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The Nuremberg Military Tribunals and the origins of International Criminal Law

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CHAPTER 9: War Crimes

INTRODUCTION

Article II(1)(a) of Law No. 10 recognized the following acts as war crimes:

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

This chapter examines the tribunals' war-crimes jurisprudence. Section 1 explores when the Hague and Geneva Conventions applied, how the tribunals defined "occupation," and whether the applicability of the Conventions was affected by the illegality of a particular aggressive war or invasion. Section 2 discusses two issues involved in the summary execution of partisans: when partisans could qualify as lawful combatants, and whether unlawful combatants could be summarily executed. Section 3 focuses on crimes against prisoners of war. Section 4 examines crimes against civilians. Finally, Section 5 addresses the crime against property of plunder/spoliation.

I. THE APPLICATION OF THE LAWS AND CUSTOMS OF WAR

A. The General Applicability of the Conventions

The tribunals derived "the laws and customs of war" from two primary sources: the Regulations annexed to the Hague Convention IV of 1907 and, to a lesser extent, the Geneva Convention of 1927. Like their predecessors at the IMT, the NMT defendants challenged the general applicability of the Conventions. The Hague Regulations did not apply, they contended, because some of the belligerents were not parties to it, thereby running afoul of the "general participation" requirement in Article 2 of the Regulations.¹ And they argued that the Geneva Convention did not apply, at least with regard to the war between Germany and the Soviet Union, because the latter had denounced adherence to the Convention.² Those arguments were no more successful than they had been at the IMT: without exception, the tribunals held that the Hague and Geneva Conventions were binding because – in the words of the *High Command* tribunal – "they were in substance an expression of international law as accepted by the civilized nations of the world."³

That said, multiple tribunals questioned whether all of the provisions in the Conventions qualified as customary international law. The *High Command* tribunal

¹ See, e.g., *High Command*, XI TWC 532.

² See, e.g., *Milch, Musmanno Concurrence*, II TWC 821.

³ *High Command*, XI TWC 534; see also *Farben*, VIII TWC 1138; *Einsatzgruppen*, IV TWC 459.

focused on POWs, pointing out that “[i]n stating that the Hague and Geneva Conventions express accepted usages and customs of war, it must be noted that certain detailed provisions pertaining to the care and treatment of prisoners of war can hardly be so designated.”⁴ The *Farben* tribunal focused on the means and methods of warfare, suggesting that “[t]echnical advancement in the weapons and tactics used in the actual waging of war may have made obsolete, in some respects, or may have rendered inapplicable, some of the provisions of the Hague Regulations having to do with the actual conduct of hostilities and what is considered legitimate warfare.”⁵ The *Flick* tribunal agreed regarding means and methods, claiming that that the obsolescence of the Hague Regulations made plain “the necessity of appraising the conduct of defendants with relation to the circumstances and conditions of their environment.” Guilt, the Tribunal insisted, “may not be determined theoretically or abstractly. Reasonable and practical standards must be considered.”⁶

B. The Specific Applicability of the Conventions

Once the tribunals determined that the Hague and Geneva Conventions applied during the war, they then had to determine whether they applied to specific wars and invasions. Four questions were particularly important. First, did the Conventions apply to “peaceful” invasions, or was actual armed conflict required? Second, at what point did a war or invasion develop into a belligerent occupation? Third, did the Conventions protect Germans who fought in wars or invasions that qualified as crimes against peace? And fourth, did violations of the laws of war release the opposing forces from the obligation to comply with those laws?

1. Actual Conflict

The tribunals uniformly held that the Hague and Geneva Conventions did not apply unless an invasion resulted in actual armed conflict. That issue was first addressed in *Farben*, when the defendants moved to dismiss plunder allegations in Austria and the Sudetenland on the ground that the prosecution had failed to prove that a “state of actual warfare” existed in those locations. Tribunal VI acknowledged “the force of the argument that property situated in a weak nation which falls a victim to the aggressor because of incapacity to resist should receive a degree of protection equal to that in cases of belligerent occupation when actual warfare has existed.” It nevertheless granted the motion, arguing that it was required “to apply international law as we find it.”⁷

The *Krupp* and *Ministries* tribunals reached similar conclusions. In *Krupp*, Tribunal III dismissed plunder charges in Austria for want of jurisdiction.⁸ And in *Ministries*, Tribunal IV dismissed plunder charges in the Sudetenland on the ground that, because Germany occupied the Sudetenland as a result of the Munich Pact, “the occupation of

⁴ High Command, XI TWC 535.

⁵ *Farben*, VIII TWC 1138.

⁶ *Flick*, VI TWC 1208.

⁷ *Farben*, VIII TWC 1130.

⁸ *Krupp*, IX TWC 1373.

the territory... did not create a situation of belligerent occupancy subject to the restrictions of the Hague Convention.”⁹

Judge Wilkins dissented from Tribunal III’s holding in *Krupp* – and from the general idea that peaceful invasions did not trigger the Hague Regulations. He made two points, both of which are persuasive. First, he noted that the “actual warfare” requirement was inconsistent with the IMT, which had specifically held that the laws of war applied in the Sudetenland¹⁰ and had not reached the same conclusion regarding Austria only because the prosecution had not alleged that war crimes were committed there.¹¹ Second, he noted that, as a matter of policy, it made no sense to exempt an aggressor from the restrictions of the Hague Regulations simply because the state that it invaded was too militarily weak to resist.¹² The latter objection is particularly important, because the “actual warfare” requirement imposed by the *Farben*, *Krupp*, and *Ministries* tribunals meant that the invasions of Austria and Czechoslovakia were crimes against peace but could not involve the commission of war crimes – an asymmetry that is difficult to reconcile with the IMT’s insistence that aggression is the “supreme international crime” because “it contains within itself the accumulated evil of the whole.”¹³

2. Belligerent Occupation

The tribunals also had to determine when actual warfare, which was sufficient to make the Hague and Geneva Conventions generally applicable, developed into a belligerent occupation, thus triggering the rules contained in Articles 42-56 of the Hague Regulations. That issue was first discussed at length in the *Hostage* case concerning the invasions of Greece, Yugoslavia, and Norway. Tribunal V distinguished between “invasion” and “occupation” as follows:

Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.¹⁴

The Tribunal emphasized – echoing Article 42 of the Hague Regulations – that the rules of occupation applied only to territory that the occupying power actually controlled and continued to apply only while the occupant maintained its control.¹⁵ It nevertheless rejected the defendants’ claim that any sustained partisan activity in a country that temporarily disrupted an occupant’s control meant that the territory was no longer belligerently occupied. Regarding such activity in Yugoslavia and Greece,

⁹ *Ministries*, XIV TWC 684.

¹⁰ IMT JUDGMENT, 125.

¹¹ *Krupp*, Wilkins Dissent, IX TWC 1459.

¹² *Id.* at 1460, Wilkins Dissent.

¹³ IMT JUDGMENT, 13.

¹⁴ *Hostage*, XI TWC 1243.

¹⁵ *Id.*

for example, the Tribunal held that belligerent occupation survived such temporary control of territory, because “the Germans could at any time they desired assume physical control of any part of the country.”¹⁶

The tribunals also rejected the defense argument that Germany’s “annexation” of various occupied countries meant that those countries were no longer belligerently occupied. The IMT had pointed out that the doctrine of annexation “was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners,” as had been the case throughout World War II.¹⁷ The tribunals agreed. In *RuSHA*, for example, Tribunal I held that “the Incorporated Eastern Territories” remained belligerently occupied, because “[a]ny purported annexation of territories of a foreign nation, occurring during the time of war and while opposing armies were still in the field,” was “invalid and ineffective.”¹⁸ The *Farben*, *Ministries*, and *Justice* tribunals took the same position – although the latter pointed out, on a realist note, that attempts to annex territory are always “dependent upon the final successful outcome of the war,” because once a war succeeds, “no one questions the validity of the annexation.”¹⁹

3. Jus ad Bellum vs. Jus in Bello

The prosecution argued in two cases that Germany’s decision to initiate aggressive wars and invasions meant that it forfeited the protections of the Hague and Geneva Conventions. In the *Justice* case, it argued that German laws that prohibited “undermining military efficiency,” which would have been legal in a defensive war, were criminal because they were connected to wars of aggression.²⁰ And in the *Hostage* case, it argued that the German army was not entitled to exercise the rights of an occupant in Yugoslavia and Greece because the occupations had resulted from illegal invasions.²¹

The tribunals disagreed. The *Hostage* tribunal specifically reaffirmed the traditional independence of the jus ad bellum and the jus in bello, noting that “international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established.”²² The *Justice* tribunal took the same position, adding that eliminating the distinction between the jus ad bellum and jus in bello would mean “that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer,” making the defendants’ trial – and all similar trials – “a mere formality.”²³

4. Reciprocity

¹⁶ Id.

