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PROSECUTIONS OF NAZI WAR CRIMINALS BEFORE POST-WORLD WAR II DOMESTIC TRIBUNALS

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- I. INTRODUCTION
- II. POST-WORLD WAR TWO WAR CRIMES TRIBUNALS
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I. INTRODUCTION

Events in Bosnia, combined with the fiftieth anniversary of the termination of World War II, have renewed interest in the international prosecution of war crimes. Discussions have centered on the International Military Tribunal at Nuremberg and the Control Council Law No. 10 courts in occupied Germany. Nonetheless, scant attention has been paid to the plethora of post-war prosecutions before domestic civil and military tribunals. These trials, in addition to their historic import, were significant in shaping the humanitarian law of war. This essay sketches the doctrinal contributions of these post-World War II domestic tribunals.¹

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1. See generally Matthew Lippman, *Conundrums Of Armed Conflict: Criminal Defenses To Violations Of The Humanitarian Law Of War*, 15 DICKINSON J. INT'L L. 1 (1996); Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171 (1997); Matthew Lippman, *The Good Motive Defense*:

II. POST-WORLD WAR TWO WAR CRIMES TRIBUNALS

A. Prosecutorial Models

The United Kingdom, the United States, and the Soviet Union pledged on October 30, 1943 that the "major war criminals, whose offenses have no particular geographical localization . . . will be punished by the joint decision of the Governments of the Allies."² In contrast, those whose crimes were centered in specific territories were to "be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein."³

Ernst Von Weizsaecker And The Nazi Ministries Case, 7 *TOURO INT'L L. REV.* 57 (1997); Matthew Lippman, *War Crimes Prosecutions Of Nazi Health Professionals And The Protection Of Human Rights*, 21 *THURGOOD MARSHALL L. REV.* 11 (1995); Matthew Lippman, *Fifty Years After Auschwitz: Prosecutions Of Nazi Death Camp Defendants*, 11 *CONN. J. INT'L L.* 191 (1995); Matthew Lippman, *War Crimes: The Trial Of Nazi Military Leaders*, 6 *TOURO INT'L L. REV.* 261 (1995); Matthew Lippman, *War Crimes Trials Of German Industrialists: The 'Other Schindlers'*, 9 *TEMPLE J. INT'L & COMP. L.* 101 (1995); Matthew Lippman, *The Nazi Doctors Trial And The International Prohibition On Medical Involvement In Torture*, 15 *LOYOLA LOS ANGELES INT'L & COMP. L. J.* 395 (1993); Matthew Lippman, *They Shoot Lawyers Don't They?: Law In The Third Reich And The Global Threat To The Independence Of The Judiciary*, 23 *CAL. W. INT'L L. J.* 257 (1993); Matthew Lippman, *The Other Nuremberg: American Prosecutions Of Nazi War Criminals In Occupied Germany*, 3 *IND. INT'L & COMP. L. REV.* 1 (1992); Matthew Lippman, *Nuremberg: Forty Five Years Later*, 7 *CONN. J. INT'L L.* 1 (1991); Matthew Lippman, *Nuremberg*, 6 *LAW IN CONTEXT* 28 (1988); Matthew Lippman, *The Denaturalization Of Nazi War Criminals In The United States: Is Justice Being Served?* 7 *HOUSTON J. INT'L L.* 169 (1985); Matthew Lippman, *The Trial Of Adolf Eichmann And The Protection Of Universal Human Rights Under International Law*, 5 *HOUSTON J. INT'L L.* 1 (1982). See generally, Matthew Lippman, *Towards An International Criminal Court*, 3 *SAN DIEGO I.J.* 1 (1995); Matthew Lippman, *Vietnam: A Twenty Year Retrospective*, 11 *DICKINSON J. INT'L L.* 325 (1993); Matthew Lippman, *War Crimes: The My Lai Massacre And The Vietnam War*, 1 *SAN DIEGO J.J.* 295 (1993).

2. Declaration On German Atrocities, Oct. 30, 1943, VI DOCUMENTS ON AMERICAN FOREIGN RELATIONS 231, 232 (1945).

3. *Id.*

Twenty-two major German war criminals were prosecuted before the International Military Tribunal at Nuremberg.⁴ Lower-level Nazi bureaucrats, diplomats, and militarists were tried in twelve American trials in occupied Germany.⁵ However, most accused German war criminals, were prosecuted before courts in the countries in which they committed their catastrophic deeds.⁶ Various prosecutorial models were utilized. Australia,⁷ Canada,⁸ France,⁹ Great Britain,¹⁰ China,¹¹ and the United States¹² provided for the trial

4. See Agreement For The Prosecution And Punishment Of The Major War Criminals Of The European Axis Powers And Charter Of The International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter]. See also International Military Tribunal For The Far East, The Tokyo War Crimes Tribunal (Nov., 1948), in II THE LAW OF WAR 1029 (Leon Friedman ed., 1972) [hereinafter Tokyo Tribunal].

5. See Control Council Law No. 10, VI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 XVII (1952).

6. See *infra* notes 7-39. The decisions of these various domestic courts constitute evidence of custom, the general principles of law recognized by civilized nations, and judicial decisions that provide a subsidiary means for the determination of the rules of law. See Statute Of The International Court Of Justice, June 26, 1945, art. 38(a)-(d), 59 Stat. 1031, T.S. No. 993.

7. See Australian Law Concerning Trials Of War Criminals By Military Courts, V L. REPT. TRIALS WAR CRIM. 94 (U.N. War Crimes Comm'n, 1948) (Annex) [hereinafter Australian Law].

8. See Canadian Law Concerning Trials Of War Criminals By Military Courts, IV L. REPT. TRIALS OF WAR CRIM. 125 (U.N. War Crimes Comm'n, 1948) (Annex)[hereinafter Canadian Law].

9. See French Law Concerning Trials Of War Criminals By Military Tribunals And By Military Government Courts In The French Zone Of Germany, III L. REPT. TRIALS WAR CRIM. 93 (U.N. War Crimes Comm'n, 1948) (Annex II) [hereinafter French Law].

10. See British Law Concerning Trials Of War Criminals By Military Courts, I L. REPT. TRIALS WAR CRIM. 105 (U.N. War Crimes Comm'n, 1947) (Annex I) [hereinafter British Law].

of accused war criminals before military courts. The jurisdiction of British Military Courts was based on a Royal Warrant of June 14, 1945 that confined the tribunals' jurisdiction to violations of the laws and usages of war committed during any conflict in which His Majesty has been, or may be engaged, at any time since September 2, 1939. This contrasted with the jurisdiction of the International Military Tribunal that extended to crimes against humanity and peace, as well as to war crimes.¹³

British Military Courts were comprised of a President and two officers equal or greater in rank than the accused. The panel members were not required to possess legal training. Mixed national panels were appointed in those instances in which one or more of the victims were drawn from countries other than Great Britain.¹⁴ Greek officers, for example, were named to the tribunal in *Peleus*, which involved eighteen Greek victims,¹⁵ while Dutch officers were included on the panel in *Almelo*, which concerned a crime committed on Dutch territory against several victims, one of whom was from the Netherlands.¹⁶ The Royal Warrant also provided for

11. See Chinese Law Concerning Trials Of War Criminals, XIV L. REPT. TRIALS WAR CRIM. 152 (U.N. War Crimes Comm'n, 1949) (Annex) [hereinafter Chinese Law].

12. See United States Law And Practice Concerning Trials Of War Criminals By Military Commissions And Military Government Courts, I L. REPT. TRIALS WAR CRIM. 111 (U.N. War Crimes Comm'n, 1947) (Annex II) [hereinafter United States Law].

13. British Law, *supra* note 10. A Royal Warrant is based on the Royal Prerogative of the Crown. *Id.* See Royal Warrant (Army Order 81/45, June 14th, 1945) *quoted and cited in id.* See Nuremberg Charter *supra* note 4, at arts. 6(a) & (c). France was distinguished from the other countries that relied on military tribunals in that the French Ordinance incorporated specific provisions of the French criminal and military criminal codes. French Law, *supra* note 9, at 95-96.

14. British Law, *supra* note 10, at 106-08.

15. Trial Of Kapitanleutnant Heinz Eck And Four Others For The Killing Of Members Of The Crew Of The Greek Steamship *Peleus*, Sunk On The High Seas (The *Peleus* Trial) (Brit. Milit. Ct., Hamburg, Oct. 17th-20th, 1945), I L. REPT. TRIALS WAR CRIM. 1 (U.N. War Crimes Comm'n, 1947) [hereinafter *Peleus*].

16. Trial Of Otto Sandrock And Three Others (The *Almelo* Trial) (Brit. Milit.

the appointment of a Judge Advocate to impartially advise the Court on substantive and procedural law and to summarize the evidence. The evidentiary rules and burden of proof were the same as those applicable in courts of ordinary criminal jurisdiction. A petition to the Confirming Officer was the only appeal that was provided. The decisions of the British and other low-level military courts do not constitute binding domestic precedents. Nevertheless, they are significant declarations of international legal doctrine and State practice.¹⁷

The Netherlands utilized a second model--initially prosecuting war criminals before special criminal courts that applied the existing criminal code. The Dutch subsequently modified this approach and incorporated the war crimes and crimes against humanity provisions of the Nuremberg Principles into their domestic legal code. The acts falling within these categories of criminal conduct were punished in accordance with analogous provisions of the existing criminal statute.¹⁸

The Netherlands established five special mixed civilian-military war criminal courts, as well as a Special Court of Cassation (Supreme Court). These Courts initially functioned under the Extraordinary Penal Law Decree of 1943. The preamble noted that this legislation was enacted to protect "the security of the State . . . [which] made it urgently necessary to lay down extraordinary penal rules [to permit] the trial of certain acts committed during the time of

Ct., Almelo, Holland, Nov. 24th-26th, 1945), I L. REPT. TRIALS WAR CRIM. 35 (U.N. War Crimes Comm'n, 1947)[hereinafter Almelo]. A French member was appointed to the panel in the prosecution of eleven defendants allegedly involved in the execution of six British and four American prisoners of war and four French Nationals. Trial Of Karl Buck And Ten Others, (Brit. Milit. Ct., Suppertal, Germany, May 6th-10th, 1946), V L. REPT. TRIALS WAR CRIM. 39, 41 (U.N. War Crimes Comm'n, 1948) [hereinafter Buck].

17. British Law, *supra* note 10, at 106-10. A Judge Advocate must be appointed in those instances in which the tribunal does not include a legally trained member. *Id.* at 107.

18. Netherlands Law Concerning Trials Of War Criminals, XI L. REPT. TRIALS WAR CRIM. 86, 102-03 (U.N. War Crimes Comm'n, 1949) (Annex) [hereinafter Netherlands Law].

the present war, which acts were gravely deserving of punishment.”¹⁹ This legislation modified existing penal laws so as to permit the imposition of more severe penalties. Several additional offenses were incorporated into the legislation, including recruitment for foreign military service, evasion of conscription, and various common law crimes committed under the authority of the occupying authority.²⁰

The Special Court of Cassation, in *Ahlbrecht*, quashed a manslaughter conviction under the Extraordinary Penal Law Decree of 1943. The Court concluded that the Dutch judiciary lacked legal competence over enemy war criminals, and explained that it was “unreasonable to try foreign soldiers and officials according to Netherlands rules which were not written for them, instead of trying them by those rules written for them which govern warfare.”²¹ In addition, “several extremely serious violations of the laws of war could not even be squeezed under the provisions of the Penal Code.”²²

The Netherlands Parliament responded with a 1947 amendment to the country’s war crimes legislation. This punished war crimes and crimes against humanity as defined in the Nuremberg Charter. The punishment of these acts remained anchored in Dutch domestic doctrine--the sentences were to be the maximum established for

19. Extraordinary Penal Law Decree of 22nd December 1943 (Statute Book of the Kingdom of Netherlands No. D.61) as amended by Statute Book No. H.204 of 27th June, 1947 and Statute Book No. H.233, of 10 July, 1947 *quoted and cited in id.* at 86.

20. *Id.* at 88.

21. *Ahlbrecht, quoted in id.* at 89.

22. *Id.* The Special Court of Cassation noted that “the jurisdiction over members of the enemy occupying forces on account of a violation of the rules of war, which the Netherlands derive from international law, has not yet been laid down in any law such as would be necessary to make the jurisdiction effective . . . the Netherlands judge has, for the time being, no jurisdiction over members of the enemy armed forces and enemy organizations attached to the same who violate the laws or customs of war in this country.” *Id.* at 89-90.

analogous domestic offenses.²³

Poland also vested jurisdiction in special criminal courts consisting of one professional and two lay-judges. In 1946, primary jurisdiction was transferred to the newly created Supreme National Tribunal, comprised of a mixed professional and lay panel. Ordinary criminal courts retained residual jurisdiction over war crimes that were not prosecuted before the Supreme National Tribunal. Polish war crimes legislation combined newly adopted articles punishing acts undertaken by individuals assisting the German State with existing provisions of the Criminal Code. These provisions were sufficiently broad to encompass acts constituting war crimes, as well as crimes against humanity and peace.²⁴

Norway adopted an alternative approach, utilizing the existing civilian courts and criminal code. County and Town Courts were provided with jurisdiction over minor war crimes while offenses punishable by more than five years imprisonment were prosecuted before a three judge Court of Appeal (Lagmannsrette). The Norwegian Supreme Court exercised appellate jurisdiction.²⁵

Norwegian war crimes jurisprudence, consistent with Continental practice, required the prosecution to demonstrate that the accused's conduct contravened a specific provision of municipal law that corresponded to a prohibition of the humanitarian law of war. This contrasted with the practice of Great Britain and other Common Law countries which directly prosecuted individuals under international law.²⁶

23. *Id.* at 90-91.

24. Polish Law Concerning Trials Of War Criminals, VII L. REPT. TRIALS WAR CRIM. 82-83, 90 (U.N. War Crimes Comm'n, 1948) (Annex) [hereinafter Polish Law].

25. Norwegian Law Concerning Trials Of War Criminals, III L. REPT. TRIALS WAR CRIM. 81, 85-86 (U.N. War Crimes Comm'n, 1948) (Annex I) [hereinafter Norwegian Law].

26. *Id.* at 82. A United States Military Commission, indicted and subsequently convicted seven German civilians staff members of a mental institution with a violation of international law in that they participated in the killing of over 400 Polish and Russian nationals. Trial Of Alfons Klein And Six Others (The Hadamar Trial), (United States Milit. Comm'n, Wiesbaden, Germany, Oct. 8th-15th, 1945),

Norwegian courts occasionally experienced difficulty in calibrating international legal principles with domestic law. The Ministry of Justice and Police observed that the German economic exploitation of Norway in the "scale and the forms in which it has been carried out lie . . . so far beyond the usual conception of criminal law that it is difficult or even impossible to regard the different acts as . . . within the scope of existing provisions of the Civil or Military Criminal Codes."²⁷ Courts found it difficult to find a domestic equivalent to the German occupant's excessive issue of currency notes and the unreasonable fixing of prices. The confiscation of property, requisitioning, imposition of contributions, illegal imposition of fines, and other forms of illicit economic gain acquired by force or threat of force, were somewhat awkwardly punished as the crime of robbery with violence.²⁸ The Norwegian Supreme Court's justification in *Klinge* for disregarding the constitutional prohibition on retroactive punishment illustrates the challenge which confronted Continental courts in integrating international law into the contours of domestic legal doctrine. Kriminalassistent Karl-Hans Hermann Klinge was indicted and convicted under the Norwegian criminal code of two counts of the mistreatment and torture of eighteen Norwegian citizens. Klinge was subsequently sentenced to death pursuant to the Provisional Decree of 4 May 1945. He argued that at the time that he had committed these crimes, they had not been punishable by death and that his sentence constituted retroactive punishment in violation of the Norwegian Constitution.²⁹

Klinge's appeal was considered sufficiently significant to merit a hearing before the full Supreme Court, which upheld his conviction by a vote of nine-to-four. The majority noted that torture

I L. REPT. TRIALS WAR CRIM. 46, 53 (U.N. War Crimes Comm'n, 1947) (Notes on the Case) [hereinafter Hadamar].

27. *Quoted in id.* at 84.

28. *Id.* at 84-85.

29. Trial Of Kriminalassistent Karl-Hans Hermann Klinge, (Eidsivating Lagmannsrett and Supreme Court of Norway, Dec. 8th, 1945-Feb. 27th, 1946), III L. REPT. TRIAL WAR CRIM. 1-2 (U.N. War Crimes Comm'n, 1948) [hereinafter Klinge].

violated the laws and customs of war as well as Norwegian law. The Court held that the punishment provided in the 1945 Decree merely authorized Norwegian courts to implement Norway's prior endorsement of the various Allied declarations and agreements to punish Nazi war criminals--a prerogative which existed under international law at the moment that Klinge's crimes were committed.³⁰

The Supreme Court observed that the prohibition on retroactive punishment was intended to insulate the society from oppressive governmental power. It was "unreasonable . . . to maintain that provisions made for the protection of the community could be pleaded by foreign intruders, citizens of a state which had attacked that same community in order to subdue it, who had used the most reckless and brutal means to achieve this end."³¹ Those who drafted the Constitution could not possibly have intended this. The Norwegian people certainly would have endorsed the imposition of capital punishment had they been able to anticipate the atrocities committed by German occupation forces. The German Third Reich's occupation, however, prevented "the people's sense of justice . . . [from being] given an opportunity to express itself . . ."³²

The dissent pointed out that only offenses could be punished in accordance with the legislation that existed at the time of their commission. International law was not binding on Norwegian courts until incorporated into the domestic criminal code. The Cabinet in London had adopted a Provisional Decree in 1942 that enhanced the punishment of various crimes, but had not found it necessary to

30. *Id.* at 3-4 (Opinion of Judge Skau).

31. *Id.* at 4.

32. *Id.* at 5. Judge Skau also noted that superior orders could not be pled in mitigation. Klinge's acts were "severe violations of the 'laws of humanity' . . . the defendant regardless of all German propaganda, could not have been in doubt that his acts, irrespective of their purpose, not only were to be condemned morally but were also unlawful." *Id.* at 6. Judge Schjelderup argued that international law had entered into force as between Norway and Germany when the Third Reich invaded Norway on April 9, 1940. Klinge thus was subject to the death penalty at the time that he perpetrated his criminal acts. *Id.* at 10. *See also id.* (opinion of Judge Larssen).

increase the severity of punishment for the types of transgressions committed by Klinge. The Cabinet believed that past failures could not be corrected by current contraventions of the constitution. The constitutional prohibition on retroactive punishment, in the view of the dissenting judges, was a foundation of Norwegian jurisprudence that did not vary in accordance with time or circumstance. Compromising legal principle was a prescription for anarchy--the excesses born of post-war anger and bitterness could only be constrained through adherence to the rule of law.³³

The French courts also adhered to the Continental approach. The Court of Appeals rejected the petition of Robert Wagner, former Gauleiter and Head of the Civil Government of Alsace, determining that it had been unnecessary to instruct the trial court that it was required to find that Wagner's violations of French law also contravened the laws and customs of war. The Court reasoned that the military courts' foundation instrument clearly stated that the tribunals were to prosecute defendants for war crimes committed during the course of World II.³⁴

In sum, major war criminals were prosecuted before international or occupation courts. Jurisdiction over lower-level Nazi criminals was variously vested in military, civilian, or specially created domestic criminal courts. Common law countries that prosecuted individuals for contravening the code of armed conflict generally relied on custom and precedent to define the scope of the humanitarian law of war.³⁵ On some occasions, these Courts drew

33. *Id.* at 6-10 (Holmboe, J. dissenting). The issue of retroactive punishment also was discussed in, Trial Of Hans Albin Rauter, (Netherlands Spec. Ct. The Hague, May 4th, 1948 And Spec. Ct. Cassation, Jan. 12, 1949), XIV L. REPT. TRIALS WAR CRIM. 49 (U.N. War Crimes Comm'n, 1949) [hereinafter Rauter].

34. Trial Of Robert Wagner, (Perm. Milt. Trib., Strasbourg, Apr. 23rd-May 3d, 1946 and Court Of Appeal, July 24th, 1946), III L. REPT. TRIALS WAR CRIM. 23, 54 (U.N. War Crimes Comm'n, 1948)(Notes on the Case) [hereinafter Wagner I]. The Court of Appeal noted that Article I of the Ordinance of 28th August 1944, "made it clear that the legality of an accused's acts under the laws and customs of war would render him not guilty of an offense. It was not, therefore necessary to ask the judges whether this element of justification existed." *Id.* at 54 (Notes on the Case).

upon municipal law to supplement the sometimes-shadowy principles of international law. For instance, in *Schonfeld*, a British Military Court utilized the domestic doctrine of accomplice liability to amplify the scope of culpability for war crimes. The Court explained that in the absence of an international legislature, it was appropriate to consult municipal law in order to gain added insight into the requirements of natural justice.³⁶

On the other hand, Continental European courts attempted, with varying degrees of success, to rely on municipal laws, sanctioning those who contravened existing or newly enacted provisions of the domestic criminal code, which also constituted violations of the humanitarian law of war.³⁷ This often frustrated prosecutions. For instance, a Netherlands Special Court in Amsterdam acquitted the accused Willy Zuehlke of the international delict of membership in a criminal organization on the grounds that the crime had not been incorporated into the domestic criminal code.³⁸

The utilization of military or special tribunals served to stress the extraordinary nature of the defendants' crimes. At the same time, reliance on the loosely codified humanitarian law of war or special legislation raised the spectra of retroactive punishment. However, the utilization of existing criminal codes served to detract from the seriousness of the crimes committed by German and Japanese combatants. The issue also arose whether crimes committed during armed conflict were cognizable under domestic criminal codes.³⁹

35. See *supra* notes 2-17 and accompanying texts.

36. Trial Of Franz Schonfeld And Nine Others, (Brit. Milit. Ct., Essen, June 11th-26th, 1946), XI L. REPT. TRIALS WAR CRIM. 64, 72 (U.N. War Crimes Comm'n, 1949) [hereinafter *Schonfeld*].

37. See *supra* notes 28-34 and accompanying texts.

38. Trial Of Willy Zuehlke, (Netherlands Spec. Ct., Amsterdam, Aug. 3rd, 1948 and Netherlands Spec. Ct. Of Cassation, Dec. 6th, 1948), XIV L. REPT. TRIALS WAR CRIM. 139, 141 (U.N. War Crimes Comm'n, 1949) [hereinafter *Zuehlke*].

39. The utilization of these various approaches to prosecution was challenged in *Yamashita*. The defendant contended that Article 63 of the Geneva Convention

B. Jurisdiction

The Allied Powers vowed to return war criminals so they could stand trial before Tribunals in the territories in which their crimes had been committed. In practice, states whose nationals or interests had been victimized claimed primary jurisdiction, regardless of the site of the delict.⁴⁰ In *Gerbsch*, the Special Court in Amsterdam assumed jurisdiction over the prosecution of Wilhelm Gerbsch, a former guard at a penal camp in Germany, who was alleged to have beaten and mistreated Dutch inmates as well as inmates of other nationalities. The Court explained that Gerbsch's acts had harmed Dutch nationals as well as the national interest of the Netherlands.⁴¹

This extension of State prerogative was consistent with domestic statutes that provided for extensive jurisdictional claims. For example, the Norwegian war crimes law extended to enemy citizens or other aliens who were in enemy service, or under enemy orders, who were responsible for the commission of war crimes in Norway or against Norwegian citizens or interests. The statute also encompassed acts committed abroad to "the prejudice of Allied legal interests or to interests which . . . are deemed to be equivalent thereto."⁴² The latter was intended to extend jurisdiction to war

required that a prisoner of war must be prosecuted before "the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Geneva Convention Relative To The Treatment Of Prisoners Of War, July 27, 1929, 47 STAT. 2021, T.S. No. 846, at art. 63 [hereinafter Geneva Convention]. This would guarantee war criminals prosecuted by the United States the statutory safeguards of the Articles of War, along with the safeguard contained within the due process clause of the United States Constitution and the Geneva Prisoners of War Convention. *See id.* at arts. 60-66. The United States Supreme Court, however, ruled that the statutory context of Article 63 indicated that the provision pertained to offenses committed by a prisoner of war while in captivity. The Geneva Convention thus did not address the prosecution of violations of the law of war committed by combatants during armed conflict. In *Re Yamashita*, 327 U.S. 3, 20-21 (1946).

40. *See supra* notes 2 and 3 and accompanying texts.

41. Trial Of Wilhelm Gerbsch, (Spec. Ct., Amsterdam April 28th, 1948), XIII L. REPT. TRIALS WAR CRIM. 131, 132-33 (U.N. War Crimes Comm'n, 1949) (Notes on the Case) [hereinafter *Gerbsch*].

crimes committed in Allied countries as well as Denmark.⁴³ Another example is that Polish law encompassed crimes committed on the territory of the Polish State, Polish sea, or Polish aircraft, as well as crimes committed abroad against the welfare or interests of the Polish State or a Polish citizen. Poland also claimed jurisdiction over Polish citizens and foreigners charged with specified international crimes whom were not extradited to a requesting State.⁴⁴

Domestic war crimes tribunals relied on this type of broad statutory language to assert jurisdiction in a variety of circumstances. Australia assumed jurisdiction over crimes committed by the Japanese against the combatants of other Allied Powers. For instance, Lieutenant-General Baba Maso was prosecuted before an Australian military court for crimes against American and British prisoners of war in Borneo.⁴⁵ British military courts claimed jurisdiction over offenders whose criminal conduct victimized nationals of the United Kingdom as well as other countries. In *Peleus*, as noted, a British Military Court presided over the prosecution of five members of a German submarine crew whose attack against a Greek merchant ship resulted in the death of nationals from England as well as China, Greece, Poland, and the Soviet Union.⁴⁶ A British Military Court, in *Buck*, prosecuted eleven German combatants for killing six British and four American prisoners of war, as well as four French nationals held in Germany.⁴⁷

42. Norwegian Law, *supra* note 25, at 83.

43. *Id.* at 84.

44. Polish Law, *supra* note 24, at 84-85.

45. Trial Of Lieutenant-General Baba Masao (Aust. Milit. Ct., Rabaul, May 28th-June 2nd, 1947), XI L. REPT. TRIALS WAR CRIM. 56 (U.N. War Crimes Comm'n, 1949) [hereinafter Masao].

46. *Peleus*, *supra* note 15, at 13-14 (Notes on the Case). The British court was sitting in the British Zone and could claim jurisdiction as an exercise of sovereign jurisdiction over occupied Germany. *Id.* at 13.

