move freely or to choose their place of residence ; to live in a household with their

families, to rear and educate their children ; to marry ; to visit public places of their own choosing ; to negotiate, either individually or through representatives of their own choice, upon the conditions of their own employment ; to organize into trade unions ; to exercise the free expression of opinion ; or to gather in peaceful assembly. They were frequently deprived of the right to worship according to their own conscience. They were inadequately fed, housed or cared for, and hundreds of thousands died of exhaustion and hunger. The victims included Frenchmen, Poles, Lithuanians, Ukranians, Czechs, Dutchmen, Russians and Jews.

The evidence showed that not only civilian inhabitants of occupied territories but also prisoners of war, including Russians, Poles and Frenchmen, were employed in German armament production. In a discussion with Sauckel, the defendant and others on the subject of manpower available for the armament industry, Göring stated on 28th October, 1943, that out of 2,200,000 in armament production, 770,000 were prisoners of war. On 14th April, 1943, Sauckel reported to Hitler that " 1,622,829 prisoners of war are employed in the German economy ".

The evidence demonstrated that the accused was aware of the use made of civilians from occupied territories and of prisoners of war in German industry. For instance, he testified that he knew that prisoners of war were employed in the airplane factory at Regensburg and that some twenty thousand Russian prisoners of war were used to man anti-aircraft guns protecting the various plants. He stated further that he saw certain of these prisoners manning 8.8. and 10.5 anti-aircraft guns at airplane factories in Luftgau 7 near Munich. Sauckel, the Minister Plenipotentiary for Labour, attended at least fifteen meetings of the Central Planning Board, over which the defendant presided, and discussed at length and in detail the problems involved in procuring sufficient foreign labourers for the German war effort. He disclosed the methods used in forcing civilians of the eastern countries into the Reich for war work. He related the difficulties and resistance which confronted him and the methods which he used and proposed to use in forcibly rounding up and transporting foreign workers. The advisability of using prisoners of war and inmates of concentration camps in the Luftwaffe was discussed, with the defendant offering advice and suggestions as to the most effective methods to be used.

There was evidence of many occasions on which the defendant not only listened to stories of enforced labour from eastern civilians and prisoners of war being recruited and thereby became aware of the methods used in procuring such labour, but on which he himself urged more stringent and coercive means to supplement the dwindling supply of labour in the Luftwaffe. At the 54th meeting of the Central Planning Board, held on 1st March, 1944, he expressed the opinion that force had to be exercised because there was nothing to attract the workers to Germany since they believed that Germany would soon be defeated, and because furthermore they were attached to their families and their own countries.

At the 42nd meeting of the Central Planning Board, held on 23rd June, 1943, it was recommended that the Führer be advised that 200,000 Russian prisoners of war, fit for the heaviest work, should be made available from the Wehrmacht and Waffen SS through the intermediary of the Chiefs of

the Army Groups. At a meeting on 30th October, 1942, Sauckel suggested that as soon as the Army took prisoners in operational territories they should be immediately turned over to him as plenipotentiary for labour. To this, Milch added :

> " The correct thing to do would be to have all Stalags transferred to you by order of the Führer. The Wehrmacht takes prisoners and as soon as it relinquishes them, the first delivery goes to your organization. Then everything will be in order."

At another meeting of the Central Planning Board, he said :

> " We have made a request for an order that a certain percentage of men in the Anti-Aircraft Artillery must be Russians. Fifty thousand will be taken altogether ; 30,000 are already employed as gunners. This is an amusing thing that Russians must work the guns."

Regarding this statement, the defendant made various explanations. According to one, the German word which has been translated into " amusing ", should really have been rendered " mad ". In support of this interpretation Milch argued that since he needed these prisoners in his armament programme, he could not have approved their use as gunners. He then also denied that they were in fact used as gunners, and if they were, he claimed not to have been responsible. Other witnesses clearly established that the Russian prisoners were stationed at the guns, either for servicing the pieces, hauling ammunition to them or actually firing them.

On 25th March, 1944, the defendant complained that prisoners of war were not being treated with severity if they refused to work, saying :

> " International law cannot be observed here. I have asserted myself very strongly, and with the help of Saur I have represented the point of view very strongly that the prisoners, with the exception of the English and the Americans, should be taken away from the military authorities. The soldiers are not in a position, as experience has shown, to cope with these fellows who know all the answers. I shall take very strict measures here and shall put such a prisoner of war before my court martial. If he has committed sabotage or refused to work, I will have him hanged, right in his own factory. I am convinced that that will not be without effect."

On another occasion, the defendant was shown to have approved the use of the whip on any prisoners of war who might be found guilty of shirking.

The Jaegerstab was formed on 1st March, 1944, for the purpose of increasing production of fighter aircraft. Milch and Speer were joint chiefs of this organization, which assumed control over fighter production and exploited and directed the use of foreign forced labour in the armament industry. From the minutes of its meetings it was clear that the question of manpower was repeatedly referred to by the defendant. When other methods of obtaining its labour were not available, the Jaegerstab recruited its own labour either directly or by organizing the seizing of manpower arriving on transports from the east. Much of the labour employed by the Jaegerstab in aircraft production and in the air armament industry was taken from

concentration camps and from among foreign forced labour. The Jaegerstab functioned from 1st March, 1944, to 1st August, 1944.

Forced labour from occupied countries were poorly fed, poorly clothed, and forced to work an official rate of seventy-two hours per week ; their general treatment resulted in the death of a great many and the permanent disability of others.

There was evidence that Milch was aware of the procurement and allocation of forced labour. He knew that forced labour and prisoners of war were being used in the Jaegerstab construction programme, and when the question of Italian civilian labour was being discussed at a meeting of the Jaegerstab, the defendant advocated the shooting of those who attempted to escape in transit. Again, on 25th April, 1944, he said :

> " It will only work if we put these workers into barracks. We cannot exactly treat them as prisoners. It must appear otherwise, but it must be so in practice . . . I am personally convinced after talking to the Führer that he will agree as soon as it is made reasonable. The people should not be able to mingle with the population and to conspire. Nor should they be allowed to run around free, so that they can cross the frontier every day. Both practices must be stopped . . . I am of the opinion that that must be done at once. It's all the same to me if individual people do object. Protest does not interest me at all, whether from the Chief of Prisoners of War Affairs or from our side . . . "

On other occasions, the accused stated that deportees from Italy who attempted to escape during their journey should be shot, and that: " No Frenchman will work when the invasion begins. I am of the opinion that the French should be brought over again by force, as prisoners."

As General Luftzeugmeister, the defendant had complete control of aircraft production and requisitioned labour for the aircraft industry with knowledge of the techniques used in recruiting these labourers.

The evidence presented by the Prosecution tended to show that the defendant advocated extreme measures in dealing with foreign forced labour. He had expressed the opinion that if foreign forced labourers refused to work, they should be shot. If they attempted to revolt, he had ordered that every tenth person be killed, regardless of his personal guilt or innocence.

The defendant pleaded that he was a man of very violent temper, who, when worried from overwork, was not wholly responsible for many utterances made by him. He protested further that he did not actually intend orders given in such fits of temper to be carried out, but that they were simply the result of uncontrolled anger and were understood by his associates and subordinates to have been so. He also declared that head injuries resulting from two serious accidents were largely responsible for such uncontrollable fits of temper.

(iii) *The evidence Regarding the Carrying Out of Illegal Experiments*

The evidence showed that at various times between March, 1942, and April, 1943, there were conducted at Dachau concentration camp experiments referred to as " low-pressure ", " cold water " and " freezing " experiments.

The apparatus used for the " low-pressure tests " was simply a wood and metal cabinet in which air pressure could be increased and decreased, the purpose of the tests being to ascertain the subject's capacity to inhale large amounts of pure oxygen, and to observe his reaction to a gradual decrease of oxygen. In this manner high-altitude atmospheric pressure was to be simulated, and from the results the experimenters were to be able to determine methods and means of maintaining and saving lives among aviators compelled to rise to extreme altitudes, or, because of war hazards, obliged to parachute to earth.

The process followed in the " cold water experiments " was to place the subject outdoors at night in a nude state, and then to pour cold water over him hourly.

The " freezing experiment " was conducted in the following manner. A large basin was filled with water and ice was added until the temperature measured 3 degrees. Then the subject, either naked or dressed in a flying suit, was forced into the freezing liquid. One witness described the experimental basin as being made of wood, two metres long, two metres high, and 50 centimetres above the floor. He stated that 280 to 300 prisoners were used in the tests, many of them undergoing as many as three experiments, and that out of the number indicated 80 to 90 died. The selection of the subjects was left to the political department of the camp after a Dr. Rascher(1) had made requests for a certain number. The eventual victims were made up of political prisoners, foreigners, prisoners of war and inmates condemned to death. The witness claimed that none of the subjects were volunteers.

It was claimed by Milch that only legitimate scientific experiments were conducted, which did not involve pain and could not ordinarily be expected to result in death. The evidence showed, however, that at least the experiments conducted by Dr. Rascher involved suffering in the extreme and often resulted in death. Under the specific guidance of Dr. Rascher, the air pressure was reduced to 14,000 metres, a point at which no airman would ever be expected to fly. When Dr. Rascher was handling the " freezing experiments " a large number of persons involved were kept in the water so long that they died. Many others died during the reviving or during the rewarming procedure.

It was also claimed by Milch that the only persons who were used in these experiments were habitual criminals who had been sentenced to death and who were given the opportunity of offering themselves for use in the experiments and receiving as a reward, if they survived, a commutation of the death sentence to life imprisonment. The evidence revealed, however, only one possible case of such a subject receiving a pardon, and that a doubtful instance.

An Austrian patent lawyer, he had been an inmate of Dachau, declared under oath that Dr. Rascher chose the victims for his researches from the punishment company at Dachau, a group made up of political prisoners marked for extermination. The witness added: " A few convicts were among the political prisoners, having been placed there merely to depress

---

(1) See p. 34.

the morale of the political prisoners, and so a few convicts were killed along with the others."

Another witness, who had been a nurse in the ward where the experiments were carried out, testified that from 180 to 200 concentration camp inmates were subject to the high-altitude experiments, and of these, 10 were volunteers. Of all these subjects only one man was ever released. It was this witness's conclusion that over a period of three months from 70 to 80 persons were killed in the high-altitude experiments. He declared further that approximately 40 of the persons killed were not previously condemned to death.