¹⁷ IMT JUDGMENT, 65.

¹⁸ RuSHA, V TWC 154.

¹⁹ Farben, VIII TWC 1137; Ministries, XIV TWC 685; Justice, III TWC 1027.

²⁰ Justice, III TWC 1025-26.

²¹ Hostage, XI TWC 1246.

²² Id. at 1247.

²³ Justice, III TWC 1027.

Finally, the *Ministries* tribunal affirmed the idea that a belligerent is obligated to respect the laws of war even if its adversary does not. Von Weizsaecker was charged with participating in the distribution of an order from Hitler directing Norwegian, Finn, and Danish soldiers who entered Norway across Sweden's neutral borders to be deemed guerrillas and executed. His defense was that the Geneva Convention's POW provisions did not apply to the executions, because the affected soldiers had violated Article 2 of Hague Convention V – concerning the rights and duties of neutral powers during land wars – which provided that “[b]elligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral power.” The *Ministries* tribunal rejected that argument, holding that such violations could not justify either murdering the soldiers or “depriving them of the status of prisoners of war and the protection afforded by the Geneva Convention.”²⁴

II. SUMMARY EXECUTION OF UNLAWFUL COMBATANTS

Hitler's order to summarily execute non-Norwegian soldiers captured in Norway was never carried out. Unfortunately, that was the exception, not the rule: as Taylor noted in his Final Report, “the outright slaughter” of individuals who resisted Germany aggression was a regular occurrence during World War II.²⁵ When those individuals qualified as POWs, their murder was obviously criminal. Article 4 of the Hague Regulations required POWs to be “humanely treated,” and Article 2 of the Geneva Convention provided that POWs had to be “at all times humanely treated and protected, particularly against acts of violence.”

NMT defendants charged with executing POWs, however, consistently argued that their victims were unlawful combatants – partisans, guerrillas, bandits, *francs-tireurs* – who were not protected by the Hague and Geneva Conventions.²⁶ That defense was anything but frivolous; as Adam Roberts has pointed out, it is difficult to contend that, during World War II, “there was a clear, precise, and effective body of law relating to the problem of resistance in occupied territories.”²⁷ Addressing the defendants' argument, therefore, required the tribunals to answer two basic questions. First, under what circumstances did partisans qualify as lawful combatants entitled to be treated as POWs? Second, if partisans did not qualify as lawful combatants, were the Nazis entitled to summarily execute them upon capture?

A. Lawful Combatants

The right of the inhabitants of an invaded country to resist their invader was the source of significant debate during the conferences that led to the adoption of the 1907 Hague Convention IV. States with large armies insisted that lawful-combatant status should extend only to organized military forces and to members of a *levée en masse* who met the same requirements as regular combatants. Less powerful states, by contrast, wanted to ensure that the definition of lawful combatant did nothing – in the words of a British proposal offered at the 1899 Hague Conference – “to modify or

²⁴ Ministries, XIV TWC 464.

²⁵ TAYLOR, FINAL REPORT, 66.

²⁶ See, e.g., Einsatzgruppen, IV TWC 492; Ministries, XIV TWC 530.

²⁷ Adam Roberts, *Land Warfare: From Hague to Nuremberg* in THE LAWS OF WAR 116, 133 (Michael Howard et al., eds., 1994).

suppress the right which a population of an invaded country possesses of fulfilling its duty of offering the most energetic national resistance to the invaders by every means in its power.”²⁸ The impasse was ultimately solved by adopting a two-pronged approach to lawful combatancy. First, the Convention would not specifically exclude groups from the definition of lawful combatant; instead, it would detail the requirements for two specific kind of armed groups – irregular forces and individuals involved in a *levée en masse* – to qualify as lawful combatants. Second, the Convention would make clear that the requirements for lawful combatancy were not exclusive.²⁹

The first aspect of the compromise led to the adoption of Articles 1 and 2 of the Hague Regulations. Article 1 addressed irregular forces such as militia and volunteer corps. It provided that such forces were entitled to lawful-combatant status if they satisfied four conditions: (1) they were commanded by a person responsible for his subordinates; (2) they had a fixed and distinctive emblem that was recognizable at a distance; (3) they carried arms openly; and (4) they conducted their operations in a manner consistent with the laws and customs of war. Article 2 dealt with a *levée en masse*, providing that the inhabitants of territory that had not yet been occupied who spontaneously took up arms to resist an invader qualified as lawful combatants as long as they carried arms openly and respected the laws and customs of war. The Preamble to the Convention then addressed the second aspect of the compromise, providing that “in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations” – the Martens Clause.

In addressing whether partisans qualified as lawful combatants, the NMTs embraced a very conservative reading of the Hague Regulations. None of the tribunals ever acknowledged the Martens Clause; on the contrary, they uniformly held that a partisan could qualify as a lawful combatant only if he satisfied the requirements of either Article 1 or 2 of the Regulations. In *High Command*, for example, Tribunal V simply quoted the two Articles and then held that “[a] failure to meet these requirements deprives one so failing on capture of a prisoner of war status.”³⁰ The *Hostage* tribunal reached a similar conclusion, even though it acknowledged the debates at the 1899 Hague Conference and the earlier 1874 Brussels Conference. Indeed, the Tribunal insisted that “[a] review of the positions assumed by the various nations” was pointless, because it believed – erroneously, in light of the Martens Clause – that Articles 1 and 2 of represented the compromise between the two sides of the debate and “remained the controlling authority in the fixing of a legal belligerency. If the requirements of the Hague Regulation, 1907, are met, a lawful belligerency exists; if they are not met, it is an unlawful one.”³¹

Having identified the applicable legal standards, the tribunals then had to address specific claims that the defendants’ victims did not qualify as lawful combatants. Only one such claim ever succeeded, regarding the status of partisan units active in

²⁸ Lester Nurick & Roger W. Barrett, *Legality of Guerrilla Forces Under the Laws of War*, 40 AM. J. INT’L L. 563, 565 (1946).

²⁹ Id. at 566.

³⁰ *High Command*, XI TWC 529-30.

³¹ *Hostage*, XI TWC 1247.

Yugoslavia and Greece. The *Hostage* tribunal held that the “greater portion” of those units – whose members were executed in the thousands – had failed to comply with the requirements of Article 1, because they had no common uniform, generally wore civilian clothes, used a distinctive emblem (the Soviet star) that could not be seen at a distance, and only carried their arms openly when it was in their advantage to do so. The partisans were thus *francs-tireurs* who were not entitled to be treated as POWs upon capture.³²

Three tribunals, by contrast, categorically rejected unlawful-combatant claims. In *Einsatzgruppen*, Tribunal II held that there was no justification for the defendants labeling thousands of their victims in the Soviet Union as partisans, because the killing-squads’ own reports indicated that “combatants were indiscriminately punished only for having fought against the enemy.”³³ In *Ministries*, Tribunal IV rejected Woermann’s argument that the non-Norwegian soldiers found in Norway were unlawful combatants, despite complying with Article 1, because they were not organized on Norwegian soil. The Tribunal noted that Article 1 did not contain such a requirement – and pointed out that “[i]f a belligerent may grant or refuse prisoner-of-war status to members of enemy forces because in its judgment the prisoner had not been lawfully inducted into the enemy army, the very purpose of the provisions of the Hague Convention would be defeated.”³⁴ Finally, in *High Command*, Tribunal V refused to even consider defense claims that the Barbarossa Jurisdiction Decree had led only to the execution of unlawful combatants, because it held that the decree categorized “partisans” in such an overbroad manner relative to Article 1 that it could not possibly be legal. For example, the decree authorized the summary execution of “[e]very civilian who impedes or incites others to impede the German Wehrmacht,” a criterion that “clearly opens the way for arbitrary and bloody implementation.”³⁵

B. Summary Execution

The second issue that the tribunals had to address was whether partisans who were unlawful combatants, and thus not protected by the Hague or Geneva Conventions, could be summarily executed upon capture. They had little trouble concluding that unlawful combatants could be *executed*. The *Hostage* tribunal pointed out, for example, that guerillas who did not satisfy either Article 1 or Article 2 of the Hague Regulations were placed “much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applies to guerrillas who are not lawful belligerents.”³⁶ The *Einsatzgruppen* tribunal was even more blunt, noting that “under these provisions, an armed civilian found in a treetop sniping at uniformed soldiers is not such a lawful combatant and can be punished even with the death penalty if he is proved guilty of the offense.”³⁷

³² Id. at 1244.

