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The Nuremberg Military Tribunals and the origins of International Criminal Law

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INTRODUCTION

A leading treatise on international criminal law describes defenses to criminal conduct as “an oft-forgotten aspect” of international criminal law.¹ As this chapter explains, that description does not apply to the NMTs, which generated an extensive jurisprudence concerning a variety of defenses. Section 1 discusses “jurisdictional” defenses, such as *tu quoque*. Section 2 focuses on substantive defenses that emphasized the defendant’s lack of responsibility for a particular crime, such as superior orders and mistake of law. Finally, Section 3 discusses the defense of military necessity, which functioned either as a failure of proof defense or as a justification, depending on the circumstances.

I. JURISDICTIONAL DEFENSES

Defendants invoked three defenses that would have required the tribunals to dismiss the charges against them for lack of jurisdiction: immunity, selective prosecution, and *tu quoque*. None were successful.

A. Immunity

Two tribunals considered arguments that defendants were immune from prosecution by virtue of their official positions. In the *Justice* case, the judicial defendants claimed that they were entitled to immunity for actions that they had taken in their capacity as judges. The Tribunal had little trouble rejecting that defense. First, it noted that the common-law doctrine of judicial immunity presumed the existence of “an independent judiciary administering impartial justice,” which had clearly not existed in Nazi Germany. Second, it pointed out that immunity did not prevent the prosecution of a judge for “malfeasance in office,” particularly of the kind in which the defendants had engaged. And third, it claimed that “the sinister influences which were in constant interplay between Hitler, his ministers, the Ministry of Justice, the Party, the Gestapo, and the courts” meant that the courts over which the defendants presided were “judicial only in a limited sense.” In the Tribunal’s view, those courts were better viewed as “administrative tribunals” whose powers were “quasi-judicial” at best.²

The *Ministries* case involved a claim of diplomatic immunity. The defendant Veessenmayer argued that he was immune from prosecution for his role in the deportation of Jews from Hungary because, at the time of the deportations, he had been accredited as Minister and Plenipotentiary General for the Greater German Reich in the country. The Tribunal acknowledged the existence of diplomatic immunity, but nevertheless rejected Veessenmayer’s claim. It began by noting that Veessenmayer’s diplomatic immunity, as immunity *ratione personae*, ended when he left office. It then adopted the customary position – endorsed not long before by the IMTFE³ – that diplomatic immunity protected the diplomat only from prosecution in the courts of the state to which he was accredited, making such immunity inapplicable in an international prosecution for an international crime.⁴

¹ ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 331 (2007).

² *Justice*, III TWC 1024-25.

³ NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 47 (2008).

⁴ *Ministries*, XIV TWC 660-62.

B. Selective Prosecution

In *Pohl*, one of the defense attorneys argued that his client (never named) “should not be tried or sentenced unless and until his superior officer has been indicted and tried and judgment entered against him.” Tribunal II rejected that claim in its supplemental judgment, pointing out that “[t]he sole province of the Tribunal is to judge those who are brought before it by the duly constituted prosecuting authorities who are entirely independent of the Tribunals. The judicial power does not extend to the institution or launching of criminal proceedings.”⁵

That conclusion was no doubt correct; Telford Taylor had exclusive authority under Ordinance No. 7 to “determine the persons to be tried by the tribunals.” But there is no question that whether certain individuals were prosecuted depended heavily on which war-crimes tribunal had jurisdiction over them. Consider, for example, the very different fates that awaited the German and Japanese doctors who had engaged in barbaric medical experiments during the war. Freyhofer notes that the Japanese experiments were similar to the German experiments, “not only with respect to the kinds of medical subjects explored, but also with respect to the scope and brutality of execution.” Nevertheless, whereas many of the defendants in the *Medical* case were executed or sentenced to life imprisonment, many of the Japanese doctors received immunity from prosecution in exchange for information about their crimes.⁶

C. Tu Quoque

The selective-prosecution defense challenged the fact that the tribunals prosecuted only a small fraction of the tens of thousands of Nazi officials and soldiers who had committed serious international crimes. The *tu quoque* defense, by contrast, challenged the right of the tribunals to prosecute specific crimes against peace, war crimes, and crimes against humanity that the Allies had themselves committed. That defense was thus quintessentially political, designed to paint the NMTs as “victor’s justice” by revealing the (alleged) hypocrisy underlying the entire proceedings.