During the periods covered by the experiments the defendant was Under-Secretary of State and Head of the Reich Air Ministry, Inspector-General and Second-in-Command under Göring of the Luftwaffe. In these various capacities, certain purely military duties devolved upon him, especially as Inspector-General, and the major part of his duties revolved around the production of aircraft for the Luftwaffe. As Inspector-General he was, however, in charge of the office which authorized research conducted on behalf of the Air Force, and one of his immediate subordinates was Professor Hippke, who held the post of Inspector of the Medical Services of the Luftwaffe. Hippke was a physician, and had supervision over all matters involving the health and physical welfare of the personnel of the Luftwaffe.

The experiments at Dachau were conducted by three physicians, Dr. Romberg, Dr. Ruff and Dr. Rascher. There was some evidence of Hippke's having ordered them to be conducted, but not of his informing Milch of his action. It was apparent from the evidence that Dr. Rascher, who was attached to the Luftwaffe, was principally responsible for the nature of the experiments. Dr. Ruff and Dr. Romberg were also attached to the Luftwaffe and were, therefore, remotely under the command and control of the defendant. It was clear that the actual activities of these three physicians were removed from the immediate scrutiny of the defendant even though their activities were conducted within the orbit of the Luftwaffe, over which the defendant had command.

There was no evidence that the defendant personally participated in or instituted the experiments, or that they were conducted under his direction. Neither was there any proof of knowledge on the accused's part that unwilling subjects would be forced to submit to experiments or that they would be painful and dangerous to human life. The defendant concerned himself very little with the details of the experiments. It was shown that a motion picture explaining the experiments was brought to Berlin and exhibited in the Air Ministry Building, where the defendant had his office, but there was no clear evidence that he was present when it was shown and the showing was held long after the experiments were concluded.

On 20th May, 1942, the defendant wrote to Wolff, Himmler's Adjutant, stating that:

> " . . . our medical inspector (Dr. Hippke) reports to me that the altitude experiments carried out by the SS and Luftwaffe at Dachau have been finished. Any continuation of these experiments seems essentially unreasonable . . .

" The low-pressure chamber would not be needed for these low-temperature experiments. It is urgently needed at another place and therefore can no longer remain in Dachau."

The same letter of 20th May, 1942, to Wolff, indicated that the defendant was aware of the proposed " freezing experiments ". He admitted giving orders for the conduct of certain experiments aiming at lessening " perils at high seas," but he contended that he did not know of, or contemplate, that the experiments would be conducted in an illegal manner or would result in the injury or death of any person. The defendant further asserted that he did not know or have any reason to believe that the experiments were conducted in such a manner as they were until after they had been completed.

Dr. Rascher wrote many reports on the results of these experiments, but there was no proof that they ever reached the defendant. On the contrary, they were addressed to Himmler and to Rudolf Brandt, his Adjutant.

3. JUDGMENT OF THE TRIBUNAL

(i) *Illegal Experiments*

The Tribunal chose to deal first with Count Two of the Indictment,[1] and on this Count the judgment ran as follows :

" In approaching a judicial solution of the questions involved in this phase of the case, it may be well to set down seriatim the controlling legal questions to be answered by an analysis of the proof:

(1) Were low-pressure and freezing experiments carried on at Dachau?

(2) Were they of a character to inflict torture and death on the subjects ?

(The answer to these two questions may be said to involve the establishment of the *corpus delicti.*)

(3) Did the defendant personally participate in them ?

(4) Were they conducted under his direction or command ?

(5) Were they conducted with prior knowledge on his part that they might be excessive or inhuman ?

(6) Did he have the power or opportunity to prevent or stop them ?

(7) If so, did he fail to act, thereby becoming *particeps criminis* and accessory to them ? "

On these questions, and in view of the evidence before it, the Tribunal found as follows :

" (1) As to the first question, the evidence is overwhelming and not contradicted that experiments involving the effect of low air pressure and freezing on live human beings were conducted at Dachau from March through June, 1942.

" (2) Approaching the second question, it is claimed by the defendant that only legitimate scientific experiments were conducted which did not involve pain or torture and could not ordinarily be expected to result in death. It is remotely possible that so long as the experiments were

---

[1] See p. 28.

under the guidance of Dr. Ruff and Dr. Romberg some consideration was given to the possible effect upon the subjects of the experiments. But it is indisputable that the experiments conducted by Dr. Rascher involved torture and suffering in the extreme and in many cases resulted in death. Under the specific guidance of Dr. Rascher, the air pressure was reduced to a point which no flier would ever be required to undergo (14,000 metres). The photographs of the subjects undergoing these experiments indicate extreme agony and leave no doubt that any victim who was fortunate enough to survive had undergone a harrowing experience. The Tribunal does not hesitate to find that these experiments, performed under the specious guise of science, were barbarous and inhuman. It has been urged by the defendant that the only persons used as subjects of these experiments were habitual criminals who had been sentenced to death and who were given the option of offering themselves for the experiments and receiving as a reward, if they survived, a commutation of the death sentence to life imprisonment. This claim scarcely merits serious consideration. A number of witnesses stated that they had a vague understanding that this was the case, but the record is entirely barren of any credible testimony which could possibly justify such a finding of fact.(1)

" (3) The Prosecution does not claim (and there is no evidence) that the defendant personally participated in the conduct of these experiments.

" (4) There is no evidence that the defendant instituted the experiments or that they were conducted or continued under his specific direction or command. It may perhaps be claimed that the low-pressure chamber, which was the property of the Luftwaffe, was sent to Dachau at the direction of the defendant, but even if this were true it could not be inferred from the fact alone that he thereby promulgated the inhuman and criminal experiments which followed. The low-pressure chamber was susceptible of legitimate use and, perhaps, had Dr. Rascher not injected himself into the proceedings, it would have been confined to that use.

" (5) Assuming that the defendant was aware that experiments of some character were to be launched, it cannot be said that the evidence shows any knowledge on his part that unwilling subjects would be forced to submit that the experiments would be painful and dangerous to human life. It is quite apparent from an overall survey of the proof that the defendant concerned himself very little with the details of these experiments. It was quite natural that this should be so. His most pressing problems involved the procurement of labour and materials for the manufacture of airplanes. His position involved vast responsibilities covering a wide industrial field, and there were certainly count-

(1) In his concurring opinion, Judge Musmanno stressed that :

" Though Milch is acquitted of complicity and participation in the medical experiments, we have nonetheless commented on those experiments at length. We have done this because otherwise the reference to Milch's acquittal standing alone might convey the impression that the experiments themselves were not criminal. The Tribunal holds that the *corpus delicti* was established and a crime was committed, even though Milch is not guilty of it."

less surbordinate fields within the Luftwaffe of which he had only cursory knowledge. The Tribunal is convinced that these experiments, which fell naturally and almost exclusively within one of his subordinate departments, engaged the attention of the defendant only perfunctorily, at all.

" (6) Did the defendant have the power or opportunity to prevent or stop the experiments ? It cannot be gainsaid that he had the authority to either prevent or stop them in so far as they were being conducted under the auspices of the Luftwaffe. It seems extremely probable, however, that, in spite of him, they would have continued under Himmler and the SS. But certainly he had no opportunity to prevent or stop them, unless it can be found that he had guilty knowledge of them, a fact which has already been determined in the negative. As early as 20th May, 1942, the defendant wrote to Wolff, Himmler's Adjutant, stating :

' . . . our medical inspector (Dr. Hippke) reports to me that the altitude experiments carried out by the SS and Luftwaffe at Dachau have been finished. Any continuation of these experiments seems essentially unreasonable . . .

' The low-pressure chamber would not be needed for these low-temperature experiments. It is urgently needed at another place and therefore can no longer remain in Dachau.' "

Certainly the defendant did not have the opportunity to prevent or stop the experiments if he had been told and was convinced that they had terminated on 20th May, 1942, and there is no reason to believe that he did not rely upon Dr. Hippke's report as to their termination. Considerable emphasis is laid upon the testimony that a motion picture of the experiments was brought to Berlin and exhibited in the Air Ministry Building, where the defendant had his office. It may even be said that the picture was brought to Berlin for the defendant's edification. But it appears that he was not present when it was shown and that, in any event, the showing was long after the experiments were concluded, at which time the defendant certainly could do nothing toward preventing them or stopping them.

" (7) In view of the above findings, it is obvious that the defendant never became *particeps criminis* and accessory in the low-pressure experiments set forth in the Second Count of the indictment.

As to the other experiments, involving subjecting human beings to extreme low temperatures both in the open air and in water, the responsibility of the defendant is even less apparent than in the case of the low-pressure experiments . . . "

The Tribunal therefore found the accused not guilty under Count Two of the Indictment.

(ii) *Slave Labour*

Following a summary of the evidence relating to Count One,[1] the Tribunal made the following remarks :

[1] See pp. 27–8.

" The defence on this Count is ingenious but unconvincing. As to the use of prisoners of war, the defendant testified that he had been advised by some unidentified person high in the National Socialist Councils that it was not unlawful to employ prisoners of war in war industries. The defendant was an old and experienced soldier, and his testimony revealed that he was well acquainted with the provisions of the Geneva and Hague Treaties on this subject, which are plain and unequivocal. In the face of this knowledge, the advice which he claims to have received should have raised grave suspicions in his mind. Presenting an entirely different aspect of his defence, he testifies that many of the Russian prisoners of war volunteered to serve in the war industries and apparently enjoyed the opportunity of manufacturing munitions to be used against their fellow countrymen and their allies. Other Russian prisoners of war, he states, were discharged as such and immediately enrolled as civilian workers. The photographs introduced in evidence, however, show that they still retained their Russian army uniforms, which makes their status as civilians suspect. Be that as it may, it does not adequately answer the charge that hundreds of thousands of Polish prisoners of war were cast into concentration camps and parcelled out to various war factories, nor the further fact that thousands of French prisoners of war were compelled to labour under the most harrowing conditions for the Luftwaffe.

" As to the French civilian workers who were employed at war work in Germany after the conquest of France, it is the contention of the defendant that these workers were supplied by the French Government under a solemn agreement with the Reich. It is claimed with a straight face that the Vichy Government, headed by Laval, entered into an international compact with the German Government to supply French labourers for work in Germany. This contention entirely overlooks the fact that the Vichy Government was a mere puppet set up under German domination, which, in full collaboration with Germany, took its orders from Berlin. The position of the defendant seems to be that, if any force or coercion was used on French citizens, it was exerted by their own government, but this position entirely overlooks the fact that the transports which brought Frenchmen to Germany were manned by German armed guards and that upon their arrival they were kept under military guard provided by the Wehrmacht or the SS.