³³ *Einsatzgruppen*, IV TWC 493.

³⁴ *Ministries*, XIV TWC 465-66.

³⁵ *High Command*, XI TWC 530.

³⁶ *Hostage*, XI TWC 1245.

³⁷ *Einsatzgruppen*, IV TWC 392.

The “proved guilty” qualification, however, was critical. The tribunals uniformly agreed that captured partisans could not be *summarily* executed; their captors first had to determine through some sort of fair judicial process that they were, in fact, unlawful combatants.³⁸ In the *Hostage* case, for example, Tribunal V held Rendulic responsible for the execution of hostages, reprisal prisoners, and partisans because “[c]ourt martial proceedings were not held as required.” Instead, the victims were simply killed “without even the semblance of a judicial hearing.”³⁹ Similarly, in *Einsatzgruppen*, Tribunal II rejected Haensch’s claim that Sonderkommando 4b’s execution of hundreds of partisans in Russia was legal on the ground that there was no evidence in the record that status hearings had been held prior to the executions, much less that such hearings had “conformed to the accepted trial requirements, recognized by the rules of war and international law.”⁴⁰

Unfortunately, the tribunals were maddeningly vague concerning what the “accepted trial requirements” actually were. The *High Command* tribunal expressed skepticism that a court procedure was required, suggesting that a quasi-judicial hearing before a military officer would suffice.⁴¹ That officer, however, had to be of significant rank; the Tribunal held that permitting a junior officer to conduct the proceedings would be criminal.⁴² Regardless of who conducted the hearing, the decision-maker could neither presume that the suspect was an unlawful combatant nor require the suspect to prove that he was not.⁴³ The decision-maker also had to apply a substantial standard of proof; mere suspicion that the suspect was an unlawful combatant was not enough.⁴⁴

If a hearing satisfied the minimum requirements of international law, the officer conducting the hearing would not be guilty of a war crime simply because he mistakenly deprived a suspect of POW status. On the contrary, the *Hostage* tribunal specifically held that “[i]n determining the guilt or innocence of an army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration.... Where room exists for an honest error in judgment the commander is entitled to the benefit thereof by virtue of the presumption of his innocence.”⁴⁵ That said, the Tribunal made clear that blind deference was also not required: a commander would not be permitted “to ignore obvious facts in arriving at a conclusion.” Indeed, the Tribunal pointed out that “[o]ne trained in military science will ordinarily have no difficulty in arriving at a correct decision.”⁴⁶

III. CRIMES AGAINST PRISONERS OF WAR

³⁸ See, e.g., *id.* at 549; *High Command*, XI TWC 531.

³⁹ *Hostage*, XI TWC 1290.

⁴⁰ *Einsatzgruppen*, IV TWC 549.

⁴¹ *High Command*, XI TWC 523.

⁴² *Id.*

⁴³ *Id.* at 531.

⁴⁴ *Id.*

⁴⁵ *Hostage*, XI TWC 1245-46.

⁴⁶ *Id.* at 1246.

Taylor noted in his Final Report that crimes against POWs played a less significant role in the NMT trials than crimes against civilians.⁴⁷ The tribunals did pay significant attention, however, to three crimes involving POWs: murder, use in the war effort, and mistreatment. The murder of POWs was obviously criminal, as discussed above. This section will thus focus on issues of use in the war effort and mistreatment.

A. Use of POWs in the War Effort

Tribunal V noted in *High Command* that the Hague Regulations and the Geneva Convention did not take a consistent approach to the use of POWs in the war effort. Article 6 of the Hague Regulations provided that the labor of POWs “shall have no *connection* with the operations of war.” Article 31 of the Geneva Convention, by contrast, provided that POW labor “shall have no *direct connection* with the operations of the war.” That inconsistency did not prevent the tribunals from concluding that two categories of POW labor clearly violated both Article 6 and Article 31: using POWs in the production of armaments and other weapons of war, such as airplanes, regardless of whether the “employer” was a government institution⁴⁸ or a private corporation⁴⁹; and using POWs in any kind of war-related work that was inherently dangerous, such as loading ammunition, mine-clearing, and manning anti-aircraft guns.⁵⁰

Defendants accused of violating Articles 6 and 31 offered two defenses for their actions. The first was that the state of which the POWs were nationals had authorized their use in the war effort. The *Krupp* defendants made that argument, for example, with regard to the Vichy government and French POWs used in Krupp plants to manufacture armaments. Tribunal III rejected the defense, noting that such an agreement – which the judges did not, in fact, believe existed – “was void under the law of nations” because it would have been made at a time when France and Germany were still technically at war, having signed an armistice but not a treaty of peace.⁵¹

Defendants also claimed that the POWs involved in the war effort had consented to being used in that manner. In *Ministries*, for example, Schellenberg made that argument regarding “Operation Zeppelin,” in which Soviet POWs were used to conduct espionage in areas that the Germans had not yet occupied. The prosecution did not contest that the Soviet POWs had voluntarily spied on their countrymen; instead, it insisted that their consent was irrelevant. The *Ministries* tribunal rejected the prosecution’s position, holding that “the cited prohibitions of the Hague Convention prohibit[ing] the use of prisoners of war in connection with war operations... apply only when such use is brought about by force, threats, or duress, and not when the person renders the services voluntarily.”⁵²

⁴⁷ TAYLOR, FINAL REPORT, 65.

⁴⁸ See, e.g., Milch, II TWC 785.

⁴⁹ See, e.g., Krupp, IX TWC 1376.

⁵⁰ See, e.g., High Command, XI TWC 601 (ammunition and mines); Milch, II TWC 785 (anti-aircraft guns).

⁵¹ Krupp, IX TWC 1395.

⁵² Ministries, XIV TWC 667-68.

B. Mistreatment of POWs

The tribunals also devoted considerable attention to the mistreatment of POWs. Such mistreatment fell into two basic categories: forcing POWs to work in inhumane and dangerous conditions; and denying POWs accused of criminal activity a fair trial.

1. Inhumane and Dangerous Conditions

Both the Hague Regulations and the Geneva Conventions required POWs to be “humanely treated.”⁵³ The Geneva Convention also contained a number of more specific provisions that prohibited the use of POWs in inhumane and dangerous labor conditions, such as Article 32’s insistence that POWs not be given “unhealthy or dangerous” work. In *High Command*, Tribunal V specifically held that all of these provisions were declaratory of customary international law and that their violation was a war crime.⁵⁴

a. Inhumane Conditions

A number of tribunals focused on the war crime of forcing POWs to work in inhumane conditions. In *Krupp*, Tribunal III condemned the company’s practice of using Soviet POWs in “heavy work” for which, “due to undernourishment, they were totally unfit physically.”⁵⁵ Indeed, the Tribunal emphasized that Krupp had treated the Soviet POWs so poorly that both plant managers and officers in the German army who were responsible for POW labor had protested.⁵⁶ Similarly, the *High Command* tribunal concluded that German treatment of Russian POWs was based on the “economic principle that it was better to work them to death than to merely let them die” and thus criminal.⁵⁷

The *Farben* tribunal, by contrast, was unimpressed by the prosecution’s claim that POWs forced to work at Auschwitz III were criminally mistreated. The Tribunal concluded that they were “treated better than other types of workers in every respect,” because “[t]he housing, the food, and the type of work they were required to perform would indicate that they were the favored laborers of the plant site.” Any “isolated instances of ill-treatment,” it thus held, did not result from Farben policy or from acts for which Farben was responsible.⁵⁸

b. Dangerous Conditions

In *Krupp*, Tribunal III convicted defendants for violating Article 9 of the Geneva Convention, which prohibited POWs from being sent to areas where they “would be exposed to the fire of the fighting zone.” According to the Tribunal, Krupp had established POW camps in Essen despite anticipating (correctly) that the city would be the target of Allied bombing attacks and had failed to provide the POWs with

⁵³ Hague Regulations, art. 4; Geneva Conventions, art. 2.

⁵⁴ *High Command*, XI TWC 538.

⁵⁵ *Krupp*, IX TWC 1388.

⁵⁶ *Id.* at 1366.

⁵⁷ *High Command*, XI TWC 538.

⁵⁸ *Farben*, VIII TWC 1183.