47. *Buck*, *supra* note 16, at 39. A French officer was appointed as a member of the Court. *Id.* The Polish Supreme National Tribunal asserted jurisdiction over crimes committed in concentration camps against Polish nationals, the nationals of

Australian courts also claimed jurisdiction over crimes against the residents of Australia's South Pacific territories.⁴⁸

A United States Military Commission, located in Shanghai, ruled that it was entitled to preside over the prosecution of Lothar Eisentrager and other German defendants for unlawfully aiding and assisting the Japanese forces that contested American forces in China. The Tribunal noted that territorial jurisdiction over common crimes is based upon the premise that offenders should be prosecuted in the localities of their crimes. Local jurisdictions ordinarily possess the greatest interest in punishing these delicts. In contrast, war crimes constitute an outrage against humanity and may be prosecuted by any state that is accepted as a member of the community of nations. The American Commission also ruled that it was entitled to convene on Chinese territory. American troops had entered and remained in China at the invitation of the host government in order to liberate the country from Japanese oppression. The completion of this mission required the prosecution and punishment of those who had trampled on the rights of the Chinese people.⁴⁹

the other countries occupied by Germany, and Soviet Prisoners of War. *See* Trial Of Obersturmbannfuehrer Rudolf Franz Ferdinand Hoess, (Sup. Nat'l Trib., Poland, March 11th-29th, 1947), VII LAW REPT. TRIALS WAR CRIM. 11 (U.N. War Crimes Comm'n, 1948) [hereinafter Hoess].

48. *See* Trial Of Sergeant-Major Shigeru Ohashi And Six Others, (Aust. Milit. Ct., Rabaul, March 20th-23rd, 1946), V L. REPT. TRIALS WAR CRIM. 25 (U.N. War Crimes Comm'n, 1948) [hereinafter Ohashi].

49. Trial Of Lothar Eisentrager And Others, (United States Milit. Comm., Shanghai, Oct. 3rd-Jan. 14th, 1947), XIV L. REPT. TRIALS WAR CRIM. 8, 15-16 (U.N. War Crimes Comm'n, 1949) (Notes on the Case) [hereinafter Eisentrager]. In *Sawada*, an American Military Commission sitting in Shanghai dismissed a challenge to its jurisdiction, citing the inherent power of the United States forces to prevent and prosecute those responsible for criminal acts against American prisoners of war, regardless of the status of their crimes. The Tribunal noted that China had consented to the convening of an American court on Chinese soil. Trial Of Lieutenant-General Shigeru Sawada And Three Others, (United States Milit. Comm'n, Shanghai, Feb. 27th-April 15th, 1946), V L. REPT. TRIALS WAR CRIM. 1, 8-10 (U.N. War Crimes Comm'n, 1948) (Notes on the Case) [hereinafter Sawada].

Several courts extended the *Eisentrager* precedent and recognized universal jurisdiction over war crimes.⁵⁰ A United States Military Commission, in *Hadmar*, convicted seven functionaries of a mental institution in the Reich for killing over four hundred Polish and Soviet nationals.⁵¹ The Commission explained that the United States possessed a direct interest in punishing crimes against the nationals of other Allied States. The Tribunal also held that it was authorized to exercise jurisdiction under the doctrine of universal jurisdiction, which provided States the prerogative to punish war criminals, regardless of the nationality of the victim or the site of the crime. This principle was based on the outrageous nature of war crimes, as well as the global interest in insuring that the perpetrators of such offenses were brought before the bar of justice.

The Commission also cited the United States' sovereign authority within occupied Germany that provided jurisdiction under both the territorial and personality (nationality of accused) principles.⁵² A British Military Court in the Zyklon B case also recognized universal jurisdiction over acts directed against Allied nationals.⁵³

Several domestic courts noted that their war crimes jurisdiction was limited to acts directed by German and other Axis belligerents against Allied nationals.⁵⁴ In the British prosecution of forty-five

50. See *supra* note 42 and accompanying text.

51. *Hadamar*, *supra* note 26, at 46. The American Tribunal was only authorized to prosecute war crimes against Allied nationals, and charges of crimes against humanity were not brought against the accused for the murder of roughly ten thousand German civilians. *Id.* at 53.

52. *Id.* at 52-54 (Notes on the Case). The *Hadmar* decision also established that United States Military Commissions would hold enemy civilians, as well as combatants, liable for war crimes. *Id.*

53. Trial Of Bruno Tesch And Two Others (The Zyklon B Case), (Brit. Milit. Ct., Hamburg, March 1st-8th, 1946), 1 L. REPT. TRIALS WAR CRIM. 93, 102-03 (U.N. War Crimes Comm'n, 1947) (Notes on the Case) [hereinafter Zyklon B].

54. See *supra* note 51 and accompanying text. The Reich's acts against civilians residing within German territory constituted crimes against humanity. See Nuremberg Charter, *supra* note 4, art. 6(c).

administrators and functionaries in the Belsen concentration camp, the Military Court conceded that its jurisdiction was restricted to war crimes committed against British inmates and inmates of various other Allied states. The Tribunal appeared to accept that acts directed against a Hungarian inmate were properly before the Court because Hungary shifted its loyalties prior to the issuance of the British Royal Warrant. The Tribunal also held that inmates from territories annexed by Germany qualified as Allied nationals because the Reich's annexation was not considered to be complete as long as armies in the field were contesting the German occupation. The Tribunal noted that delicts against individuals who were not Allied nationals could be admitted as evidence to establish a pattern of mistreatment.⁵⁵ The *Belsen* Court also convicted five Polish nationals of committing war crimes against Allied nationals. The Court explained that the accused worked on behalf of, and identified with, the German authorities.⁵⁶

In *Motuskuke*, A Netherlands East Indies Court-Martial Tribunal addressed whether a victim qualified as an Allied national. The Court presided over the prosecution of Susuki Motosuke for various murders, including the execution of Barends, a Dutch subject who had voluntarily joined the Japanese Army. The Court ruled Barends' enlistment resulted in the loss of his Dutch citizenship. As a result, Motosuke was not considered culpable of a war crime against an Allied national. Instead, he was convicted of the common law crime of murder.⁵⁷

55. Trial Of Josef Kramer And 44 Others (The Belsen Trial), (Brit. Milt. Ct., Luneburg, Sept. 17th-Nov. 17th, 1945), 2 L. REPT. TRIALS WAR CRIM. 150, 150-151 (U.N. War Crimes Comm'n, 1947) [hereinafter Belsen].

56. *Id.* at 150-52 (Notes on the Case). The decision also affirmed that civilians could be held culpable of war crimes. *Id.* at 152. In another case, prisoner Berg, along with five German combatants, was found guilty of the killing of three British and one French female nationals. *See* Trial Of Werner Rohde And Eight Others, (Brit. Milit. Ct., Wuppertal, Germany, May 29th-June 1st, 1946), 5 L. REPT. TRIALS WAR CRIM. 54 (U.N. War Crimes Comm'n, 1948) [hereinafter Rhode].

57. Trial Of Susuki Motosuke, (Netherlands Temporary Court-Martial, Amboina, Jan. 28th, 1948), 13 L. REPT. TRIALS WAR CRIM. 126, 128-29 (U.N. War Crimes Comm'n, 1949) (Notes on the Case) [hereinafter Motosuke].

British military courts in the prosecution of Nazi military officers who killed Italian nationals later modified the requirement that war crimes must be directed against Allied nationals. At the time of these killings, Italy had entered into an armistice with the Allied Powers and was recognized as a co-belligerent power. The British Military Courts rationalized that their jurisdiction extended to crimes directed against co-belligerent nationals as well as Allied Powers.⁵⁸

Other domestic courts were less willing to flexibly interpret the scope of their jurisdiction. A French Military Tribunal sitting in Strasbourg sentenced defendant Gruner to death for murdering four British airmen. The Court of Appeals ruled that the Military Court lacked jurisdiction because Gruner's crimes were committed against Allied combatants in Germany.⁵⁹

War crimes trials were envisioned as being based on the territorial principle. In practice, states whose nationals had been victimized or whose interests had been impinged assumed primary jurisdiction. States extended their jurisdiction beyond their own territory and nationals by relying on the universal principle, asserting an interest in punishing crimes committed against the nationals of other Allied Powers, and claiming sovereign jurisdiction over occupied Germany. Courts also flexibly interpreted the definition of Allied belligerents. Together, these rulings permitted domestic tribunals to assume a broad scope of jurisdiction over Axis war criminals.⁶⁰

58. See Trial Of General Von Mackensen And General Maelzer, (Brit. Milit. Ct., Nov. 18th-30th, 1945), VIII L. REPOT TRIALS WAR CRIM. 1 (U.N. War Crimes Comm'n, 1949) [hereinafter Von Mackensen]; The Trial Of Albert Kesselring, (Brit. Milit. Ct., Venice, Italy, Feb. 17th-May 6th, 1947), *Id.* at 9 [hereinafter Kesselring].

59. Wagner I, *supra* note 34, at 47-49.

60. See *supra* notes 41-59 and accompanying texts.

III. WAR CRIMES TRIALS

A. Superior Orders

Before Nuremberg, the international consensus was that states were legally responsible for breaches of the humanitarian law of war.⁶¹ The Nuremberg judgment and the decisions of Domestic War Crimes Tribunals took the unprecedented step of extending criminal liability to combatants as well as to civilians.⁶² These Tribunals refused to recognize that war crimes constituted an act of state for which only defendants could be held accountable before a domestic forum. Such crimes were considered to contravene the acceptable contours of a country's conduct, and consequently did not fall within a state's sovereign prerogatives.⁶³

Article Eight of the Nuremberg Charter addressed the superior orders defense. This provision provided that "[t]he fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."⁶⁴ The International Military Tribunal at Nuremberg refined the requirements of Article Eight and ruled

that a soldier [who] was ordered to kill or torture in

61. *But see* Commission On The Responsibility Of The Authors Of The War And On Enforcement Of Penalties (March, 29, 1991), 14 AM. J. INT'L L. 96 (1919). Convention (No. IV) Respecting The Laws And Customs Of War On Land, With Annexes And Regulations, Oct. 18, 1907, 36 STAT. 2277, T.S. NO. 539, 1 Bevans 631 [hereinafter Hague Convention]. A belligerent violating the provisions of the Hague Convention is liable to pay compensation. *Id.* at art. 2.

62. Belsen, *supra* note 55, at 147-48. On the liability of civilians, *see* Zyklon B, *supra* note 53, at 103.

63. Trial Of Gauleiter Artur Greiser, (Sup. Nat'l Trib. of Poland, June 21st-July 7th, 1946), XIII L. REPT. TRIALS WAR CRIM. 71, 117 (U.N. War Crimes Comm'n, 1949) [hereinafter Greiser].

64. Nuremberg Charter, *supra* note 4, at art. 8.

violation of the international law of war has never been recognized as a defense to . . . acts of brutality, though . . . the order may be urged in mitigation . . . [t]he true test . . . is not the existence of the order, but whether moral choice was in fact possible.⁶⁵

In contemplation of the convening of the International Military Tribunal, both Great Britain and the United States abandoned sweeping statements recognizing the superior orders defense, and instead adjusted the discussions in their military manuals to anticipate the Nuremberg standard.⁶⁶ The German Military Penal Code of 1872 provided qualified recognition of the superior orders defense. The plea was admissible other than in instances in which subordinates exceeded an order, were aware of an order's criminality, or played a small part in carrying out the crime.⁶⁷

Domestic war crimes legislation did not invariably incorporate a superior orders defense. Statutes that made provisions for such a plea failed to fully endorse the Nuremberg standard--accepting that under appropriate circumstances, superior orders could be pled as a defense as well as in mitigation. The Canadian provision stated that "superior orders . . . shall not constitute an absolute defense . . . it may . . . be considered either as a defense or in mitigation of punishment if . . . justice so requires."⁶⁸ The Norwegian statute only recognized superior orders in mitigation, but noted that "[i]n

65. XXII Trial of the Major War Criminals Before the International Military Tribunal 411, 466 (1948) [hereinafter Nuremberg Judgment].

66. See Trial Of General Anton Dostler, Commander Of The 75th Germany Army Corps,(The Dostler Case), (U.S. Milit. Comm., Rome, Oct. 8th-12th, 1945), 1 L. REPT. TRIALS WAR CRIM. 22, 31-32 (1947) (Notes on the Case))[hereinafter Dostler]. Both the American and British military manuals, prior to their amendments, provided for the superior orders defense while imposing liability on the officer issuing the order. The British provision was modified to preclude the superior orders defense. The American manual, in contrast, permitted superior orders to be pled in mitigation as well as in defense. *Id.*

67. Zuehlke, *supra* note 38, at 150.

68. Canadian Law, *supra* note 8, at 129.

particularly extenuating circumstances the punishment may be entirely remitted."⁶⁹

These standards and statutes were subsequently interpreted in a uniform manner by domestic tribunals to mitigate a defendant's sentence when an accused lacked the requisite criminal intent. Therefore, the plea of superior orders was recognized in the instances in which the defendant was unaware, and a reasonable person would have been unaware, of an order's illegality. The plea was also admissible in cases in which the defendant was compelled to act in order to avoid the imminent infliction of serious bodily harm or death.⁷⁰

General Nikolaus von Falkenhorst, Commander-in-Chief of the German Armed Forces in Norway, received, re-issued, and carried out Adolf Hitler's Commando Order of 1942. This order called for the summary execution of uniformed and non-uniformed Allied troops apprehended behind German lines.⁷¹ A British Military Court convicted von Falkenhorst of war crimes and the confirming officer commuted his death sentence to life imprisonment.⁷² The Court determined that von Falkenhorst was aware, or should have been aware, that the Commando Order violated an unchallenged rule of warfare that outraged the general sentiments of humanity.⁷³ The Fuehrer's order admonished that a

69. Norwegian Law, *supra* note 25, at 85. The Netherlands statute was particularly problematic. The superior orders defense was recognized so long the order was within a superior's competent authority. Netherlands Law, *supra* note 18, at 99.

70. See *infra* notes 71-84. A Netherlands Special Court of Cassation adopted the position that the Nuremberg standard could not be regarded as a widely accepted principle of international law and that, in any event, Article Eight was limited to major war criminals and did not extend to lower-level combatants. Zuehlke, *supra* note 38, at 149.

71. Trial Of Generaloberst Nikolaus Von Falkenhorst (Brunswick, Brit. Milit. Ct., July 29th-Aug. 2d, 1946), XI L. RPT. TRIALS WAR CRIM. 18-23 (U.N. War Crimes Comm'n, 1949) [hereinafter Von Falkenhorst]. The defendant reissued the order to his commanders in October 1942. *Id.* at 22.

72. *Id.* at 23.

73. *Id.* at 25 (Notes on the Case).

refusal to carry out the command would result in court-martial. However, the Tribunal failed to find that disobedience would lead to the immediate threat or infliction of serious bodily harm or death.⁷⁴

Von Falkenhorst also pled that the commando killings were justified acts of reprisal. The Tribunal ruled that von Falkenhorst was required to demonstrate that he possessed a good faith belief that he had engaged in lawful reprisals. It conceded that the law of reprisals was quite controversial and confusing, and that even a senior soldier could be confounded and incapable of comprehending this area of the law.⁷⁵

The Tribunal also recognized that von Falkenhorst relied on the text of Hitler's Commando Order, which strongly suggested that the killings were in retaliation for the commandos' continued contravention of international law. Nevertheless, the Court determined that "there were no facts upon which the court could find that the defendant really believed that the Fuehrer Order purported to be a reprisal . . ."⁷⁶

Von Falkenhorst was also charged with ordering his troops to transfer Jewish prisoners of war to the Security Police for execution.

74. *Id.* (Notes on the Case). The Court failed to find an instance in which duress has been successfully raised as a complete defense on a charge of committing a war crime. *Id.* Two aspects of the Commando Order clearly contravened international law. Firstly, those apprehended were to be executed without trial. Secondly, the order applied to uniformed combatants engaged in legitimate acts of war. The question of commando war crimes in Norway might potentially arise in the case of Allied combatants who discarded their uniforms and were apprehended while fleeing to the Swedish border in ski clothes. These individuals might be prosecuted as war traitors or spies. *Id.* at 28.

75. *Id.* at 25-26 (Notes on the Case).

76. *Id.* at 26 (Notes on the Case). The Court did not resolve whether a defendant's good faith belief constituted a defense, or whether a defendant also must demonstrate that he or she neither knew, or ought to have known, that the order did not satisfy the legal requirements for an act of reprisal. *Id.* Article 23 of the Hague Convention prohibits the killing or wounding of an enemy, as well as declaring that "no quarter will be given." Hague Convention, *supra* note 61, at art. 23(c)-(d). For a discussion of reprisals, see *supra* notes 103-131 and accompanying texts.

He was unaware that the policy was to transfer prisoners of war to Germany. He was found guilty based on the fact that "he thought that it could be carried out but was surprised to find that it could not or was not . . ."⁷⁷

In *Wielen*, the Head of the Criminal Police in Breslau along with members of the S.S. were charged with executing fifty members of the Royal Air Force and other Allied forces who had escaped from Stalag Luft III, a prisoner of war camp in Silesia. These killings were ordered by Adolf Hitler, and were subsequently recorded as having occurred during the prisoners' escape.⁷⁸

The British Military Court determined that the defendants must have been aware that the execution of the prisoners violated an unchallenged rule of warfare and outraged the general sentiments of humanity. A belief that the detainees were spies and saboteurs would not have been exonerating because even those charged with such crimes are entitled to a trial. The Tribunal noted that the imposition of this objective superior orders standard was equitable and fair because it paralleled German military law. There was also no evidence that the executions had been undertaken in response to a threat of immediate bodily harm or death. Nonetheless, the Judge Advocate observed that duress did not constitute a defense to murder. The notes to the case point out that acceptance of the defendants' superior orders plea would have unacceptably limited liability to the Fuehrer.⁷⁹

77. Von Falkenhorst, *supra* note 71, at 29 (Notes on the Case). A defendant who did not believe that the order could be carried out would be acquitted. *Id.*

78. Trial Of Max Wielen And 17 Others (The Stalag Luft III Case) (Brit. Milit. Ct., Hamburg, July 1st-Sept. 3rd, 1947), 11 L. RPT. TRIALS WAR CRIM. 31-34 (U.N. War Crimes Comm'n, 1949) [hereinafter *Wielen*].

79. *Id.* at 46-47, 50-51 (Notes on the Case). Oscar Hans was in charge of a Sonderkommando charged with the execution of death sentences imposed by Norwegian occupation courts. He was responsible for the killing of at least 312 Norwegians, 68 of whom were executed without trial. Hitler abolished these tribunals in July 1944. The Lagmannsrett (lower court) convicted Hans, finding that he should have been aware that the victims were deprived of a trial. The Supreme Court, however, disputed this finding and questioned whether the documents ordering execution were sufficiently deficient to have notified the defendant of the illegality. Trial Of Hauptsturmfuehrer Oscar Hans (Eidsivating

The defendants argued that, as a matter of equity, they should not be placed in the position of having to choose between defiance of either domestic or international law. The notes to the case observe that the defendants were not presented with this problem because, absent authorization from a judicial tribunal, Hitler lacked the authority to order executions. Nevertheless, assuming the legality of the Fuehrer's command, the prevailing opinion was that international law takes precedence over the dictates of domestic law.⁸⁰

Peleus was the third British judgment to address superior orders. Four members of a German submarine crew were convicted of following orders to fire upon the surviving crew of the *Peleus*. The Judge Advocate instructed that there was no duty to obey an unlawful order. The fact that a rule of warfare was violated pursuant to the order of a belligerent government or military official did not deprive the act of its criminal character or confer immunity from punishment. The Judge Advocate recognized that combatants could not be expected to consult an international law text or academic specialist during the heat of battle. However, "It must have been obvious to the most rudimentary intelligence that [the order to fire upon the crew] was not a lawful command, and that those who shot are not to be excused for doing it upon the ground of superior orders."⁸¹

In *Bruns*, three members of the German occupation authorities were accused of abusing and torturing suspected members of the Norwegian resistance.⁸² The Lagmannsrett (lower court) ruled that the resistance adhered to the humanitarian law of war and that the

Lagmannsrett, January 1947 and Supreme Court Of Norway, Aug. 1947), 5 L. REPT. TRIALS WAR CRIM. 82, 87 (U.N. War Crimes Comm'n, 1948).

80. Wielen, *supra* note 78, at 50. The notes indicated that the same standards governing defenses based on compliance with municipal law were involved with the superior orders defense. *Id.*

81. *Peleus*, *supra* note 15, at 12.

82. Trial Of Kriminalsekretaer Richard Wilhelm Hermann Bruns And Two Others, (Eidsivating Lagmannsrett and The Supreme Court of Norway, March 20th-July 3rd, 1946), 3 L. REPT. TRIALS WAR CRIM. 15, 16 (U.N. War Crimes Comm'n, 1947).

acts of torture--leg screws, cold baths and blows and kicks in the face--were not justified reprisals. The Court dismissed the defense that they would have been subjected to retribution had they refused to engage in torture. The judges suggested that the defendants had taken the initiative on various occasions because they "could not believe that a state, even Nazi Germany, could force its subjects, if they were unwilling, to perform such brutal and atrocious acts as those of which the defendants were guilty."⁸³ Superior orders could not be considered in mitigation of such serious offenses because "if a nation, which, without warning has attacked another, finds it necessary to use such methods to fight opposition, then those guilty must be punished, whether they gave the orders or carried them out."⁸⁴

Superior orders were recognized in mitigation in several cases. In *Sawada*, a United States military court convicted two Japanese military judges who presided over the unfair and fraudulent trial and conviction of eight United States pilots. The warden responsible for the pilots' confinement and execution was also convicted. All three were determined to have acted in accordance with the special instructions of their superiors. The three lower-level defendants were sentenced to relatively light sentences of five to nine years of hard labor.⁸⁵ This sentence may have reflected that Warrant and Petty Officers acted at the direct command of a Rear-Admiral at a time when the Japanese forces were witnessing the inexorable advance of American troops throughout the South Pacific.⁸⁶

Major-General Shigeru Sawada was absent at the front during

83. *Id.* at 18.

84. *Id.* The Supreme Court concurred in this analysis. The Court noted that on some occasions the defendants had taken the initiative in torturing prisoners and that such conduct had been tolerated, but not ordered, by their superiors. Judge Larssen also doubted whether those who exercised leniency towards prisoners would have been punished. *Id.* at 19-20.

85. *Sawada*, *supra* note 49, at 5-8.

86. *Id.* at 18 (Notes on the Case). Tatsuta briefly visited the courtroom, but the Court failed to find that he possessed either actual or constructive knowledge of the trial's illegality. *Id.* at 6.

the trial. The Commission seemed satisfied that Sawada lacked authority to remit or mitigate the sentences, and that he had discharged his responsibility by protesting the punishments to the Commanding General of the China Forces.⁸⁷ The sentences in *Sawada* were rather remarkable since Yusei Wako, the law member of the Military Tribunal, and Ryuhei Okada, the lay-member, both unquestioningly accepted flawed and fraudulent evidence and unflinchingly imposed the death penalty.⁸⁸

In *Jaluit Atoll*, four members of the Japanese navy were convicted of executing three American airmen without a trial.⁸⁹ Three of the defendants were sentenced to death and the fourth, Ensign Tasaki, was sentenced to ten years' imprisonment. This relatively lenient sentence reflected the "brief, passive and mechanical participation of the accused."⁹⁰ Despite Tasaki's sentence, the Tribunal rejected the defendants' argument that they should not be judged by Western concepts and ideals since Japan was an authoritarian society and the Emperor's orders were considered the imperial will.⁹¹

In the *Trial Of Albert Wagner*, the accused was convicted and sentenced to fifteen years' imprisonment for murdering a Russian worker who was attempting to escape a slave labor camp. The French Court noted that the worker was entitled to flee confinement. However, "[a] guard . . . is not likely to be able to distinguish a lawfully from an unlawfully detained prisoner, and in such case may

87. *Id.* at 7. Sawada was sentenced to hard labor for five years. This was based on his negligent failure to investigate the treatment of the prisoners. *Id.* at 7-8.

88. *Id.* at 7.

89. Trial Of Rear-Admiral Nisuke Masuda And Four Others Of the Imperial Japanese Navy (The Jaluit Atoll Case) (United States Milit. Comm., Kwajalein Island, Kwajalein Atoll, Marshall Islands, Dec. 7th-13th, 1945), 1 L. REPT. TRIALS WAR CRIM. 71 (1947) [hereinafter Masuda].

90. *Id.* at 76.

91. *Id.* at 74 (Notes on the Case). The need for discipline, according to the defendants, was accentuated by the declining strategic situation of the Japanese forces. *Id.*

not be expected to judge whether or not he is under the obligation to follow the instructions of his superiors, concerning the escape of prisoners.⁹²

A French Court acquitted Ludwig Luger, Public Prosecutor, at the Special Court at Strasbourg, France. Luger prosecuted thirteen Alsations who were falsely charged with killing a border guard during an attempted escape to Switzerland. The accused were denied fundamental due process rights, and Luger conceded at trial that there was no evidence that the defendants were involved in the killing. Nevertheless, Luger successfully demanded the death sentence--which was subsequently carried out. No proof existed to support that idea the proceedings were orchestrated by Robert Wagner, Gauleiter and head of the civil government of Alsace. Luger was found to have complied with Wagner's dictates, and was acquitted. This presumably reflected the fact that Luger had not made the decision to convict and execute the defendants.⁹³

In sum, domestic courts recognized superior orders as a plea in mitigation where a defendant was determined to lack the requisite criminal intent. Defendants seeking to rely on the plea were required to demonstrate that they believed, and that a reasonable person would have believed, that the order was legal. Conversely, defendants were entitled to rely on superior orders in those instances in which they were able to demonstrate that disobedience resulted in imminent bodily harm or death. The latter, however, did not constitute a defense to the taking of human life.⁹⁴ Officials issuing illegal orders that were not implemented were held liable in those cases in which the order was issued with the intent that it should be carried out.⁹⁵

Courts feared that recognition of the superior orders defense

92. Trial Of Albert Wagner (Gen. Milit. Gov. Trib. of the French Zone Of Occupation in Germany, Nov. 29th, 1946), 13 L. REPT. TRIALS WAR CRIM. 118, 120 (U.N. War Crimes Comm'n, 1949) (Notes on the Case) [hereinafter Wagner II].