The *Ministries* tribunal specifically addressed the “victor’s justice” aspect of the *tu quoque* defense. It openly acknowledged that fairness required applying the same standards of conduct to both the Germans and the Allies:

These Tribunals were not organized and do not sit for the purpose of wreaking vengeance upon the conquered. Was such the purpose, the power existed to use the firing squad, the scaffold, or the prison camp without taking the time and putting forth labor which have been so freely expended on them, and the Allied Powers would have copied the methods which were too often used during the Third Reich. We may not, in justice, apply to these defendants because they are Germans standards of duty and responsibility which are not equally applicable to the officials of the Allied Powers and to those of all nations. Nor should Germans be convicted for acts or conducts which, if committed by Americans, British, French, or Russians would not subject them to legal trial and conviction.⁷

⁵ Pohl, Supplemental Judgment, V TWC 1171-72.

⁶ FREYHOFER, 93.

⁷ Ministries, XIV TWC 317.

The Tribunal emphasized, however, that the defendants were not contending that their actions would have been legal if they had been committed by the Allies. Instead, they were claiming that it was unfair to prosecute them for crimes that the Allies had also committed. That was a very different proposition, the Tribunal pointed out, and one that had to be rejected: “[i]t has never been suggested that a law duly passed becomes ineffective when it transpires that one of the legislators whose vote enacted it was himself guilty of the same practice or that he himself intended, in the future, to violate the law.”⁸

The *Ministries* tribunal addressed *tu quoque* in the context of crimes against peace, rejecting a defense claim that the secret protocol of the 1939 Molotov-Ribbentrop Pact, which permitted Germany’s invasion of Poland and made clear the Soviet Union’s intention to invade the country as well, disqualified the Soviets from enacting the London Charter and Law No. 10 and rendered both instruments invalid.⁹ Tribunal V rejected a similar argument in *High Command*, reiterating that it was irrelevant whether the Soviets had waged aggressive war against Poland, because “[u]nder general principles of law, an accused does not exculpate himself from a crime by showing that another committed a similar crime, either before or after the alleged commission of the crime by the accused.”¹⁰ The *Einsatzgruppen* tribunal reached the same conclusion.¹¹

Defendants also invoked *tu quoque* in two other contexts. In *Ministries*, the defendants claimed that they could not be prosecuted for violations of the Hague Regulations concerning belligerent occupation, particularly those requiring occupants to respect national laws, because the Allies had committed similar violations during their occupation of Germany. The Tribunal did not even feel it necessary to reiterate the general rule against *tu quoque*; instead, it reminded the defendants that – as discussed in Chapter 5 – Germany’s unconditional surrender and the subsequent debellatio meant that the Allies were not bound by the Hague Regulations.¹²

Finally, in both *Einsatzgruppen* and the *Hostage* case, defendants claimed that they could not be convicted of war crimes and crimes against humanity for killing innocent civilians, because – to quote *Einsatzgruppen* – “every Allied nation brought about the death of noncombatants through the instrumentality of bombing.”¹³ That was a clever argument; the Allies were so sensitive about the attacks on Dresden, Berlin, Hiroshima, and Nagasaki that they had deliberately avoided charging IMT defendants with crimes related to the bombing of London.¹⁴ Both tribunals nevertheless rejected the defense, the *Hostage* tribunal noting that even if the Allied bombings were illegal, “they can give no comfort to these defendants as recriminatory evidence.”¹⁵

There is no question that the tribunals correctly rejected *tu quoque*; no domestic criminal-law system accepts the defense,¹⁶ and not even von Knieriem, otherwise so critical of the NMTs,

⁸ Id. at 323.

⁹ Id. at 322.

¹⁰ *High Command*, XI TWC 482.

¹¹ *Einsatzgruppen*, IV TWC 456.

¹² *Ministries*, XIV TWC 690.

¹³ *Einsatzgruppen*, IV TWC 467.

¹⁴ Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L. J. 49, 91-92 (1994).

¹⁵ *Hostage*, XI TWC 1317.