“adequate air raid protection” – a failure that the Tribunal held aggravated the crime.⁵⁹

2. Unfair Trials

Although none of the tribunals questioned Germany’s right to try captured POWs for violations of the laws of war, they agreed that – in the words of the *Ministries* tribunal – “[w]here a captured enemy is suspected or charged with violation of the rules of war, he has the right to be tried in accordance with those rules.”⁶⁰ The failure to provide POWs with a fair trial led to a number of convictions during the trials. In *Ministries*, Tribunal IV held that Schellenberg was criminally responsible for permitting his subordinates to execute Soviet POWs who had voluntarily served in Operation Zeppelin “without trial or notice of any offense of which they were alleged to be guilty,” a policy that the Tribunal described as “a flagrant violation of international law.”⁶¹ In the *Justice* case, Tribunal III convicted Lautz for bringing “high treason” charges against Polish POWs for attempting to escape from the Reich, because such charges “represented an unwarrantable extension of the concept of high treason” and meant that POWs would be executed “for a minor offense.”⁶² And in *High Command*, Tribunal V held that the mere act of turning over POWs to the SD was a war crime, because the defendants “must have... suspected or known” that the “murderous organization” would execute the POWs without trial.⁶³

IV. CRIMES AGAINST CIVILIANS

War crimes against civilians played a central role in a number of trials. This section focuses on five of the most important crimes: hostage-taking and reprisals; use in the war effort; deportation; slave labor; and mistreatment.

A. Hostage-Taking and Reprisals

As Taylor noted in his Final Report, Germany’s “wholesale execution of hostages under the guise of pacification” in occupied territory “perhaps aroused the bitterest and widespread condemnation during the war.”⁶⁴ Tribunal V shared in that condemnation in the *Hostage* case – but nevertheless upheld the right of an occupier to execute civilian hostages in certain circumstances. It began by distinguishing between “hostages” and “reprisal prisoners”:

For the purposes of this opinion the term “hostages” will be considered as those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken. The term “reprisal prisoners” will be considered as those individuals who are taken from the civilian population to be killed in

⁵⁹ Krupp, IX TWC 1393.

⁶⁰ Id. at 441.

⁶¹ Id. at 668.

⁶² Justice, III TWC 1028.

⁶³ High Command, XI TWC 538.

⁶⁴ TAYLOR, FINAL REPORT, 68.

retaliation for offenses committed by unknown persons within the occupied area.⁶⁵

The Tribunal then held that the execution of hostages was governed by different rules than the execution of reprisal prisoners.

1. Hostages

The *Hostage* tribunal based its approach to hostages on a “theory of collective responsibility” that applied to both the occupying power and the inhabitants of occupied territory. Occupation conferred on the occupying power the “right of control for the period of the occupation within the limitations and prohibitions of international law.” Conversely, occupation obligated the inhabitants of occupied territory “to refrain from all injurious acts toward the troops or in respect to their military operations.” The occupying power was thus entitled to respond to “injurious acts” by the inhabitants of occupied territory by taking hostages “to guarantee... peaceful conduct” and then, if peaceful conduct did not follow, to shoot them “as a last resort.”⁶⁶

The “last resort” language, however, was critical. The Tribunal rejected the defendants’ claim that hostages could be taken “as a matter of military expediency.” On the contrary, it insisted that the occupying power was “required to use every available method to secure order and tranquility before resort may be had to the taking and execution of hostages.” Prior to taking hostages, the occupying power was required to issue regulations designed to convince the inhabitants of occupied territory to not interfere with the occupation, such as imposing restrictions on their movement, evacuating “troublesome” areas, imposing monetary fines, etc. Hostage-taking was justified only if all of those less-Draconian steps failed to pacify the population.⁶⁷

The Tribunal also restricted who could be taken hostage when such taking was justified, holding that, because deterrence was the goal of executing hostages, “there must be some connection between the population from whom the hostages are taken and the crime committed.”⁶⁸ Ideally, the hostages taken would come from the specific population resisting occupation. The Tribunal accepted, however, that “[n]ationality or geographic proximity” was acceptable when such a narrow geographic nexus was impracticable.⁶⁹

Finally, the Tribunal imposed three procedural restrictions on the execution of hostages. First, the occupying power had to publish a proclamation that identified the hostages taken and that informed the affected population that future acts of resistance would lead to their execution. Second, the actual execution order had to be based “upon the finding of a competent court martial that necessary conditions exist and all preliminary steps have been taken which are essential to the issuance of a valid

⁶⁵ Hostage, XI TWC 1249.

⁶⁶ Id.

⁶⁷ Id. at 1249-50.

⁶⁸ Id. at 1250.

⁶⁹ Id.

order.” Third, and finally, the number of hostages executed had to be proportionate to “the severity of the offenses the shooting is designed to deter.”⁷⁰

2. Reprisal Prisoners

The *Hostage* tribunal also held that it was legal for an occupying power to execute inhabitants of occupied territory in reprisal for violations of the laws of war.⁷¹ As with hostages, however, it imposed a number of requirements on such executions. First, the same connection between the affected population and the perpetrators of the offense had to exist. Second, the occupying power had to publish a statement identifying the offense that ostensibly justified the reprisal. Third, the occupying power had to provide the affected population with a reasonable opportunity to identify the perpetrators of the offense. Fourth, executions had to be preceded by a judicial finding that the executions were warranted, unless “the necessity for the reprisal require[d] immediate reprisal action to accomplish the desired purpose and which would be otherwise defeated by the invocation of judicial inquiry.” Fifth, and finally, the reprisal could not be excessive in comparison to the underlying crime.⁷²

3. Fixed Ratios

Although the *Hostage* tribunal accepted the general idea that hostages and reprisal prisoners could be executed in the right circumstances, it had no trouble concluding that “[t]he extent to which the practice has been employed by the Germans exceeds the most elementary notions of humanity and justice.”⁷³ An example was the execution of thousands of Serbian civilians in “reprisal” for a partisan attack that had killed 22 German soldiers near Topola. The Tribunal held that List was responsible for “plain murder,” because there was “no evidence of any connection whatever, geographical, racial, or otherwise between the persons shot and the attack at Topola,” no judicial finding was ever made, and the executions were not even remotely proportionate to the underlying crime.⁷⁴

The Tribunal was particularly appalled by the Germany military’s regular use of “fixed ratios” – orders that required or permitted the execution of a certain number of civilians for every German soldier killed by partisan activity. At Topola, for example, the ratio was 100:1. Such fixed ratios, the Tribunal held, were *per se* criminal.⁷⁵

No doubt anticipating this holding, Hans Laternser, List’s main counsel, attempted to prove that the Allies had also relied on fixed ratios for reprisals. In particular, he alleged that on 25 November 1944, following the liberation of Paris, General Jacques Philippe LeClerc, the commander of the 2nd French Armored Division, had ordered the execution of five German hostages for each French soldier killed. The Tribunal responded by ordering General Eisenhower to submit an affidavit confirming or denying the allegation. Eisenhower ultimately confirmed that the order had been

⁷⁰ Id.

⁷¹ Id. at 1253.

⁷² Id. at 1252-53.

⁷³ Id. at 1252.

⁷⁴ Id. at 1270

⁷⁵ Id.

given, but pointed out that LeClerc's successor had rescinded the illegal order less than a week later and had informed the Germans "that future orders would conform strictly to the principles of international law."⁷⁶

4. Status Under Customary International Law

The *Hostage* tribunal's approach to hostage-taking provides a striking example of how, in general, the NMTs ignored substantive provisions of Law No. 10 that they believed were inconsistent with customary international law. The "killing of hostages" was specifically criminalized by Article II(1)(b) of Law No. 10, as it had been by Article 6(b) of the London Charter. The Tribunal, however, did not even mention Article II(1)(b) when it upheld the right of occupying powers to execute hostages and reprisal prisoners. On the contrary, it looked exclusively to conventional and customary international law, noting that "[i]nternational law is prohibitive law and no conventional prohibitions have been invoked to outlaw this barbarous practice."⁷⁷

Although regrettable, the tribunal's holding was likely correct. Killing hostages was the second war crime included on the list prepared by the Commission on Responsibilities at the end of World War I, but scholars generally accept that the absence of *opinio juris* and state practice meant that such executions were permitted by customary international law.⁷⁸ The American Rules of Land Warfare, for example, specifically provided that "[h]ostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed."⁷⁹

B. Use in the War Effort

The tribunals held that two different methods of using civilians in the war effort constituted war crimes: forced conscription into the armed forces; and forced labor related to military operations.