93. Wagner I, *supra* note 34, at 31-32 and 42.

94. See *supra* notes 64-65 and 79 and accompanying texts.

95. See *supra* note 77 and accompanying text.

would limit liability to a small core of high-level officials.⁹⁶ Nevertheless, tribunals were willing to recognize superior orders as a defense, or in mitigation, in those instances in which an individual's role was considered small and insubstantial.⁹⁷ Sentences were also mitigated in those cases in which lower-level officials could not have been expected to fathom the factual and legal intricacies.⁹⁸ However, the superior orders plea was unsuccessful when defendants engaged in serious and severe acts that were manifestly illegal.⁹⁹ Tribunals rejected the duress defense--determining that those who refused to comply with commands were subject to retribution.¹⁰⁰

The defense of reprisal confounded courts. Moreover, the law of reprisal was considered complex and confusing and courts conceded that even experienced military officials could not be expected to comprehend the legal intricacies involved. The reprisal plea was cognizable in instances where a defendant was able to establish a good faith belief that there were adequate grounds to support the claim.¹⁰¹

96. See *supra* note 79 and accompanying text.

97. See *supra* note 85-86, 90 and 93 and accompanying texts.

98. See *supra* note 92 and accompanying text.

99. See *supra* notes 79 and 81 and accompanying texts. "If you were to go to a lunatic Asylum to visit a field-marshal who was an inmate there and he said: 'Go and kill the head warder,' you would not, I imagine, go and do so and say: 'Well, I had to as the field-marshal said do it.'" Rohde, *supra* note 56, at 58 (Notes on the Case).

100. See *supra* notes 7 and 82 and accompanying texts. See also Dostler, *supra* note 66, at 27. Officers pled that they were required to take a special oath of obedience to the Fuehrer. The Dostler Court noted that General von Saenger was only able to cite two cases, one based on rumor, in which officers were executed for disobedience of an order. *Id.*

101. See *supra* notes 75-76 and accompanying texts. It was uncertain whether a good faith belief was sufficient, or whether defendants seeking to satisfy the reasonableness standard were required to demonstrate that a reasonable person with a comprehension of the law of reprisals would have believed the order to have been lawful. *Id.*

Defendants complained that the abrogation of superior orders placed them in the position of either adhering to the demands of patriotism or principle. Court decisions, however, affirmed the supremacy of international doctrine and the duty to defy the unlawful dictates of domestic law.¹⁰²

B. Reprisals

It was well settled that a state victimized by conduct that contravened international law was privileged to undertake an illegal act in order to deter the continued action of the offender. Such reprisals were accepted in peacetime, but their permissibility during armed conflict remained questionable until the end of World War II. Wartime reprisals were difficult to regulate. Individuals engaging in illegal actions might conveniently claim that their criminal conduct was a legitimate reprisal. This might be denied by the victim state--ushering in an escalating cycle of violence. What are the prerequisites for reprisals? Might innocent civilians be the targets of such an act? Are reprisal killings justified?¹⁰³

Some treaties contained language that limited reprisals.¹⁰⁴ Article Two of The Geneva Convention Relative to the Treatment of Prisoners of War, provides that "[m]easures of reprisal against them [prisoners of war] are prohibited."¹⁰⁵ Article Fifty of the Hague Convention states that "[n]o general penalty, pecuniary or otherwise,

102. See *supra* note 80 and accompanying text. An individual only is required to obey lawful orders. Although a combatant could not be expected to comprehend the intricacies of international law, some principles were clear and unambiguous. See *supra* note 81 and accompanying text.

103. See generally Judgment In Case Of Commander Karl Neumann (Hospital Ship "Dover Castle") (1921), 16 AM. J. INT'L. L. 704, 707 (1922).

104. But see Protocol Additional To The Geneva Conventions Of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1977 Y.B. 95, reprinted in 16 I.L.M. 1391 (1977)[hereinafter Geneva Protocol I]. "Attacks against the civilian population or civilians by way of reprisals are prohibited." *Id.* at art. 51(6).

105. Geneva Convention *supra* note 39, at art. 2.

shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.”¹⁰⁶ The Nuremberg Charter includes killing of hostages as a violation of the laws or customs of war.¹⁰⁷

A British Military Court addressed the law of reprisal in *Maelzer*¹⁰⁸ and *Kesselring*.¹⁰⁹ Both cases centered on a bomb explosion in Rome that killed thirty-three German police officers. Hitler issued an order to Field Marshal Albert Kesselring, Commander of Army Group C in Italy, specifying that ten Italians were to be shot for each German casualty. Kesselring transmitted the order to General Hans Georg von Mackensen, Commander of the German 14th Army in Rome. Von Mackensen, in turn, conveyed the order to General Maelzer, Military Commander of the City of Rome. Maelzer then charged Lieutenant Colonel Herbert Kappler, Head of the Security Police, with carrying out the order. Only four of the 335 who were subsequently executed were suspected of involvement in the bombing.¹¹⁰

Von Mackensen and Maelzer claimed that this was a justified reprisal because during the month preceding the bomb attack, they witnessed a series of assaults against German troops in Rome. They nevertheless hoped to confine the impact of the order, and relied on the assurances of the Security Police that the executions would be limited to those already sentenced to lengthy prison terms or death.¹¹¹

106. Hague Convention, *supra* note 61, at art. 50. There is support for the view that this provision was not intended to limit reprisals, but was primarily directed against collective financial burdens imposed by an occupying power. *See* Rauter, *supra* note 33, at 137-38.

107. Nuremberg Charter, *supra* note 4, at art. 6(b).

108. Von Mackensen, *supra* note 58, at 1.

109. Kesselring, *supra* note 58, at 9.

110. Von Mackensen, *supra* note 58, at 1-2.

111. *Id.* at 2. Lieutenant-Colonel Herbert Kappler, head of the Security Service, stated that there were 280 persons “worthy of death”—imprisoned persons who were sentenced to death awaiting execution, serving long sentences of

The Court noted that reprisals must be preceded by a violation of the laws and usages of war, and are intended to compel a belligerent to conform to accepted legal standards. Reprisals are a last resort that may be undertaken only when those responsible for the criminal conduct cannot be apprehended and a prior complaint has been lodged with the offending regime. These preconditions may be waived when immediate action is required in order to guarantee safety and security. Reprisals must also be proportionate to the provocation and reasonable in character. The accused were sentenced to life imprisonment.¹¹² The notes accompanying the case observe that

[i]t cannot be said . . . whether the Court found that the reprisals were unreasonable (i.e. the taking of lives was not warranted) or that they were excessive (i.e. the ratio 10:1 was not warranted) or that the accused were responsible for the manner in which they were carried out. Any of these three contentions would support the findings.¹¹³

imprisonment, or detained for partisan activities or acts of sabotage. *Id.* at 1. The accused explained that they expected only these detainees would be shot. *Id.* at 1-2. Victims ranged in age from fourteen to seventy. A Court acquitted one of those killed. Fifty-seven of the victims were non-Italian Jews who were not involved in partisan activities. *Id.* at 2. The accused were divided into groups of five and each group was brought into the Ardeatine Cave and shot. The cave was blown up following the killings. *Id.*

112. *Id.* at 3-6 (Notes on the Case).

113. *Id.* at 7 (Notes on the Case). The notes to the case report that both the American Rules of Land Warfare and the British Military Manual permit the destruction of property in reprisal, but do not comment on the justifiability of executing hostages. *Id.* at 5-6. The comments to the case, in reviewing the judgment, note that:

[t]he question whether von Mackensen and Maelzer ordered only prisoners who had been condemned to death or a long sentence of imprisonment to be shot or others as well seems to have no bearing on the finding, though it may have some bearing on the sentences . . . [I]f the reprisal was reasonable and proportionate, no war crime could have been committed even if the victims had been . . . innocent people. [I]f the . . . reprisal was unreasonable and excessive a war crime was

As noted, Field Marshal Albert Kesselring conveyed Hitler's orders requiring the killing of ten Italians for every German victim to General von Mackensen. Two months later, Kesselring gave orders to the German forces in Italy requiring that the partisans be attacked and destroyed. In addition, he pledged that he would "protect any commander who exceeds our usual restraint in the choice and severity of the means he adopts whilst fighting partisans."¹¹⁴ Kesselring further ordered that partisan attacks were to be combated through the seizure and execution of hostages, the burning of villages, and the public hanging of perpetrators.¹¹⁵

The Judge Advocate advised that international law addressed the relations between organized governments. Kesselring had few options--he could not negotiate with disparate and disorganized partisan groups whom could not control their members. The German forces were unable to apprehend those responsible for partisan attacks and, as a result, Kesselring may have confronted a situation in which it was justifiable to resort to reprisals against innocents.¹¹⁶ Kesselring was convicted on the first charge, but it was not clear whether this was based on the fact that the ratio of ten-to-one was excessive or whether 335 hostages, rather than the 330 hostages authorized under the Fuehrer's orders, were executed. On the second charge, the Court determined that Kesselring's orders

committed even if . . . the victims had been sentenced to death or to long-term imprisonment.

Id. at 7. The Court appeared to hold that both defendants possessed a duty to insure that their orders were properly carried out. *Id.*

114. Kesselring, *supra* note 58, at 10.

115. *Id.* at 10-11. Kesselring noted in August that the Reich's indiscriminate measures were harming the dignity and discipline of the German army. He ordered a halt to such actions in September. *Id.* at 11.

116. *Id.* at 13 (Notes on the Case). The Judge Advocate instructed that international law was unclear on the permissibility of killing innocent hostages, and under the conditions that existed, Kesselring should be given the benefit of the doubt. *Id.*

constituted incitement to illegal activity rather than reprisals.¹¹⁷

The British Military Tribunals in *Maelzer* and *Kesselring* did not directly rule on the permissibility of executing hostages.¹¹⁸ However, this issue was addressed by a French Court in *Holstein*. In *Holstein*, the accused had participated in a series of reprisals that took place in Dijon in 1944. Civilians who were believed to support the partisans were killed, their property was pillaged, and their farms and dwellings were burned to the ground. Suspected resistance members were summarily shot.¹¹⁹ The French Permanent Military Tribunal convicted the various accused of involvement in premeditated murder.¹²⁰

The Tribunal conceded that the law of reprisals remained imprecise. However, it noted that the authoritative trend of opinion was that

while entitled to take hostages . . . to bring about a cessation of violations of the laws of war . . . the retaliating party is expected to treat hostages in a humane manner, which in no case may lead to putting them to death. Any such act . . . [against] hostages, would be criminal and would . . . result in a situation where there was no "reprisal" in the proper sense, but merely arbitrary acts of revenge.¹²¹

117. *Id.* at 13-14 (Notes on the Case). Thus, Kesselring knowingly and deliberately issued orders which would foreseeably result in illegal conduct by German troops. *Id.*

118. *See Id.* at 14 (Notes on the Case). The notes to the case distinguish between hostages who are seized to guarantee future compliance with the humanitarian law of war and those who are seized and executed in retaliation for unlawful acts. Only the latter constitutes an act of reprisal. *Id.*

119. Trial Of Franz Holstein And Twenty-Three Others (Perm. Milit. Trib., Dijon, France, Feb. 3rd, 1947), VIII L. REPT. TRIALS WAR CRIM. 22-26 (U.N. War Crimes Comm'n, 1949) [hereinafter *Holstein*].

120. *Id.* at 26. Twenty-two of the accused were convicted, and two were acquitted. *Id.*

121. *Id.* at 29 (Notes on the Case). "[I]t would appear that wherever persons are the objects of reprisals, their lives are the ultimate limit the retaliating party is not

The Court noted that *Holstein's* recognition of killings as lawful reprisals would erode the distinction between civilians and combatants. No evidence existed that any of the victims were either members of the resistance or had violated the humanitarian law of war.¹²²

The Netherlands Special Court of Cassation, in *Rauter*, concurred with, and elaborated upon, the judgment of the French Military Tribunal. Hans Albin Rauter served as Higher S.S. (Security Service), Police Leader, and General Commissioner for Public Safety in the Occupied Netherlands Territories. He was sentenced to death for offenses against the Dutch civilian population, including persecutions of Jews, deportations for slave labor, pillage and confiscation of property, illegal arrests and detentions, and the systematic execution of civilians and hostages.¹²³

The Special Court of Cassation ruled that Germany engaged in an illegal war of aggression, which was carried out in contravention of the humanitarian law of war. Once having occupied the Netherlands, Germany implemented an illicit policy of Nazification. The Kingdom of the Netherlands, had it possessed the military might and capacity, would have been legally entitled to engage in reprisals against the German Third Reich.¹²⁴

Was Germany authorized to engage in reprisals? Reprisals are intended to correct the conduct of States rather than partisans. Germany, as an occupying power, was authorized to apprehend and punish the perpetrators of illicit acts of resistance, but was not entitled to impose collective penalties on innocents. The notes accompanying the case observe that "[t]he rule which emerges is that offenses committed by members of the civilian population of an occupied territory can in no case entitle the occupying Power to kill

permitted to transgress." *Id.*

122. *Id.* at 29. French law established that killing in reprisal constituted premeditated murder. *Id.*

123. *Rauter*, *supra* note 33, at 93-105.

124. *Id.* at 134-35 (Notes on the Case). Germany would not have been legally authorized to respond with counter-reprisals. *Id.* at 135.

hostages. All it is entitled to do is to punish the actual offenders, if it can lay its hands on them."¹²⁵

The Norwegian Lagmannsrett convicted Gerhard Friedrich Ernst Flesch, Commander of the Security Service in northern Norway and the Falstad Concentration Camp, of murder. Flesch ordered the torture and execution of various Norwegians suspected of membership in the resistance. The Tribunal ruled that "an act of reprisal can in no circumstances be pleaded in exculpation unless it was . . . announced publicly . . . or it appeared from the act . . . that it was intended as a reprisal and showed clearly against what unlawful acts it was directed."¹²⁶ Flesch's acts "must be considered as acts solely intended to terrorize the population in order to stem the underground movement. It was considered significant . . . that the defendant's underlings had reacted against the inhumane orders by trying to avoid carrying them out."¹²⁷ The Lagmannsrett, in *Bruns*, also rejected the defendants' claim that their torture of detainees had been intended as reprisals. These acts, according to the Norwegian Court, had been routinely carried out to compel confessions and to inflict punishments.

Reprisals were generally understood to aim at changing the adversary's conduct and forcing him to keep generally accepted rules of warfare. If this aim were to be achieved, the reprisals must be made

125. *Id.* at 137-38 (emphasis omitted) (Notes on the Case).

126. Trial Of Gerhard Friedrich Ernst Flesch, SS Obersturmbannfuehrer, Oberregierungsrat, (Frostatting Lagmannsrett, Nov.-Dec. 1946; and Sup. Ct. of Norway, Feb. 1948), VI L. REPT. TRIALS WAR CRIM. 111, 115 (U.N. War Crimes Comm'n, 1948). These acts did not satisfy the requisites for reprisals. The Germans did not announce that the killings were undertaken as acts of reprisal. In fact, the accused were shot in the back to make it appear that they had been killed while escaping. The specific acts the reprisals were directed to deter were never specified. *Id.* at 115-16. The Court noted that lawful acts of war committed by uniformed British troops behind enemy lines did not breach international law. The Germans, however, did not distinguish between acts committed by uniformed and non-uniformed combatants. *Id.* at 115-16.

127. *Id.* at 116.

public and announced as such . . . [T]here was no indication from the German side . . . that their acts . . . were to be regarded as reprisals. . .¹²⁸

These domestic court decisions clarified the law of reprisal during armed conflict. Reprisals were intended to deter the illegal activity of belligerent states. Courts recognized the difficulty of distinguishing between repression and reprisals. As a result, reprisals were constrained by a number of procedural requirements. The reprisals were to be undertaken as a last resort following a warning to cease and desist from illicit conduct. Such acts were only permissible in those instances in which the perpetrators could not be apprehended. The reprisal was to be proportionate to the provocation and limited by the rule of reasonableness.¹²⁹

An Occupying Power was prohibited from killing or taking reprisals against innocents. The occupant was required to apprehend and punish those responsible for delicts.¹³⁰ There was support for the view that hostages could be detained, but that they were to be humanely treated.¹³¹

C. Command Responsibility

A number of courts imposed vicarious liability on high-ranking military officials. In *In Re Yamashita*, the United States Supreme Court confirmed the conviction of Tomoyuki Yamashita, Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. The 260,000 troops under Yamashita's command committed widespread atrocities during the American invasion of the Philippines in October 1943. More than 25,000 unarmed noncombatant civilians were mistreated and

128. Bruns, *supra* note 82, at 19.

129. See *supra* notes 103-128 and accompanying texts.

130. See *supra* notes 121-125 and accompanying texts. But see *supra* note 116 and accompanying text.

131. See *supra* notes 121 and 122 and accompanying texts.

murdered in Batangas Province alone.¹³²

The Supreme Court ruled that the law of war presumes that a responsible military commander will control the conduct of combatants, stating:

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations, which [it] is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.¹³³

What reasonable measures is a military official required to undertake? According to the United States Supreme Court, a commander possesses an "affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."¹³⁴

Lieutenant-General Baba Masao was named General Officer of the 37th Japanese Army in Borneo in 1944. Masao permitted the forced march of 1,000 American and British prisoners planned by

132. *In Re Yamashita*, 327 U.S. 1, 14, 32 (1945).

133. *Id.* at 15.

134. *Id.* at 16. The United States Military Commission that initially conducted the prosecution evaluated the totality of the circumstances in evaluating the measures that Yamashita might have reasonably undertaken. The Commission considered the pressures created by the rapidly advancing United States forces, the miscalculations of Yamashita's predecessors as well as the organization, equipment, supply, training, discipline and morale of Yamashita's troops. The Commission concluded that Yamashita had not taken the measures that were required under the circumstances to control his troops. *Id.* at 17, n.4.

his predecessor to proceed. A large number of the already weakened prisoners died during the 165-mile trek. The final death total was overwhelming--only thirty-three of the prisoners were alive at the end of July 1944. The survivors were executed by troops under Masao's command the following month.¹³⁵ The Judge Advocate instructed the Australian Military Court to find Masao guilty if "war crimes were committed as a result of the accused's failure to discharge his duties as a commander, either by deliberately failing in his duties or by culpably or willfully disregarding them, not caring whether this resulted in the commission of a war crime or not."¹³⁶ Masao was sentenced to death by hanging.¹³⁷

A Canadian Military Court, in the *Abbaye Ardenne Case*, convicted Kurt Meyer, Commander of the 25th S.S. Panzer Grenadier Regiment of the 12th S.S. Panzer Division, of the killing of prisoners of war. Although the Court determined that Meyer had not ordered the executions, it held him vicariously liable for the killings that occurred adjacent to his regimental headquarters.¹³⁸ The Judge Advocate instructed the Court that a high-ranking officer is liable for a failure to assert that measure of disciplinary control that a military official is obligated to exercise. Under Canadian law, once a course of conduct in contravention of the laws and customs of war is established, the burden of going forward shifts to the accused.¹³⁹

135. Baba Masao, *supra* note 45, at 56-57.

136. *Id.* at 60 (Notes on the Case). In determining the extent of a commander's duty, "future courts will have to be guided by the nature of the accused's military command as well as by the strategic situation and the circumstances in which he had to exercise his command." *Id.* at 59 (Notes on the Case).

137. *Id.* at 57. *See also* Trial Of Willi Mackensen (Brit. Milit. Ct., Hannover, Jan. 28th, 1946), XI L. REPT. TRIALS WAR CRIM. 81 (1949) [hereinafter Mackensen].

138. Trial Of S.S. Brigadefuehrer Kurt Meyer (The Abbaye Ardenne Case), (Canadian Milit. Ct., Aurich, Germany, Dec. 10th-29th, 1945), IV L. REPT. TRIALS WAR CRIM. 97, 103, 109 (U.N. War Crimes Comm'n, 1948) [hereinafter Meyer].

139. *Id.* at 110-11 (Notes on the Case). Canadian war crimes legislation provided for vicarious liability. Canadian Law *supra* note 8, at 128 (1948).

In *Student*, General Kurt Student was convicted of three of seven counts pertaining to atrocities committed by his parachute troops in Crete against British prisoners of war and combatants. The Court appeared to find that the employment of prisoners to unload ammunition and the punishment of those who refused were part of an intentional policy adopted by Student. However, Student had not ordered and had no reasonable basis for anticipating that prisoners would be deployed to screen the advance of German troops or that a field hospital had been targeted for an aerial attack. The fact that Student had supervised the training of his troops was not sufficient to impose vicarious liability for all of the crimes that they had committed. The Court also appears to have accepted the view of the Judge Advocate that parachutists inevitably work in isolated and small autonomous groups, and that a less strict standard of command liability should be imposed.¹⁴⁰

Vicarious liability was extended to low-level combatants in the *Essen Lynching Case*. In *Essen*, a British Military Court convicted Hauptmann Erich Heyer of publicly ordering his troops to refrain from intervening to protect three British prisoners of war. The captured airmen, who were in the custody of a military unit under Heyer's command, were attacked and killed by a German mob while being escorted to a Luftwaffe base for questioning.¹⁴¹ The Court, in convicting a Private Koenen, noted that

'Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as prima facie evidence of the responsibility of the commander for those crimes.'

Id. at 128 (emphasis omitted).

140. Trial Of Kurt Student, (Brit. Milit. Ct., Luneberg, Germany, May 6th-10th, 1946), IV L. REPT. TRIALS WAR CRIM. 118-124 (U.N. War Crimes Comm'n, 1948)[hereinafter Student].

141. Trial Of Erich Heyer And Six Others (The Essen Lynching Case), (Brit. Milit. Ct., Essen Dec. 18th-19th and Dec. 21st-22nd 1945), I L. REPT. TRIALS WAR CRIM. 88, 89 (U.N. War Crimes Comm'n, 1947)[hereinafter Essen Lynching].

this escort, as the representative of the Power which had taken the airmen prisoners, had the duty not only to prevent them from escaping but also of seeing that they were not molested[I]t was the duty of the escort . . . to protect the people in his custody. . . [and he] failed to do what his duty required him to do.¹⁴²

In the *Velpke Children's Home Case*, a British Military Court imposed vicarious liability on the head regional Nazi official, a doctor, and an administrator, all of whom were in charge of the Velpke Children's Home, an institution established for Polish children involuntarily separated from mothers working in Germany. The three rarely, if ever, visited the Velpke Home or took an interest in the children's condition. The institution was filthy and infested with flies--over eighty Polish infants died in six months. The Court appeared to concur with the prosecutor's argument that once the infants were forcibly removed from their mothers, parental responsibility devolved onto the relevant Nazi officials. Hermann Mueller, the leading official in the village, and Werner North, the mayor, were both aware of the deaths in the home, but did nothing to alleviate the situation. Nevertheless, the two were acquitted based

142. *Id.* at 90. Heyer was sentenced to death by hanging; Koenen was sentenced to five years imprisonment. *Id.* In 1945, a British Military Court seemingly restricted the doctrine of vicarious liability in *Killinger*. Three of the five defendants were convicted of being "concerned as parties to the ill-treatment of British Prisoners of War." Trial Of Erich Killinger And Four Others, (Brit. Milit. Ct., Wuppertal, Nov. 26th-Dec. 3rd, 1945), III L. REPT. TRIALS WAR CRIM. 67 (U.N. War Crimes Comm'n, 1948)[hereinafter *Killinger*]. The British Court ruled that vicarious liability may not be imposed on a commanding officer based on mere negligence. There must be a demonstration that the officer intentionally refrained from fulfilling their duty. *Id.* at 69 (Notes on the Case). But see Trial Of Major Karl Rauer And Six Others (Brit. Milit. Ct., Wuppertal, Germany, Feb. 18th, 1946), IV L. REPT. TRIALS WAR CRIM. 113, 117 (U.N. War Crimes Comm'n, 1948)[hereinafter *Rauer*] (Acquitted of subordinates initial execution of prisoners of war and held liable for failing to take action following the second incident). The Judge Advocate in *Masao* instructed that the mental standard was satisfied by either an intentional or negligent omission. *Supra* note 45, at 60 (Notes on the Case).

on the fact that they had lacked official authority to intervene.¹⁴³

In sum, civilian and military officials are vicariously liable for the acts of their subordinates of which they possess either actual or constructive knowledge.¹⁴⁴ This is not a strict liability standard, and officials are not culpable for the obscure and distant actions of their subordinates.¹⁴⁵

Officials are obligated to intervene and to take reasonable steps to prevent illicit conduct. The reasonableness of an official's actions is dependent on various factors, including the available avenues of communication, the experience and training of subordinates, and the nature and scope of the provocation and criminal conduct.¹⁴⁶ The prevailing view is that an intentional or negligent failure to act is sufficient to impose criminal liability.¹⁴⁷ Some domestic codes provided that once a *prima facie* case was established, the burden of establishing the reasonableness of an official's actions shifted to the accused.¹⁴⁸

D. Naval Warfare

The London Protocol of 1930 specifies that prior to attacking a merchant vessel, a submarine must insure that the passengers, crew, and ship's papers are secured in a safe site. This standard is not satisfied by placing the crew in a vessel's lifeboats, unless the attack

143. Trial of Heinrich Gerike and Seven Others (The Velpke Children's Home Case) (Brit. Milit. Ct., Brunswick, March 20th-April 3rd, 1946), VII L. REPT. TRIALS WAR CRIM. 76-79 (U.N. War Crimes Comm'n, 1948) [hereinafter Gerike]. The Judge Advocate instructed the Court that either an intent or negligence standard could be appropriately applied. *Id.* at 81 (Notes on the Case).

144. *See supra* notes 133-134 and accompanying texts.

145. *See supra* note 140 and accompanying text.

146. *See supra* note 134 and accompanying text.

147. *See supra* note 136 and accompanying text. *See also supra* note 142 and accompanying text.

148. *See supra* note 139 and accompanying text.

is proximate to land or to another vessel that is in a position to take the sailors on board.¹⁴⁹

The Commander of the German Navy, Admiral Karl Donitz, was charged at Nuremberg with ordering the waging of unrestricted submarine warfare. The prosecution argued that German U-Boats failed to follow the requirement of warning merchant ships of an impending attack. The defense countered that the security of the submarine is the guiding rule at sea, and the threat of air attack often made rescue risky. The Tribunal said “[i]f the commander cannot rescue, then . . . he cannot sink a merchant vessel and should allow it to pass unharmed before his periscope. These orders . . . prove Donitz . . . guilty of a violation of the Protocol.”¹⁵⁰ The Tribunal ruled that “the evidence does not establish with the certainty required that Donitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous, and deserve the strongest censure.”¹⁵¹

Korvetten Kapitaen Karl-Heinz Moehle was the commander of the 5th U-boat Flotilla at Kiel, and was responsible for briefing as many as three hundred U-boat commanders prior to their operational patrols. Moehle’s responsibilities included acquainting the U-boat commanders with the Laconia Order of 1942, which provided that “[r]escue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.”¹⁵² The order also

149. Proce’s-Verbal Relating To The Rules Of Submarine Warfare Set Forth In Part IV Of The Treaty Of London Of April 22, 1930, Nov. 6, 1936, T.S. 29, 31 AM. J. INTL. L. 137 (Supp. 1937).

150. Nuremberg Judgment, *supra* note 65, at 559.

151. *Id.* Donitz, on the order of the Fuehrer, also established operational zones within which neutral ships were sunk without warning. The Tribunal adjudged this to be a violation of the London Protocol. *Id.* at 558. A sentence was not assessed against Donitz on this charge for breaches of the law of submarine warfare on the grounds of reciprocity. The Tribunal noted that the British Admiralty had announced on May 8, 1940, that all vessels should be sunk at night in the Skagerrak, and that the United States had carried out unrestricted submarine warfare in the Pacific Ocean. *Id.* at 559.