" It was sought to disguise the harsh realities of the German Foreign labour policy by the use of specious legal and economic terms, and to make such policy appear as the exercise of conventional labour relations and labour law. The fiction of a ' labour contract ' was frequently resorted to, especially in the operations of the Todt Organization, which implied that foreign workers were given a free choice to work or not to work for German military industry. This, of course, was purely fictitious, as is shown by the fact that thousands of these ' contract workers ' jumped from the trains transporting them to Germany and fled into the woods. Does anyone believe that the vast hordes of Slavic Jews who laboured in Germany's war industries were accorded the rights of contracting parties ? They were slaves, nothing less—kidnapped, regimented, herded under armed guards, and worked until

they died from disease, hunger and exhaustion. The idea of any Jew being a party to a contract with Germans was unthinkable to the National Socialists. Jews were considered as outcasts and were completely at the mercy of their oppressors. Exploitation was merely a convenient and profitable means of extermination, to the end that, ' when this war ends, there will be no more Jews in Europe ' . . .

" The German nation, before the ascendancy of the NSDAP, had repeatedly recognized the rights of civilians in occupied countries. At the Hague Peace Conference of 1907, an amendment was submitted by the German delegate, Major-General von Gundell, which read :

> ' A belligerent is likewise forbidden to compel the nationals of the adverse party to take part in the operations of war directed against their country, even when they have been in his service before the commencement of the war.'

The German Manual for war on land (*Kriegsbrauch im Landrecht*, ed. 1902) stated :

> ' The inhabitants of an invaded territory are persons endowed with rights . . . subject to certain restrictions . . . but who otherwise may live free from vexations and, as in time of peace, under the protection of the laws.' "

During the First World War, an order of the German Supreme Command (3rd October, 1916) provided for the deportation of Belgian vagrants and idlers to Germany for work, but specified that such labour was not to be used in connection with operations of war. The order resulted in such a storm of protest that it was at once abandoned by the German authorities.

" It cannot be contended, of course, that foreign workers were entitled to comforts or luxuries which were not accorded German workers. It is also recognized that, especially during the latter part of the war, there was a universal shortage of food and fuel throughout the Reich and in the discomforts arising therefrom foreign workers were bound to share. But it is an undoubted fact that the foreign workers were subjected to cruelties and torture and the deprivation of decent human rights merely because they were aliens. This was not true in isolated instances, but was universal and was the working out of the German attitude toward those whom it considered inferior it was merely to maintain their productivity and did not stem from any humanitarian considerations.

" The Tribunal therefore finds the defendant guilty of the war crimes charged in Count One of the Indictment, to wit, that he was a principal in, accessory to, ordered, abetted, took a consenting part in and was connected with, plans and enterprises involving slave labour and deportation to slave labour of the civilian populations of countries and territories occupied by the German armed forces, and in the enslavement, deportation, ill-treatment and terrorization of such persons ; and further that the defendant was a principal in, accessory to, ordered, abetted, took a consenting part in, and was connected with plans and enterprises involving the use of prisoners

of war in war operations and work having a direct relation to war operations."

(iii) *The Charge of Crimes Against Humanity*

Regarding Count Three,[1] the Tribunal, in addition to summarizing the relevant evidence, declared as follows :

" Count Three of the Indictment charges the defendant with crimes against humanity committed against ' German nationals and nationals of other countries.' Sufficient proof was not adduced as to such offences against German nationals to justify an adjudication of guilt on that ground. As to such crimes against nationals of other countries, the evidence shows that a large number of Hungarian Jews and other nationals of Hungary and Rumania, which countries were occupied by Germany but were not belligerents, were subjected to the same tortures and deportations as were the nationals of Poland and Russia. In Count One of the Indictment these acts are charged as war crimes and have heretofore been considered by the Tribunal under that Count in this judgment. In the judgment of the International Military Tribunal (Vol. I, *Trial of the Major War Criminals*, page 254), the court stated :

" ' From the beginning of the war in 1939, war crimes were committed on a vast scale which were also crimes against humanity.' "

This is a finding of law and an interpretation of Control Council Law No. 10, with which this Tribunal is in full accord.

" Our conclusion is that the same unlawful acts of violence which constituted war crimes under Count One of the Indictment also constitute crimes against humanity as alleged in Count Three of the Indictment. Having determined the defendant to be guilty of war crimes under Count One, it follows, of necessity, that he is also guilty of the separate offence of crimes against humanity, as alleged in Count Three, and this Tribunal so determines."

(iv) *Superior Orders*

The Tribunal then expressed the following conclusions regarding what amounted to a plea of superior orders :

" In exculpation, the defendant states that he was a German soldier and that whatever was done by him or with his knowledge or consent was done in pursuance of a national military policy, promulgated by Hitler and in obedience to military orders. He protests that, no matter how violently he disagreed with the methods used by the German Reich in the furthering of its policy of aggressive war, he was helpless to extricate himself and had no alternative except to stay with the venture to the bitter end. It is true that withdrawal may involve risks and dangers, but these are incidental to the original affiliation with the unlawful scheme. He who elects to participate in a venture which may result in failure must make his election to abandon the enterprise if it is not to his liking or to stay as a participant, and win or lost according to the outcome.

" Much significance must be attached to the meeting of 23rd May, 1939, at which the defendant was admittedly present and in which

(1) See p. 28.

Hitler spoke at great length as to his plans for the subjugation of friendly minor nations and the ultimate conquest of Europe. A purported record of the events at this meeting has been introduced in evidence and has been found to be reliable and accurate by the International Military Tribunal. The defendant has throughout insisted that this record, is spurious and was made by Schmundt long after the occasion which it records. Of course, it was never anticipated that this record which was marked ' Top Secret, To be Transmitted by Officer Only,' would ever be captured and its contents become known. It is not surprising that those who sat and listened to the astounding programme of the Führer now wish that they had been absent. It cannot be denied that there was a meeting of some kind which the defendant attended and at which the Führer spoke, and further that it was held a few short months before the actual invasion of Poland, as forecast in the report of the meeting. The Schmundt paper does not pretend to be a verbatim report of Hitler's exact words, but certainly all of the diabolical plans which it reveals were not manufactured by Schmundt out of thin air, attributed to Hitler, and then marked ' Top Secret '. Even if Hitler said only a small part of what is attributed to him Schmundt, there was enough said to advise and warn a man of the defendant's intelligence and experience that mischief was afoot. Every sentence shrieks of war. The record hints at nothing else, and, if all references to conquest and war and world domination are eliminated, Hitler did not speak at all. At this early date, the defendant must be charged with knowledge that a war of aggression, to be ruthlessly pursued, was planned. This, then, was the time for him to have made his decision—the decision which confronts every man daily—to be honourable or dishonourable. Life consists quite generally in making such decisions. As an old soldier, schooled in the code of war and well aware of the principles to which an honourable soldier must adhere, he sat complacently and listened to a proposed programme which violated national honour, personal integrity and the moral code of an honest soldier. He made his choice and elected to ride with the tyrant.

" When the defendant joined the National Socialist Party in 1933, Germany was in the throes of dire economical and political distress and was burdened by a myriad of political parties, each with its separate programme and all functioning at cross-purposes. The defendant elected to affiliate with the NSDAP because, he testified, he believed it offered the most likely agency for bringing order out of chaos. But very soon he must have realized that he had joined a band of villans whose programme contemplated every crime in the calendar. The Nazi code was not a secret. It was published and proclaimed by the party leaders in long harangues to the people ; decrees and directives were broadcast ; the infamous Streicher was spreading anti-Jewish obscenities throughout the Reich in *Der Stuermer ;* Roehm and a large number of the SA were murdered by Hitler's orders ; hundreds of German citizens were cast into concentration camps for ' political re-education ', without hearing or opportunity for defence ; the iniquitous Gestapo stormed through the land, with power over life and liberty which could not be questioned ; in public view Jews were beaten

and killed, their synagogues burned and their stores destroyed. The Party proclaimed its objectives from the house-tops and verified them by open public conduct throughout the Reich. The significant fact which must not be overlooked is that all these things happened *before* the war was launched, at a time when there was no claim upon the loyalty of the defendant as a soldier to protect his homeland at war. He protests that he never subscribed to the Master Race philosophy, but 13 years before he joined the Party in 1933, its precepts and demands had been proclaimed, among which was Point 4 :

> ' Only a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently no Jew can be a member of the race.' "

The humblest citizens of Germany knew that the iniquitous doctrines of the Party were being implemented by ruthless acts of persecution and terrorism which occurred in public view. Thousands of obscure German citizens were only too well aware that they were living under the scrutiny of an army of spies and saw their friends and relatives summarily dispatched to concentration camps for the slightest suspicion of dissidence. The defendant did not live in a vacuum. He was not blind or deaf. Long before 1939 ; long before his military loyalty was called into play ; long before the door to withdrawal was closed, he could have seen the bloody handwriting on the wall, for murder and enslavement of his own countrymen was there written in blazing symbols. But he had taken on the crimson mantle of the Party, with all its ghastly implications, and he wore it with glory and profit to himself to the end. Others with more courage and higher principles and with more loyalty to the ancient German ideals rebelled and withdrew from the brutal crew : Von Clausewitz, Yorck von Wartemberg, Schlegelberger, Schmitt, Elts von Ruebenach, Tesmer. These men in high positions had the character to repudiate great evil, and if in so doing they took risks and made sacrifices, nevertheless they made their choice to stand with decency and justice and honour. The defendant had his opportunity to join those who refused to do the evil bidding of an evil master, but he cast it aside, and his professed repentence now comes too late . . .

" In an authoritarian state, the head becomes the supreme authority for woe as well as weal. Those who subscribe to such a state submit to that principle. If they abjectly place all the power in the hands of one man, with no right reserved to check or limit or repudiate, they must accept the bitter with the sweet. This is especially true of those in high places in the state—those who choose to enjoy the honour, the emoluments and the power to such high stations. By accepting such attractive and lucrative posts under a head whose power they knew to be unlimited, they ratify in advance his every act, good or bad. They cannot say at the beginning, ' The Führer's decisions are final ; we will have no voice in them ; it is not for us to reason why ; his will is law ', and then, when the Führer decrees aggressive war or barbarous inhumanities or broken covenants, to attempt to exculpate themselves by saying, ' Oh, we were never in favour of *those* things ' . . . "

4. CONCURRING OPINION BY JUDGE MUSMANNO

(i) *Slave Labour*

In the course of a concurring judgment, Judge Musmanno ruled that the Nazi Programme for the forcible recruiting of millions of foreign workers for employment in German industry was in direct violation of Article 52 of the Hague Convention, which provides that :

> " Requisitions in kind and services shall not be demanded from local authorities or inhabitants except for needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country . . . "

The use of prisoners of war for the same purpose was a breach of Article 31 of the Geneva Prisoners of War Convention and Article 6 of the Hague Convention which run as follows :

> " Article 31. Work done by prisoners of war shall have no direct connection with the operations of the war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units . . . "
>
> " Article 6. The State may employ the labour of prisoners of war, other than officers, according to their rank and capacity. The work shall not be excessive, and shall have no connection with the operations of the war . . . "

At another point in his judgment Judge Musmanno dealt with the illegality of the German use of Russian prisoners of war on anti-aircraft guns, as follows :

> " It is clear that the Russian prisoners were utilized at the guns and that this type of use of prisoners of war represents an extreme violation of the laws and customs of war.
>
> " It has been argued by the defence that since Russia had denounced adherence to the Geneva Convention, Germany was not compelled to treat Russian prisoners with the limitations laid down in that convention. German Admiral Canaris on 15th September, 1941, in a memorandum of counsel to the German High Command, declared that despite Russia's attitude on the Geneva Convention her prisoners were yet entitled to immunities guaranteed under the rules and customs of war :
>
> ' The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the USSR. Therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th Century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people . . . The decrees

for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint.' (I.M.T. 222.)