1. Conscription

Three tribunals condemned the Nazi practice of forcibly conscripting the inhabitants of occupied territory into the German military. The *Hostage* tribunal convicted General von Leyser for his role in the forcible conscription of Croatian civilians into the Waffen Ustasha and the Croatian Wehrmacht. As the Tribunal noted, "occupation forces have no authority to conscript military forces from the inhabitants of occupied territory. They cannot do it directly, nor can they do it indirectly."⁸⁰ The *RuSHA* tribunal convicted Lorenz, the head of VoMi, for permitting "tens of thousands of foreign nationals" to be removed from VoMi camps and conscripted into the Waffen SS or the German army.⁸¹ And the *Ministries* tribunal convicted Berger for

⁷⁶ Eisenhower Affidavit, 1 Dec. 1947, NA-153-1018-7-86-1-1, at 1-2.

⁷⁷ *Hostage*, XI TWC 1252.

⁷⁸ See, e.g., A. R. Albrecht, *War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949*, 47 AM. J. INT'L L. 590, 601-02 (1953).

⁷⁹ U.S. ARMY RULES OF LAND WARFARE, FIELD MANUAL 27-10, 89-90 (1940).

⁸⁰ *Hostage*, XI TWC 1305.

⁸¹ *RuSHA*, V TWC 144.

participating in forced conscription in ten different countries, emphasizing that although it was not illegal to permit civilians to voluntarily enlist, “pressure or coercion to compel such persons to enter into the armed services obviously violates international law.”⁸²

2. Military Operations

Article 52 of the Hague Regulations provided that “[r]equisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall... be of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.” Belligerents traditionally distinguished between “military operations” and “military preparations,” excluding from the ambit of Article 52 “compulsion upon inhabitants to render assistance in the construction of military roads, fortifications, and the like behind the front, or in any other works in preparation for military operations.”⁸³ The IMT rejected that distinction, expanding Article 52 to include not only “military preparations” but also any work that directly assisted an enemy’s “war effort” or “war economy.”⁸⁴

The NMTs continued the IMT’s expansion of Article 52. In *Krupp*, for example, Tribunal III held that the company had violated the Article by using civilians to produce arms, noting that “in the latter years of the war the production of armament on a substantial scale reached could not have been carried on without their labor.”⁸⁵ Even more dramatically, the *High Command* tribunal convicted General Reinhardt for forcing civilians to engage in various kinds of labor within the area under his command.⁸⁶ According to the Tribunal, Article 52 meant that “the compulsory labor of the civilian population *for the purpose* of carrying out military operations against their own country was illegal”⁸⁷ – a construction that indicates just how far the “military operation” language in Article 52 had evolved.

The *Milch* tribunal also held that forcing French civilians to engage in “war work,” such as building airplanes for the military, was a war crime.⁸⁸ More notable, though, is the Tribunal’s rejection of two alleged justifications for such labor. First, anticipating the *Krupp* tribunal’s similar position with regard to POWs, the Tribunal held that it was irrelevant that the civilian laborers had been supplied by the French government pursuant to an agreement with Germany, because “the Vichy Government was a mere puppet set up under German domination, which, in full collaboration with Germany, took its orders from Berlin.”⁸⁹ Second, it dismissed the defendants’ insistence that the French civilians had voluntarily engaged in war work as “purely fictitious,” asking “[d]oes anyone believe that the vast hordes of Slavic Jews who labored in Germany’s war industries were accorded the rights of contracting

⁸² Ministries, XIV TWC 549.

⁸³ UNWCC HISTORY, 227.

⁸⁴ Id. at 228-29.

⁸⁵ *Krupp*, IX TWC 1431.

⁸⁶ *High Command*, XI TWC 609.

⁸⁷ Id. at 540.

⁸⁸ *Milch*, II TWC 788.

⁸⁹ Id.

parties?” The Tribunal answered its own question: “[t]hey were slaves, nothing less.”⁹⁰

C. Deportation

Article II(1)(b) of Law No. 10 criminalized “deportation to slave labour or for any other purpose, of civilian population from occupied territory.” The tribunals did not have to devote much effort to determining whether civilians had, in fact, been deported to Germany; as noted in Chapter 6, the *Milch*, *Pohl*, and *Farben* tribunals held that the IMT’s conclusion that occupation authorities had deported “at least 5,000,000 persons to Germany to serve German industry and agriculture”⁹¹ was *res judicata*. The tribunals were thus left to address whether those deportations were criminal – an issue the IMT had essentially taken for granted.

The illegality of deportations arose for the first time in *Milch*, because many of the employees in the factories under the defendant’s control had been deported from France and the Incorporated Eastern Territories. Tribunal II convicted Milch, but it said very little about the circumstances in which deportations were illegal. That silence led Judge Phillips to write separately to clarify the issue. In his view, deportation was a war crime in three different situations. First, it was illegal when conducted without “legal title,” such as the deportation of civilians from occupied territory. Article 52 of the Hague Regulations limited requisitions in “services” to the “needs of the army of occupation”; by definition, civilians deported to labor outside of occupied territory were not working to satisfy such needs. Second, it was illegal when the purpose of the deportation was illegal, such as deportations designed to force civilians to participate in military operations against their own country. Third, it was illegal “whenever generally recognized standards of decency and humanity [we]re disregarded. This flows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner.”⁹²

Judge Phillips’ concurring opinion had a significant influence on later trials. Tribunal III explicitly adopted his tripartite test for illegal deportation in *Krupp*,⁹³ and three other tribunals – in *Justice*, *RuSHA*, and *High Command* – held that the deportation of civilians from occupied territory was criminal on similar grounds.⁹⁴ The tribunals then had little trouble condemning specific deportations as criminal, such as Krupp’s use of Jewish labor deported from Poland in its Bertha Works,⁹⁵ the Night and Fog program,⁹⁶ and the systematic deportation of ethnic Germans from occupied territories for Germanization.⁹⁷

Unfortunately, the tribunals failed to conclusively resolve three important legal issues. To begin with, it is unclear whether deportation was limited to relocating civilians from one state to another or included relocations within a state. The *High Command*

⁹⁰ Id. at 789.

⁹¹ IMT JUDGMENT, 57.

⁹² Milch, Phillips Concurrence, II TWC 865-66.

⁹³ Krupp, IX TWC 1432.

⁹⁴ Justice, III TWC 1057; RuSHA, V TWC 126; High Command, XI TWC 603.

⁹⁵ Krupp, IX TWC 1417.

⁹⁶ Justice, III TWC 1057.

⁹⁷ RuSHA, V TWC 126.

tribunal was the only tribunal that explicitly addressed the issue. It held that “there is no international law that permits the deportation... either within the area of the army... or to rear areas or to the homeland of the occupying power,”⁹⁸ implying that both deportation and transfer were war crimes. The *RuSHA* tribunal also implied that cross-border relocation was not required, referring to relocations from incorporated Poland to the Government General as deportation.⁹⁹

It is also unclear whether the tribunals believed that deportations had to be *forcible*. They most likely did: the *High Command* tribunal specifically held that the deportations had to be “against the will” of the affected civilians,¹⁰⁰ and the tribunals generally refused to condemn genuinely consensual acts that would have been criminal in the absence of consent. That said, the Article 52 rationale for criminalizing deportations articulated by Judge Phillips and adopted by the *Krupp* tribunal – that the labor of deported civilians would not be directed toward the needs of the occupying army – would apply to both voluntary and forcible deportations.

Finally, the tribunals left open the possibility that otherwise-criminal deportations could be justified on two different grounds. First, in the context of rejecting a “state security” defense of the Night and Fog program, the *Justice* tribunal suggested that an occupying power could remove civilians from occupied territory if doing so “was necessary to protect the security of the occupant forces”¹⁰¹ – a potentially broad exception. Second, the *RuSHA* tribunal refused to condemn deportations that were carried out “by virtue of treaties entered into by Germany and the country concerned by the resettlement action,”¹⁰² thus suggesting an exception to the tribunals’ general refusal to recognize the right of governments to authorize the criminal treatment of their nationals.

D. Slave Labor

Slave-labor charges played a central role in seven of the 12 NMT trials: *Milch*, *Pohl*, *Flick*, *Farben*, *Krupp*, *High Command*, and *Ministries*. In part, their centrality simply reflected the fact that the Nazis had enslaved at least 5,000,000 civilians from occupied territories, a number that the *Pohl* tribunal stated “had been repeatedly and conclusively proved before this and other Tribunals,”¹⁰³ most notably the IMT. Taylor acknowledged in his Final Report, however, that the OCC’s emphasis on slave-labor was also motivated by political concerns:

[T]he problem of forced-labor was of current importance and particular significance in view of rumors and reports that it was prevalent in one or more countries of eastern Europe. It seemed to me that vigorous prosecution of those who were guilty of deporting and enslaving foreign workers under the Third Reich would make it

⁹⁸ *High Command*, XI TWC 603.