152. Trial Of Karl-Heinz Moehle, (Brit. Milit. Ct., Haumburg, Oct. 15-16th, 1946), IX L. REPT TRIALS WAR CRIM. 75-78 (U.N. War Crimes Comm’n,

admonished commanders to "[b]e harsh, having in mind that the enemy has no regard for the women and children in his bombing attacks on German cities."¹⁵³ Moehle advised the commanders to destroy any safety rafts that they encountered carrying airmen or the crews of sunken vessels. He admonished that a failure to kill these combatants may permit their rescue and re-entry into the war. Moehle concluded by reminding the commanders that "the safety of your own boat must always remain your primary consideration."¹⁵⁴ The Judge Advocate instructed that international law imposes a duty upon submarine commanders to save the lives of their crew. A commander is relieved of this duty in those instances in which the safety of his ship would be jeopardized. The Judge Advocate noted the prosecution had argued that the Laconia Order required a refusal to rescue survivors, regardless of the circumstances, which effectively condemned the survivors to death.¹⁵⁵ Moehle was sentenced to five years in prison.¹⁵⁶

The notes of the *Moehle* case scrutinized the International Military Tribunal and determined that Donitz should be criticized for issuing the ambiguous Laconia Order, but that he was not legally culpable for ordering the killing of shipwrecked survivors. Moehle, on the other hand, gave the impression that the policy of the Naval High Command was to kill the ship's crew. Thus, "whereas there was a reasonable doubt as to the meaning of Doenitz's order and . . .

1949)[hereinafter Moehle].

153. *Id.*

154. *Id.* at 76.

155. *Id.* at 77-78. The defense contended that the order contained a prohibition against rescuing the crews, but did not specifically require killing the crews. Moehle contended that, by instructing the commanders to act in accordance with the dictates of their conscience, he had taken steps to ameliorate the impact of the command. Moehle, however, admitted on cross-examination that a failure to rescue would likely result in the death of the crew. The Judge Advocate instructed that there was no duty to rescue in those instances in which the submarine would be placed in danger. But, the prosecution contended that the order prohibited rescue under all circumstances. *Id.* at 77-78.

156. *Id.* at 78.

the benefit of that doubt was given to Doenitz . . . there was no such doubt in view . . . [of] the way in which Moehle had added to this order.”¹⁵⁷

Moehle argued there was no evidence that ships were sunk or that sailors were drowned as a result of his instructions. The Court, however, concurred with the Judge Advocate that the inference was that Moehle’s orders and explanations had influenced the conduct of U-boat commanders.¹⁵⁸

In *Peleus*, the Greek ship *Peleus* was sunk by German submarine No. 852 commanded by Heinz Eck. Eck was charged with ordering crew members to fire machine guns and throw grenades at the lifeboats and rafts carrying the survivors. He had advised the U-boat crew that “[i]f we are influenced by too much sympathy, we must also think of our wives and children who at home die also as victims of air attack.”¹⁵⁹ Only three of the thirty-five civilian sailors survived the attack. Eck pled that his intent had been to eliminate all traces of the *Peleus* in order to conceal the site of the sinking. He feared that the debris would reveal the location of the assault and result in the aerial spotting and sinking of his U-boat. Eck also claimed he had not realized the attack harmed any of the surviving crew. He testified that he believed the crew had jumped out of the rescue vessels, but made no effort to assist them because his orders prohibited rescue.¹⁶⁰

The Judge Advocate instructed the Tribunal that the killing of unarmed enemies was a grave breach of the law of nations. There were circumstances of operational necessity under which such an act might be justified, but the facts appeared to contradict Eck’s claim

157. *Id.* at 80 (Notes on the Case).

158. *Id.* at 81. The Judge Advocate noted that what occurred as a result of these orders was not relevant in determining Moehle’s guilt. Nonetheless, he instructed that the conduct of U-boat commanders following the issuance of this order over a period of years provided evidence of the interpretation that a reasonable U-boat commander would give to the order. *Id.*

159. *Peleus*, *supra* note 15, at 5.

160. *Id.*

that his intent had been to safeguard his submarine. The Judge Advocate pointed out that Eck had cruised the site for five hours rather than flee the site of the attack and that sinking the remnants of the *Peleus* would not eliminate oil slicks. The Court convicted and sentenced Eck to death, suggesting that the Tribunal believed Eck could have more effectively safeguarded the submarine through a swift escape.¹⁶¹

A British Military Court convicted Helmut von Ruchteschell for attacking three British merchant ships without giving them fair warning. In each case, von Ruchteschell continued firing despite signs of surrender and the crew's effort to evacuate the ships. In addition, in two instances von Ruchteschell made no effort to rescue the survivors, thereby effectively condemning the crews to death at sea.¹⁶²

The notes to the case observe that von Ruchteschell was not charged with an illegal attack, which suggests that it is permissible to launch an unwarned attack upon a merchantman. This exception to the rules of sea warfare imposes a duty upon the attacking warship to limit itself to the employment of adequate force and not to kill or wound more members of the crew than is reasonably required. Once the ship is subdued, reasonable steps must be taken to rescue the crew of both merchant and war ships. The attacking crew is under no obligation to pursue survivors who prefer the perils of the sea to capture. The survivors possess a correlative duty to care for their wounded colleagues and to call attention to their location in order to facilitate the rescue of the wounded crew. In those instances in which the survivors reasonably believe that no quarter would have been given and were reluctant to be rescued, a higher duty rests upon the attacking vessel to make efforts to save the crew.¹⁶³

161. *Id.* at 12.

162. Trial Of Helmuth Von Ruchteschell, (Brit. Milit. Ct., Hamburg, May 5th-21st, 1947), IX L. REPT. TRIALS WAR CRIM. 82-86 (U.N. War Crimes Comm'n, 1949)[Von Ruchteschell].

163. *Id.* at 87-88 (Notes on the Case). A war ship may be attacked without warning. Enemy merchant ships only may be attacked if they refuse the attacking vessel's request to board. A merchant ship that is armed and integrated into the naval intelligence service forfeits its immunity from unwarned attack. *Id.* at 87.

An attack must cease as soon as an attacked or counter-attacked vessel indicates she is prepared to surrender. The Court ruled that the surrender requires the capitulating ship to stop her engines, turn on her lights, raise a white flag, and respond to an attacker's signals through wireless communication or, if not possible, through hauling down the flag or signaling with a flashlight. An attacker may not create conditions in which signals of surrender cannot be effectively communicated and then justify a continued attack on the grounds that such signals had not been received.¹⁶⁴

In the *Scuttled U-Boats* case, First Lieutenant Gerhard Grumpelt was convicted of scuttling two U-boats in contravention of the terms of the German surrender in northwest Germany. The surrender specified that all ships in the area were to be handed over to the Allied forces. Four hours before the fighting was to cease, the German Navy was ordered to scuttle its U-boats. This order was countermanded in a matter of hours. Grumpelt defied the latter order and scuttled two U-boats. Both incidents took place on May 6, a day following the transfer of the ships into Allied control. The scuttling of the ships contravened the terms of surrender, and was ruled a war crime.¹⁶⁵

Article 35 of the Hague Convention provides that capitulations must be "scrupulously observed by both parties."¹⁶⁶ The Hague Convention also provides that "a violation of the terms of the armistice by individuals acting on their own initiative . . . entitles the injured party to demand the punishment of the offenders."¹⁶⁷ Surrender, even absent a specific provision prohibiting scuttling,

164. *Id.* at 89-90.

165. Trial Of Oberleutnant Gerhard Grumpelt (The Scuttled U-boats Case), (Brit. Milit. Ct., Hamburg, Germany, Feb. 12-13th, 1946), I L. REPT. TRIALS WAR CRIM. 55-65 (U.N. War Crimes Comm'n, 1947).

166. *Id.* at 68 (Notes on the Case) *citing and quoting* Hague Convention, *supra* note 61, at art. 35.

167. *Id.* *citing* Hague Convention at art. 41. The accused's mistake of fact defense was rejected. He was considered to have possessed constructive knowledge that the scuttle order had been countermanded. *Id.* at 69-70.

embodies an implied condition that all war materials will be surrendered in the same condition it was in at the time the agreement was signed. Military equipment, however, may be destroyed in anticipation of surrender. A temporary cessation of hostilities, an armistice, or a cease-fire, permits a belligerent to augment or dismantle military equipment outside the immediate battlefield. However, there is no agreement on the obligations of armies confronting one another on the battlefield.¹⁶⁸

These decisions stand as the single set of World War II war crimes prosecutions for transgressions at sea. The Nuremberg Tribunal determined that the *Laconia* Order did not violate international law. Mohle was held liable for interpreting this command so as to countenance and require illegal attacks upon merchant vessels and a refusal to rescue the crews. The irresistible inference was that Mohle's addendums had caused thousands of Allied casualties.¹⁶⁹ The Court, in *Peleus*, recognized, but avoided addressing the parameters of operational necessity. Eck's plea was conceived as being based on convenience rather than a concern with safety.¹⁷⁰ *Von Ruchteschell* recognized that armed merchant ships that are integrated into the war effort are subject to limited armed attacks. An attack must cease following a merchant vessel's signaling of surrender. There is a duty on the attacking vessel, as well as on the surviving crew, to take steps to ensure rescue.¹⁷¹ The Court in the *Scuttled U-Boats* case ruled that the duty to turn over war material in the same condition in which it was at the time of capitulation is an implied term of surrender. A domestic order, law, or practice may not override this rule of customary and conventional international law.¹⁷²

168. *Id.* at 67-69.

169. *See supra* notes 152-58 and accompanying texts.

170. *See supra* notes 159-161 and accompanying texts.

171. *See supra* notes 162-64 and accompanying texts.

172. *See supra* notes 165-68 and accompanying texts.

E. Land Warfare

Two cases raised the novel question of the legality of ruses and trickery. Otto Skorzeny and nine other officers of the 150th Panzer Brigade were acquitted of improperly obtaining Red Cross packages and American uniforms from prisoners-of-war and of making use of these uniforms to treacherously fire upon United States troops during combat.¹⁷³

Skorzeny was commissioned by Hitler to disguise troops in American uniforms and to infiltrate United States lines. These troops were trained in American language, mannerisms, and military maneuvers. Some of their uniforms, along with Red Cross parcels, were illicitly obtained from prisoner-of-war camps. Several witnesses observed Skorzeny's brigade wearing American uniforms with German parachute overalls in operational areas. However, only two American soldiers testified that they had encountered German troops in combat wearing United States uniforms.¹⁷⁴

The Tribunal noted the Hague Convention prohibits the prosecution of persons engaging in espionage who subsequently return to their home Army. This immunity extends solely to espionage, and does not prevent prosecution for other war crimes.¹⁷⁵ The wearing of enemy uniforms during armed combat is prohibited. Some contend that such uniforms may be utilized to assist in arriving at the point of attack. The defendants adopted the latter interpretation, and pled that they planned to reach their objectives under cover of darkness, discard the American uniforms and fight

173. Trial Of Otto Skorzeny And Others, (United States Gen. Milit. Gov. Ct., Aug. 18th-Sept. 9th, 1947), IX L. REPT. TRIALS WAR CRIM. 90-92 (U.N. War Crimes Comm'n, 1949).

174. *Id.* at 91. Skorzeny's troops were assigned to the Ardennes offensive. Their objective were the three Maas bridges at Angier, Amee and Huy. This mission was abandoned due to the German's inability to penetrate enemy lines. Skorzeny and his unit were then reassigned to an infantry mission and subsequently disbanded. *Id.*

175. *Id.* at 94.

under their national colors.¹⁷⁶

The Hague Convention provides little guidance. Article 23(f) prohibits the "improper use of a flag of truce, of the national flag, or of the military insignia or uniform of the enemy, as well as the distinctive badges of the Geneva Convention."¹⁷⁷ The question remains whether the wearing of enemy uniforms at all times is improper. The Court apparently determined that the Germans had not fired at American troops, and thus could not be held liable of having worn the uniforms during combat.¹⁷⁸

The German defendants clearly contravened Article Six of the Geneva Prisoner-of-War Convention that safeguards the personal possessions, including military uniforms, of prisoners of war. They also violated Article 37, which prohibits the appropriation of packages sent to prisoners of war. The Court apparently viewed the latter two offenses as *de minimis*, and acquitted the defendants.¹⁷⁹

Heinz Hagendorf was convicted of having wrongfully fired a weapon at United States soldiers from an enemy ambulance displaying the Red Cross emblem. United States soldiers pursued and disabled the ambulance, captured Hagendorf, and killed the driver as he fled from the vehicle.¹⁸⁰

The Hague Convention, as noted, prohibits the improper use of

176. *Id.* at 92 (Notes on the Case).

177. *Id.* at 93 *citing and quoting* Hague Convention at art. 23(f).

178. *Id.* at 93. An American combatant testified that he had fought and captured several German soldiers wearing American uniforms with German parachute overalls. The American witness was uncertain as to the unit to which they were attached. As a result, the prosecution in *Skorzeny* was unable to connect these combatants with the 150th Brigade. The accused Kocherscheid admitted firing several shots at an American military police sergeant while dressed in a United States uniform. However, there was no evidence that a single American soldier had been wounded or killed. The Court apparently viewed the latter as an insignificant offense. *Id.*

179. *Id.* at 94, *quoting* Geneva Convention at arts. 6, 37.

180. Trial Of Heinz Hagendorf (United States Intermediate Milt. Gov. Ct., Dachau, Germany Aug. 8th-9th, 1946), XIII L. REPT. TRIALS WAR CRIM. 146 (U.N. War Crimes Comm'n, 1949) [hereinafter Hagendorf].

the distinctive signs of the Geneva Convention.¹⁸¹ The humanitarian law of war also accords protection to vehicles equipped for the evacuation of wounded and sick persons displaying the Red Cross insignia. As a result, persons displaying the Red Cross insignia may neither be treated as a combatant nor targeted for attack. Medical personnel enjoy this immunity so long as they refrain from initiating acts of armed belligerency.¹⁸²

The Court rejected Hagendorf's claim that he had acted in self-defense while in transit to collect wounded Germans. The panel noted that "the firing of a weapon from an ambulance by personnel who were themselves protected by such emblems . . . in the absence of an attack upon them . . . [c]onstituted unlawful belligerency, and a criminal course of conduct."¹⁸³

The accused in *Thiele* argued that they were hiding from the surrounding American troops, and had no alternative other than to kill an American prisoner of war. The Court rejected the plea of necessity, determining instead that conventional and customary rules may be adjusted only in those instances in which the text provides for this qualification. The prohibition of killing prisoners of war did not qualify for such an exception.¹⁸⁴

In *Eisentragers*, Lothar Eisentrager, head of a German intelligence agency in China, and various other diplomats and security agents, were convicted of voluntarily and knowingly producing propaganda pamphlets and transmitting and failing to prevent the gathering and transmission of information concerning American troop movements to the Japanese armed forces. This aid

181. Hague Convention, *supra* note 61, at art. 23(f).

182. Hagendorf, *supra* note 180, at 147.

183. *Id.* at 148. "It is hard to conceive of a more flagrant misuse than the firing of a weapon from an ambulance by personnel who were themselves protected by such emblems . . . in the absence of an attack upon them. This constituted unlawful belligerency, and a criminal course of conduct." *Id.*

184. Trial of Gunther Thiele And Georg Steinert, (United States Milit. Comm'n, Augsburg, Germany, June 13th, 1945), III L. REPT. TRIALS WAR CRIM. 56-59 (U.N. War Crimes Comm'n, 1948) [hereinafter *Thiele*].

and assistance was rendered following Germany's unconditional surrender in violation of the laws and customs of war.¹⁸⁵

Article 35 of the Hague Convention stipulates that surrender must be scrupulously observed and combatants must cease hostilities.¹⁸⁶ Any continuance of the conflict constitutes an international delict, regardless of the extent of the resulting injury. The defendants' cooperation with the Japanese clearly contravened the code of conflict. The appropriate alternative was to claim non-belligerent status or to seek repatriation to Germany.¹⁸⁷

The decision in *Eisentrager* was unique in that the defendants had not carried on hostilities in the field of combat following surrender. Instead, they engaged in military activities in a theater of war where hostilities were being carried out by a German co-belligerent. The defendants' conviction suggests that in the event of surrender, belligerent nationals are not free to continue the conflict under another banner.¹⁸⁸

The defendants were civilian members of the Intelligence Agency of Germany. The judgment indicates that the terms of surrender apply to all nationals of the surrendering belligerent, and are not restricted to members of the armed forces. "This was a

185. Trial Of Lothar Eisentrager, (United States Milit. Comm'n, Shanghai, Oct. 3rd-Jan. 14th, 1946), XIV LAW REPT. TRIALS WAR CRIM. 8-14 (U.N. War Crimes Comm'n, 1949) [hereinafter *Eisentrager*].

186. *Id.* at 17, (Notes on the Case) citing and quoting the Hague Convention.

187. *Id.* at 14. The Tribunal acquitted the diplomatic defendants, presumably determining that they lacked the authority and power to prevent the production of propaganda and dissemination of intelligence. *Id.* at 14. There is no indication that these acquittals were based on the defendants' diplomatic privilege or status. *Id.* at 22 (Notes on the Case). A stipulated surrender, or capitulation, involves establishing conditions for surrender. A simple surrender entails an unconditional cessation of hostilities. The common denominator is that hostilities between the Parties cease. A breach of this obligation by a State is an international delict, while a breach by an individual is a war crime. Germany entered into an unconditional surrender. The Court was able to rely the language of the Declaration of Berlin of June 5, 1945, that could be interpreted as explicitly prohibiting the dissemination of intelligence and propaganda. *Id.* at 16-18.

188. *Id.* at 21.

capitulation not of a mere fortress or a mere army or two; it was unconditional surrender of all forces under German control and carried with it all people of the German nation.”¹⁸⁹

Skorzeny affirmed that belligerents could not appropriate and dress in enemy uniforms during armed combat. It is open to debate whether such uniforms may be worn in an effort to arrive at the point of attack.¹⁹⁰ In *Hagendorf*, the American Tribunal further held that medical personnel protected under the emblem of the Red Cross shall not employ armed aggression other than in self-defense.¹⁹¹

Thiele established that the requirements of the humanitarian law of war shall not be qualified on the basis of necessity. This defense is admissible only when explicitly incorporated into the code of conflict.¹⁹² In addition, *Eisentrager* established that civilians and combatants shall not assist allied forces or engage in armed conflict following their country’s surrender.¹⁹³

F. Crimes Against Peace

The Nuremberg Charter imposed liability for crimes against peace, the planning or waging of a war of aggression, or a war in violation of international treaties.¹⁹⁴ The International Military Tribunal noted that war is “essentially an evil thing. Its consequences . . . affect the whole world. . . . To initiate a war of aggression . . . is

189. *Id.* at 22. The Tribunal also broadly interpreted the prohibition on continuing military activity to encompass activities such as transmitting radio messages and collecting intelligence, producing propaganda, ordering and encouraging subordinates to work on behalf of the Japanese, and submitting to the Japanese a list of raw material and equipment in possession of the German community so as to enable the Japanese to seize items to be seized. *Id.*

190. *See supra* notes 173-179 and accompanying texts.

191. *See supra* note 180-83 and accompanying texts.

192. *See supra* note 185 and accompanying text.

193. *See supra* note 188-89 and accompanying texts.

194. Nuremberg Charter, *supra* note 4, at art. 6(a).

the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."¹⁹⁵

The Tribunal concluded that the high-ranking defendants indicted at Nuremberg must have been aware they were acting in defiance of international treaties and law when they intentionally launched wars of aggression.¹⁹⁶ Domestic war crimes statutes were generally silent on the subject of crimes against peace, and only Poland and China provided for jurisdiction over this delict.¹⁹⁷

Takashi Sakai was the Commander of the Japanese 23rd Army operating in South China. He was convicted of participating in a crime against peace as well as committing war crimes and crimes against humanity. The Chinese Tribunal determined that Sakai had organized and threatened terrorist activities and assassinations intended to destabilize the local Chinese government and facilitate the establishment of Japanese rule. He was also found to have incited and permitted his subordinates to engage in war crimes and crimes against humanity.¹⁹⁸

The Tribunal concluded that Sakai "was one of the leaders who were instrumental in Japan's aggression against China,"¹⁹⁹ and that he was guilty of having "conducted military operations which formed part of a war of aggression."²⁰⁰ The Court did not clarify whether Sakai's conviction was based on the terrorist attacks that he had organized against China between 1931 and 1939, as well as on

195. Nuremberg Judgment, *supra* note 65, at 427. The seizures of Austria and Czechoslovakia were listed in the indictment as acts of aggression. The first war of aggression in the indictment was initiated against Poland on September 1, 1939. *Id.* The defendants were convicted of planning and waging aggressive wars against twelve nations. *Id.* at 459.

196. *Id.* at 462.

197. Polish Law, *supra* note 24, at 90; Chinese Law, *supra* note 11, at 152-53.

198. Trial Of Takashi Sakai (Chinese War Crimes Milit. Trib. of The Ministry Of National Defense, Nanking, Aug. 29th, 1946), XIV L. REPT. TRIALS WAR CRIM. 1-2 (U.N. War Crimes Comm'n, 1949).

199. *Id.* at 1.

200. *Id.* at 4 (Notes on the Case).

Sakai's activities following the initiation of formal hostilities in 1939.²⁰¹ His aggressive acts were determined to have violated the Nine Power Treaty of 1922, which guarantees respect for the sovereignty, independence and territorial integrity of China along with the Pact of Paris of 1928, which condemned recourse to war for the solution of international controversies.²⁰²

Artur Greiser was also convicted of a crime against peace. Greiser served as Deputy Gauleiter of the Nazi Party for the Danzig district in Poland, and in May 1934 assumed the additional post of President of the Danzig Senate.²⁰³ The Tribunal noted that Greiser was one of the Fuehrer's most enthusiastic and reliable collaborators, and was involved in a crucial component of the Fuehrer's "unfolding plan for aggressive war on a world scale."²⁰⁴ He was convicted of preparing and implementing an aggressive war in violation of the German-Polish non-aggression pact of January 26, 1934, which resulted in the German annexation of portions of the Free City of Danzig, as well as parts of Poland. This was the initial step in Germany's scheme to incorporate adjoining territories into the Third Reich so as to provide territory for the resettlement of ethnic Germans.²⁰⁵

In the aftermath of World War I, Danzig was organized as a Free City whose autonomy was guaranteed by the League of Nations. The National Socialists succeeded in capturing governmental control in 1933, and over the course of the next five years, Greiser implemented a program designed to undermine the city's autonomous and non-partisan character. This program culminated in Greiser's appointment of Albert Forster as Chief of the

201. *Id.* at 5. The accused's guilt for the acts committed during the period covering 1931 and 1934 appeared to have been judged under Chinese municipalities rather than under international law. *Id.* at 6.

202. *Quoted and cited in id.* at 6.

203. Greiser, *supra* note 63, at 70.

204. *Id.* at 104.

205. *Id.* at 74-75.

"Free State of Danzig" on August 23, 1939. One week later, Forster, acting on the orders of Adolf Hitler, unilaterally annexed Danzig into the Reich. This coincided with Germany's September 1, 1939 invasion and subsequent annexation of a portion of occupied Poland.²⁰⁶

In *Rauter*, the Netherlands Special Court of Cassation ruled that international law did not distinguish between occupations that resulted from legal and illegal conflicts. The Tribunal noted that "once a war had started, the law makes no distinction between a lawful or an unlawful war, or between legitimate or illegitimate occupation."²⁰⁷ The rights and duties of the occupants and the inhabitants are the same in both instances.²⁰⁸

The deployment of armed forces has traditionally been viewed as an essential aspect of sovereignty. The Nuremberg Charter took the unprecedented step of declaring that the planning, preparation, initiation, or waging of an aggressive war constituted a crime against peace.²⁰⁹ The Chinese Military Tribunal's conviction of Takashi Sakai for crimes against peace extended the scope of liability established at Nuremberg, which had limited liability to high echelon decision-makers.²¹⁰ The conviction of lower-level military officers, such as Sakai, presumed that these combatants possessed either actual or constructive knowledge that they were engaging in illegal criminal aggression.²¹¹ *Sakai* and *Greiser* also affirmed that a crime against peace might take the form of terrorist incidents or the fulmination of internal unrest and needs to involve large-scale, conventional military activity.²¹² *Rauter* affirmed that the rights and

206. *Id.* at 77.

207. *Rauter*, *supra* note 33, at 128.

208. *Id.*

209. *See supra* note 194 and accompanying text.

210. Nuremberg Judgment, *supra* notes 195-97 and accompanying texts.

211. *See supra* notes 198-202 and accompanying texts.

212. *See supra* notes 198-206 and accompanying texts.

duties of occupants and inhabitants of occupied territories are independent of the legality of the armed conflict.²¹³

G. Protection Of Prisoners of War And Civilians

The Hague Convention contains several provisions pertaining to the protection of prisoners of war. Article 23 prohibits killing or wounding an enemy “who, having laid down his arms, or having no longer means of defense, has surrendered at discretion.”²¹⁴ Prisoners of war²¹⁵ are to be treated humanely,²¹⁶ and their maintenance is the responsibility of the confining power.²¹⁷ The tasks to which prisoners are assigned “shall not be excessive and shall have no connection with the operations of the war.”²¹⁸ Escaped prisoners who are apprehended prior to rejoining their own army or before leaving the territory occupied by the detaining army are liable to disciplinary punishment.²¹⁹ Spies are defined as those who act clandestinely or on false pretenses in obtaining or endeavoring to

213. See *supra* notes 207-08 and accompanying text.

214. Hague Convention, Annex I, *supra* note 61, art. 23(c)-(d).

215. *Id.* at art 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- (1) To be commanded by a person responsible for his subordinates;
- (2) To have a fixed distinctive emblem recognizable at a distance;
- (3) To carry arms openly; and
- (4) To conduct their operations in accordance with the laws and customs of war. . . .

Id. These requirements were subsequently modified. Hague Convention, Protocol I, *supra* note 104, art. 44(3).

216. Hague Convention, Annex I, *supra* note 61, art. 4.

217. *Id.* at art. 7.

218. *Id.* at art. 6.

