CASE No. 48

THE FLICK TRIAL

TRIAL OF FRIEDRICH FLICK AND FIVE OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG

20TH APRIL–22ND DECEMBER, 1947

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

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

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

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

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

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

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

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

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

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

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

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

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

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

2. THE INDICTMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. THE EVIDENCE BEFORE THE TRIBUNAL

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

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

(i) *Evidence Regarding the Flick Organisation*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. THE JUDGMENT OF THE TRIBUNAL

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

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

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

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

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

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

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

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

As to the substantive law administered, the Tribunal declared:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[1] See pp. 52–4.

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

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

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

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

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

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

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

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

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

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

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

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

" Further on in the argument, it was said:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgment then continues:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgment states:

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

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

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

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

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

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

(1) See p. 14.

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

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

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

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

The judgment then continues:

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

The judgment continues:

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

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

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

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

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

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

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

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

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

The Tribunal added:

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

(vi) *Membership of Criminal Organisations*

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

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

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

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

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

The judgment states:

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

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

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

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

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

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

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

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

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

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

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

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

(viii) *The Findings of the Tribunal*

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

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

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

(ix) *The Sentences*

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

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

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

B. NOTES ON THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) See Vol. VI, pp. 35–36.

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

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

(5) *Ibid*, p. 41.

(6) *Ibid*, p. 43.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) *Ibid*, p. 36.

(4) *Ibid*, pp. 36–37.

(5) *Ibid*, p. 41.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Again, Professor Hans Kelsen has written:

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

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

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

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

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

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

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

4. OFFENCES AGAINST PROPERTY AS WAR CRIMES

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

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

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

(3) See pp. 59–74.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. CRIMES AGAINST HUMANITY

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

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

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

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

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([1]) See p. 25.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) See p. 4.

(4) See p. 25,

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

(6) See p. 44, note 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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(1) Italics inserted.

(2) See p. 26.

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

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

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

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

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

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

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

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

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

> " ' Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or Stateless persons, be a German court, if authorised by the occupying authorities.'

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

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

6. ENSLAVEMENT AND DEPORTATION TO SLAVE LABOUR

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

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

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

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

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

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

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

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

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

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

(2) See Vol. VII, pp. 53–61.

(3) See pp. 18–20.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) See pp. 25 and 44.

(3) See Vol. X of these Reports.

(4) See p. 17.

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

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

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

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

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

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

GENERAL TAYLOR: Quite.

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

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

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

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

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

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

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

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

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

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

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

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

CASE No. 49

TRIAL OF HANS SZABADOS

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

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

A. OUTLINE OF THE PROCEEDINGS

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

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

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