" Admiral Canaris's position was entirely correct and in accordance with accepted international law. In the episode of the Russian gunners adverted to by Milch, he could not help but know the physical facts and could not escape being aware that such use of prisoners of war violated international law. His responsibility here is unequivocal."

The judgment later quoted Article 9 of the Geneva Convention, which provides that :

" . . . No prisoner may at any time be sent to an area where he would be exposed to the fire of the fighting zone, or be employed to render by his presence certain points or areas immune from bombardment."

The learned Judge pointed out that, according to the Defence, while it was recognized that Article 52 of the Hague Regulations represented the law and that deportation for forced labour was illegal yet " total warfare, as it raged in World War II, suspended, if it did not outrightly abrogate, all these rules heretofore respected and esteemed as binding on civilized nations. In this respect Defence Counsel argues that ' modern warfare, having as its aim total annihilation of the armed production of the enemy, brought with it to a great extent warfare against the civilian population ', and he cites total blockade as an illustration of his thesis." The Judgment ruled, however, that " it does not follow that because military necessity unintentionally victimizes a civilian population, political domination may strip them of their civil rights and subject them to intentional torture and possible death. With all its horror modern war still ' is not a condition of anarchy and lawlessness between the belligerents, but a contention in many respects regulated, restricted and modified by law.' (Oppenheim, *ibid*, 421)."

" Though the adversaries descend into the pit of bloody combat, there is always open to them the means or reascending to the level of non-hostile negotiations. The matter of temporary truces for recovering the dead and succouring the wounded, the making of arrangements through international relief organizations for the treatment of prisoners, the granting of safe passage through the lines of persons mutually agreed upon by the parties, all are instances which refute the logical development of Defence Counsel's argument that total warfare justifies the abandonment of every restriction and authorizes the combatants to use all manners and means to win the conflict."

Of the claim by the defendant that he did not intend his more violent words to be taken seriously, the judgment said : " But underlings who heard these wild, inflammatory utterances did not know that Milch was only barking if in fact we are to assume that his ferocious words were only purposeless growlings ", and, later, " violent language is not as innocuous as Milch would have the present world believe. Even if it should be true that his immediate circle laughed at his fulminations, as was testified, there is no assurance that others laughed ".

(ii) *Medical Experiments*

Regarding the legality of medical experiments, Judge Musmanno ruled that:

" Whether the project was criminal and inhumane depends upon answers to the inevitable questions:

1. Were the prisoners actually condemned to death previously ?
2. If so, for what reasons were they condemned to capital punishment ?
3. Were the experiments painful to the subjects ?
4. What scientific benefits resulted from the experiments ? "

In Judge Musmanno's opinion " the subjects were to die anyway ", but of the second point he said: " If any prisoner used in the experiments was condemned to death merely for opposing the Nazi Régime without actually having committed any physical crime, it does not answer the criminal charge to say that the subject was already doomed to die. . . . Exculpation from the charge of criminal homicide can only possibly be based upon bona fide proof that the subject had committed murder or any other legally recognized capital offence; and, not even then, unless the sentencing Tribunal with authority granted by the State in the constitution of the court, declared that the execution would be accomplished by means of a low-pressure chamber ". The judgment points out that many of the victims were in fact " political prisoners marked for extermination ".

Judge Musmanno quoted evidence of the extreme pain caused to the victims of the experiments, and made it clear that in his opinion the experiments were of no value whatever.

5. CONCURRING OPINION BY JUDGE PHILLIPS

Judge Phillips summarized the evidence against the accused on all Counts, but, in his remarks on legal matters, concentrated his attention on Counts One and Three, which involved charges of deportation and slave labour. He pointed out that: " International Law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime ".

These conditions he enunciated as follows: " If the transfer is carried out without a legal title, as in the case where people are deported from a country occupied by an invader while the occupied enemy still has an army in the field and is still resisting, the deportation is contrary to international law. The rationale of this rule lies in the supposition that the occupying power has temporarily prevented the rightful sovereign from exercising its power over its citizens. Articles 43, 46, 49, 52, 55 and 56, Hague regulations which limit the rights of the belligerent occupant, do not expressly specify as crime the deportation of civilians from an occupied territory. Article 52 states the following provisions and conditions under which services may be demanded from the inhabitants of occupied countries.

1. They must be for the needs of the army of occupation.
2. They must be in proportion to the resources of the country.
3. They must be of such a nature as not to involve the inhabitants in

the obligation to take part in military operations against their own country.

" In so far as this section limits the conscription of labour to that required for the needs of the army of occupation, it is manifestly clear that the use of labour from occupied territories outside of the area of occupation is forbidden by the Hague Regulation.

" The second condition under which deportation becomes a crime occurs when the purpose of the displacement is illegal, such as deportation for the purpose of compelling the deportees to manufacture weapons for use against their homeland or to be assimilated in the working economy of the occupying country. The defence as contained in this case is that persons were deported from France into Germany legally and for a lawful purpose by contending that such deportations were authorized by agreements and contracts between Nazi and Vichy French authorities. The Tribunal holds that this defence is both technically and substantially deficient. The Tribunal takes judicial notice of the fact that after the capitulation of France and the subsequent occupation of French territory by the German army that a puppet government was established in France and located at Vichy. This government was established at the instance of the German army and was controlled by its officials according to the dictates and demands of the occupying army and that in a contract made by the German Reich with such a government as was established in France amounted to in truth and in fact a contract that on its face was null and void. The Vichy Government, until the Allies regained control of the French Republic, amounted to no more than a tool of the German Reich. It will be borne in mind that at no time during the Vichy régime a Peace Treaty had been signed between the French Republic and the German Reich but merely a cessation of hostilities and an armistice prevailed, and that French resistance had at no time ceased and that France at all times still had an army in the field resisting the German Reich.

" The third and final condition under which deportation becomes illegal occurs whenever generally recognized standards of decency and humanity are disregarded. This flows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner. A close study of the pertinent parts of Control Council Law No. 10 strengthens the conclusions of the foregoing statements that deportation of the population is criminal whenever there is no title in the deporting authority or whenever the purpose of the displacement is illegal or whenever the deportation is characterized by inhumane or illegal methods."

The judgment then continued :

" Article II (1) (*c*) of Control Council Law No. 10 specifies certain crimes against humanity. Among those is listed the deportation of any civilian population. The general language of this subsection as applied to deportation indicates that Control Council Law No. 10 has unconditionally contended as a crime against humanity every instance of the deportation of civilians. Article II (1) (*b*) names deportation to

slave labour as a war crime. Article II (1) (*c*) states that the enslavement of any civilian population is a crime against humanity. Thus Law No. 10 treats as separate crimes and different types of crime " deportation to slave labour " and " enslavement ". The Tribunal holds that the deportation, the transportation, the retention, the unlawful use and the inhumane treatment of civilian populations by an occupying Power are crimes against humanity.

" The Hague and Geneva Conventions codify the precepts of the law and usages of all civilized nations. Article 31 of the Geneva Convention provides that labour furnished by prisoners of war shall have no direct relation to war operations. Thus the Convention forbids: 1, the use of prisoners of war in manufacture or transportation of arms or ammunitions of any kind ; and 2, the use for transporting of material intended for combat units. The Hague Regulations contain comparable provisions. The essence of the crime is the misuse of prisoners of war which derives from the kind of work to which they are assigned, in other words, to work directly connected with the war effort. The Tribunal holds as a matter of law that it is illegal to use prisoners of war in armament factories and factories engaged in the manufacture of airplanes for use in the war effort."

Of the Defence claim that the accused made violent statements, due to uncontrollable temper, overwork and head injuries, which were not to be taken seriously, Judge Phillips expressed his opinion as follows :

" I have given due consideration to the explanation given by the defendant and am compelled to reject it. If but only a few of such remarks could be attributed to the defendant, his protestations might be given some credence ; but when statements such as appear in the documents have been persistently made over a long period of time, at many places and under such varying conditions, the only logical conclusion that can be reached is that they reflect the true and considered attitude of the defendant toward the Nazi foreign labour policy and its victims and are not mere aberrations brought on by fits of uncontrollable anger. I find as a fact, therefore, that the true attitude of the defendant toward foreign labourers and prisoners of war is that reflected in the documents of the Prosecution, and was not the result of uncontrollable fits of temper. I find, further, that the defendant ordered, advised, counselled and procured inhumane and illegal treatment of foreign workers resulting in permanent injury and death to many ".

## 6. SENTENCE

Having been thus found guilty under Counts One and Three, but not guilty under Count Two, Milch was sentenced to imprisonment for life.

The sentence passed was confirmed by the Military Governor.

## 7. PETITION TO THE SUPREME COURT OF THE UNITED STATES

On 17th May, 1947, Milch's Counsel submitted an application, signed by both, to the Military Governor, to be forwarded to the Supreme Court of the United States. In his application Milch requested the Supreme

Court to quash the sentence as illegal under Articles 60, 63 and 64 of the Geneva Convention. He concluded by saying:

> " I therefore request the Supreme Court in Washington to examine whether the decree No. 7 of the Military Government of Germany may be applied in my case, and whether with due regard to the regulations of Articles 60–65 of the Geneva Convention, the present Military Court II, Nuremberg, was in a position to pass sentence on me."