219. *Id.* at art. 8.

obtain information in the zone of operations of a belligerent with the intention of communicating to the hostile party. A spy may not be punished without a previous trial.²²⁰

The Geneva Convention Relative to Prisoners of War states that prisoners are considered to be in the power of the hostile custodial government, and "must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity. Measures of reprisal against them are prohibited."²²¹ The detaining power is obligated to provide for the maintenance of prisoners of war.²²² Prisoners must be evacuated, within the shortest possible period following their capture, to a safe and secure region. They shall not be needlessly exposed to danger while awaiting evacuation.²²³ Prisoner of war camps are required to provide sanitary living conditions²²⁴ and prisoners shall be provided adequate food,²²⁵ clothing,²²⁶ and medical attention.²²⁷ The Geneva Convention repeats that labor furnished by prisoners shall have no direct relation with operations of war. Captors are prohibited from using prisoners of war for manufacturing and transporting arms or munitions and for transporting material intended for combat units.²²⁸ Arrest is the most severe disciplinary punishment that may be imposed on a prisoner. The duration of a single punishment may not exceed thirty days.²²⁹

220. *Id.* at art. 29.

221. Geneva Convention, *supra* note at 39, art. 3. "Prisoners of war have the right to have their person and their honor respected." *Id.*

222. *Id.* at art. 4.

223. *Id.* at art. 7.

224. *Id.* at arts. 10 and 13.

225. *Id.* at art. 11.

226. *Id.* at art. 2.

227. *Id.* at art. 14.

228. *Id.* at art. 31.

229. *Id.* at art. 54. Punishments for separate offenses shall be separated by a

A number of prosecutions pertained to the killing of prisoners of war. Defendant Max Wielen, head of the Criminal Police in Breslau, was convicted, along with several Gestapo officers, for involvement in the killing of escaped prisoners of war. Wielen was summoned to Berlin where he was instructed that more than half of those apprehended were to be executed. He subsequently handed twenty-seven of the thirty-six prisoners apprehended within his jurisdiction over to the Gestapo with full knowledge that they would be executed. Wielen then returned to Berlin and helped orchestrate the concealment of the killings. The urns containing the ashes of fifty murdered officers were sent to Wielen, who returned them to Stalag Luft III with the explanation that the prisoners had been shot while attempting to escape.²³⁰

In the *Almelo Trial*, three German combatants were accused of murdering a British airman whom Dutch nationals were hiding. The pilot, whose plane had been shot down, was clothed as a civilian when apprehended. The notes to the case show that the airman's execution could not be justified absent a judicial determination that the pilot was a spy. The British Tribunal also rejected the superior orders defense, holding that combatants are expected to be familiar with the legal formalities required for the carrying out of a death sentence. The Court also rejected the defense of duress, dismissing the contention that the defendants were motivated by a concern for their personal safety.²³¹

In the *Drierwalde Case*, Oberfeldwebel Karl Amberger was sentenced to death for executing four prisoners of war. All four had been shot through the head. Amberger claimed that the prisoners had attempted to escape. However, one witness testified that Amberger had vowed to kill the prisoners prior to escorting them to a detention camp. The Judge Advocate instructed the Court that a combatant who possesses actual or reasonable grounds to believe

period of at least three days. *Id.*

230. Wielen, *supra* note 78, at 20-36, 39-40. The Court rejected the mistake of fact defense, determining that the defendants should have been aware that the captured prisoners were entitled to a trial. *Id.* at 50-51 (Notes on the Case).

231. See *Almelo*, *supra* note 16, at 45; see also Rhode, *supra* note 56, at 54.

that a prisoner is attempting to escape may utilize reasonable force to restrain the prisoner. The guard should strive to shoot to wound, but this is flexibly applied and the death of an escapee does not ordinarily constitute a war crime. The privilege of using deadly force is based on the presumption that the escaping prisoner may constitute a potential belligerent. The Court, however, found no factual support for Amberger's escape defense.²³²

In *Buck*, German combatants were accused of executing six British airmen, four American prisoners of war, and four French nationals. The British Court determined that the defendants were aware that the prisoners had not been provided with the required trial prior to their execution. Were the defendants justifiably ignorant of this requirement? Should they have complied with orders to execute the prisoners? The Judge Advocate instructed the Court that the defendants, as non-lawyers, may not have been familiar with the requirements of multi-national conventions and could not be expected to possess a book on military law. Nevertheless, the Court assumed that "men who are serving either as prisoners or in proximity to soldiers know as a matter of the general facts of military life whether a prisoner of war has certain rights and whether one of those rights is not, when captured, to security for his person."²³³

232. Trial Of Karl Amberger (The Dreierwalde Case), (Brit. Milit. Ct., Wuppertal, March 11th-14th, 1946), I L. REPT. TRIALS WAR CRIM. 81-82, 86-87 (U.N. War Crimes Comm'n, 1947) (Notes on the Case) [hereinafter Amberger]. The Judge Advocate noted that it is the duty of a captured combatant to attempt to escape. The corollary is that the detaining power is entitled to prevent the individual's escape. *Id.* at 86 (Notes on the Case).

233. *Buck*, *supra* note 16, at 44. (Notes on the Case). The defendants contended that they believed the security police subjected the victims to a trial. The prosecution pointed out that lawful executions do not ordinarily take place in the woods, and that the victims' remains are not customarily buried in bomb craters with their valuables, clothing, and identity markings removed. *Id.* at 43 (Notes on the Case). On the privilege to use force to prevent the escape of prisoners, *see also* Trial Of Karl Adam Golkel And Thirteen Others, (Brit. Milit. Ct., Wuppertal, Germany, May 15th-21st, 1946), V L. REPT. TRIALS WAR CRIM. 45 (U.N. War Crimes Comm'n, 1948) [hereinafter Golkel]. Premeditation may arise instantly and spontaneously. An accused's act need not be the sole cause of death—it is sufficient if the act contributed to the death. Insanity is recognized as a defense in prosecutions of war crimes. *See* Trial Of Peter Back, (U.S. Milit. Comm'n,

A United States Tribunal, in *Bury*, directly addressed the legality of superior orders to execute prisoners of war. Two police officers were convicted of unlawfully killing an American airman. The defendants claimed that they had received orders that “terror flyers” were not entitled to prisoner of war status and were to be summarily executed. The Tribunal dismissed the superior orders defense, determining that the accused had not been explicitly ordered to execute the airman. The Court stated that an unlawful act committed pursuant to an order is not justified if the combatant actually knew or reasonably should have known that the order was unlawful under the laws and customs of war, the principles of criminal law generally prevailing in civilized nations, or the laws of his own country. International principles take precedence over the domestic legal code in cases of conflict.²³⁴

Others were convicted of illegally employing or abusing prisoners of war. Max Schmidt, a German medical officer in France, severed the head from a dead American airman and placed the skull on his desk. He later sent the skull to Germany as a souvenir. The American military Court ruled that belligerents possess an obligation to safeguard and honorably bury or cremate the dead.²³⁵ He was convicted and imprisoned for ten years.

Lieutenant Tanabe Koshiro was adjudged guilty and sentenced to seven years imprisonment as a result of his employment of Dutch, American, Australian, and British prisoners of war in the construction of an ammunition depot adjacent to a prisoner of war camp. The depot was filled with ammunition and surrounded with artillery, exposing the prisoners to an Allied aerial attack. Flimsy air-

Ahrweiler, Germany, June 16th, 1945), III L. REPT. TRIALS WAR CRIM. 60-61 (U.N. War Crimes Comm'n, 1948)[hereinafter Back].

234. Trial Of Albert Bury And Wilhelm Hafner, (U.S. Milit. Comm'n, Freising, Germany, July 15th, 1945), III L. REPT. TRIALS WAR CRIM. 62-64 (U.N. War Crimes Comm'n, 1948) [hereinafter Bury].

235. Trial Of Max Schmid, (United States General Milit. Gov. Ct., Dachau, Germany May 19th, 1947), XIII L. REPT. TRIALS WAR CRIM. 151-52 (U.N. War Crimes Comm'n, 1949) [hereinafter Schmid]. Graves also are to be properly marked. *Id.* at 152 (Notes on the Case).

raid shelters were provided which were constructed of rotten trunks of coconut palms, tattered timber, and thin sheets of dilapidated zinc.²³⁶ Koshiro was convicted of using prisoners for war-related work and exposing prisoners to Allied bombing attacks. Koshiro's acts violated Japan's legal obligations as a signatory to the Hague Convention, as well as its duties under the customary laws and usages of war that were embodied in the Geneva Prisoner of War Convention.²³⁷

Lieutenant General Kurt Maelzer was convicted by a United States Military Commission for obeying an order to parade two hundred American prisoners of war through the streets of Rome. The crowd jeered and threw sticks and stones. The accused threatened to shoot those prisoners who responded with defiant gestures. Photographs of the prisoners marching under the threat of German bayonets appeared in the press. Maelzer was convicted of breaching his duty to safeguard the prisoners.²³⁸

There were also examples of successful criminal defenses. Police officers Erich Weiss and Wilhelm Mundo were acquitted of killing an American airman. Weiss claimed that he had been threatened by the airman's movement of his hand towards his pocket, so he shot in self-defense. Mundo's back was turned and upon hearing a shot, turned and also fired. There was no evidence that the victim had been subsequently searched to determine whether he was armed.²³⁹

236. Trial Of Tanabe Koshiro, (Netherlands Temporary Court-Martial, Macassar, Feb. 5th, 1947), XI L. REPT. TRIALS WAR CRIM. 1-4 (U.N. War Crimes Comm'n, 1948)[hereinafter Koshiro].

237. *Id.* at 4 (Notes on the Case).

238. Trial Of Lieutenant General Kurt Maelzer, (United States Milit. Comm'n, Florence, Sept. 9th-14th, 1946), XI L. REPT. TRIALS WAR CRIM. 53 (United States Milit. Comm'n, Florence, Sept. 9th-14th, 1949) [hereinafter Maelzer].

239. Trial Of Erich Weiss And Wilhelm Mundo, (United States General Milit. Gov. Ct., Ludwigsburg, Germany, Nov. 9th-10th, 1945), XIII L. REPT. TRIALS WAR CRIM. 149-150 (U.N. War Crimes Comm'n, 1949) [hereinafter Erich Weiss].

Arno Heering was convicted of failing to provide prisoners with sufficient food, adequate billets, and medical supplies. In addition, Heering was convicted of mistreating prisoners and marching prisoners excessive distances. The prosecution argued that Heering's threat to shoot prisoners who left the column, as a result of exhaustion or illness, constituted mental cruelty. The Judge Advocate, however, instructed that the warnings had been directed to guards rather than to prisoners, and that mere words could not constitute an assault.²⁴⁰

Which individuals are entitled to be treated as lawful belligerents and, upon capture, considered to attain prisoner of war status? Colonel Karl Bauer ordered the execution of three captured French partisans. All three were captured while fighting in accordance with the rules of warfare and were adorned with a tricolor strap around their arm. Bauer was sentenced to death, and those who carried out his orders received five years' imprisonment.²⁴¹

The Hague Convention requires that lawful combatants serve under a commander; wear a fixed, distinctive sign; carry arms openly; and conduct operations in accordance with the laws and customs of war.²⁴² Article Two extends belligerency status to the unorganized inhabitants of an unoccupied territory who spontaneously take up arms upon the approach of the enemy. These individuals are required to openly carry arms and respect the laws and customs of war.²⁴³ Territory is considered occupied when

240. Trial Of Arno Heering, (Brit. Milit. Ct., Hanover, Jan. 24th-26th, 1946), XI L. REPT. TRIALS OF WAR CRIM. 79-80 (U.N. War Crimes Comm'n, 1949) [hereinafter Heering]. Words might constitute inhumane treatment if they amount to mental cruelty and interfere with the health or well-being of the prisoners. *Id.* at 80 (Notes on the Case).

241. Trial Of Carl Bauer, Ernst Schrameck And Herbert Falten, (Perm. Milit. Trib., Dijon, Oct. 18, 1945), VIII L. REPT. TRIALS WAR CRIM. 15 (U.N. War Crimes Comm'n, 1949)[hereinafter Bauer].

242. See Hague Convention, Annex I, *supra* note at 61, art. 1.

243. *Id.* at art. 2.

subordinated to the authority and control of a hostile army.²⁴⁴

The French Tribunal appears to have concluded that the partisans were entitled to be treated as prisoners of war and were entitled to have their guilt determined at trial. What was the basis of this determination? Invading French troops and indigenous partisan forces challenged German forces in Bauer. The resulting deterioration of the Third Reich's command and control may have resulted in the Court's determination that the relevant territory should no longer be considered occupied. Additionally, the rapidly expanding and increasingly disorganized partisan forces were encompassed within the spontaneous uprising exception. However, the Tribunal may have considered that the partisans qualified as lawful combatants because they were under the command of the regular French forces, openly carried arms, and were variously adorned with tricolor straps, helmets, and khaki overalls. The latter view was problematic since the tricolor straps would not appear to satisfy the distinctive military symbol requirement of the Hague Convention.²⁴⁵

In *Hangobl*, a United States military court convicted Josef Hangobl, a member of the non-uniformed Austrian home guard, of killing a downed American pilot. The trial record was ambiguous as to whether the American pilot was attempting to escape, resist, or surrender. The Court seemed to have determined that Hangobl did not satisfy the requirements of lawful belligerency and only was entitled to exercise armed force in self-defense. Also, the Tribunal's decision may have been based on a determination that Hangobl was a lawful belligerent and had employed unnecessary and excessive force.²⁴⁶

In sum, defendants were convicted for the execution of prisoners of war without trial. Both police and military personnel were expected to be aware of the requirement that those accused of

244. *Id.* at art. 42.

245. Bauer, *supra* note 241, at 16-19 (Notes on the Case).

246. Trial Of Josef Hangobl (Gen. Milit. Ct., Dachau, Germany, Oct. 17th-18th, 1945), XIV L. REPT. TRIALS WAR CRIM. 86-88 (U.N. War Crimes Comm'n, 1949).

war crimes are entitled to a judicial adjudication of their guilt.²⁴⁷ While reasonable force may be used to restrain a prisoner attempting to escape, this standard is flexibly interpreted and the prisoner assumes the risk that escape may result in death.²⁴⁸ Those who escape and are later apprehended are subject to imprisonment, but may not be executed.²⁴⁹ Other defendants were convicted of mutilation of the dead, illegal employment of prisoners in war-related activities, exposing prisoners to danger, and of failure to safeguard prisoners from public humiliation.²⁵⁰ Individuals satisfying specified organizational and uniform requirements were entitled to the status of lawful belligerents.²⁵¹

It also is a crime to mistreat or kill civilian inhabitants of occupied territories. The Hague Convention requires an occupying power to respect inhabitants' "[f]amily honor . . . rights . . . lives . . . and private property, as well as religious convictions and practice."²⁵²

In the *Zyklon B* case, industrialist Bruno Tesch and his assistant, Karl Weinbacher, were convicted of knowingly providing as much as two tons of Zyklon B poison gas each month to concentration camps. An estimated six million people were exterminated, four and a half million in Auschwitz/Birkenau alone. The Court determined that the size of the shipments, company documents, and reported conversations, indicated that the defendants were aware that Zyklon B was being used to exterminate, rather than to disinfect, inmates. The defendants were sentenced to death, affirming that the humanitarian law of war extends liability to

247. See *supra* notes 230-34 and accompanying texts.

248. See *supra* note 232 and accompanying text.

249. See *supra* note 229 and accompanying text.

250. See *supra* notes 235-38 and accompanying texts.

251. See *supra* notes 241-44 and accompanying texts.

252. Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, art. 46, 36 Stat. 2277.

civilians as well as to members of the military.²⁵³

In *Becker*, nineteen defendants were convicted of the illegal arrest and mistreatment of French nationals. Illegal arrests, although punishable under the French Penal Code, are not explicitly condemned under the Hague Convention. The French Court ruled that systematic arrests are encompassed within the Martens Clause which provides, in part, that inhabitants "remain under the protection and governance of the principles of the laws of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience."²⁵⁴ The Court noted that "[i]t is not disputable that 'indiscriminate mass arrests' are a violation of the . . . penal law of civilized nations . . . [and] represent . . . 'systematic terrorism.'"²⁵⁵

In several cases, defendants were convicted of mistreating inhabitants of occupied territories in violation of the Hague Convention.²⁵⁶ Additionally, this mistreatment was enumerated as a war crime under the Nuremberg Charter²⁵⁷ as well as Control Council Law No. 10.²⁵⁸ The French Criminal Code punished the infliction of wounds, blows, or other acts of violence. The penalty

253. *Zyklon B*, *supra* note 53, at 102.

254. Trial Of Gustav Becker, Wilhelm Weber and 18 Others, (Perm. Milit. Trib., Lyon, July 17, 1947), VII L. REPT. TRIALS WAR CRIM. 67, 68 (U.N. War Crimes Comm'n, 1948) (Notes on the Case) [hereinafter *Becker*] *citing* Hague Convention, *supra* note 61, at preamble (Martens Clause). Such arrests are not required to be undertaken in a systematic and mass fashion in order to fall within the prohibitions of the French Penal Code. *Id.* at 69 (Notes on the Case).

255. *Id.* at 68-69 (Notes on the Case).

256. *Id.* at 70, *citing* Hague Convention, *supra* note 61, at art. 43 (duty of occupant to ensure public safety and to respect the laws of the occupied territory) and 46 (obligation to respect family honor and rights and individual life). Physical mistreatment is also encompassed within the Martens Clause of the Hague Convention. *Id.* *citing* Hague Convention, *supra* note 61, at preamble.

257. The Nuremberg Charter prohibits the "ill-treatment of civilian population in occupied territory." *Id.* Nuremberg Charter, *supra* note 4, at art. 6(b).

258. Control Council Law No. 10, *supra* note 5, at art. II(1)(b).

was conditioned upon the degree of resulting harm. A French Court applied these domestic and international provisions in convicting the defendants in *Becker* of the severe beating and other physical mistreatment of French nationals.²⁵⁹

In *Bruns*, the defendant, Richard Bruns, and two co-defendants, were convicted of deploying various methods of torture to carry out interrogations--cold baths, blows and kicks, and the application of leg screws. The Court acknowledged that the defendants were motivated by patriotic zeal and had acted in response to superior orders. The Tribunal also recognized that these techniques had been effective in combating the resistance. However, such atrocious conduct by an invading army could not be excused. "If a nation, which without warning has attacked another, finds it necessary to use such methods to fight opposition, then those guilty must be punished, whether they gave the orders or carried them out."²⁶⁰

Defendant Wilhelm Gerbsch was convicted by the Special Court in Amsterdam of seriously mistreating Dutch citizens and nationals of other European States who had been deported to the penal camp in which Gerbsch served as a guard. He was one of the few defendants convicted of a crime against humanity, which encompasses "inhumane acts committed against a civilian population."²⁶¹ This charge was based on the fact that Gerbsch was charged with the abuse of nationals of various European states and the Netherlands' legislation limited war crimes to only acts directed against Dutch nationals. Crimes against humanity also were directed against the type of systematic acts of abuse undertaken by Gerbsch.²⁶²

259. *Becker*, *supra* note 254, at 69-70 (Notes on the Case).

260. *Bruns*, *supra* note 82, at 18. "The Court could not believe that a State, even Nazi Germany, could force its subjects, if they were unwilling, to perform such brutal and atrocious acts as those of which the defendants were guilty." *Id.*

261. *Gerbsch*, *supra* note 41, at 133-36 (Notes on the Case).

262. *Id.* at 136. Mistreatment was also a crime under the Netherlands East Indies (N.E.I.) criminal code. In *Motmura*, Shegeki Motomura, head of Tokkeitai in the South-West Celebes, was convicted of ordering, tolerating, and engaging in unlawful arrests and systematic torture against the civilian population. Trial Of

In *Chusaburo*, the defendant, a sergeant in the Imperial Japanese Army, was convicted of killing a civilian resident of Kuala Lumpur. Hostilities had ceased, but the Tribunal ruled that violations of the laws and usages of war committed during the process of surrender and disarmament remained war crimes. Chusaburo had caught Omar, a civilian, stealing rice from the storehouse. In the course of stealing the rice, Omar killed the victim during a scuffle with seven or eight individuals who were attempting to wrest Omar from Chusaburo's grasp. The Tribunal determined that Omar did not lose his civilian status as a result of his criminal activity. The loss of civilian status required taking up arms and committing hostilities against the enemy. The theft of rice did not fall within this category of activity.

Additionally, the Court failed to find that drunkenness or provocation would sufficiently allow for a reduced conviction of manslaughter or that it would sustain the defendant's plea of self-defense. The notes to the case observe that there is a dispute as to whether the humanitarian law of war distinguishes between homicide and manslaughter.²⁶³

Washio Awochi, a Japanese innkeeper, was convicted of recruiting and subjecting Dutch women to enforced prostitution in the Netherlands East Indies. Women as young as twelve were required to meet a monetary quota or face imprisonment, deportation or abuse at the hands of the Japanese military police.²⁶⁴

Robert Wagner, Gauleiter and Reich Governor of Alsace, was convicted of inciting, recruiting, and conscripting French nationals to

Shigeki Motomura and 15 Others, (Netherlands Temporary Court-Martial at Macassar, July 18th, 1947), XIII L. REPT. TRIALS WAR CRIM. 138, 143-44 (U.N. War Crimes Comm'n, 1949). Illegal detention was treated as an inhumane act that constituted a crime against humanity when carried out against Jews based on their race and religion. See Zuehlke, *supra* note 38, at 145.

263. Trial Of Yamamoto Chusaburo, (Brit. Milit. Ct., Kuala Lumpur, Jan 30th-Feb. 1, 1946), III L. REPT. TRIALS WAR CRIM. 76-80 (U.N. War Crimes Comm'n, 1948) (Notes on the Case).

264. Trial Of Washio Awochi, (Netherlands Temporary Court-Martial at Batavia, Oct. 25, 1946), XIII L. REPT. TRIALS WAR CRIM. 122 (U.N. War Crimes Comm'n, 1949).

bear arms against France.²⁶⁵ Hitler authorized Wagner to draft Alsatians in order to inculcate the occupied population with respect for their new Fatherland. Those who failed to fulfill their military obligation were subject to arrest and deportation to the Reich. This policy was ruthlessly implemented. Deserters and resisters were shot and their families were dispossessed and deported to Germany.²⁶⁶

In sum, domestic court decisions affirmed that civilians were entitled to protection against arbitrary killing, abuse, and mistreatment by a foreign or occupying power.²⁶⁷

H. Concerned In Killing And Mistreatment

British military courts extended accessory liability to those charged with being concerned in the killing of prisoners and civilians.²⁶⁸ The Judge Advocate, in *Golkel*, advised that the concept of this accessory liability was to be broadly interpreted, and instructed that “[i]t is for the members of the Court to decide what participation is fairly within the meaning of those words.”²⁶⁹

In *Wielen*, the Judge Advocate clarified that:

the persons concerned must have been part of the machine doing some duty, carrying out some performance which went on directly to achieve the killing, that it had some real bearing on the killing, would not have been so effective or been done so expeditiously if that person had not contributed his

265. Wagner I, *supra* note 34, at 40.

266. *Id.* at 28-30. The French criminal code punished the recruitment of French combatants to fight on behalf of a foreign power during wartime. *Id.* at 51 (Notes on the Case).

267. *See supra* note 252-66 and accompanying texts.

268. *See Wielen*, *supra* note 78, at 46 (Notes on the Case).

269. Gokel, *supra* note 234, at 53 (Notes on the Case).

willing aid.²⁷⁰

The *Wielen* Court adjudged defendants who had issued the order to kill, fired the fatal shot, acted as an escort, or drove the victims to the site of the execution to be guilty. The Court also attached liability to those issuing the orders, despite the fact that they were not present at the scenes of the executions. All of the defendants were sentenced to death, with the exception of two drivers, who witnessed the killings and received ten years in prison, presumably based on their minor role and limited knowledge concerning the circumstances surrounding the executions.²⁷¹

In *Rauer*, Major Karl Rauer, his adjutant Hauptmann Wilhelm Scharschmidt, and five subordinates, were convicted of being concerned in the killings of five Allied airmen who were captured following an attack on an aerodrome at Dreierwalde, Germany. Those detailed by Scharschmidt to escort the airmen to a prisoner of war camp, executed the prisoners while in transit, and reported that the airmen had been shot while attempting to escape. Rauer and Scharschmidt were acquitted of this charge, but were convicted of the killings of prisoners under similar circumstances on two subsequent occasions. There was no evidence that either of the two principal defendants had issued orders to kill the prisoners. However, they failed to take steps following the initial killings to insure that there was no repetition of this type of incident. Rauer and Scharschmidt also made no effort to investigate the killings. The Judge Advocate instructed that the charge of being concerned in killing did not encompass negligence. Instead, the charge required a "complete and direct allegation that Rauer was either instigating murder or condoning it."²⁷²

270. *Wielen*, *supra* note 78, at 46 (Notes on the Case). The Judge Advocate did advise that "I do not think the prosecution can ask you to consider a case of a minor official who was concerned with some administrative matter." *Id.*

271. *Id.*

272. *Rauer*, *supra* note 142, at 116 (Notes on the Case). The other defendants were convicted and sentenced to death based upon their direct involvement in the killings. *Id.* 114.

In *Rhode*, Commandant Fritz Hartjenstein and six others were convicted of being involved in the lethal injection of four Allied female prisoners, three of whom were British and the remaining one French. The women were falsely informed that they were receiving typhus injections, and their bodies were immediately cremated following their deaths. Only medical officer Werner Rohde had been present at the killings. The defendants were nevertheless convicted based on having countenanced, administered, and/or participated in organizing the extermination and/or disposal of the bodies. The Judge Advocate instructed that it was not necessary for an individual to be present for that individual to be convicted for the killings. He provided an example of two men who undertake a murder, one of whom stands guard one-half mile from the actual killing. Although the latter “was not actually present when the murder was done, if he was taking part . . . with the knowledge that that other man was going to put the killing into effect, then he was just as guilty as the person who fired the shot or delivered the blow.”²⁷³

The British military court in *Killinger* convicted three former Luftwaffe officers for being parties to the illegal interrogation of British prisoners of war. The Tribunal interpreted the phrase “concerned together as parties to the ill-treatment of British prisoners of war” to require that an individual possess knowledge of the abuse, and yet refrained from intervening to prevent these practices.²⁷⁴

In *Oenning*, defendant Emil Nix ordered his subordinate, Johannes Oenning, to eliminate a prisoner of war, and then assisted in secretly burying the victim. Nix clearly harbored the criminal intent to kill the victim, and subsequently assisted in covering up the crime.²⁷⁵

273. *Rhode*, *supra* note 56, at 54, 56 (Notes on the Case). The accused could not be legally executed absent a trial. *Id.* at 58 (Notes on the Case).

274. *Killinger*, *supra* note 142, at 69 (Notes on the Case). The Court required an intentional rather than negligent failure to act. *Id.* (Notes on the Case).

275. Trial Of Johannes Oenning and Emil Nix (Brit. Milit. Ct., Borken, Germany Dec. 21st-22nd, 1945), XI L. REPT. TRIALS WAR CRIM. 74-75 (U.N. War Crimes Comm'n, 1949) (hereinafter *Oenning*).