⁹⁹ *RuSHA*, V TWC 126.

¹⁰⁰ *High Command*, XI TWC 603.

¹⁰¹ *Justice*, III TWC 1059.

¹⁰² *RuSHA*, V TWC 126.

¹⁰³ *Pohl*, V TWC 970.

clear beyond doubt that the United States did not condone such practices at any time or under any circumstances.¹⁰⁴

In each of the seven cases, the OCC charged the defendants' use of slave labor as both a war crime and a crime against humanity. That practice could have become an issue during the trials: although Law No. 10 specifically designated "enslavement" as a crime against humanity, it only prohibited "deportation to slave labor" as a war crime. Indeed, Judge Phillips acknowledged that distinction in his concurring opinion in *Milch*.¹⁰⁵ The tribunals nevertheless treated both enslavement and "deportation to slave labor" as independent war crimes.¹⁰⁶

The tribunals also insisted, quite progressively, that the war crime of enslavement was different than the war crime of "ill treatment" of a civilian population. As Tribunal II noted in *Pohl*, "[s]lavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint... There is no such thing as benevolent slavery."¹⁰⁷ That view was echoed by the *High Command* tribunal, which held that giving "extra rations or extra privileges" to enslaved civilians "could be considered, if at all, only in mitigation of punishment and not as a defense to the crime."¹⁰⁸

Although all of the tribunals condemned the use of slave labor, the slave-labor charges themselves met with mixed success. Three cases resulted in all or nearly all of the defendants being convicted. In *Milch*, the defendant was convicted for using slaves in the airplane factories that he controlled.¹⁰⁹ In *Pohl*, all of the defendants were convicted for their roles in the WVHA, which "managed and controlled a vast number of economic enterprises" that "were operated almost entirely by the use of concentration camp labor."¹¹⁰ And in *Krupp*, all of the defendants except Pfirsch were convicted for participating in the company's willing use of slave labor at Auschwitz, the Bertha Works, and other factories.¹¹¹

The charges were much less successful in *Flick*, *High Command*, *Ministries*, and *Farben*. The *Flick* tribunal acknowledged that the company had made widespread use of slaves,¹¹² but nevertheless acquitted four of the six defendants on the ground that they had a valid necessity defense – a questionable decision discussed in Chapter 13 – and convicted the other two, Flick himself and Weiss, only for their roles in securing Russian POWs to produce freight cars for the company's Linke-Hoffman Werke.¹¹³ The *High Command* tribunal acquitted eight of 13 defendants, only convicting those who, like Field Marshal von Kuechler and General Reinhardt, commanded occupied

¹⁰⁴ TAYLOR, FINAL REPORT, 67.

¹⁰⁵ *Milch*, Phillips Concurrence, II TWC 866.

¹⁰⁶ See, e.g., *Farben*, VIII TWC 1174.

¹⁰⁷ *Pohl*, V TWC 970.

¹⁰⁸ *High Command*, XI TWC 603.

¹⁰⁹ *Milch*, II TWC 828.

¹¹⁰ *Pohl*, V TWC 966.

¹¹¹ *Krupp*, IX TWC 1449.

¹¹² *Flick*, VI TWC 1196.

¹¹³ *Id.* at 1198.

areas in which large numbers of slaves were “recruited” and used.¹¹⁴ And the *Ministries* tribunal convicted five of 14 defendants, limiting responsibility to those who either helped shape the slave-labor policy, like Lammers,¹¹⁵ or actually used slaves, like Pleiger, the head of the Hermann Goering Works.¹¹⁶

The *Farben* trial led to similar results. Only five of the 23 defendants were convicted, even though the Tribunal concluded that the company had employed thousands of slaves at Auschwitz and at other Farben plants.¹¹⁷ Three of the defendants – Ambros, Butefisch, and Duerrfeld – were convicted because they were the Farben officials “most directly responsible” for the construction at Auschwitz III.¹¹⁸ Krauch was convicted because, as a member of the Central Planning Board, he was involved in allocating slave laborers to Auschwitz and to other non-Farben chemical factories,¹¹⁹ while ter Meer was Ambros’ superior and had steered Farben toward Auschwitz because of the ready supply of slave labor there.¹²⁰

The other 18 defendants were acquitted for various reasons. Those defendants fell into three categories: members of the Vorstand who managed individual Farben plants as members of the Technical Committee (TEA); members of the Vorstand who were not part of TEA; and lower-level officials who were not members of either the Vorstand or TEA. The Tribunal held that the eight defendants in the first category were entitled to a defense of necessity for using slaves in the plants that they managed and had not known that slave laborers would be used at Auschwitz III when they approved its construction.¹²¹ It held that the seven defendants in the second category, despite being aware of Farben’s widespread use of slave labor in other plants, were not directly involved in the “allocation or recruitment” of slaves and knew even less about the use of slaves at Auschwitz III than the members of TEA.¹²² And the Tribunal summarily acquitted the three defendants in the third category for lack of evidence.¹²³

The acquittals provoked an angry dissent from Judge Hebert. Although he concurred with the acquittals of the three non-Vorstand defendants, he insisted that the members of the Vorstand were not entitled to a necessity defense¹²⁴ and that they knew full well slave labor was being used at Auschwitz III – a fact Krauch himself had freely admitted in a pre-trial affidavit (one that the majority had conveniently decided to ignore).¹²⁵ More importantly, though, Judge Hebert categorically rejected the idea that members of the Vorstand could only be convicted if they had been directly involved in recruiting or allocating slave labor. In his view, the role they had played

¹¹⁴ See, e.g., High Command, XI TWC 607.

¹¹⁵ *Ministries*, XIV TWC 809.

¹¹⁶ *Id.* at 843.

¹¹⁷ *Farben*, VIII TWC 1186-87.

¹¹⁸ *Id.* at 1187.

¹¹⁹ *Id.* at 1189.

¹²⁰ *Id.* at 1192.

¹²¹ *Id.* at 1193-94.

¹²² *Id.* at 1195.

¹²³ *Id.* at 1196.

¹²⁴ *Id.* at 1312, Hebert Dissent.

¹²⁵ *Id.* at 1318, Hebert Dissent.

in formulating and approving Farben's general "corporate policy" of using slaves made them criminally responsible for the results of that policy.¹²⁶

E. Mistreatment of Civilians

Law No. 10 specifically designated the "ill treatment" of civilians as a war crime. As interpreted by the tribunals, that war crime encompassed three different kinds of mistreatment: inhumane labor conditions; medical experimentation; and the deprivation of fundamental rights.

1. Inhumane Labor Conditions

Mistreatment charges played a central role in the three industrialist cases: *Flick*, *Krupp*, and *Farben*. The IMT had specifically condemned the conditions in the Krupp Works in Essen,¹²⁷ so it is not surprising that the charges were most successful in *Krupp*. Tribunal III convicted all of the defendants but Pfirsch for abusing civilians – nearly all of whom were slaves – employed by Krupp factories and housed in Krupp-controlled penal camps. It noted, for example, that the workers imprisoned in the company's Dechenschule camp had their heads shaved, were forced to wear "convict clothing" and painful wooden shoes, subsisted on liquid food, lived in rat-infested quarters, were regularly beaten with a truncheon, had "no real medical facilities," and were assigned an air-raid trench that was unsafe and too small to protect all of the workers.¹²⁸

By contrast, the mistreatment charges failed completely in *Flick*. Tribunal IV not only held rejected the prosecution's description of the "inhuman" conditions in Flick's plants as "not sustained by the evidence," it went out of its way to praise the company for doing everything it could "to provide healthful housing for such laborers, to provide them with not only better but more food than permitted by governmental regulations, to give them adequate medical care and necessary recreation and amusement."¹²⁹

The *Farben* majority was equally sympathetic to the defendants, acquitting them of mistreatment with regard to all of Farben's plants other than Auschwitz III on the ground that, "as a general policy, Farben attempted to carry out humane practices in the treatment of its workers and that these individual defendants did what was possible under then existing conditions to alleviate the miseries inherent in the system of slave labor."¹³⁰ Not even the *Farben* majority, however, could completely overlook the miserable conditions in which the company's Auschwitz slaves labored under the watchful eye of the SS – the inadequate food and clothing, the endless heavy and dangerous labor, the regular beatings, the constant threat of being transferred to Birkenau for extermination if they were unable to work.¹³¹ It thus convicted Ambros, Butefisch, and Duerrfeld on the mistreatment charges, holding that

¹²⁶ Id. at 1312-13, Hebert Dissent. Judge Hebert's views on the responsibility of corporate officials are explored in more detail in Chapter 11.