Milch's application for leave to file a petition for a writ of habeas corpus was submitted to the Supreme Court for its consideration when it reconvened on 6th October, 1947, and on 20th October, 1947, the Court entered the following order:

> " The motion for leave to file petition for writ of habeas corpus is denied. Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Murphy and Mr. Justice Rutledge are of the opinion that the petition should be set for hearing on the question of the jurisdiction of this Court. Mr. Justice Jackson took no part in the consideration or decision of this application."

Chief Justice Vinson, Mr. Justice Reed, Mr. Justice Frankfurter and Mr. Justice Burton voted for the denial.

## B. NOTES ON THE CASE

### 1. ILLEGAL EXPERIMENTS AS WAR CRIMES AND CRIMES AGAINST HUMANITY

While finding Milch himself not guilty under Count Two, the Tribunal expressed certain opinions as to the characteristics of legal and illegal medical experiments.

The judgment of the Tribunal indicated that the *corpus delicti*, as far as Count Two of the Indictment was concerned, would be established if it were shown that low-pressure and freezing experiments were carried on which were " of a character to inflict torture and death on the subjects ".(1) In finding that the *corpus delicti* had been proved the Tribunal pointed out (i) that the experiments were carried out " under the specious guise of science " and that under the specific guidance of Dr. Rascher, the air pressure was reduced to a point which no flier would ever be required to undergo ";(2) and (ii) that there was no credible evidence that the subjects of the experiments were " habitual criminals who had been sentenced to death ".(3)

From Judge Musmanno's remarks(4) it seems that, in his opinion, the experiments would not be legal unless they were performed upon prisoners actually condemned to death previously by a court with authority to declare " that the execution would be accomplished by means of a low-pressure chamber ", which actually did so declare, and " after bona fide proof that the subject had committed murder or any other legally recognized capital offence " ; and even then only if the experiments were painless and were

(1) See p. 35.
(2) See p. 36.
(3) See p. 36.
(4) See p. 45.

of scientific value. Judge Musmanno made it clear that " political prisoners marked for extermination " would not fall within the category of persons found to have committed a " legally recognized capital offence ".

Allegations of responsibility for illegal experiments were made also in the *Trial of Karl Brandt and Others* (The *Doctors' Trial*) and in the *Trial of Oswald Pohl and Others.* Both trials were held before United States Military Tribunals in Nuremberg, the former from 21st November, 1946, to 20th August, 1947, and the latter from 10th March, to 3rd November, 1947.(1) The Judgment in the *Pohl Trial*, which was delivered after those in the *Milch Trial* and *Doctors' Trial*, did not expand upon the legal aspects of the conducting of medical experiments and was content to state : " The fact that criminal medical experiments were performed upon the involuntary inmates of concentration camps has been repeatedly proved and determined before these Tribunals, in the case of *United States* v. *Karl Brandt, et al.* (Tribunal I), in the case of *United States* v. *Erhard Milch*, tried before this Tribunal, and by ample and convincing proof in the instant case. To completely document this finding of fact would result in unduly prolonging this judgment. It is sufficient to state that the performance of such criminal medical experiments has not been seriously denied. Defendants have unanimously denied knowledge of or participation in such experiments, but the proof of their performance stands substantially uncontradicted " ; and then to set out a very brief account of the actual experiments proved to have taken place.

The Judgment delivered in the *Doctors' Trial*, however, includes the following passages under a heading : *Permissible Medical Experiments :*

> " The great weight of the evidence before us is to the effect that certain types of medical experiments on human beings, when kept within reasonably well-defined bounds, conform to the ethics of the medical profession generally. The protagonists of the practice of human experimentation justify their views on the basis that such experiments yield results for the good of society that are unprocurable by other methods or means of study. All agree, however, that certain basic principles must be observed in order to satisfy moral, ethical and legal concepts :
>
> > " 1. The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent ; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion ; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment ; the method

(1) Considerations of time and space will prevent a full report of these two trials from being made in the present series. Some further reference to the two sets of proceedings have, however, already been made, to the *Doctors Trial*, in Volume IV of these Reports, pp. 91-93 and to both in Volume VI p. 104. None of the references made to the *Pohl Trial* in the present notes require any modification in the light of the Supplemental Judgment delivered on 11th August, 1948, by the Tribunal which conducted that trial.

and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

" The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

" 2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.

" 3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.

" 4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

" 5. No experiment should be conducted where there is an *a prior* reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.

" 6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

" 7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.

" 8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.

" 9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.

" 10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

" Of the ten principles which have been enumerated our judicial concern, of course, is with those requirements which are purely legal in nature—or which at least are so closely and clearly related to matters legal that they assist us in determining criminal culpability and punishment. To go beyond that point would lead us into a field that would be beyond our sphere of competence. However, the point need not be laboured. We find from the evidence that in the medical experiments

which have been proven, these ten principles were much more frequently honoured in their breach than in their observance. Many of the concentration camp inmates who were the victims of these atrocities were citizens of countries other than the German Reich. They were non-German nationals, including Jews and ' asocial persons ', both prisoners of war and civilians, who had been imprisoned and forced to submit to these tortures and barbarities without so much as a semblance of trial. In every single instance appearing in the record, subjects were used who did not consent to the experiments ; indeed, as to some of the experiments, it is not even contended by the defendants that the subjects occupied the status of volunteers. In no case was the experimental subject at liberty of his own free choice to withdraw from any experiment. In many cases experiments were performed by unqualified persons ; were conducted at random for no adequate scientific reason, and under revolting physical conditions. All of the experiments were conducted with unnecessary suffering and injury and but very little, if any, precautions were taken to protect or safeguard the human subjects from the possibilities of injury, disability, or death. In every one of the experiments the subjects experienced extreme pain or torture, and in most of them they suffered permanent injury, mutilation, or death, either as a direct result of the experiments or because of lack of adequate follow-up care.

" Obviously all of these experiments involving brutalities, tortures, disabling injury and death were performed in complete disregard of international conventions, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, and Control Council Law No. 10. Manifestly human experiments under such conditions are contrary to ' the principles of the laws of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience.' "

At a later point the Tribunal added :

" Another argument presented in briefs of counsel attempts to ground itself upon the debatable proposition that in the broad interest of alleviating human suffering, a State may legally provide for medical experiments to be carried out on prisoners condemned to death without their consent, even though such experiments may involve great suffering or death for the experimental subject. Whatever may be the right of a State with reference to its own citizens, it is certain that such legislation may not be extended so as to permit the practice upon nationals of other countries who, held in the most abject servitude, are subjected to experiments without their consent and under the most brutal and senseless conditions."

Elsewhere the Judgment dealt as follows with the fate of certain Polish women who had been used, without their consent, as the subjects of experiments :

" Moreover, assuming for the moment that they had been condemned to death for acts considered hostile to the German forces in the occupied territory of Poland, these persons still were entitled to the protection

of the laws of civilized nations. While under certain specific conditions the rules of land warfare may recognize the validity of an execution of spies, war rebels, or other resistance workers, it does not under any circumstances countenance the infliction of death or other punishment by maiming or torture."

A claim on the part of Germany to have the legal right to enact laws for the carrying out of euthanasia would certainly not legalize the murder of non-German nationals:

> " We have no doubt but that Karl Brandt—as he himself testified—is a sincere believer in the administration of euthanasia to persons hopelessly ill, whose lives are burdensome to themselves and an expense to the State or to their families. The abstract proposition of whether or not euthanasia is justified in certain cases of the class referred to, is no concern of this Tribunal. Whether or not a state may validly enact legislation which imposes euthanasia upon certain classes of its citizens, is likewise a question which does not enter into the issues. Assuming that it may do so, the Family of Nations is not obliged to give recognition to such legislation when it manifestly gives legality to plain murder and torture of defenceless and powerless human beings of other nations.
>
> " The evidence is conclusive that persons were included in the programme who were non-German nationals. The dereliction of the defendant Brandt contributed to their extermination. That is enough to require this Tribunal to find that he is criminally responsible in the programme."

It is to be observed that the " ten principles " set out above were introduced as " moral, ethical and legal concepts " ; the Tribunal did not differentiate between those legally necessary and those not, either in enumerating them or in setting out its reasons for finding, on the evidence, that they " were much more frequently honoured in their breach than in their observance ". On the other hand, the Judgment was clear and definite in declaring illegal the infliction of punishment by maiming or torture upon spies, war rebels and other resistance workers, who have been, however legally, condemned to death and the Judgments in the *Milch Trial* and in the *Doctors' Trial* certainly go some way towards elaborating the nature of such experiments as may constitute war crimes or crimes against humanity. It may also be noted that the relevant Counts contained in the Indictment in the *Doctors' Trial* and in the *Milch Trial* charged, *inter alia*, responsibility for " plans and enterprises involving medical experiments *without the subjects' consent* " (Italics inserted), and that the analogous wording in the Indictment in the *Pohl Trial* was: " The murders, torture and ill-treatment charged were carried out by the defendants by divers, methods, including . . . medical, surgical, and biological experimentation on *involuntary* human subjects ". (Italics inserted). The wording of the Judgments in the *Doctors' Trial* and in the *Pohl Trial* indicates that Pohl and others were found guilty of war crimes and/or crimes against humanity under these Counts ; for instance, it is said that Pohl's connection with the medical experiments previously described in the judgment consisted in knowingly supplying the subjects from the inmates of concentration camps, and of Karl Brandt his Judges ruled: " We find

that Karl Brandt was responsible for, aided and abetted, took a consenting part in, and was connected with plans and enterprises involving medical experiments conducted on non-German nationals against their consent, and in other atrocities, in the course of which murders, brutalities, cruelties, tortures and other inhumane acts were committed. To the extent that these criminal acts did not constitute war crimes they constituted crimes against humanity ".(1)

2. DEPORTATION AND SLAVE LABOUR AS OFFENCES AGAINST CIVILIANS

Judge Phillips, in his concurring opinion, made some interesting remarks on deportation of civilians as a war crime or crime against humanity, and based his views upon, *inter alia*, Article 52 of the Hague Regulations and Articles II (1) of Control Counsel Law No. 10.(2)

In their closing statement, the Prosecution made certain submissions which were much the same as the principles set out by Judge Phillips. Elaborating upon the first principle, the Prosecution stated that :

> " The illegality of the deportation of civilians in territories under belligerent occupation was demonstrated in the First World War when the Germans attempted a deportation programme of Belgian workers into Germany. This measure met with world-wide protest and was abandoned after about four months.
>
> " Among the voices raised in protest against the deportation of Belgians by Germany in 1916–1917 was that of Lansing, Secretary of State. He wrote :
>
> " ' The Government of the United States has learned with the greatest concern and regret of the policy of the German Government to deport from Belgium a portion of the civilian population for the purposes of forcing them to labour in Germany, and is constrained to protest in a friendly spirit but most solemnly against this policy which is in contravention of all precedent and all principles of international practice which have long been accepted and followed by civilized nations in their treatment of non-combatants in conquered territory.' Other protests were lodged with the German Government by Spain, Switzerland, Netherlands and Brazil, all neutral countries. International lawyers all over the world condemned Germany's action in the strongest terms.
>
> " The opposition in the German Reichstag accused the Government of violating the Hague Convention and refused to vote for the war budget.
>
> " It is worthy of note, in passing, that the defendant has testified at this trial that he knew of this effort at deportation of labour on the part of Germany in the First War and that he was much interested in the investigation conducted by a Reichstag Committee concerning this matter. He could not have followed this investigation, as he admits he

(1) Illegal medical experiments were also involved in the facts proved in the trial of Hoess by the Polish Supreme National Tribunal. See pp. 14–15 and 24–26.
(2) See pp. 45–47.

did, without learning that the deportation in question was violation of international law."