The charge of being concerned in killings was relied upon to impose accessory liability on those who countenanced, planned, or ordered killings, as well as those who carried out, condoned, and covered up illicit executions or interrogations. Individuals who performed a minor role were not held criminally culpable. The prosecution was required to demonstrate that a defendant acted with the intent to kill, mistreat, or assist in the victims' killing or mistreatment. Negligent conduct was not sufficient.²⁷⁶

Other domestic courts merely applied the basic principles of accomplice liability. In *Becker*, for instance, the accused were convicted of having caused, "without intent to inflict it," the death of those he was responsible for deporting to Germany.²⁷⁷

I. Genocidal Crimes

Poland brought three middle-ranking German occupation authorities to trial under the Decree of August 31, 1944, as amended by the Decree of February 16, 1945, concerning the punishment of Fascist-Hitlerite criminals guilty of murder and ill-treatment of civilian population, et al. The Decree punished any person who, in assisting the German authorities:

- (a) took part in committing acts of murder, ill-treatment or persecution against the civilian population or prisoners of war;

276. See *supra* notes 268-75. (In *Schonfeld*, the four accused were ordered to apprehend three Allied airmen believed to be in hiding in a house operated by the Dutch Resistance. The accused, Michael Rotschopf, killed the airmen, claiming at trial that he had shot them in order to prevent their escape from the German Security Police. The Judge Advocate instructed that the defendants could be found guilty of being concerned in the killings under alternative theories. The four could be found guilty as principals in the first or second degree or for involvement in a common plan to commit murder. A third approach imposed a presumption of guilt on those involved in a concerted plan. The Judge Advocate also instructed that actions subsequent to the killings did not create liability.) See *Schonfeld*, *supra* note 36, at 68-73 (Notes on the Case).

277. *Becker supra* note 254, at 70 (Notes on the Case).

(b) acted to the detriment of persons wanted or persecuted by the authorities of occupation for whatever reason it may be (with the exception of prosecution for common law crimes), by sentencing, detaining or deporting them²⁷⁸

These acts also violated Article 46 of the Hague Convention which provides that “[f]amily honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”²⁷⁹

The prosecution charged that the defendants’ acts amounted to genocide, that is, the destruction of a nation or a national group. The notes to the *Goeth* case clarify that genocide entails attacks against individuals due to their membership in a national group. This clarification does not necessarily require the immediate destruction of a collectivity. It also encompasses the disintegration of economic, cultural, political, religious, and social institutions, as well as attacks on the personal security, liberty, health, dignity, and lives of individuals. The first phase of genocide, the denationalization or the destruction of the national pattern of an oppressed group, typically is accompanied by a second phase that entails the imposition of the national pattern of the dominant group.²⁸⁰

Amon Leopold Goeth, an Austrian member of the Nazi Party and Waffen SS (military arm of the security police), was charged with ordering and participating in the deprivation of freedom, mistreatment, and extermination of Jews and Poles. His actions

278. *Quoted in* Trial Of Hauptsturmfuhrer Amon Leopold Goeth, (Sup. Nat’l Trib., Cracow, Aug. 27th-31st Aug. & Sept. 2nd-5th, 1946), VII L. REPT. TRIALS WAR CRIM. 1, 7 (U.N. War Crimes Comm’n, 1948) (Notes on the Case)[hereinafter *Goeth*]. (The decree also abrogated the superior orders defense. “The fact that any of the crimes envisaged in Articles 1 and 2 of the Decree was committed while in service of the enemy authority of occupation or on its orders, or under duress, does not exempt from criminal responsibility.”) *Id.* at 10 (Notes on the Case).

279. Hague Convention, *supra* note 61, at art. 46.

280. *Goeth*, *supra* note 278, at 7-10 (Notes on the Case).

were described as part of a series of coordinated actions aimed at the extermination of these groups. Goeth, with the assistance of security police experts on Jewish affairs, initiated the final liquidation of the Krakow ghetto on March 13, 1943. Approximately four thousand people were murdered, some of whom were personally shot by Goeth. The remaining ten thousand people were forced into the Plaszow labor camp. The next step was the liquidation of the Tarnow ghetto in September 1943. Goeth himself killed between thirty and ninety women and children, and sent roughly ten thousand Jews to Auschwitz by rail. Only four hundred arrived alive.²⁸¹

Between September 1943 and February 1944, Goeth liquidated the forced labor camp at Szebnie. He ordered the murder or deportation of inmates to other camps, resulting in the death of several thousand prisoners. Goeth also served as Commandant of the forced labor camp at Plaszow (Krakow) between February 1943 and September 1944. During Goeth's tenure, he caused the death of roughly 8,000 inmates, ordering a large number to be exterminated.²⁸² The Tribunal noted that "[t]he wholesale extermination of Jews and also of Poles had all of the characteristics of genocide in the biological meaning of this term, and embraced in addition the destruction of the cultural life of these nations."²⁸³ Goeth was sentenced to death.²⁸⁴

Rudolf Hoess, Commandant of the Auschwitz Camp between May 1940 and October 1943, was the second person accused that was convicted of genocide. Auschwitz was perhaps the most infamous of the nine concentration camps established by the Third Reich. Roughly four million Jews, Poles, and Russians were exterminated within the institution. As many as sixty thousand people were asphyxiated in gas chambers each day, and another twenty-four thousand were immolated daily in the crematoria. Those who were not exterminated were subjected to unsanitary

281. *Id.* at 3.

282. *Id.* at 1.

283. *Id.* at 9 (Notes on the Case).

284. *Id.* at 4.

conditions, inadequate food, forced labor, wholesale robbery, and other forms of mistreatment.²⁸⁵

Hoess, in addition to being held liable for the deprivation of human life, was also convicted of carrying out involuntary medical experiments. These experiments included castration, premature termination of pregnancy, sterilization, artificial insemination, and intrusive anti-cancer surgical procedures. The experiments involved procedures ranging from massive X-ray treatment, injections of large amounts of fluids into the uterus and fallopian tubes, radical amputations, surgical excisions, and transplantations. Hoess was sentenced to death.²⁸⁶

The Supreme National Tribunal observed that one of the aims of the Nazi Party was the biological and cultural extermination of subjugated nations, especially the Jewish and Slavic nations. This was intended to facilitate the territorial expansion of Germany. The Tribunal noted that the Third Reich's policy constituted "the crime of genocide . . . an attempt on the most organic bases of the human relationship, such as the right to live and the right to existence."²⁸⁷ The medical experiments were aimed at achieving the most appropriate means by which to reduce or destroy the reproductive power of the "non-German nations which were considered by the Nazis as standing in the way of the fulfillment of German plans of world domination. Thus, they were preparatory to the carrying out of the crime of genocide."²⁸⁸ Furthermore, "[T]hey constituted the preparatory stage of one of the forms of the crime of genocide, which was intended to be perpetrated by scientific means."²⁸⁹

285. Hoess, *supra* note 47, at 12.

286. *Id.* at 14-16. These experiments were often performed by unqualified doctors in appalling conditions. They did not serve any valid scientific purpose, and resulted in unnecessary suffering and injury. The victims experienced extreme pain, torture, permanent injury, and death. *Id.* at 25 (Notes on the Case).

287. *Id.* at 24 (Notes on the Case).

288. *Id.* at 25 (Notes on the Case).

289. *Id.* at 26 (Notes on the Case).

The third genocide trial was directed against Gauleiter and Reichsstadthalter (Governor) of the Warthegau, Artur Greiser. Greiser was prosecuted for acts violative of the August 31, 1944 Decree and the Hague Convention, and was sentenced to death.

In 1941, Greiser wrote that the Wartheland (western Poland) was to be cleansed of Poles, resettled by Germans, and transformed into a granary for the support of the Greater Reich. The Poles were to be deported into the Governor General (eastern Poland), and the Jews were to be exterminated.²⁹⁰

Greiser issued and implemented regulations intended to subordinate the Wartheland to Germany, reduce Poles to slave laborers, and cleanse the incorporated territories of Jews. These measures included the confiscation of property, limitations on marriage, deprivation of employment, deportation to slave labor, establishment of German schools, the arrest and extermination of clergy, the closing of churches, and the imposition of a criminal code that severely punished antagonism to the Third Reich. The intelligentsia was imprisoned and exterminated, Polish books and periodicals were seized, cultural centers were closed, and monuments and research centers were destroyed.²⁹¹

In 1940, Greiser initiated what the Tribunal characterized as the "systematic humiliation and insulting of the Polish nation, and . . . every sort of prohibition and order was employed to lower its standard of living, fertility, and strength."²⁹² Germans and Poles

290. Trial Of Gauleiter Artur Greiser (Sup. Nat'l Trib., Poland, June 21st-July 7th, 1946), XIII L. REPT. TRIALS WAR CRIM. 70, 71, 97 (U.N. War Crimes Comm'n, 1949)[hereinafter Greiser]. See Hague Convention, *supra* note 61, at arts. 43, 46-47, 50, 52, 55 & 56 cited in *id.* at 71. These acts were also in violation of the provisions of the Polish Penal code of 1932 pertaining to complicity in murder, grievous bodily harm, torture, and ill treatment. Greiser, *id.* at 107 (Notes on the Case).

291. *Id.* at 78-85. Poles, for instance, were required to work at the age of fourteen. They were to receive no more than eighty percent of the wage paid to German workers. Holidays were not to be granted, and the working day was to be a minimum of ten hours. There was no additional remuneration for overtime, night, or Sunday work. *Id.* at 85. Greiser wrote that "Germans are the lords, and Poles are the servants." *Id.* at 98.

292. *Id.* at 89.

were segregated. Shops were required to cater to Germans. Poles were to be served only during a limited number of hours. Poles were required to tip their hats, to defer to Germans on the footpaths, and were prohibited from using public transportation. Poles who engaged in sexual relations with Germans were subject to the death penalty.²⁹³

Several concentration camps for political prisoners were established within the Wartheland. The internees were beaten, mistreated, and killed. Greiser possessed the power of life and death over the inmates, and personally ordered the execution of between fifty and one hundred Poles for each German killed.²⁹⁴

Greiser singled out Jews for repression and extermination. This action included encouraging and organizing disappearances, conducting arbitrary searches and seizures, detaining Jews for compulsory labor, burning synagogues, defiling cemeteries, and seizing items of artistic value. Jews were completely cleansed from the Wartheland and deported into the General Government (eastern Poland), where they were ghettoized and subsequently exterminated.²⁹⁵

The Tribunal concluded that Greiser had launched a program of forced Germanization. This program was accomplished through physical and spiritual genocide, the deportation of Jews and Poles, the indoctrination of physically suitable Polish children into German culture, the mass extermination of the population, and the complete destruction of Polish culture and institutions.²⁹⁶ According to the Court, Greiser was not merely a cipher. He independently ordered, countenanced, and facilitated a systematic program to weaken the resistance and exterminate the Polish population.²⁹⁷ This constituted

293. *Id.* at 89-90.

294. *Id.* at 92-93.

295. *Id.* at 94-95.

296. *Id.* at 114 (Notes on the Case).

297. *Id.* (Notes on the Case).

a "general totalitarian genocidal attack on the rights of the small and medium nations to exist, and to have an identity and culture of their own."²⁹⁸

In sum, the three Tribunals catalogued a series of crimes contrary to the Hague Convention and the "principles of the law of nations and the postulates of humanity and the conscience of nations."²⁹⁹ These acts, both separately and combined, were considered to constitute genocide as well as a crime against humanity.³⁰⁰

The Tribunals described the first phase of genocide as entailing the disintegration of the Polish population through the destruction of its national, social, cultural, and economic institutions and the extermination of portions of the populace. The second phase involved the Germanization of the remaining population--inculcating biologically suitable children into German culture and providing for German emigration into Poland.³⁰¹ Most acts alleged against the accused occurred during the first phase. These included the segregation and subordination of Poles, repression of religious institutions and practices, attacks on culture and learning, economic exploitation of the population and resources, deportation of the Polish population, internment, torture, extermination, and the torture of Jews.³⁰²

298. *Id.* Greiser's defense of superior orders was rejected. Article 4 of the Decree of August 31, 1944 abrogated the superior orders and duress defenses. *Id.* at 117 (Notes on the Case).

299. *Id.* at 71. The articles of the Hague Convention which were contravened cover such concerns as enacting and changing existing laws; respecting the rights of families and religious convictions; confiscating private property; imposing collective responsibility and the requiring of civilian labor other than for the needs of the army of occupation; and seizing or destroying historic monuments and works of science and art as well as religious, charitable, scientific, and artistic institutions. See Hague Convention, *supra* note 61, at arts. 43, 46-47, 50, 52, and 56.

300. See Goeth, *supra* note 278, at 7-8 (Notes on the Case).

301. See *supra* note 280 and accompanying text. See Greiser *supra* note 290, at 113. (Notes on the Case).

302. Greiser, *supra* note 290, at 112-13 (Notes on the Case). "It should be noted that these are exactly the general characteristics of the crime of *genocide*, the

Goeth was convicted of both personally killing and ordering the execution and deportation of the occupied population. The Court noted that this constituted biological genocide, which resulted in the destruction of the cultural life of Jews and Poles.³⁰³ Rudolf Hoess, as Commandant of Auschwitz, helped further the Nazi persecution and extermination of various ethnic and religious groups at the Auschwitz concentration camp. He directed and condoned the extermination of approximately four million Jews through asphyxiation, shootings, hangings, lethal injections, systematic starvation, and excessive work. Hoess was also involved in mistreating and torturing inmates and supervising the wholesale robbery of property. The unique contribution of the *Hoess* case was the determination that the medical experiments conducted on inmates constituted biological genocide through scientific means, thus extending the definition of genocide to include preparations for the prevention of births.³⁰⁴ Artur Greiser both was Reichsstadthalter (governor) and Gauleiter (party leader) of Wartheland. He ordered, condoned, and encouraged the systematic enfeeblement of the Polish people. The Tribunal ruled that Greiser had committed both physical and cultural genocide, which broadened the crime to encompass attacks on the intellectual, political, religious, and social life of a community.³⁰⁵

These cases extended liability to those who participated in, ordered, or knowingly tolerated the commission of criminal activity. Liability was imputed to Greiser for both ordering and sanctioning the detention, torture, extermination, and destruction of Polish cultural institutions.³⁰⁶ Hoess was convicted of participating in murder and acting to the detriment of inmates by confining them in a

notion of which has been discussed in some detail in connection with other trials reported in this series.” *Id.* at 113 (Notes on the Case).

303. *See supra* notes 281-84 and accompanying texts.

304. *See supra* notes 285-89 and accompanying texts.

305. *See supra* note 290-98 and accompanying texts.

306. *See Greiser, supra* note 290, at 115-16.

camp where they were subjected to mistreatment and robbery.³⁰⁷

Genocide is defined as a criminal intent to exterminate a group.³⁰⁸ This mental element was not explicitly established as a requirement for conviction under the August 1944 Decree.³⁰⁹ However, the Polish Tribunals demonstrated that the defendant's intent was demonstrated through their statements,³¹⁰ the nature and purpose of their criminal activity,³¹¹ awareness of the Reich's genocidal plans,³¹² and the presumption that the accused were aware of the connection between their actions and the Reich's ultimate genocidal aspirations.³¹³

Tribunals also utilized expert witnesses to document the impact of the accused's criminal conduct. For instance, the prosecution in *Greiser* presented a demographics expert whose calculations concluded that the accused had been "personally responsible for the loss to the Polish nation of two million people in the Wartheland, as well as for the loss in the natural increase in population by 200,000."³¹⁴ The Tribunals dismissed the defendants' superior orders defense, determining that the accused exercised initiative in

307. Hoess, *supra* note 47, at 17-18 (Notes on the Case).

308. See Convention On The Prevention And Punishment Of The Crime Of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277.

309. See *supra* note 278 and accompanying text.

310. Greiser, *supra* note 290, at 97.

311. Hoess, *supra* note 47, at 25 (Notes on the Case). The medical experiments clearly were aimed at the prevention of births. *Id.*

312. *Id.* (Notes on the Case).

313. Goeth, *supra* note 278, at 2, 4. "Amon Goeth . . . life career from the early years was inseparably bound with the Nazi movement, and . . . [he] was responsible for the atrocities committed as part of a general pattern of the German policy aiming at complete extermination of the Jewish population in Europe." *Id.*

314. Greiser, *supra* note 290, at 101 (Testimony of Dr. St. Waszak, Director of the Statistical Office in Poznan).

carrying out their crimes³¹⁵ and knowingly implemented and issued clear legal orders.³¹⁶

J. Military Justice And Occupation Courts

A central contribution of post-war domestic trials was the specification of due process standards for occupation courts. Gauleiter Robert Wagner served as head of the civil government of Alsace during the German occupation. He regularly intervened in the administration of justice by instructing the Prosecutor and President of the Special Court as to the verdict and penalties to be imposed in various prosecutions.³¹⁷ Wagner was later convicted of murder and complicity in murder, and was sentenced to death.

Wagner's powerful influence was demonstrated in the case of Theodore Witz. Witz was a young Alsatian who was tried and convicted of the illegal possession of an antiquated firearm. Wagner dismissed the prosecutor's plea that Witz was an impetuous youth who should be sentenced to four or five years in prison. Instead, Wagner ordered Witz "to be executed. Urgent."³¹⁸ The Special Court sentenced Witz to death, and Wagner rejected the prosecutor's plea for a modification of the sentence.³¹⁹

In a second case, fourteen Alsations who allegedly killed a frontier guard while attempting to escape to Switzerland were brought to trial. The accused were only informed of the charges against them and permitted to meet with their appointed attorney a few hours prior to trial. They were neither advised of their rights to request a supplementary inquiry into the charges, nor of their rights to present witnesses and designate an attorney. Wagner also

315. See Goeth, *supra* note 278, at 10.

316. See Greiser, *supra* note 290, at 114-116.

317. Wagner I, *supra* note 34, at 25. There is no recorded instance in which Wagner exercised mercy in reviewing a sentence. *Id.* at 25.

318. *Id.* at 31.

319. *Id.*

reportedly conferred with the Chief Judge, Public Prosecutor, and Head of Security Services on the eve of trial.³²⁰

The prosecutor conceded in his closing argument that there was no evidence that the accused had been responsible for the death of the guard. He contended that the defendants deserved the death penalty and the accused were quickly dispatched to the executioner. One victim who was mistakenly included in the execution roster signed by Wagner was an underage minor who had been confined in a mental institution.³²¹

Wagner was not a disinterested observer. His initial intention was to execute the Alsatians without a trial, and he only agreed to the proceedings on the condition that they be initiated within twenty-four hours. Wagner was so confident of a conviction that he issued a command to the Gestapo to execute the detainees prior to trial.³²²

Wagner was convicted of complicity in the murder of Witz and the thirteen Alsatians, but the French Tribunal determined that the evidence did not clearly establish that he had been complicit in the juvenile's execution.³²³ Chief Judge Richard Huber, President of the Special Court at Strasbourg, was tried in *absentia*. Herber was also found complicit in murder and was sentenced to death. Prosecutor Ludwig Luger successfully invoked the superior orders defense.³²⁴

Concurrently, a series of prosecutions of Japanese officers and combatants established legal standards governing the war crimes prosecution of captured belligerents. In *Sawada*, Major-General

320. *Id.*

321. *Id.* at 32.

322. *Id.* Wagner also ordered the execution of Allied prisoners without trial. In addition, he was instrumental in establishing the Schirmeck concentration camp, in which several hundred were executed and others were exterminated. *Id.* at 33.

323. *Id.* at 40. The name of the juvenile Muller had been inserted in the place of defendant Brungard on the petition for mercy, which Wagner rejected. The list contained thirteen names, yet fourteen individuals were executed. The roster was corrected following the executions. The Court presumably viewed this as an unfortunate error rather than as a deliberate scheme. *Id.* at 32.

324. *Id.* at 42.

Shigeru Sawada, former Commanding General of the Japanese Imperial 13th Expeditionary Army in China, was convicted of prosecuting eight United States pilots on false and fraudulent charges. For example, the pilots were downed and captured by Japanese forces in April 1942, and were subjected to interrogation and torture during fifty-two days in solitary confinement. The Americans were then brought before several officers, including defendants Second-Lieutenant Okada Ryuhei and Lieutenant Wako Yusei, who they later learned had constituted a court-martial. The pilots were not aware at the time that they were being subjected to trial, or that charges were being lodged against them. The defendants sat passively as the accusations were read in Japanese. They were neither provided the opportunity to enter a plea nor to be represented by counsel. The prosecution did not offer witnesses or evidence and the proceedings were not transcribed.³²⁵

Pursuant to Tokyo's request, the trial was delayed until the issuance of the Enemy Airmen's Act in August 1942. This specified that pilots who attacked any non-military targets or violated international law were subject to a possible death sentence, which might be commuted by the court to a term of imprisonment. Following the hearing, a staff officer arrived with orders from Tokyo instructing the Court to impose the death penalty. The Tribunal considered the evidence for an hour and dutifully returned a verdict of guilty. The death sentences were later modified in response to Tokyo's decision that only three should be executed and five condemned to life imprisonment of the pilots.³²⁶

The Japanese Tribunal was appointed and served under the command of General Shigeru Sawada, Commander of the 13th Army, headquartered in Shanghai. Sawada was absent from headquarters during the prosecution. Upon his return in September 1942, he reviewed the trial and protested to General Hata, Commanding General of the China Forces, who responded that

325. Sawada, *supra* note 49, at 2-3. The defendants contended that a report of the damage resulting from Allied bombing as well as the flyers' alleged confessions were read in court. There was no evidence that these purported confessions were genuine. *Id.* at 3.

326. *Id.* at 3-4.

Tokyo was responsible for the severe sentences. Sawada made no further efforts to suspend or mitigate the punishments handed out by the Court.³²⁷

The fourth accused, Captain Tatsuta Sotojiro, was warden of the Kiangwan Military Prison in Shanghai and was responsible for the execution of the three fliers. Tatsuta was acquitted of murder--the Tribunal determined that Tatsuda possessed neither actual nor constructive knowledge of the nature of the trial. However, Tatsuta was adjudged responsible for depriving the surviving prisoners of heat and adequate clothing, food, and health and hygiene supplies.³²⁸

Sawada was acquitted of failing to commute, remit, and revoke the sentences. This acquittal appears to have been based on the fact that he protested the Court's decision to his immediate superior. The Tribunal presumably did not require that Sawada bring his objections to the attention of the Tokyo command. Although he had been informed that the pilots were receiving the same treatment accorded to Japanese officers in prison, Sawada was sentenced to five years of hard labor for failing to intervene to insure that the Americans were protected from mistreatment.³²⁹

Wako and Okada were convicted of depriving the defendants of life and liberty without a fair trial. Wako was the law member of the Military Tribunal. Yet, he unquestioningly followed orders, accepted the purported confessions, and voted to impose the death penalty. As a result he was sentenced to hard labor for nine years. Okada possessed no legal training, initially resisted serving as a judge, and, like Wako, followed instructions in giving out capital punishment. He was sentenced to five years of hard labor. Tatsuta followed orders in denying the prisoners the treatment to be accorded prisoners of war. Despite the lack of evidence that Tatsuta personally abused or mistreated the prisoners, he was sentenced to five years of hard labor.³³⁰

327. *Id.* at 4.

328. *Id.* at 6.

329. *Id.* at 7-8.

330. *Id.* The relatively light sentences appear to reflect the fact that the three

The notes to the *Sawada* case catalogue several aspects of the trial which contributed to the Japanese Court's criminal character: a failure to specify the charges; the denial of counsel, an interpreter, and the right to examine the evidence and to take the stand; reliance on false and fraudulent allegations and evidence; and the judges' failure to conscientiously examine the documents submitted to the court.³³¹

In *Ohashi*, an Australian Tribunal convicted two Japanese military police officers, Sergeant-Majors Shigeru Ohashi and Yoshifumi Komoda, of issuing and assisting in carrying out a judicial order to behead eighteen civilian inhabitants of New Britain. The evidence indicated that the Japanese government had authorized summary trials to combat unrest in occupied territories such as New Britain. Unit commanders were accorded discretion as to the convening, constitution, and penalties to be meted out by the field courts.³³²

The eighteen New Britain defendants pled guilty to conspiring against the armed forces of Japan. They were denied counsel, but were permitted to address the Court and were provided with an interpreter. The two prosecution witnesses testified for roughly four minutes and the Court conferred for approximately ten minutes before returning a guilty verdict. Shigeru Ohashi, Yoshifumi Komoda, and a third judge adjourned for an additional ten minutes before sentencing the defendants to death. The Provost Marshal, Colonel Kikuchi, immediately confirmed that the trial had been fair. The executions were carried out an hour later. Ohashi and Komoda were convicted and sentenced to life imprisonment. This was later commuted to imprisonment for two years. The other defendants

low-ranking defendants acted pursuant superior orders. *Id.* at 13 (Notes on the Case).

331. *Id.* at 12-13 (Notes on the Case).