¹²⁷ IMT JUDGMENT, 59.

¹²⁸ *Krupp*, IX TWC 1400-03.

¹²⁹ *Flick*, VI TWC 1199.

¹³⁰ *Farben*, VIII TWC 1194.

¹³¹ Id. at 1184.

they were so deeply involved in the operations of Auschwitz III that they shared responsibility for the conditions in the camp with the SS.¹³²

Judge Hebert dissented on the mistreatment charges. In his view, just as the Vorstand was collectively responsible for the use of slaves in the Auschwitz III, it was also collectively responsible for their mistreatment.¹³³ He additionally rejected the majority's claim that only three of the 20 members of the Vorstand were aware of the conditions in Auschwitz III, noting that they "were so horrible that it is utterly incredible to conclude that they were unknown to the defendants, the principal corporate directors, who were responsible for Farben's connection with the project."¹³⁴

2. Medical Experimentation

The *Medical* tribunal had little trouble concluding that the notorious medical experiments conducted by the Nazis on civilians imprisoned in concentration-camps – involving everything from infecting the prisoners with deadly diseases to forcibly sterilizing them – violated the laws and customs of war. The Tribunal did not hold that those experiments were criminal *per se*; instead, it articulated ten "basic principles" that determined whether a particular experiment was lawful, such as that the subject consented and the experiment was designed to avoid unnecessary suffering – what is now known as the "Nuremberg Code."¹³⁵ Without exception, however, the Nazis' experiments violated those principles:

In every single instance appearing in the record, subjects were used who did not consent to the experiments.... All of the experiments were conducted with unnecessary suffering and injury and but very little, if any, precautions were taken to protect or safeguard the human subjects from the possibilities of injury, disability, or death.¹³⁶

Because the prosecution alleged that the experiments violated both the laws of war and the "general principles of criminal law as derived from the criminal laws of all civilized nations," Tribunal I permitted the prosecution to call Dr. Andrew Ivy to testify concerning the conduct of medical experimentation in "civilized nations." As noted in Chapter 6, that decision backfired – although Ivy testified on direct that he knew of no experiments conducted during the war in the U.S. that did not comply with the Nuremberg Code, the defendants forced him to admit on cross that he had personally conducted dangerous experiments on prisoners and conscientious objectors.

3. Denial of Rights

Although not specifically prohibited by Article II(1)(b) of Law No. 10, the tribunals held that depriving civilians in occupied territory of certain fundamental rights was a

¹³² Id. at 1185.

¹³³ Id. at 1315, Hebert Dissent.

¹³⁴ Id. at 1322, Hebert Dissent.

¹³⁵ Medical, II TWC 181-82.

¹³⁶ Id. at 183.

war crime, particularly the right to a fair trial, the right to private property, the right to nationality, and the right to freedom of religion. Some of those rights were expressly protected by Article 46 of the Hague Regulations, which provided that “[f]amily honor and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.” The others, according to the tribunals, were implicitly protected by Article 23(h), which provided that it was forbidden “[t]o declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party,” and by Article 43, which provided that an occupying power was required to take “all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

i. Right to a Fair Trial

The *Justice* tribunal held that a variety of German decrees concerning the prosecution of civilians in occupied territory violated the Hague Regulations, making participation in their formulation or execution a war crime. Three decrees were particularly important: the Law Against Jews and Poles, the Law to Change the Penal Code, and the Night and Fog Decree.

The Law Against Jews and Poles, which was enacted on 4 December 1941, extended German criminal law to Jews and Poles in the Incorporated Eastern Territories and mandated the death penalty for a wide range of offenses.¹³⁷ The *Justice* tribunal condemned a number of aspects of the law. First, it held that the very act of suspending the domestic law in occupied territory in favor of German criminal law violated not only Articles 23(h), 43, and 46 of the Hague Regulations, but also the Martens Clause.¹³⁸ Second, it held that the law breached the *nullem poena sine lege* principle, because it permitted courts to impose the death penalty on Jews and Poles “even where such punishment was not prescribed by law,” as long as the evidence indicated that they had “particularly objectionable motives.”¹³⁹ Third, the law violated the principle of non-retroactivity, because the law was made applicable – by a decree issued by Schlegelberger on 31 January 1942 – “to offenses committed before the [law] came into force.”¹⁴⁰

The Law to Change the Penal Code, issued by Hitler on 28 June 1935, provided that an act that was not specifically criminal under German criminal law “shall be punished according to the law whose underlying principle can be most readily applied to the act.” The *Justice* tribunal held that the law was a flagrant violation of the *nullem crimen sine lege* principle, because its adoption of criminalization by analogy “constituted a complete repudiation of the rule that criminal statutes should be definite and certain”¹⁴¹ and meant that civilians in occupied territory “could have no possible conception of the acts which would constitute criminal offenses.”¹⁴²

¹³⁷ Justice, III TWC 995-96.

¹³⁸ Id. at 1076-77.

¹³⁹ Id. at 1063-64.

¹⁴⁰ Id. at 1085.

¹⁴¹ Id. at 990.

¹⁴² Id. at 1083.

Finally, the Night and Fog (*Nacht und Nebel*) decree, which was enacted on 7 December 1941, required civilians in occupied territory who were suspected of committing offenses against either the Reich or German occupation forces to be secretly transferred to Germany for trial and punishment. The criminality of the deportations the Night and Fog decree authorized was discussed above. Here it is important to note that the *Justice* tribunal held that the trials conducted pursuant to the decree –which led to thousands of executions – deprived the civilian defendants of their right under the Hague Regulations to a fair trial:

The accused NN persons were arrested and secretly transported to Germany and other countries for trial. They were held incommunicado. In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were tried secretly and denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. No indictment was served in many instances and the accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them.¹⁴³

ii. Right to Property

The *Pohl* tribunal held that, in light of Article 46 of the Hague Regulations, it was a war crime to confiscate the personal property of civilians in occupied territory. The Tribunal focused on Action Reinhardt, the Nazi program of systematically looting the property of Jews imprisoned and murdered in concentration camps and transferring that property to Germany. As the Tribunal pointed out, “everything that could be lifted was moved,” most notoriously human hair and dental gold.¹⁴⁴

iii. Right to Nationality

The *RuSHA* tribunal held that “Germanization” was a criminal violation of the rights protected by the Hague Regulations.¹⁴⁵ That process – defined as subjecting civilians to measures designed “to strengthen the German nation and the so-called ‘Aryan’ race at the expense of... other nations and groups by imposing Nazi and German characteristics upon individuals selected therefrom”¹⁴⁶ – involved a variety of criminal acts: “[d]eportation of Poles and Jews; the separation of family groups and the kidnapping of children for the purpose of training them in Nazi ideology; confiscation of all property of Poles and Jews for resettlement purposes; the destruction of the economic and cultural life of the Polish population; and the hampering of the reproduction of the Polish population.”¹⁴⁷ Those crimes, which the prosecution alleged were part of “a systematic program of genocide,” are discussed in more detail in the next chapter.

¹⁴³ Id. at 1047.

¹⁴⁴ Pohl, V TWC 977-78.

¹⁴⁵ RuSHA, V TWC 153.

¹⁴⁶ RuSHA, Indictment, para. 2, IV TWC 609-10.

¹⁴⁷ RuSHA, V TWC 96.

IV. Right to Religion

Finally, the *Ministries* tribunal condemned the Nazi regime's "campaign of persecution of the Catholic Church, its dignitaries, priests, nuns, and communicants," a campaign that included removing priests from occupied territory to deprive its inhabitants of religious teaching and comfort.¹⁴⁸ The Tribunal held that such acts violated not only the right to "religious convictions and practice" protected by Article 46 of the Hague Regulations, but also violated Article 56's mandate that "institutions dedicated to religion" must be treated by an occupying power as private property.¹⁴⁹

V. CRIMES AGAINST PROPERTY

Law No. 10 designated the "plunder of public or private property" a war crime. That crime – which the prosecution variously referred to as both plunder and spoliation, terms that the *Farben* tribunal said were synonymous¹⁵⁰ – was at issue in five of the twelve trials: *Pohl*, *Flick*, *Farben*, *Krupp*, and *Ministries*.