As far as war crimes are concerned, it could be added that the Nuremberg International Military Tribunal also ruled that " The laws relating to forced labour by the inhabitants of occupied territories are found in Article 52 of the Hague Convention ".(1) The Judgment, after quoting the Article, continues: " The policy of the German occupation authorities was in flagrant violation of the terms of this convention, and the account which it gave to illustrate this finding indicates that it interpreted widely the words " taking part in military operations against their own country " so as to include any work for the German war effort, including " German industry and agriculture ", and not merely " work on German fortifications and military installations ": all of the foregoing types of labour are mentioned in the Judgment.(2)

Certain remarks were made by the Tribunal which conducted the *Milch Trial* on Article II of Control Council Law No. 10 in relation to deportation and slave labour.(3) It may be convenient to quote here the relevant provisions of Article II:

" 1. Each of the following acts is recognized as a crime:

" (*b*) War Crimes. Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

" (*c*) Crimes Against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

The Prosecution had pointed out that " Article II (1) (*b*) lists under war crimes ' ill-treatment or deportation to slave labour *or for any other purpose* of civilian population from occupied territories ' ", and, they claimed, " It is clear that Law No. 10 established the following separate and distinct crimes: ill-treatment of civilians from occupied territories; deportation to slave labour of such civilians; and deportation for any other purposes of such civilians ". Again, " Control Council Law No. 10 has . . . unconditionally condemned, *as a crime against humanity, every* instance of the deportation of civilians ". The Tribunal would appear to have agreed that for a deportation to become a war crime or a crime against humanity it need not have had enslavement as its object.

(1) British Command Paper Cmd. 6964, p. 56.
(2) *Ibid*, pp. 57-60. This point is dealt with at greater length in Chapter IX of the *History of the United Nations War Crimes Commission*, London, 1948, pp. 227–229.
(3) See pp. 46-47.

At this point it is interesting to glance at the attitude taken by certain other war crimes laws and courts to the question of deportation as a war crime. Thus, in passing judgment on Hauptsturmführer Konstatin Wagner in October, 1946, the Eidsivating Lagmannsrett ruled that the deportation of 531 Norwegian Jews was a war crime at variance with the laws of humanity and the laws and customs of war. The Supreme Court of Norway, while reducing the sentence passed upon Wagner, did not upset this ruling. It should be added, however, that the Lagmannsrett had also found that, when taking part in the deportation, the accused knew that the victims faced slavery and many of them death ; further, the charges against the accused were charges of bringing about slavery and death.(1)

In practice, of course, the questions of deportation and enslavement have usually arisen simultaneously for consideration by the Courts trying war criminals, but there are many indications that deportation for any purpose is recognized as a war crime. For instance the French Ordinance of 28th August, 1944, concerning the suppression of war crimes, provides, in its Article 2 (5) that :

> " (5) Illegal restraint, as specified in Articles 341, 342 and 343 of the *Code Pénal*, shall include forced labour of civilians and deportation for any reason whatever of any detained or interned person against whom no sentence which is in accordance with the laws and customs of war has been pronounced."(2)

The definition of " war crime " under Australian Law also includes " deportation of civilians,(3) as did the list of war crimes drawn up by the Responsibilites Commission of the Paris Peace Conference in 1919, on which the Australian catalogue of war crimes was based. According to Article III of the Chinese War Crimes Law of 24th October, 1946, the term " war criminal " includes " Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as (*a*) killing, starving, massacring, enslaving, or mass deportation of its nationals " ; while Article 3 ( ) of the Yugoslav War Crimes Law of 25th August, 1945, provides, *inter alia*, that " forced deportation or removal to concentration camps " by enemy nationals are war crimes. The jurisdictional provisions of most of the instruments governing United States Military Commissions state that " deportation to slave labour or for any other purpose of civilian population of or in occupied territory " or "deportation to slave labour or for any other illegal purpose" of such persons, shall be regarded as war crimes.(4)

The Tribunal which tried Milch stated that *under certain conditions* deportation of civilians became a war crime, thus leaving open the possibility of there being a legal deportation. Nevertheless the account given of

---

(1) This trial has also received mention in Vol. V of this series, p. 17.
(2) See Vol. III of these Reports, p. 96, and also p. 52.
(3) See Vol. V, p. 95.
(4) See Vol. III, pp. 106-107.

the first of these conditions made it clear that all instances which would usually be regarded as war crimes fell within the Tribunals' definition.(1)

Of the claim that agreements had existed between the German Government and the Vichy authorities for the deportation of persons from France into Germany, the Prosecution in the *Milch Trial* pointed out that " Many of the Vichy Government's highest officials who held office by reason of and under the protection of Nazi power, have been punished for treason by the present legitimate government " and claimed that " the agreements themselves were illegal—because they were exacted under duress, and because they were void *ab initio* because of their immoral content. It is common knowledge that even the puppets of Vichy did not of their own accord agree to the Nazi deportation measures. It is equally clear that these agreements were *contra bonos mores*. Then, too, it was illegal for any French Government, to conclude agreements which provided for the compulsory mass deportation of French workers to aid the enemy's war effort. At the time of the agreement between Germany and Vichy there was merely a state of suspension of hostilities. French resistance had not ceased, and the outcome of the war continued to be uncertain. Lastly, the deportation agreements were invalid because their manifest purpose was to aid Germany in the commission of the crime of aggressive war. That an agreement in furtherance of an act which is illegal in international law is invalid has been stated by various authorities. For example, Professor Charles Cheney Hyde of Columbia University defines as internationally illegal " agreements which are concluded for the purpose of, and with a view to, causing the performance of acts which it (international law) prescribes ".

The Prosecution continued :

" Professor Hall, page 382 of the 8th Edition of *International Law* (1924), declares :

> " ' The requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of International Law and their undisputed applications.'

" Lauterpacht on *International Law* by L. Oppenheim, at Vol. 1, page 706, states :

> " ' It is an unanimously recognized customary rule of international law that obligations which are at variance with universally recognized principles of International Law cannot be the object of a treaty '."

The Defence on the other hand, claimed that " the rules of the Hague Land Warfare regulations can be suspended between two States. I have given proof of the fact that there were between Germany and France agreements whereby the French population had to make themselves available for work in Germany, first, by volunteering, and later, on the basis of a law for compulsory labour issued by the French Government. No restrictions were laid down to what extent and for what purpose these people were to be employed.

---

(2) See pp. 45–46.

" The objection has been raised that the Vichy Government was a government of traitors, but it was that government which concluded the armistice with Germany, and throughout the war all Frenchmen, including those in De Gaulle's camp, would raise passionate protests when they thought that one of its articles had been violated. Thus, they all acknowledged that an armistice could be concluded, and was concluded. Once you acknowledge the existence of an armistice agreement, you cannot, logically or legally, deny the legality of the government which has concluded the armistice. You must eat your cake as it is and you must not pick out the plums alone."

The Tribunal, however, ruled that " the Vichy Government was a mere puppet set up under German domination " ;(1) which would seem to indicate that the Tribunal regarded any such contract as that claimed by the Defence, to be void on the grounds of the incapacity of one of the parties. Judge Phillips's opinion seems to strengthen this impression.(2) It has been said that " A State possesses therefore, treaty-making power only so far as it is sovereign . . . Not full sovereign States . . . can become parties only to such treaties as they are competent to conclude ",(3) and that, while " war was a legitimate means of compulsion, and consent given in pursuance thereof could not properly be regarded as tainted with invalidity," the position " has now probably changed in so far as war has been prohibited by the Charter of the United Nations and the General Treaty for the Renunciation of War ".(4) It must be admitted, however, that, once the status of France (after her defeat) as an occupied territory within the meaning of the Hague Regulations has been established, it would seem to follow that her inhabitants could not have been deprived of their rights under those Regulations by any authority, and that no need really arose to call upon the rules relating to the conclusion of treaties by sovereign or partly sovereign States.

The judgment of the Tribunal which conducted the *Pohl Trial*(5) made the following remarks regarding the use of slave labour from occupied territories :

" The freedom of man from enslavement by his fellow men is one of the fundamental concepts of civilization. Any programme which violates that concept, whether prompted by a false feeling of superiority or arising from desperate economic needs, is intolerable and criminal. We have been told many times, ' Germany was engaged in total war. Our national life was endangered. Everyone had to work '. This cannot mean that everyone must work for Germany in her waging of criminal aggressive war. It certainly cannot mean that Russian and Polish and Dutch and Norwegian non-combatants, including women and children, could be forced to work as slaves in the manufacture of war material to be used against their own countrymen and to destroy their own homelands. It certainly cannot mean, in spite of treaties and all rules of civilized warfare (if warfare can ever be said to be civilized), that prisoners taken in battle can be reduced to the status of

(1) See p. 38.
(2) See p. 46.
(3) Oppenheim-Lauterpacht *International Law*, Vol. I, Sixth Edition, pp. 795-6.
(4) *Ibid*, p. 803.
(5) See p. 49.

slaves. Even Germany prior to 1939 had repudiated any such fallacious position. And yet, under the hypnotism of the Nazi ideology, the German people readily became complaisant to this strange and inhuman system. Under the spell of National Socialism, these defendants today are only mildly conscious of any guilt in the kidnapping and enslavement of millions of civilians. The concept that slavery is criminal *per se* does not enter into their thinking. Their attitude may be summarized thus : " ' We fed and clothed and housed these prisoners as best we could. If they were hungry or cold, so were the Germans. If they had to work long hours under trying conditions, so did the Germans. What is wrong in that ? ' When it is explained that the Germans were free men working in their own homeland for their own country, they fail to see any distinction. The electrically charged wire, the armed guards, the vicious dogs, the sentinel towers—all those are blandly explained by saying, ' Why, of course. Otherwise the inmates would have run away.' They simply cannot realize that the most precious word in any language is ' liberty '. The Germans had become so accustomed to regimentation and government by decree that the protection of individual human rights by law was a forgotten idea. The fact that the people of the eastern territories were torn from their homes, families divided, property confiscated, and the able-bodied herded into concentration camps, to work without pay for the perpetrators of these outrages—all this was complaisantly justified because a swollen tyrant in Berlin had scribbled ' H.H.' on a piece of paper. And these are the men who now keep repeating, ' *Nulla pæna sine lege.*' "