332. Ohashi, *supra* note 48, at 25-26. The accused allegedly concealed weapons, stole grenades and rations, blew up a petrol dump, and attacked a Japanese civilian and a Japanese soldier. *Id.* at 25. Offenses in occupied territory ordinarily would have been prosecuted before a court martial. However, an April 1944 Declaration provided unit commanders with the discretion to convene a summary tribunal rather than a court martial. *Id.* at 25-26.

were acquitted. Although they had been involved in carrying out the executions, they were adjudged to have been unaware of the illicit character of the court proceedings.³³³

The Australian Judge Advocate instructed that charges of treason in time of war might be prosecuted before a military court or such other court as the occupant may assemble. International law specifies neither the constitution nor the procedures that are to be followed. But, the trial must conform to the fundamental principles of justice. Although the defendants pled guilty to war treason, the Australian Court determined that the trial had failed to conform to the requirements of international law. These procedures, according to the Judge Advocate, include that reasonably informed judges act in good faith, informing the accused of the charges and evidence, a fair evaluation of the evidence, and punishment that does not outrage the sentiments of humanity.³³⁴

In *Isayama*, eight officers attached to the Japanese Formosan Army were convicted by an American Military Commission for the mistreatment and false trial of fourteen United States airmen. The

333. *Id.* at 26. The Japanese alleged that they had acted in a summary fashion based on their fear that the local population would make an effort to rescue the incarcerated conspirators. The third judge--the accused's superior, Lieutenant Yamada--who was not indicted. *Id.*

334. *Id.* at 28, 30-31 (Notes on the Case). In *Shinohara*, three Japanese officers were convicted of failing to provide a fair and proper trial to two natives of Kanbanguru. The prosecutor claimed that five factors must be considered: whether there was an impartial tribunal; whether the accused was informed of the charges prior to trial; whether some evidence was presented against the accused; whether the right against self-incrimination was respected; and whether the accused was provided the right to call witnesses and speak in mitigation. The Judge Advocate noted that there was sufficient evidence for the Tribunal to return a guilty verdict. However, the proceedings failed to fulfill the standards for a fair and proper trial. The President of the Court had determined that the accused was guilty prior to trial. In addition, the charge sheet was translated into Pidgin English, which was not understood by the accused. On the other hand, the defendant had pled guilty and had been extensively interrogated by the Court. The Australian Court sentenced the accused to five years in prison, but this was not confirmed by the reviewing authority. *Trial Of Captain Eitaro Shinohara And Two Others*, (Aust. Milt. Ct., Rabaul, March 30th-April 1st, 1946), V L. REPT. TRIALS WAR CRIM. 32, 34-36. (U.N. War Crimes Comm'n, 1948).

airmen were prosecuted under the infamous law of October 12, 1944, that punished enemy airmen who engaged in the indiscriminate bombing and strafing of Japanese civilians and forces.³³⁵

The lead defendant, Lieutenant-General Harukei Isayama, Chief of Staff of the 10th Area Army, received instructions from Tokyo to prosecute the captured American airmen under the Enemy Airmen's Act and to impose severe punishments. Harukei Isayami proceeded to instruct his subordinates to prepare the cases for trial. Several interrogation records were falsified to incriminate the defendants, and these fraudulent admissions were then introduced at trial.³³⁶

The accused were not afforded the opportunity to obtain evidence or to be represented by counsel. The trials were conducted in Japanese, and only the enumeration of the charges was translated into English. All fourteen defendants were convicted on the basis of the contrived confessions as well as police investigations of the bomb damage. Tokyo instructed the military tribunals that death was the appropriate penalty, and on June 19, 1945, the American fliers were lined up in front of an open ditch, shot to death, and buried in the trench.³³⁷

Colonel Seiichi Furukawa and Lieutenant-Colonel Naritaka

335. Trial Of Lieutenant General Harukei Isayama And Seven Others, (United States Milit. Comm'n, Shanghai, July 1st-25th, 1946), V L. REPT. TRIALS WAR CRIM. 60 (U.N. War Crimes Comm'n, 1948). Defendants were subject to trial before a military tribunal composed of three judges--two ordinary army officers and one judicial officer--who were to be appointed by the commander. The Act punished enemy airmen who carried out any of the following: bombing and strafing, with intent to kill, wound or intimidate civilians; bombing and strafing with intent to destroy or burn private objectives of non-military nature; bombing and strafing non-military objectives other than in unavoidable circumstances; disregarding human rights and carrying out inhuman acts; or entering into the jurisdiction with the intent of carrying out any of the foregoing. These acts were to be punished by death, but depending on the circumstances, this could be reduced to either imprisonment for ten years or life. *Id.* at 61.

336. *Id.* at 61-62.

337. *Id.* at 62-63.

Sugiura were sentenced to death. Their sentences were subsequently commuted to life imprisonment. Seiichi Furukawa was head of the Judicial Department and chief prosecutor. He was responsible for instructing the judges and superiors on the relevant law and facts, particularly the culpability of radiomen and photographers, under the theory of accomplice liability. Following the Japanese surrender, Seiichi Furukawa directed prosecutors to modify the interrogation records so as to give the appearance that there was little doubt concerning the defendants' guilt. Naritaka Sugiura served as chief judge in the prosecutions. He also was a member of the Intelligence Department, and was involved in interrogating the airmen prior to their being turned over to the Judicial Department for investigation.³³⁸

Harukei Isayama and Captain Yoshio Nakano were sentenced to life imprisonment. Harukei Isayama served as liaison with Tokyo, discussed the decision with the judges and members of the judicial department, and monitored the progress of the prosecutions. He was also responsible for preparing and filing the order of execution. Yoshio Nakano was an associate judge in the trials and, as a member of the Intelligence Department, was involved in the interrogations.³³⁹ Two military judges, Jitsuo Date and Ken Fujikawa, were convicted and sentenced to lengthy prison terms. The latter two verdicts were not confirmed by the Reviewing Authority, which had failed to find that the defendants had been aware that the evidence against the airmen had been fabricated. Masaharu Matsui and Tadao Ito had been involved in interrogating the airmen, and were convicted and sentenced to terms of forty and twenty years in prison, respectively.³⁴⁰

The notes to the case point out that the trials failed to meet the requisite standards of fairness. The most glaring omissions included reliance on false evidence, the denial of counsel and interpretation, denial of the opportunity to obtain evidence or witnesses, and the

338. *Id.* at 63-64.

339. *Id.*

340. *Id.* at 64.

summary nature of the proceedings.³⁴¹

In *Hisakasu*, six Japanese officers were convicted of participating in the illegal trial and unlawful killing of United States Major Houck, whose plane was shot down during an air raid on Hong Kong harbor. During his interrogation, the Major denied that he had intentionally attacked a thirty-ton Chinese civilian vessel and caused the death of eight Chinese nationals.³⁴²

The evidence presented by the prosecution at trial consisted of two reports on damage to the vessel and a record of Houck's interrogation in which he denied culpability. At trial, Houck also disavowed attacking the ship. Following the proceedings, the judges unanimously voted for the death penalty.³⁴³

General Tanaka Hisakasu, Governor General of Hong Kong and Commanding General of the Japanese 23rd Imperial Expeditionary Army at Canton, had delegated full authority over Hong Kong to his Chief of Staff, Major-General Fukuchi Haruo. Tanaka Hisakasu had cautioned Fukuchi Haruo about taking action against Houck. Fukuchi Haruo requested and obtained permission from Tokyo to conduct the trial. He then directed the preparation of evidentiary reports and endorsed the judgment of death without seeking the required approval from Tanaka Hisakasu. There was no evidence that Tanaka Hisakasu had ordered or participated in the trial or that he was aware that the sentence would be carried out without his personal approval.³⁴⁴

Lieutenant-Colonel Kubo Nishigai and Major Watanabe Masamori served on the judicial tribunal, and relied on the judgment of Captain Yamaguchi Koichi. Yamaguchi Koichi was an experienced legal officer and had insisted on Houck's guilt. Both lay members admitted that they had not been compelled to adjudge

341. *Id.* at 65 (Notes on the Case).

342. Trial Of General Tanaka Hisakasu And Five Others, (United States Milit. Comm'n, Shanghai, Aug. 3-Sept. 3, 1946), V L. REPT. TRIALS WAR CRIM. 66 (U.N. War Crimes Comm'n, 1949) [hereinafter *Hisakasu*].

343. *Id.* at 67.

344. *Id.* at 68-69.

the defendant guilty, and Watanabe Masamori further conceded that the trial had been unfair.³⁴⁵

Prosecutor Captain Asakawa Hiroshi was acquitted due to the Court's finding that he had acted at the direction of his superior Shii, who had committed suicide prior to the American prosecution. Tanaka Hisakasu and Fukuchi Haruo were sentenced to death, Kubo Nishigai and Yamaguchi Koichi were condemned to life imprisonment, and Watanabe Masamori to fifty years in prison. The Confirming Authority refused to ratify Tanaka Hisakasu's sentence, and commuted Fukuchi Haruo's punishment to life and Kubo Nishigai and Watanabe Masamori's sentences to imprisonment for ten years. The commutation of Tanaka Hisakasu's sentence presumably was based on his absence during the trial and his purported lack of knowledge concerning the character of the proceedings. Houck's trial resembled that of other American airmen because he was provided neither defense counsel nor an opportunity to prepare a defense or to secure witness. Furthermore, witnesses were not presented to corroborate the charges. The entire trial lasted two hours, suggesting that the verdict was reached in a summary fashion.³⁴⁶

In *Latza*, the Norwegian Supreme Court affirmed a decision by the Eidsivating Lagmannsrett (Court of Appeals) that acquitted Hans Paul Helmuth Latza, President of the Standgericht (Special Tribunal), and Reinhold Regis and Christian Kehr, assessor judges. The indictment alleged that the prosecution presided over by Latza constituted an illicit act of reprisal in which the five victims had been sentenced to death and executed under legal provisions that were contrary to the laws and customs of war.³⁴⁷

345. *Id.* at 69.

346. *Id.* at 70-71 (Notes on the Case).

347. Trial Of Hans Paul Helmth Latza And Two Others (Eidsivating Lagmannsrett and the Supreme Court of Norway, Feb. 18th, 1947-Dec. 3rd 1948), XIV L. REPT. TRIALS WAR CRIM. 49 (U.N. War Crimes Comm'n 1949)[hereinafter *Latza*]. Latza was convicted, and the two other defendants, acquitted by the Lagmannsrett in March 1947. The Supreme Court quashed the verdict and ordered a new trial. The re-trial before the Eidsivating Lagmannsrett resulted in the acquittal of all three defendants in January 1948. The Supreme

Latza was named head of a Standgericht (Special Court), which had been established by Hitler following the assassination of the German Chief of Police in Oslo. Four Norwegians who were viewed as the intellectual inspirations behind the Norwegian resistance were immediately arrested, brought to trial, and sentenced to death. Six alleged saboteurs were also subsequently brought to trial and condemned to capital punishment. A seventh defendant, Aage Martinsen, was convicted of failing to denounce his two brothers-in-law, both of whom had allegedly participated in sabotage-related activities. All eleven were executed in February 1945.³⁴⁸

The Lagmannsrett held that there were no express provisions in international law regulating the minimum court procedures to be provided by an occupying power. In the opinion of the Norwegian Court of Appeals, the Standgericht's procedures had been fair and unbiased, and there was no evidence that German officials had influenced the Standgericht's rulings. The accused had been informed of the charges against them, and were provided an opportunity to testify on their own behalf. The evidence also sustained the convictions since there was proof that various defendants were active in the underground. The accused were not provided counsel, but there was no indication that they had requested representation.

The prosecution relied on reports by the German police and unnamed Norwegian collaborators. However, the prosecution's reliance on direct testimony was not adjudged violative of proper procedures because this reliance was not an indispensable principle of international law. The Lagmannsrett further concluded that the sentences meted out by the Stangericht were not disproportionate to the defendants' crimes. The imposition of punishment was a matter of discretion, and the Court could not be faulted for seeking to deter and incapacitate the Norwegian resistance.³⁴⁹

On the other hand, the Norwegian Supreme Court believed the

Court upheld the judgment and findings of the Lagmannsrett in December 1948. *Id.* at 51.

348. *Id.* at 54-56.

349. *Id.* at 68-70.

Standgericht's procedures were questionable. However, the Court's findings were not entirely decisive. The determining factor was that "there had been a fair trial before independent judges who delivered their judgment according to their free conviction. . . . The Standgericht went through each and every charge with the accused and . . . they were given full opportunity to explain themselves. . . . [T]he accused . . . had partly admitted charges brought against them."³⁵⁰ In addition, the Supreme Court noted that occupation courts had understandably imposed severe punishments in order to stem the Norwegian resistance.³⁵¹

In sum, the Norwegian Supreme Court found that impartiality, the opportunity to present evidence, and the grounding of a conviction on sufficient evidence were the indicia of a fair trial. The Court did not find it controlling that the prosecution had failed to memorialize the charges in writing prior to trial, relied on indirect evidence, neglected to provide counsel to the accused, and that the reviewing authority provided only cursory review.³⁵² The Supreme Court's conclusion seemingly overlooked the fact that the Standgericht had been explicitly established to eliminate opposition forces, and that Latza had close and continuing contacts with high-ranking Nazi officials prior to trial. The Norwegian Courts also deferred to German sovereignty in adjudging the propriety of the penalties and punishment meted out to the Norwegian defendants. Yet, the activities of five of the seven intellectual leaders were benign, ranging from anti-German propaganda and financially assisting the underground to assisting the escape of Jews and political dissidents. Only two defendants, those involved in smuggling arms, clearly were engaged in war treason.³⁵³

An additional issue addressed by domestic tribunals was

350. *Id.* at 82. The questionable procedures included the failure to specify the charges in writing, the absence of defense counsel, the indirect nature of the evidence, the summary nature of the proceedings, and the superficial review provided by the superior officer. *Id.* at 81.

351. *Id.* at 83.

352. *Id.* at 81.

353. *Id.* at 53-57.

whether the citizens of occupied countries were obligated to comply with German law and denounce individuals opposed to the Third Reich. The United Nations War Crimes Commission adopted the position that an act of denunciation was not a delict. Only an illicit arrest, torture, or deportation that resulted from the denunciation was punishable. A different approach was adopted under French municipal law, which treated denunciation as an independent crime regardless of the consequences. The French Ordinance of January 31, 1944, defined "denunciation" as providing information concerning individuals who either were active in the resistance or who refused to cooperate with occupation authorities. Denunciation also included reporting the commission of "acts punishable under the laws of the French quisling administration, when such laws were not confirmed by the French Government after the war, as well as acts for which an amnesty had been granted or which had entailed punishments quashed by higher courts."³⁵⁴

A Permanent French Military Tribunal convicted German citizen Jean-Pierre Lex for having denounced and instigated the deportation and looting of seventeen French families.³⁵⁵ Similarly, in *Latza*, the defendants were charged for having illicitly convicted defendant Aage Martinsen, a Norwegian police officer, because he did not denounce his brother-in-laws whom he allegedly was aware were involved in sabotage. The Norwegian Supreme Court ruled that it would have been more consistent with the laws of humanity and dictates of public conscience for the panel to have refused to impose a punishment. Sanctioning this conduct appeared contrary to the prohibition, which required the population of an occupied territory to take part in war operations against their own country. Nevertheless, the Norwegian Supreme Court noted that respectable

354. Becker, *supra* note 254, at 72 (Notes on the Case). The United Nations War Crimes Commission standard punished denunciation under the law of complicity. *Id.*

355. Trial Of Jean-Pierre Lex, (Perm. Milit. Trib., Nancy, May 13th, 1946), VII L. REPT. TRIALS WAR CRIM. 74 (U.N. War Crimes Comm'n, 1948). Lex was a German citizen residing in Peltre who worked as assistant to the Secretary of the Town Hall. Lex informed occupation authorities that the families were guilty of having used the French language and of conducting anti-German propaganda. *Id.*

scholarly authorities had adopted the position that a duty to denounce may attach to imminent acts undertaken by irregular combatants that are inconsistent with international law. The lack of a clear consensus on the permissibility of punishing denunciation persuaded the Court that the best course was refusal to convict the defendants on this count.³⁵⁶

In sum, the accused in the American prosecutions were convicted of denying certain basic safeguards that were recognized by all civilized nations as essential to a fair trial.³⁵⁷ These rights were considered to arise from Article 2 of the Geneva Prisoners of War Convention, which is declaratory of customary international law. This article provides an independent source of due process guarantees.³⁵⁸ The Australian trials affirmed that similar rights must be provided in the trial of civilian inhabitants of occupied territories accused of war crimes.³⁵⁹ The fact that trials before occupation courts provided the same level of protection as were guaranteed to persons belonging to the armed forces of the detaining power did not constitute a defense. A state may not rely on municipal law to avoid its international obligations.³⁶⁰

There is no talismanic formula as to the rights required. However, the impartiality of the Tribunal appears central.³⁶¹ The Judge Advocate, in *Ohashi*, advised that "[t]he Court should satisfy itself that the accused is guilty before awarding punishment . . . but there must be consideration by a tribunal . . . who will endeavor to judge the accused fairly upon the evidence . . . honestly endeavoring to discard any preconceived belief in the guilt of the accused or any prejudice against him."³⁶² Those, such as Robert Wagner, who

356. Latza, *supra* note 347, at 82-83.

357. *See supra* notes 335-41 and accompanying texts.

358. *See* Hisakasu, *supra* notes 342, at 73 (Notes on the Case).

359. *See supra* notes 332-34 and accompanying texts.

360. Hisakasu, *supra* note 342, at 72-73 (Notes on the Case).

361. *See supra* note 350 and 352 and accompanying texts.

intervened to influence judicial decisions along with individuals who complied with these commands and perverted the judicial process, were adjudged complicit in murder.³⁶³

The other requisites for a fair trial include the presentation of false and fraudulent charges and facts, the provision of counsel, interpretation, and the opportunity to testify and address the court. Other essentials include informing the accused of the charges, providing an opportunity to examine documents, and insuring that the trial is sufficiently lengthy to permit an adequate presentation and investigation of the facts.³⁶⁴

The Judge Advocate in *Ohashi* noted that the punishment “should not be one which outrages the sentiments of humanity.”³⁶⁵ For instance, Wagner and two others were adjudged guilty of murder for sentencing Theodore Witz to death for possession of an antiquated firearm.³⁶⁶ However, Norwegian panels were distinguished by the deference they paid to the discretion of occupation courts. They accepted the use of the death penalty on those who had engaged in anti-German propaganda, financially supported the resistance, or sheltered Jews and political dissidents.³⁶⁷

Most of those convicted were once judges.³⁶⁸ Some, however, were lay members,³⁶⁹ and others served as law representatives³⁷⁰ or

362. *Quoted in Hisakasu, supra* note 342, at 75 (Notes on the Case).

363. *See supra* notes 317-24 and accompanying texts.

364. *See supra* notes 331 and 334 and accompanying texts.

365. *Quoted in Hisakasu, supra* note 342, at 75 (Notes on the Case).

366. *See supra* notes 318-19 and accompanying texts.

367. *See supra* note 349 and 351 and accompanying texts.

368. *See Hisakasu, supra* note 342, at 77 (Notes on the Case). Jitsuo Date and Ken Fujikawa did not have their sentences confirmed. *See supra* note 340 and accompanying text.

369. *See supra* notes 330 and 345-46 and accompanying texts.

370. *Id.*

as Chief Judge.³⁷¹ Courts appeared reluctant to convict prosecutors, presumably believing that they had only carried out the orders of superiors and were not responsible for denying defendants due process or meting out punishment. For example, in *Hisakasu*, Asakawa Hiroshi was indicted for having acted as prosecutor in a trial that resulted in the death of an American airmen. But, he was determined to have acted under the direction of Prosecutor Shii and was acquitted by the Tribunal.³⁷² Also in *Isayama*, Seiichu Furukawa was convicted, but his conviction appeared to have been partially based on his role in falsifying interrogation records.³⁷³

Judges were acquitted or leniently punished when they were unaware of the false and fraudulent nature of the proceedings and had reached an independent decision.³⁷⁴ The sentences of the two lay judges in *Hisakasu* were commuted to ten years in prison. However, Yamaguchi Koichi, the law member of the judicial panel, was sentenced to life imprisonment.³⁷⁵ Judges were also acquitted or given lenient sentences when the denial of fair procedures did not prejudice the defendants. For example, in *Shinohara*, the evidence indicated that Captain Eitaro Shinohra had determined that two civilians accused of war treason in the South Pacific were guilty of war treason prior to trial. However, the accused admitted guilt and received some of the requisites of a fair trial.³⁷⁶ The defendants in *Ohashi* also pled guilty and, despite the flawed trial procedures, Judges Shigeru Ohashi and Yoshiumi Komoda had their sentences changed to two years in prison.³⁷⁷

371. See *supra* note 324 and accompanying text.

372. See *supra* note 346 and accompanying text. Prosecutor Ludwig Luger was acquitted in *Wagner*. See *supra* note 324.

373. *Hisakasu*, *supra* note 342, at 78 (Notes on the Case). See *supra* note 338 and accompanying texts.

374. See *supra* note 340 and accompanying text.

375. See *supra* notes 345-46 and accompanying texts.

376. See *Shinohara*, *supra* note 334, at 32-34. The accused's sentence of five years in prison was not confirmed. *Id.* at 34.

Two military officers with command authority over the proceedings initiated against the Allied victims, Major-General General Shigeru Sawada and General Tanaka Hisakasu, were acquitted. Tanaka Hisakasu was absent from his headquarters during the trial. He neither possessed a basis for doubting the fairness of the trial nor a reason to believe that the sentences would be carried out without his consent. The Confirming Authority refused to confirm Hisakasu's conviction.³⁷⁸ Sawada, on the other hand, was informed of the harsh sentences meted out against the American airmen on his return to headquarters. He protested the penalties to his superior officer, and was acquitted on the complicity in murder charge.³⁷⁹

Persons carrying out executions who lacked criminal intent were acquitted. In *Ohashi*, the accused were determined to have taken part in the execution of the eighteen civilians, but only the two who had acted as judges were adjudged guilty. The interpreter, as well as four of the executioners who were adjudged to have been unaware of the illicit nature of the proceedings, were acquitted.³⁸⁰ The reviewing authority in *Sawada* refused to confirm the conviction of Sotojiro Tatusuta for knowingly causing the death of three United States prisoners. The writ of execution appeared to be facially legal and, while Tatusuta briefly visited the courtroom, there was no conclusive proof that he had possessed either actual or constructive knowledge of the illegality of the trial.³⁸¹

377. See *supra* note 332-34 and accompanying texts.

378. See *supra* notes 344 and 346 and accompanying texts.

379. See *supra* notes 327 and 329 and accompanying texts. Sawada also possessed jurisdiction over the prison in which the victims had been incarcerated under dire conditions. He was convicted of failing to intervene to prevent their mistreatment. See *supra* notes 328-29 and accompanying texts.

380. See *supra* notes 332-34 and accompanying texts.

381. See *supra* notes 328 and 330 and accompanying texts. Those executioners convicted in other trials typically acted despite the absence of evidence that a trial had been conducted and often attempted to conceal the killings, suggesting that they realized the criminal nature of their conduct. See *supra* notes 231-34 and accompanying texts.

K. Membership In Criminal Organizations

Article Nine of the Nuremberg Charter authorized the International Military Tribunal to declare German organizations criminal. The competent national authority of any Signatory was authorized under Article Ten to criminally prosecute those who knowingly belonged to such organizations. The criminal character of these groups or organizations was considered established and not subject to challenge. This process was intended to ease the burden of proof placed upon prosecutors and expedite the prosecution of Nazi activists.³⁸²

A criminal organization, according to the International Military Tribunal, is analogous to a criminal conspiracy in that both involve "cooperation for criminal purposes."³⁸³ The requisite requirement is that "[t]here must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter."³⁸⁴ Knowingly having membership in such organizations was considered criminal. Those who lacked awareness of an organization's criminal purposes or acts as well as those who were conscripted into such organizations were excluded from criminal liability unless personally implicated in the commission of crimes condemned in the Nuremberg Charter.³⁸⁵

The Leadership Corps of the Nazi Party, Gestapo, and SD (Security Police), as well as the SS (Security Service), were declared criminal. However, no such declaration was issued in regards to the SA (party para-military, abolished in 1934), Reich Cabinet, or German General Staff and High Command.³⁸⁶ The Tribunal noted that the Reich Cabinet had not convened after 1937 and the membership was so modest that individual prosecutions could be

382. Nuremberg Charter, *supra* note 4, at arts. 9-10.

383. Nuremberg Judgment, *supra* note 65, at 500.

384. *Id.*

385. *Id.*

386. *Id.* at 498-521.

conducted.³⁸⁷

The Polish Decree of August 31, 1944, in Article Four, punished membership in criminal organizations.³⁸⁸ The Supreme National Tribunal of Poland ruled that while it was bound by the findings of the International Military Tribunal, the Nuremberg Charter authorized the Supreme Tribunal to declare additional organizations criminal.³⁸⁹ The Supreme Tribunal explained that the rationale for punishing organizational membership was that the crimes committed by groups were more dangerous than those committed by individuals. The Reich's mass atrocities, for example, could not have occurred absent criminal combinations that were cemented by their commitment to a common goal.³⁹⁰

The Supreme National Tribunal, in the March 1947 trial of Ludwik Fischer, former governor of Warsaw, and his assistant, Ludwik Leist, declared that the occupation government of the Government General of Poland was a criminal group. This criminality was based on the occupation government's aspirations and activities. The Court noted that Hitler had adopted the view that the Polish State had ceased to exist, and that the Reich was therefore unrestrained by the limitations imposed on an occupying power under international law. Germany proceeded to implement a series of genocidal policies that resulted in the death or disappearance of close to seven million residents of Poland and material losses

387. *Id.* at 520.

388. *Cited and quoted in* Trial Of Dr. Joseph Buhler, (Sup. Nat'l Trib., Poland, June 17th-July 10th, 1948), XIV L. REPT. TRIALS WAR CRIM. 23, 41 (U.N. War Crimes Comm'n, 1949) (Notes on the Case) [hereinafter Buhler]. A criminal organization is defined as a group or organization that has as its aims the commission of crimes against peace, war crimes or crimes against humanity; or which while having a different aim, tries to attain it through the commission of such acts. Article Four specifically mentioned the Nazi Party, S.S. (Security Detachments), State Secret Police (Gestapo) and Security Service (S.D.). *Id.*

389. *Id.* at 42 (Notes on the Case).

390. Trial Of Ludwik Fischer And Ludwik Leist, (Sup. Nat'l Trib. Poland, March 3rd, 1947) *discussed in* Buhler, *supra* note 388, at 42-44 (Notes on the Case).

amounting to many millions of dollars.³⁹¹

The scope of this criminality extended from the top leadership to the heads of county and town districts, thereby encompassing several hundred persons. Those who voluntarily performed their tasks while being conscious of the occupation government's aims and activities were considered criminally culpable. These individuals were deemed to have been knowingly involved in implementing the Nazi Party's ideological aspirations, and could not credibly claim that they had acted in response to superior orders.³⁹²

Joseph Buhler was deputy to Hans Frank, Governor of the Government General. Buhler, along with Frank, was responsible for implementing the repressive regime in central and southern Poland. The Supreme National Tribunal noted that he "regularly took part in the meetings of the Government General's cabinet, and in drafting and approving laws and orders, especially those which resulted in deportation, persecution, and extermination of people, and had a detailed knowledge of how all these measures were being put into practice."³⁹³ Buhler prepared all legal measures bearing Frank's signature.

[He] was a type of war criminal who did not directly commit any common crime himself, but one who sitting . . . in his cabinet office, took part in . . . war crimes and crimes against humanity . . . he was the chief engineer of the complicated and widespread criminal machinery, who guided thousands of the willing tools in how to use it.³⁹⁴

Buhler personally endorsed and drafted the directives and instructions for the deportation of Jews from the Reich to Poland. He

391. *Id.* at 45 (Notes on the Case).

392. *Id.* at 42-45 and 48 (Notes on the Case). This group included the central office of the Government General; the district-governors and their deputies; the heads of departments and sections in the district-governors' offices; and the heads of subordinate districts. *Id.* at 44.

393. *Id.* at 34.