A. Private Property

The tribunals uniformly held that plundering private property violated the Hague Regulations.¹⁵¹ Three Regulations were particularly important: Article 46, which provided, as noted, that "private property... cannot be confiscated"; Article 47, which provided that "[p]illage is formally forbidden"; and Article 52, which provided in relevant part that "[r]equisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country." The Regulations thus protected two different kinds of rights in occupied territory: the *individual* right of civilians to enjoy private property (Articles 46 and 47); and the *collective* right of the occupied state to maintain an economy that would be viable after the occupation ended (Article 52).

All of the tribunals agreed that it was a war crime to violate the individual right. They disagreed, however, over the status of the collective right. The *Krupp* tribunal specifically held that violating the collective right was a war crime,¹⁵² convicting the defendants involved in appropriating Dutch factories on the ground that the plunder was conducted – quoting the IMT – "in the most ruthless way, without consideration of the local economy."¹⁵³ The *Ministries* tribunal agreed, convicting Darre, for example, because he applied the Reich Food Estate Law to the Incorporated Eastern Territories with "utter disregard for the provisions of Article 52."¹⁵⁴

In criminalizing violations of Article 52, the *Krupp* and *Ministries* tribunals were simply following the lead of the IMT, which (as the quote above indicates) had

¹⁴⁸ *Ministries*, XIV TWC 520.

¹⁴⁹ *Id.* at 522.

¹⁵⁰ *Farben*, VIII TWC 1133.

¹⁵¹ See, e.g., *id.* at 1131; *Krupp*, IX TWC 1341.

¹⁵² *Krupp*, IX TWC 1342.

¹⁵³ *Id.* at 1370. Interestingly, the Tribunal also held that the defendants could not have relied on Article 52 even if the plunder had been consistent with it, because a private corporation did not belong "to the army of occupation." *Id.* at 1345.

¹⁵⁴ *Ministries*, XIV TWC 710.

reached the same conclusion. The *Farben* tribunal nevertheless specifically limited the war crime of plunder to violations of the individual right to private property, holding that the collective impact of acquisitions on the local economy was irrelevant as long as the property was acquired with the owner's consent. "We look in vain," The Tribunal wrote, "for any provision in the Hague Regulations which would justify the broad assertion that private citizens of the nation of the military occupant may not enter into agreements respecting property in occupied territories when consent of the owner is, in fact, freely given."¹⁵⁵ The *Farben* tribunal thus not only rejected the IMT's position, it quite literally read Article 52 out of existence.

The *Farben* tribunal did, however, take a progressive approach to the question of what made a civilian's decision to sell property "voluntary." It acknowledged that the mere fact that property was transferred during an occupation did not negate voluntariness as a matter of law. But it also emphasized that numerous transactions that did not involve overt violence should be considered involuntary, holding that when an owner's "consent" was obtained "by threats, intimidation, pressure, or by exploiting the position and power of the military occupant under circumstances indicating that the owner is being induced to part with his property against his will, it is clearly a violation of the Hague Regulations."¹⁵⁶

The *Farben* tribunal also took a progressive approach to other aspects of plunder. First, it insisted – and the *Krupp* tribunal agreed¹⁵⁷ – that the Hague Regulations applied not only to the nonconsensual acquisition of tangible property, such as a factory or machines, but also to the nonconsensual acquisition of intangible property, such as stocks or legal title.¹⁵⁸ Second, and conversely, it rejected the defendants' contention that the Hague Regulations did not prohibit seizing tangible property "as long as no definite transfer of title was accomplished." In its view, an occupant did not "respect" private property if its actions in any way deprived the owner of "lawfully exercising his prerogative as owner."¹⁵⁹ Third, it held that as long as an acquisition was nonconsensual, the fact that the occupant paid for the property or provided "other adequate consideration" for it did not render the transaction legal.¹⁶⁰

The plunder charges involving private property were relatively successful. Tribunal VI convicted nine *Farben* defendants of illegally acquiring factories and machinery in Poland, Norway, Alsace-Lorraine, and France through "the everpresent threat of forceful seizure of the property by the Reich or other similar measures, such, for example, as withholding licenses, raw materials, the threat of uncertain drastic treatment in peace treaty negotiations."¹⁶¹ Tribunal III convicted six *Krupp* defendants for seizing plants and machinery in France and the Netherlands,¹⁶² with Judge Wilkins insisting in dissent that the majority wrongly held that it had no jurisdiction over the seizure of a metalwork plant in Austria and that the majority

¹⁵⁵ *Farben*, VIII TWC 1135.

¹⁵⁶ *Id.* at 1135-36.

¹⁵⁷ *Krupp*, IX TWC 1347.

¹⁵⁸ *Farben*, VIII TWC 1134; see also *Krupp*, IX TWC 1346.

¹⁵⁹ *Farben*, VIII TWC 1345.

¹⁶⁰ *Id.* at 1132.

¹⁶¹ *Id.* at 1140.

¹⁶² See, e.g., *Krupp*, IX TWC 1357-58.

should have convicted the defendants for confiscating mining properties in France and Yugoslavia.¹⁶³ And Tribunal IV convicted nine defendants in *Ministries* for being involved in plunder throughout the Incorporated Eastern Territories, such as the German Resettlement Trust's systematic theft of property – farms, estates, houses, businesses – from civilians who were deported to the Reich, a program that involved more than 250,000 separate transactions.¹⁶⁴

B. Public Property

The tribunals also agreed that the plunder of public property violated the Hague Regulations. Two Regulations were particularly important: Article 53, which limited an army of occupation to seizing state property – such as arms and vehicles – that were of use in military operations; and Article 55, which provided that “[t]he occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State.”¹⁶⁵ Article 53 was important as a counterweight to the defense argument in *Ministries* that state-owned property, unlike private property, could be seized regardless of military use.¹⁶⁶ Article 55 was important to cabin the general principle, accepted by the tribunals, that state-owned property could be seized for the benefit of the occupying power for the duration of the occupation. As the *Ministries* tribunal pointed out, that right did not permit the occupying power to “strip off the property involved” or to “so use the property as to ruin or destroy the economy of the occupied territories.”¹⁶⁷

Plunder of public property resulted in convictions in two cases. In *Farben*, von Schnitzler and ter Meer were convicted of illegally acquiring a dyestuffs plant in Poland owned by the Polish government.¹⁶⁸ In *Ministries*, a number of defendants were convicted of plundering state-owned property in occupied territory. Lammers, for example, was convicted for participating in the formulation and execution of the Nazis’ plan “to assure the highest utilization and development of existing stores and capacities” of the Soviet Union for the benefit of Germany.¹⁶⁹ Similarly, Stuckart was convicted for creating the Main Trustee Office East, which was responsible for seizing property not only from Poles and Jews, but also from the Polish state.¹⁷⁰

CONCLUSION

Much of the NMTs’ jurisprudence concerning war crimes was progressive. The tribunals held that the rules of belligerent occupation applied even if territory was annexed and insisted on the strict separation of the *jus ad bellum* and *jus in bello*. They required judicial process to determine whether a captured partisan was entitled to POW status or whether a POW had violated the laws of war. And they held that enslavement did not require slaves to be mistreated, articulated far-reaching

¹⁶³ Id. at 1455, WD.

¹⁶⁴ *Ministries*, XIV TWC 584.

¹⁶⁵ See, e.g., *Krupp*, IX TWC 1338-39; *Ministries*, XIV TWC 746.

¹⁶⁶ *Ministries*, XIV TWC 746.

¹⁶⁷ Id. at 747.

¹⁶⁸ *Farben*, VIII TWC 1141-43.

¹⁶⁹ *Ministries*, XIV TWC 712.

¹⁷⁰ Id. at 720.

principles for the use of humans in medical experimentation, and criminalized the deprivation of rights even though such deprivation was not specifically prohibited by Article II(1)(b).

Other aspects of the tribunals' jurisprudence, however, were problematic. In some cases, the tribunals articulated the law better than they applied it. The *Flick* and *Farben* tribunals, for example, accepted that enslavement and mistreatment of civilians was criminal, yet acquitted a number of defendants despite overwhelming evidence of their guilt. In other cases, the law itself was the problem. Two examples stand out: the tribunals' insistence – over Judge Wilkins' dissent – that a bloodless invasion was a crime against peace but did not trigger the Hague and Geneva Conventions; and the willingness of the tribunals to tolerate the execution of civilians as hostages and in reprisal. Fortunately, as discussed in Chapter 16, the 1949 Geneva Conventions later rejected both of those positions.