There is also some similarity between the judgments delivered in the *Milch Trial* and the judgment delivered in the *Justice Trial.* The latter held the *Nacht und Nebel* plan to be illegal on the grounds, *inter alia*, of the illegality of the deportation of inhabitants of occupied territories. The " inhumane treatment " of relatives and friends who were left without trace of the victims was also stressed.(1)

### 3. DEPORTATION AND SLAVE LABOUR AS OFFENCES AGAINST PRISONERS OF WAR

In his closing statement, the Defence Counsel made the following submission :

" I shall begin by examining the question as to what extent the Hague Convention on land warfare and the Geneva Convention of 1929 were valid for the treatment of Russian prisoners of war. By the statements of witness von Neurath it has been confirmed that the U.S.S.R. in 1919 specifically withdrew from the Hague Convention on land warfare as well as the former Geneva Convention. Jurists will not dispute the fact that a formal withdrawal from agreements is of greater importance in the relations between states than the act of joining such a convention. Even if one were of the opinion that the Hague Convention on Land Warfare and the Geneva Convention represented merely the codification of already existing international law, so that

(1) See Vol. VI, pp. 56–58.

also the State that did not join the conventions would be bound to this already existing international law in all details, even in such a case the expressly stated withdrawal from such a convention must mean also a withdrawal from the natural international law. If this were not the case, the withdrawal from such conventions would be an act without meaning which so intelligent politicians as those to be found in the USSR would never have undertaken. Nor is this conception of mine contradicted by the expert opinion offered in the first Nürnberg Trial (Canaris Document No. EC–338) because this expert opinion is only concerned with the order of Hitler and Keitel regarding the killing and cruel treatment of prisoners. It is of course clear that inhumane acts do not become permissible even through withdrawing from a convention. What we must examine here, however, is purely the question whether or not, and for what activities, such prisoners of war may be used. Detailed regulations of international law, which in themselves do not contain atrocities, can, in my opinion, be nullified by expressly withdrawing from a convention codifying existing international law. Finally we wish to draw the attention to Article 82 paragraph 2 of the Geneva Convention of 1929 which contains the following regulation: ' If in wartime one of the belligerents is not a member of the convention the regulations of this convention remain valid, nevertheless, for the belligerents who have signed the convention.' This does not mean that the signatories are bound to the Geneva Convention also with regard to the treatment of soldiers of a non-signatory power, but only with regard to soldiers of the signatories who are at war. Article 82 paragraph 2 of the Geneva Convention, therefore, states that with regard to the relations of non-signatories the convention is not valid. The regulation was made so that it should not be thought that if a non-signatory participated in the war the Geneva Convention would not apply to that war."

Elsewhere, Defence Counsel said: " So far as the Italian prisoners of war are concerned, the evidence has shown that the Mussolini Government, which at the time was the covenant Government in that part of Italy not occupied by the allied forces, made them available for work in the armament industry, especially after Germany had to manufacture armaments for Mussolini's Italy."

In replying, the Prosecution recalled that:

" The defendant has offered, as a plausible reason for the employment of Russian, French and Italian prisoners of war, the fact that various historical events made it unnecessary to abide by the terms of the Convention concerning prisoners of war. The witness von Neurath testified that Russia had renounced the Conventions in question, and hence Germany could renounce them as to Russia. As for France, it is contended that the alleged Government headed by Pierre Laval had concluded an arrangement with the Reich which made it legal to employ prisoners of war in tasks forbidden by the Conventions. A similar reason is advanced for the use of Italian the concluding of an arrangement between the Reich and Mussolini. The International Military Tribunal made a finding with respect to this matter (page 16892). ' The argument in defence of the charge with regard to the murder and

ill-treatment of Soviet prisoners of war, that the USSR was not a party to the Geneva Convention, is quite without foundation. On 15th September, 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, signed by General Reinecke on 8th September, 1941 '."

Counsel then quoted the passage from the Judgment of the International Military Tribunal which appears in the Judgment of Judge Musmanns in the trial of Milch(1) and continued:

" The defendant was a soldier of some experience, he knew it was improper, even criminal, to have the Russian prisoners work in the Luftwaffe factories, but he paid no attention to the breach of this duty of the soldier. The manner in which the Reich bludgeoned a treaty from the French is too well known to warrant discussion. It cannot be contended with any seriousness that the French prisoners of war, who were negotiated into slavery by a puppet government, were voluntary employed by the Germans. Indeed the witness Le Friec has testified that when he was taken to work in the airplane factory, he was told that he would ' work on baby carriages '."

Regarding the position of Italian prisoners of war and their illegal employment, the Prosecutor said: " The Wehrmacht had moved into Italy early in the war and in 1943, when the Badoglio Government concluded an armistice with the Allies, the Wehrmacht continued to occupy the northern part of Italy as an occupying Power. They allegedly made a treaty with the by then tottering shadow of the former sawdust Cæsar and proceeded to bring the Italian prisoners of war to the Reich to work. Here again the soldiery had been sold into bondage by their former chief. The record shows that the Russian, French and Italian prisoners of war were used to work in airplane factories. Whether they made the fighter plane, ME 109, or the jet fighter, ME 262, or the transport plane, JU 52, is of little moment. In the total warfare in which the Reich was engaged there is one certainty, that nothing was being constructed which was not part of the war armament programme.

" The International Military Tribunal stated in this connection (page 16915): ' Many of the prisoners of war were assigned to work directly related to military operations, in violation of Article 31 of the Geneva Convention. They were put to work in munitions factories, and even made to load bombers, to carry ammunition and to dig trenches, often under the most hazardous conditions. This condition applied particularly to Soviet prisoners of war '."

The Judgment ruled that, while the specific provisions of the Geneva Convention had not been binding between Germany and the USSR they were both bound by the principles of customary international law, which forbade the use of Russians on German guns.(2) Between parties to the Conventions, the use of prisoners of war to man guns was a violation of Article 31 of the Geneva Convention and Article 6 of the Hague Convention.(3) Article 9 of the former was also quoted.(4)

---

(1) See pp. 43-44
(2) See pp. 43-44
(3) See p. 43 and also p. 47.
(4) See p. 44.

In ruling as it did the Tribunal must be taken to have overruled the submission of the Defence that in withdrawing from the Geneva Convention a state relinquished all rights even under the customary international law which was codified in the Convention, except for the protection against outright " inhumane acts ".(1)

The Indictment against Milch charged that: " Pursuant to the order of the defendant Milch, prisoners of war who had attempted escape were murdered on or about 15th February, 1944."

The Tribunal does not appear to have found that any specific prisoner of war was killed as a direct result of orders from the accused, but there was evidence,(2) of which the Tribunal took note in its judgment, that Milch had expressed the opinion that prisoners of war who attempted to escape should be shot. In its closing speech, the Defence had claimed that " All countries of the world have prisoners shot who attempt to escape."

The legality under certain circumstances of shooting a prisoner of war *while* trying to escape has certainly received recognition, as has been shown in reports appearing in earlier volumes in this series.(3) On the other hand it is not permissible to shoot a prisoner of war on recapture *on the grounds that* he attempted to escape. Thus, in the trial of Toma Ikeba and others by an Australian Military Court at Rabaul, 15th—16th May, 1946, three accused were awarded sentences of imprisonment for killing certain Indian prisoners of war who had been caught attempting to escape.

Nor is it permissible to shoot prisoners of war to *prevent their attempting* to escape, even though their intentions to make the attempt is known; this was shown by two other Australian cases tried at Rabaul, that of Teruma Hiranaka and one other on 13th May, 1946, and that of Kunito Hatakeyama and one other, on 14th–17th July, 1947.

Finally, a prisoner of war may not legally be shot if attempting to escape to save his life, according to the decision of a United States Military Tribunal, at Ludwigsburg, 22nd–24th January, 1946, in sentencing to life imprisonment Johann Melchior and Walter Hirschelmann on a charge of illegally killing two prisoners of war. The accused Melchior claimed that he shot one of the captured fliers to prevent his escape, but there was no evidence that the captives had made any attempt to escape until they found themselves confronted with three men with weapons in their hands under circumstances in which it was not unreasonable for the victims to assume that their lives were in danger.(4)

### 4. THE LIMITS OF THE RESPONSIBILITY OF A SUPERIOR FOR THE OFFENCES OF HIS SUBORDINATES

In their closing statement, the Prosecution quoted the decision of the United States Supreme Court in the case *in re Yamashita*;(5) it was claimed

(1) Compare the similar attitude of the Norwegian Supreme Court, as set out on pp. 119-120, of Vol. VI of this series.
(2) See p. 32.
(3) See Vol. I of these Reports, pp. 86-87, and Vol. III, p. 22.
(4) This trial has also been referred to in connection with the plea of superior orders. See Vol. V, p. 17.
(5) See Vol. IV of this series, pp. 38-49.

that " the facts of the Yamashita case are similar to those of the Milch case, and the opinion rendered by the Court is particularly in point in the matter of responsibility for senior officers."

The Prosecution pointed out that the Supreme Court had ruled that Articles 1 and 43 of the IVth Hague Convention of 1907, Article 19 of the Xth Hague Convention of 1907, and Article 26 of the Geneva Red Cross Convention of 1929 " plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized and its breach penalized by our own military tribunals "(1) The Prosecution continued :

> " In the cases of the medical experiments, we have a much less complex situation. There is no question of a senior officer in an occupied country, rather we are faced with a simple direct chain of command problem. Milch—Förster—Hippke. Had Milch given the order, the experiments would have been terminated, but no order of termination was given—people were murdered and Dr. Rascher remained in the Luftwaffe until he was transferred to the SS in March of 1943. The defendant had an affirmative duty to know what was going on, and an affirmative duty to act so as to stop the experiments. That he was ignorant of the true state of affairs in unbelievable in view of the letters and the testimony of those who were below him. Field-Marshals are not made as are non-commissioned officers . . . By holding the office which he held, he had the duty to control the activities of those who were his subordinates, to insure that they conducted themselves as soldiers and not as murderers. He has failed woefully in the task."