394. *Id.* at 35.

also signed over one hundred orders establishing the death penalty for a range of innocuous offenses, such as the use of an automobile or motorcycle. Other directives provided for the extermination of intellectuals, compulsory work for Poles, the removal of art and scientific equipment, and a prohibition on district-governors mitigating the death sentences of Jews apprehended while escaping from the ghetto. As a result of these policies, thousands of innocents lost their lives or were put to death or punished for acts that were legal under both Polish and international law.³⁹⁵

The Tribunal noted that the criminal nature of the administration of the Government-General already had been established in the trial of Ludwik Fischer. There could be no doubt that considering Buhler's high position that he possessed "perfect knowledge of the criminal aims" of the German occupation authorities.³⁹⁶ He was adjudged guilty of criminal membership and deemed responsible for formulating, instigating, and carrying out a criminal plan and conspiracy. In addition, he was held vicariously liable for those criminal acts committed by his subordinates in furtherance of this scheme.³⁹⁷

The Supreme National Tribunal also went beyond Nuremberg in declaring that the administration and garrison of the Auschwitz concentration camp was a criminal group. This was based on the determination that the camp had been established with the aim of unlawfully depriving individuals of freedom, health, property, and life based upon their religion or political conviction. Many involved in the vast web of the camp's administration were directly and indirectly implicated in a wide compass of clear criminality, but were not members of an organization declared criminal at Nuremberg. The Supreme Tribunal's declaration was influenced by the realization that subjecting these individuals to separate trials would involve inordinate time and resources.³⁹⁸

395. *Id.* at 36-38.

396. *Id.* at 45 (Notes on the Case).

397. *Id.* (Notes on the Case).

398. Hoess, *supra* note 47, at 20-21 (Notes on the Case) *discussing* Trial Of

The Commandant of Auschwitz, Rudolf Hoess, also was convicted of membership in the SS, a criminal organization, which was allegedly engaged in war crimes and crimes against humanity.³⁹⁹

In addition, Hoess was charged with membership in the Nazi Party that was described as having engaged in "planning, organizing, and perpetrating crimes against peace, war crimes, and crimes against humanity."⁴⁰⁰ Hoess was acquitted of membership in the latter organization based on the fact that the Polish statute limited liability to those staffing "all leading positions."⁴⁰¹

British tribunals relied upon Regulation 8(ii). This provided that in those instances in which a war crime resulted from the concerted action of a unit or group, that evidence against any member of such unit or group may be considered as *prima facie* evidence of the responsibility of other members. Individuals charged with such an offense were not permitted to sever their trial from the

Artur Liebehenschel. The organization of the camp was considered to encompass the authorities, administration, and personnel. Those inmates assisting the Germans were acquitted since they were not members of the criminal organization—they were not voluntarily bound together by the common aim to commit crimes against humanity. The Nuremberg Tribunal did not rule on the criminal nature of the administration of prison camps. The Tribunal's judgment nevertheless included numerous references to the Nazi Party's reliance on the camps to exterminate political opponents and racial inferiors. *Id.* at 21-22 (Notes on the Case).

399. *Id.* at 18-19 (Notes on the Case).

400. *Id.* The Nuremberg Tribunal held that the Nazi Party was engaged in war crimes and crimes against humanity connected with war. The indictment in Goeth described the Nazi Party as aiming "through violence, aggressive wars and other crimes, at world domination and establishment of the National Socialist regime." Goeth, *supra* note 278, at 5-6 (Notes on the Case).

401. Hoess, *supra* note 47, at 19. Those offices that were considered as criminal were those leading ranks and positions enumerated in the Nuremberg judgment. *Id.* The Supreme National Tribunal made no finding in regards to Goeth since the prosecution preceded the Nuremberg prosecution. Goeth, *supra* note 278, at 6-7. Greiser, however, was convicted of membership in the Nazi Party based on the provisions of the Nuremberg Charter and the articles in the Polish domestic criminal code prohibiting conspiracies to commit a hostile act against the Polish State. Greiser, *supra* note 290, at 107-08 (Notes on the Case).

other accused.⁴⁰²

Each defendant in the Belsen trial was charged with personal as well as collective acts of criminality. A defendant's delicts constituted individual criminal conduct, as well as evidence of collective criminality. Mere involvement in the administration at Auschwitz was not sufficient to establish criminality. The defense and prosecution agreed that it must be established that an accused knowingly participated in a common plan to ill-treat prisoners. Proof of a conspiracy could be deduced from the acts of an accused, and there was no requirement that an individual was aware of the identity of the other participants in the conspiratorial design. Neither the insignificance of an individual's role nor the fact that an accused joined an ongoing scheme and was not involved in its origination constituted a defense. However, the extent of an individual's involvement and knowledge did bear upon the degree of their culpability and punishment. The notes to the case illustrate the principles involved by observing that an individual taking part in selection parades for the crematorium, knowing their purpose would be complicit in homicide.⁴⁰³

Forty defendants were convicted by an American Military Court in the *Dachau Concentration Camp* case of acting in pursuance of a common design to kill, beat, torture, starve, and abuse inmates of the camp. The prosecution established that the accused aided, abetted, or participated in a plan to commit these crimes against prisoners. The defendants' complicity in this system was established through the character of their office or conduct.⁴⁰⁴

Thus, the fact that an accused held the position of Deputy Camp Commandant or Regimental Sergeant Major was sufficient to result in the imposition of liability. On the other hand, in the case of

402. Regulation 8(ii), British Royal Warrant, Army Order 81/1045., *quoted and cited in* Belsen, *supra* note 55, at 138 (Notes on the Case).

403. *Id.* at 139 (Notes on the Case).

404. Trial Of Martin Gottfried Weiss And Thirty-Nine Others, (The Dachau Concentration Camp Trial) (Gen. Milit. Gov. Ct., United States, Nov. 15th-Dec. 13th, 1943), XI L. REPT. TRIALS WAR CRIM. 5, 13 (U.N. War Crimes Comm'n, 1949) (Notes on the Case) [hereinafter Martin Weiss].

an accused who was in charge of the bath or laundry, the prosecution was compelled to establish that the defendant carried out their responsibility in an illicit fashion. The Tribunal broadly interpreted the scope of culpability to include guards who were deployed to prevent escape from the camp, as well as prisoner functionaries who worked on behalf of the camp administration. An accused's punishment varied with the degree of their participation--sentences ranged from five years hard labor to death.⁴⁰⁵ The notes to the case conclude that *Dachau*

seems to have established a rule that membership of the staff of a concentration camp raises a presumption that the accused has committed a war crime. This presumption may . . . be rebutted by showing that the accused's membership was of such short duration or his position of such insignificance that he could not be said to have participated in the common design.⁴⁰⁶

In sum, the International Military Tribunal's declarations of organizational criminality were intended to expedite individual prosecutions before domestic courts. An individual who was a knowing and voluntary member of such an organization was liable for criminal membership. The criminal nature of an organization was binding on courts in subsequent prosecutions. However, the prosecution possessed the burden of establishing the accused's knowledge of the organization's criminal character.⁴⁰⁷ The underlying philosophy was that such collective conduct posed a greater danger than acts of individual criminality.⁴⁰⁸

The theory of organizational criminality obviated the requirement that the prosecution demonstrate an explicit or implicit

405. *Id.* at 13-14 (Notes on the Case).

406. *Id.* at 15-16 (Notes on the Case).

407. *See supra* notes 382-87 and accompanying texts.

408. *See supra* note 390 and accompanying text.

agreement among the defendants to pursue a common design or plan. The scope of liability was circumscribed by the contours of the organization. All of those who were aware of an organization's criminal purpose, who nevertheless remained or entered the organization, were vicariously liable. This was intended to facilitate the prosecution of large numbers without the burden of establishing individual criminality.⁴⁰⁹

The Polish Decree of August 31, 1944, authorized the Supreme National Tribunal to extend the scope of organizational criminality beyond the precedent established at Nuremberg.⁴¹⁰ The Tribunal adjudged that the higher and mid-level echelon of the German occupation government constituted a criminal organization.⁴¹¹ This resulted in the imposition of personal and vicarious criminal liability on Joseph Buhler.⁴¹²

The Supreme National Tribunal also issued a declaration of criminality against the administration and garrison of the Auschwitz concentration camp.⁴¹³ A British Military Court imposed collective liability on the staff of the Belsen concentration camp,⁴¹⁴ while an American court determined that those acting in concert at Dachau were criminally culpable.⁴¹⁵ The British and American courts created a presumption that those who participated in the administration of the camps were involved in a common plan to commit war crimes.⁴¹⁶ Most domestic legislation did not provide for the crime of membership. More typical was the provision adopted in

409. *See supra* notes 382-90 and accompanying texts.

410. *See supra* notes 388-89 and accompanying texts.

411. *See supra* notes 391-92 and accompanying texts.

412. *See supra* notes 393-397 and accompanying texts.

413. *See supra* note 398 and accompanying text.

414. *See supra* notes 402-03 and accompanying texts.

415. *See supra* notes 404-05 and accompanying texts.

416. *See supra* note 406 and accompanying text.

jurisdictions such as the Netherlands East Indies. These provisions provided that a war crime which is committed within the framework of the activities of a group of persons in such a way that the crime can be ascribed to the group as a whole⁴¹⁷ may result in the attribution of criminal liability to each participant. Thus, once collective criminality was established, a crime committed by one member of the group was ascribed to the others.⁴¹⁸

L. Property Offenses

Several French prosecutions addressed the nature and scope of property offenses under the humanitarian law of war. The Hague Convention requires an occupying power to respect "[f]amily honour and rights, the lives of persons, and private property."⁴¹⁹ Pillage is specifically prohibited.⁴²⁰ Requisitions in-kind and services may be demanded to meet the needs of the army of occupation. These confiscations shall be proportionate to the resources of the country and may not involve inhabitants in military operations against their own nation.⁴²¹ The property of municipalities and religious, charitable, and educational institutions are to be treated as private property. The seizure or destruction of this property, as well as historic monuments and works of art and science, is prohibited.⁴²²

417. Trial Of Shigeki Motomura And 15 Others, (Netherlands Temporary Court-Martial At Macassar, July 18th, 1947), XIII L. REPORT. TRIALS WAR CRIM. 138, 141 (U.N. War Crimes Comm'n, 1949) (Notes on the Case).

418. *Id.* at 141-42 (Notes on the Case). Some jurisdictions provided for a reversal of the burden of proof once the initial concerted crime was established. *Id.*

419. Convention (No. IV) Respecting The Laws And Customs Of War On Land, With Annex Of Regulations, Oct. 19, 1907, art. 46, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention].

420. *Id.* at art. 47.

421. *Id.* at art. 52.

422. *Id.* at art. 56. The so-called Martens Clause in the Preamble extends the scope of the Convention. The Clause provides that:

The war crimes provision of the Nuremberg Charter capsulates these prohibitions and forbids the “plunder of public or private property, wanton destruction . . . or devastation not justified by military necessity.”⁴²³

S.S. Obersturmfuehrer Philippe Rust was charged with “abusive and illegal requisitioning . . . [of French property and] . . . employing French subjects on military works.”⁴²⁴ It was alleged that in September 1944, Rust compelled several French civilians to provide horses and vehicles to transport munitions. These individuals were also ordered to repair military bicycles, motorcycles, and electrical installations. Rust failed to issue receipts, which effectively resulted in the confiscating of the goods and labor without payment. The Court convicted Rust of abusing his powers, but dismissed the charges of pillage and deploying civilians on military matters. The Tribunal presumably determined that the requisitions were for the needs of the army of occupation, and were in proportion to the resources of the occupied territory. In addition, the Tribunal found that the individuals were not required to participate in military operations against France. The decision, however, failed to elucidate these standards. For instance, there is little clarification of the scope of the prohibition on civilian involvement in military operations against their own country.⁴²⁵

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Id. at preamble.

423. Nuremberg Charter, *supra* note 4, at art. 6(b).

424. Trial Of Philippe Rust (Perm. Milit. Trib. at Metz, March 5th, 1948), IX L. REPT. TRIALS WAR CRIM. 71 (U.N. War Crim. Comm’n, 1949).

425. *Id.* at 71, 72-74 (Notes On The Nature Of The Offence). “The offense for which the accused was found guilty eventually amounted to a case of ‘illegal’ requisitioning, that of violating the requirements according to which, unless

Hans Szabados, a German officer assigned to a Police Regiment in occupied France, was convicted of participating in the execution of hostages, as well as the pillage, immolation, and bombing of homes and hamlets in retribution for the ambush shooting of German combatants.⁴²⁶ Article 23(g) of the Hague Regulations prohibits the destruction or seizure of enemy property, unless "imperatively demanded by the necessities of war."⁴²⁷ The French Court appeared to determine that this provision excuses incidental destruction of property during active military operations, but does not permit demolition that is not related to an armed attack.⁴²⁸

German civilian Karl Lingenfelder settled in occupied France on a farm that had been confiscated by Nazi authorities. He subsequently pulled down a monument to Allied soldiers killed in World War I and broke a statue of Joan of Arc. Lingenfelder also removed horses and vehicles to Germany. As a result of being convicted of the destruction of public monuments and theft, he was sentenced to one year in prison. The theft conviction was based on the fact that the French military code required that pillage involve force or violence.⁴²⁹ In *Boomer*, a German couple was convicted of the theft of furniture, horses, jewelry, linens, and money belonging to a deported French family. The *Boomer*'s children were charged and convicted of receiving stolen property.⁴³⁰

payment is made 'in ready money,' a receipt is to be given in respect of the objects requisitioned." *Id.* at 74.

426. Trial Of Hans Szabados (Perm. Milit. Trib. Clermont-Ferrand, June 23, 1946), IX LAW REPT. TRIALS WAR CRIM. 59-60 (U.N. War Crimes Comm'n, 1949).

427. *Id.* at 61 *citing and quoting* Hague Convention, *supra* note 61, at art. 23(g).

428. *Id.* at 59-60. The French Tribunal presumably determined that Szabados' acts of retribution were not limited to those thought to be responsible for the shootings and did not constitute lawful reprisals. *Id.* at 60.

429. Trial Of Karl Lingenfelder, (Perm Military Trib., Metz, March 11th, 1947) IX L. REPT. TRIALS WAR CRIM. 67-8 (1949).

430. Trial Of Alois And Anna Bommer And Their Daughters (Perm. Milit. Tribunal at Metz, Feb. 19, 1947), IX L. REPT. TRIALS WAR CRIM. 62 (U.N.

Christian Baus, a German transport contractor, managed numerous French farms. He sent various objects to Germany which he had stolen or which had been loaned to him. He was subsequently convicted of theft and pillage. The pillage count was based on Baus' abuse of confidence in appropriating the goods lent to him. He was sentenced to the penalty specified for abuse of confidence under French law. This suggests that the Court was treating abuse of confidence as an independent crime punishable under the Martens Clause of the Hague Convention.⁴³¹

Rust and *Szabados* are consistent with the obligation of an occupying power to respect and safeguard private property. Both, however, failed to clarify central concepts. How are requisitions to be calibrated to the resources of the country? At what point are inhabitants involved in military operations against their own country? When does military necessity permit the incidental destruction of property?⁴³²

Ligenfelder affirmed that an occupying power must respect historic monuments and, along with *Boomer* and *Baus*, established

War Crimes Comm'n, 1949) [hereinafter *Boomer*]. *Boomer* also established that minors between the ages of sixteen and eighteen are liable for war crimes, although their punishment may be mitigated. The Court was authorized to utilize its discretionary power to free one of the *Boomer*'s daughters who was under the age of sixteen from legal responsibility. *Id.* at 66.

431. Trial Of Christian Baus, (Perm. Milit. Trib. at Metz, Aug. 21st, 1947), IX L. REPT. TRIALS WAR CRIM. 68 (U.N. War Crimes Comm'n, 1949). Under the French Suppression of War Crimes Ordinance of August 28, 1944, the removal of French property from France in time of war as a result of theft, abuse of confidence or any other act was treated as pillage. Misappropriation by abuse of confidence was a domestic crime regardless of whether the property was removed from France. The Court apparently adopted the view that misappropriation by abuse of confidence was an independent war crime punishable under the Martens Clause of the Hague Convention. As a result, Baus received the penalty for this offense under domestic law rather than for pillage under French war crimes legislation. The Court presumably would have held Baus liable even if he had not removed the property from France. The Tribunal's focus on misappropriation seems to reflect the Continental tradition of attempting to calibrate war crimes with the requirements of domestic law. *Id.* at 70 (Notes on the Nature of the Offense).

432. See *supra* notes 424-28 and accompanying texts.

that civilians are liable for war crimes.⁴³³ The French courts also broadly interpreted the Hague Convention to correspond with the requirements of the relevant French criminal statutes. The Convention does not explicitly condemn the receipt of stolen property or abuse of confidence. But, the French tribunals, in accordance with the so-called Martens Clause, read the Hague Convention's prohibitions on theft and pillage in light of the "principles of the laws of nations derived from the usages established among civilized peoples."⁴³⁴

M. Punishment

Domestic war crimes statutes generally provided for a range of punishments, including, but not limited to death, imprisonment ranging from years to life, confiscation of property, and fines.⁴³⁵ Some legislation provided for additional penalties, including restitution and a loss of civil rights.⁴³⁶ Combinations of these penalties were usually imposed upon defendants. For instance, defendant Joseph Buhler was sentenced to death, as well as to the loss of public and civil rights, and the forfeiture of property.⁴³⁷

Courts generally expressed little sympathy for those who perpetrated war crimes. The Netherlands Court of Cassation, in affirming defendant Hans Rauter's death sentence, noted that Rauter had flouted the integrity of Netherlands law as well as the "sense of justice of the community of Nations, which sense has been most deeply shocked . . ."⁴³⁸ Rauter's detention and deportation of Jews

433. See *supra* notes 428-431 and accompanying texts.

434. See *supra* notes 430-31 and accompanying texts. Hague Convention, *supra* note 61, at Preamble. See also *id.* at art. 47, 52, 53, 56.

435. See Canadian Law, *supra* note 8, at 129-30.

436. See Polish Law, *supra* note 24, at 88; United States Law, *supra* note 12, at 120.

437. Buhler, *supra* note 388, at 39.

438. Rauter, *supra* note 33, at 109.

and slave laborers, pillage and confiscation of property, and reprisals against innocents “betray . . . a reprehensible mentality bereft . . . of every conception of right or morality, and . . . did . . . bring with them serious results for innumerable victims of the reign of terror.”⁴³⁹ The Court refused to mitigate Rauter’s sentence on the grounds that he had been motivated by patriotic zeal. Rauter certainly was aware that even such lofty motives neither license the criminal conduct of armed conflict nor the use of terrorism against the inhabitants of occupied territories.⁴⁴⁰

The Tribunal was particularly troubled by Rauter’s concession that, despite his professed innocence, the Netherlands was entitled to seek retribution. His willingness to believe that the Netherlands would prosecute and punish an innocent, according to the Court, revealed the type of immoral and instrumental mentality that characterized the Nazi regime.⁴⁴¹

Courts were willing to recognize a lack of criminal intent as an extenuating circumstance. The Netherlands Special Court in Amsterdam sentenced prison warden Willy Zuehlke to only five years in prison for illegally detaining and mistreating Jewish and other prisoners. The Court explained that these plans did not originate with the accused. Zuehlke “stupidly allowed himself to be carried along with the criminal stream of German terrorism, rather than acted with intent on his own initiative.”⁴⁴² The panel stressed that the prisoners had not been seriously injured, and that the accused had lacked criminal intent. The accused’s acts had been motivated by his rough nature rather than by a “desire to attack his victims.”⁴⁴³

Similarly, defendant Wilhelm Gerbsch was convicted of

439. *Id.* at 110.

440. *Id.*

441. *Id.* at 111.

442. Zuehlke, *supra* note 38, at 141. The Court of Cassation later reduced his seven-year sentence to five years in prison. *Id.* at 143.

443. *Id.* at 141

abusing concentration camp inmates in Germany. Netherlands law permitted an enhanced penalty for those who utilized their office to commit criminal offenses. But, Gerbsch was sentenced to fifteen years in prison on the grounds that he had not acted on his own initiative, and rather had been drawn into "the whole abominable system of terrorism and brutality carried out under the higher German Nazi administration against civilians of the occupied nations."⁴⁴⁴ The Court noted that this, in part, might have resulted from the defendant's defective mental faculties.⁴⁴⁵

A French Court, in *Wagner*, considered Wagner's firing of two warning shots prior to killing an escaping worker as an extenuating circumstance that merited reducing his sentence to fifteen years imprisonment.⁴⁴⁶ A Netherlands Court-Martial, in sentencing Lieutenant Tanabe Koshiro to five years imprisonment, determined that Koshiro did not intend to subject prisoners of war to the danger of an Allied attack in putting them to work loading an ammunition depot. Instead, Koshiro's intent was to safeguard his forces' combat supplies.⁴⁴⁷

Defendant Johannes Oenning was involved in the killing of a British Royal Air Force Officer and was sentenced to eight years in prison. The Court explained that this lenient sentence was based on the fact that the fifteen year old lacked the capacity to comprehend the criminality of his actions because he had grown up under the

444. Gerbsch, *supra* note 41, at 132.

445. *Id.* The Court was authorized to augment by one-third the punishment of individuals such as Gerbsch who utilized the power of their office to commit a crime. *Id.* at 137 (Notes on the Case).

446. *Wagner II*, *supra* note 92, at 119 (Notes on the Case). The Court also determined that the victim was cornered between the wall and the railing of the factory. As a result, Wagner possessed the discretion whether to utilize deadly force to prevent the victim's escape. *Id.* (Notes on the Case). Nevertheless, the Court also took into consideration as an extenuating circumstance that Wagner, as a factory guard, was not positioned to distinguish between those individuals who were lawfully detained and those, such as the deceased, who were being unlawfully detained. *Id.* at 120 (Notes on the Case).

447. Koshiro, *supra* note 236, at 4.

Reich regime and had been socialized into the Nazi ideology.⁴⁴⁸ Juveniles generally received lenient treatment. The two sixteen year-old defendants in *Boomer* were sentenced to eighteen months imprisonment for receiving stolen property while the third, who was under sixteen, was acquitted on the grounds that she lacked the capacity to form a criminal intent.⁴⁴⁹

In most cases, courts refused to recognize mitigating circumstances. A Norwegian Court rejected Gerhard's Flesch's plea, in mitigation to his death sentence, that the prisoners whose execution had been ordered by Flesch may possibly have been sentenced to death by a legally convened court.⁴⁵⁰ Defendant Artur Greiser attempted to mitigate his genocidal acts by pointing to the benevolent treatment he extended to his Polish house staff. The Polish National Tribunal noted that such duality was not unusual among the Nazi leadership and that there was no evidence that Greiser's benevolence extended beyond the private sphere. As a result, the Tribunal failed to find that this "good natured and correct attitude" mitigated the severity of the Greiser's crimes.⁴⁵¹

Defendant Karl Amberger was convicted and sentenced to death for having ordered the execution of Allied prisoners. A British Military Court refused to take into account the defendant's previous record as a brave and responsible soldier. The Court also did not consider Amberger's belief that the airmen had been responsible for an attack in which forty civilians were killed as a mitigating circumstance.⁴⁵²

The Norwegian Court of Appeals, in *Bruns*, refused to reduce

448. Oenning, *supra* note 276, at 75.

449. Bommer, *supra* note 430, at 66 (Notes on the Case). The French penal code provided that minors between the ages of thirteen and eighteen could be reprimanded, committed to the care of their parents or criminally punished. *Id.* (Notes on the Case).

450. Flesch, *supra* note 126, at 120. The Tribunal notes that Flesch was responsible for denying the executed Norwegians a proper trial. *Id.*

451. Greiser, *supra* note 290, at 106.

452. Amberger, *supra* note 232, at 84.

the defendants' punishment for acts of torture based upon extenuating circumstances. Defendant Richard Bruns pointed to various incidents in which he had assisted Norwegians, Rudolf Schubert pled difficulties at home and Emil Clemens pointed to several hundred interrogations in which he had humanely treated prisoners.⁴⁵³

IV. CONCLUSION

Scholarly discussions of World War II war crimes trials have concentrated on Nuremberg and other major trials. Yet, most prosecutions occurred before domestic, civilian, or military tribunals.⁴⁵⁴ A review of these trials reveals that most involved minor and modest delicts.⁴⁵⁵

Why was this the case? Most major war criminals either had fled or already had been detained or sheltered by the occupying powers. The Allied Powers were also likely to be reluctant to accelerate post-war animosities by initiating high-profile prosecutions. This was encouraged by the fact that West Germany was viewed as a bulwark against Soviet expansionism. In addition, the demands of post-war reconstruction left little energy or resources to devote to the trial of war criminals. The wisdom of this strategy, in retrospect, is open to question. The lingering legacy of World War II is partially due to the fact that full retribution was not achieved.⁴⁵⁶

The list of domestic defendants is conspicuous for the absence of those mid-level bureaucrats and military officials who implemented German occupation policies.⁴⁵⁷ There was also a

453. Bruns, *supra* note 82, at 18.

454. *See supra* notes 2-39 and accompanying texts.

455. *See supra* notes 419-33 and accompanying texts. These property cases are conspicuous for the relatively minor nature of the offenses involved. *Id.*

456. *See generally* Lippman, *The Denaturalization Of Nazi War Criminals In The United States: Is Justice Being Served?* *supra* note 1.

457. *But see supra* notes 393-97 and accompanying texts.

failure to bring charges for crimes committed during armed combat. Most of the trials concerned the mistreatment of prisoners of war or civilians.⁴⁵⁸ These trials also point to the value of international prosecutions. There is an unsettling sense that domestic courts lacked the objectivity, resources, and intellectual aptitudes required to fully and fairly deliver these judgments. The failure of some courts to adequately discuss and document their decisions limited the historical and legal import of the judgments.⁴⁵⁹

The domestic decisions reviewed in this essay nevertheless made a significant contribution to the corpus of the humanitarian law of war. The cases on naval⁴⁶⁰ and land warfare,⁴⁶¹ genocide,⁴⁶² the treatment of prisoners of war,⁴⁶³ the liability of judicial officials,⁴⁶⁴ and property offenses⁴⁶⁵ are of singular significance in international jurisprudence. Second sets of judgments provide insight into the domestic implementation of international doctrine. The latter include the decisions on jurisdiction,⁴⁶⁶ superior orders,⁴⁶⁷ reprisals,⁴⁶⁸ and command responsibility.⁴⁶⁹

458. *But see supra* notes 149-193 and accompanying texts.

459. *See supra* note 419-34 and accompanying texts. French courts, for instance, provided little explanation for their verdicts. *Id.*

460. *See supra* notes 149-172 and accompanying texts.

461. *See supra* notes 173-193 and accompanying texts.

462. *See supra* notes 278-316 and accompanying texts.

463. *See supra* notes 214-251 and accompanying texts.

464. *See supra* notes 317-81 and accompanying texts.

465. *See supra* notes 419-34 and accompanying texts.

466. *See supra* notes 40-60 and accompanying texts.

467. *See supra* notes 61-102 and accompanying texts.

468. *See supra* notes 103-131 and accompanying texts.

469. *See supra* notes 132-148 and accompanying texts.