The Judgment of the Tribunal which conducted the *Milch Trial* did not refer to the decision of the Supreme Court, but in his concurring opinion Judge Phillips said : " The Tribunal in its majority opinion has fully considered the decision of the United States Supreme Court in the Judgment in *re Yamashita* and was found that said decision is not controlling in the case at bar." This statement must be taken to signify that the Tribunal had in fact discussed the relation of the Yamashita trial to the present proceedings during their deliberations *in camera.*

While not mentioning the Yamashita trial, the Tribunal set out in detail its reasons for finding Milch not responsible for illegal medical experiments.(2) In concurring, Judge Phillips said : " All of the testimony and the evidence, both for the Prosecution and the Defence is to the effect that the defendant Milch did not have such knowledge of the high altitude or low-pressure experiments which were carried out and completed by Luftwaffe physicians at Dachau until after the completion of such experiments. The evidence offered as to the knowledge or responsibility of the defendant Milch was not such a nature as to show guilty knowledge on his part of said experiments."

Of the " cooling or freezing " experiments, he said :

---

(1) *Ibid*, p. 44.
(2) See pp. 36-37.

" In weighing the evidence, the Tribunal was mindful of the fact that the defendant gave the order and directed his subordinates to carry on such experiments, and that thereafter he failed and neglected to take such measures as were reasonably within his power to protect such subjects from inhumane treatment and deaths as a result of such experiments. Notwithstanding these facts, the Tribunal is of the opinion that the evidence fails to disclose beyond a reasonable doubt that the defendant had any knowledge that the experiments would be conducted in an unlawful manner and that permanent injury, inhumane treatment or deaths would result therefrom.

" Therefore, the Tribunal found that the defendant did not have such knowledge as would amount to participation or responsibility on his part and therefore found the defendant not guilty on charges contained in Count No. 2."

It will be noted that Milch was found not guilty under Count Two of the Indictment because the Tribunal was not satisfied that he knew of the illegal nature of the experiments carried out by persons in his command ; no duty to find whether they had such a nature is mentioned.

On the other hand, it will be recalled that, in certain passages from the judgment delivered in the *Doctors' Trial* which were quoted on pages 91–93 of Volume IV of these Reports, it was made clear that there could exist a duty on the part of a superior to take reasonable steps to find the nature of medical experiments carried on by persons under his command. The Tribunal ruled, *inter alia*, that " Occupying the position he did and being a physician of ability and experience, the duty rested upon him (Karl Brandt) to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps."(1)

It may be that the fact that Milch was not " a physician of ability and experience ", and the circumstance that " His position involved vast responsibilities covering a wide industrial field, and there were certainly countless subordinate fields within the Luftwaffe of which he had only cursory knowledge ", including the conduct of medical experiments,(2) go far towards explaining why his judges excused Milch of a duty to discover whether the experiments carried out by persons within his general command were of a legal character.

In the judgment in the *Pohl Trial*,(3) the accused Erwin Tschentscher, who had been a battalion commander of a supply column, and a company commander, on the Russian Front during 1941, was held not responsible for the murder of Jewish civilians and other non-combatants in Poland and the Ukraine by members of his commands at that time. The Tribunal found that he had no " actual knowledge " of these offences, and added that the decision of the Supreme Court in the *Yamashita Trial* " does not apply to the defendant Tschentscher ", for " Conceding the evidence of the

(1) See Vol. IV, p. 92.
(2) See the Judgment of the Tribunal, on pp. 36-37 of the present volume.
(3) See p. 49.

Prosecution to be true as to the participation of subordinates under his command, such participation by them was *not of sufficient magnitude or duration* to constitute *notice* to the defendant, and thus give him an opportunity to control their actions. Therefore, the Tribunal finds and adjudges that the defendant Tschentscher is not guilty of participating in the murders and atrocities committed in the Russian campaign as alleged by the prosecution."(1)

5. THE PLEA OF MISTAKE OF LAW

Judge Toms recalled that the defendant had claimed to have been advised that it was not unlawful to employ prisoners of war in war industries.(2) He rejected this plea, not on the grounds that a mistake of law, as opposed to a mistake of fact, is never an excuse, but on the grounds that it was unlikely that Milch could actually have been so mistaken. Other examples of the apparent reluctance of legal authorities to apply to the full the maxim *ignorantia juris non excusat*, the relevant law being international law, have already been noted.(3) It would seem that an accused is not expected to be as well acquainted with rules of international law as with his own municipal law, which touches more frequently or closely upon his own everyday experience.

6. THE PLEA OF NECESSITY

The Defence, in their closing statement, urged that: " The validity of the regulations laid down in the Hague Convention for Land Warfare can be cancelled by a special factor which precludes lawlessness. In all codes of law of the civilized world the law of so-called emergency situations exists. This conception of law must also be applied to international law. That Germany was in an emergency situation in that sense that the use of the civilian population for labour in the occupied territories was only caused by the emergency situation, I have shown in detail a little while ago. Modern war means total war and as such has suspended, in several points, international law as it existed up to now. It is uncontested that according to the Hague Convention for Land Warfare actions of combat against the civilian population are forbidden. Modern air warfare, having as its aim total annihilation or armament and production of the enemy, brought with it to a great extent warfare against the civilian population without any of the belligerents regarding such combat actions as forbidden according to the Hague Convention on Law Warfare. This also applies to the total blockade of a country which aims at starving the population of that country. These comprehensive ways of waging war which hit all classes of the population permit, in my opinion, to a state which is at war, especially on account of the fact that its civilian population is brought into the strife, to use for its purposes labour from occupied countries so as to maintain its production and armament."

---

(1) Italics inserted. Compare Vol. IV, pp. 85-6 and 94-5.

(2) The defendant's Counsel put forward this plea in a way which is réminiscent of the way in which the plea of superior orders has so frequently been argued: " How should Milch, who is not a legal expert, who as a layman did not understand anything about applicable International Law, how could he form a different opinion ? "

(3) See Vol. V of this series, p. 44.

As has been seen, however, the Tribunal did not allow this plea of necessity, and Judge Musmanno made some remarks on his own attitude to it.(1)

## 7. THE PLEA OF SUPERIOR ORDERS

The Tribunal expressed certain conclusions regarding what amounted to a plea of superior orders.(2) It seems fair to summarize the decision of the Tribunal by saying that it rejected the plea on the grounds that the superior orders relied upon related to the waging of a war of aggression and involved the commission of " ruthless acts of persecution and terrorism ", and that the defendant *must have known* that the orders were in these ways illegal. This finding is interesting in that it represents the first instance reported in these volumes in which the illegal nature of aggressive war has been related to the principle that the plea of superior orders can only be effective if the orders were legal or if the accused could not reasonably be expected to be aware of their illegality.

The Tribunal also pointed out that the accused began his alleged course of action long before the outbreak of war, " at a time when there was no claim upon the loyalty of the defendant as a soldier to protect his homeland at war ".(3) This seems to be a recognition that, whatever the effectiveness of the plea of superior orders, such effectiveness would be greater in conditions of war-time than during time of peace.(4)

In their opening statement, the Prosecution submitted that :

> " This defendant cannot plead in truth that he did not know that the use of slave labour was wrong. He cannot use even the technical excuse so common among the Nazis that this was not illegal because the Nazi law authorized it. Official sanction of slavery would have been a law so evil that even the Nazi masters dared not proclaim it. A search through the mass of decrees and pronouncements which passed for law during the régime of Adolf Hitler fails to reveal sanction for slavery of foreign labourers. On the other hand certain prohibitory laws survived from a more respectable day.
>
> " Paragraph 234 of the German Criminal Law (*Strafegesetzbuch*, 11th edition, Beck 'sche Verlagsbuchhandlung, Munich and Berlin, 1942, pages 364–365) provides that ' whosoever seizes a person by ruse, threat or force in order to expose him in a helpless situation, and to bring him into slavery, serfdom and foreign Army and Navy service shall be punished for kidnapping with penal servitude.' This law was in force during the Nazi régime and was published in the most recent edition of German Criminal Law which we have been able to find."

A claim of legality under municipal law, even had it succeeded, would not, however, have constituted a complete defence, though it might have been considered as a factor in mitigation of punishment.(5)

---

(1) See p. 44.
(2) See pp. 40-42.
(3) See p. 42.
(4) Compare Vol. V, pp. 18-19.
(5) *Ibid*, pp. 22-24.

## 8. MILCH'S APPLICATION TO FILE A PETITION FOR A WRIT OF HABEAS CORPUS

Milch's motion for leave to file a petition for a writ of habeas corpus was denied by the Supreme Court of the United States and the Court entered an order to which reference has already been made.(1)

The applicant's plea that he was tried in violation of Articles 60-65 of the Geneva Prisoner of War Convention calls for no treatment here beyond a reference to previous findings that the section of the Convention into which these provisions fall does not apply to offences committed by prisoners of war before their capture.(2)

In rejecting the motion, the Supreme Court did not entertain arguments. It seems likely that the difference in treatment of Milch's motion and that of Yamashita(3) arose out of the fact that Milch's petition was treated as an original application whereas the *Yamashita Case* came up through appellate channels from the Supreme Court of the Philippines at a time when the Philippines were a dependency of the United States.(4)

The difference between the original and appellate jurisdiction of the Supreme Court is laid down in Article III, Section 2, of the United States Constitution which provides, *inter alia*, that :

> " In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make ".

The applicant could not claim to fall within the category of persons in whose cases the Supreme Court would have original jurisdiction. Nor does it appear that the military tribunal before which applicant was tried and convicted bears the same relationship to the judicial system of the United States as did the Supreme Court of the Philippines, over the proceedings of which the Supreme Court of the United States could exercise appellate jurisdiction.

It is suggested that the military tribunal which tried and convicted Milch was not a court-martial or military commission according to traditional usage. It was established by and acted under the authority of a Four-Power Agreement providing for the trial of Nazi war criminals, and as such would not, within customary construction, constitute a part of the judicial system of the United States for any purpose.

It may be noted that petitions for writs of habeas corpus submitted by war criminals convicted by United States military commissions at Dachau likewise have been treated as original applications and likewise have been denied by the Supreme Court for want of jurisdiction. The above discussion of the nature of the Tribunal which tried and convicted Milch should not be taken as an indication that the possible international nature of this Tribunal in any way affected the denial of Milch's application for a writ of habeas corpus.

---

(1) See p. 47.
(2) See Vol. IV of these Reports, p. 78.
(3) See Vol. IV, pp. 38, *et seq.*
(4) *Ibid*, p. 37.