¹⁶ See Sienho Yee, *The Tu Quoque Argument as a Defence to International Crimes, Prosecution or Punishment*, 3 CHINESE J. INT’L L. 87, 94 (2004).

argued that it should have been recognized.¹⁷ It is nevertheless easy to understand Sienho Yee's claim that the *tu quoque* defense "troubles the human soul, when it is presented in a fitting situation."¹⁸ The *Medical* case again provides a compelling example. There was nothing unjust about convicting the defendants for conducting the medical experiments revealed during the trial. But it is impossible to ignore that, as discussed in previous chapters, both the prosecution and the judges themselves did everything they could to obscure the fact that American doctors and scientists had engaged in medical experiments during the war that differed in degree, but certainly not in kind. Indeed, the hypocrisy was even greater, because some of the *Medical* defendants were prosecuted for experiments that they had continued to conduct after the war on behalf of the U.S. military. Ruff, for example, had engaged in high-altitude research for the Air Force using the same kind of low-pressure chamber that he had previously used in Dachau – research that involved multiple fatalities.¹⁹

II. SUBSTANTIVE DEFENSES

The NMTs took an unsystematic approach to defenses that negative the defendant's responsibility for a crime. The tribunals not only failed to distinguish between justifications, excuses, and failure-of-proof defenses, they also generally ignored the issue of whether the prosecution or the defense bore the burden of proof with regard to a defense. They did, however, discuss a number of substantive defenses in great detail.

A. Burden of Proof

Only one tribunal discussed burden of proof issues. In *Krupp*, Tribunal III cited with approval Wharton's approach to "confession and avoidance" defenses – defenses that admitted the elements of the crime, but argued that the defendant's commission of that crime was either justified or excused. That approach placed the burden of proof on the defendant, requiring him to introduce evidence sufficient to raise a reasonable doubt of his guilt.²⁰

B. Superior Orders

As noted above, Article II(4)(b) of Law No. 10 provided that "[t]he fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation." In *Einsatzgruppen*, Tribunal II provided the classic explanation of why superior orders should not be considered a complete defense:

The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery. It is a fallacy of wide-spread consumption that a soldier is required to do everything his superior officer orders him to do... If every military person were required, regardless of the nature of the command, to obey unconditionally, a sergeant could order the corporal to shoot the lieutenant, the lieutenant could order the sergeant to shoot the captain, the captain could order the lieutenant to shoot the colonel, and in each instance the executioner would be absolved of blame.²¹

¹⁷ VON KNIERIEM, 23.

¹⁸ Yee, 87.

¹⁹ FREYHOFER, 92.

²⁰ Krupp, IX TWC 1437, citing WHARTON'S CRIMINAL EVIDENCE 236-37 (11th ed. 1935).

²¹ Einsatzgruppen, IV TWC 470.

Although the tribunals took a remarkably consistent approach to superior orders, they disagreed about two aspects of the defense.

1. Source

To begin with, they disagreed concerning the source of law that justified refusing to consider superior orders a complete defense. The *High Command* tribunal simply relied on the existence of Article II(4)(b), noting that “we are bound by it as one of the basic authorities under which we function as a judicial tribunal”²² – a rare example of a tribunal applying a specific provision of Law No. 10 without considering its conventional or customary foundation. The *Hostage* tribunal, by contrast, specifically held that “[t]he rule that superior order is not a defense to a criminal act is a rule of fundamental criminal justice that has been adopted by civilized nations extensively” and thus “properly may be declared as an applicable rule of international law.”²³ In reaching that conclusion, the tribunal acknowledged – as argued by the defendants – that Oppenheim, the British *Manual of Military Law*, and the American *Rules of Land Warfare* each endorsed superior orders as a complete defense. It nevertheless dismissed Oppenheim as a “decidedly minority view” and held that military regulations were “not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilized nations generally,” because they were “neither legislative nor juridical pronouncements.”²⁴ The Tribunal also noted that the military regulations of other Allied countries rejected the defense of superior orders, which would have precluded recognizing the defense as a fundamental principle of justice even if military regulations were a competent source of law.²⁵

2. Scope and Effect

The tribunals also disagreed about the scope and effect of the defense. The seemingly clear language of Article II(4)(b) actually masked a fundamental ambiguity. Did the *mere existence* of a superior order entitle the defendant to a sentence reduction? Or were only *some kinds* of superior orders mitigating?

The tribunals divided into three distinct camps. The *Pohl* tribunal took the position that a defendant who committed a criminal act pursuant to any superior order, even a clearly illegal one, was entitled to at least some degree of sentence mitigation. Bobermin, for example, attempted to justify the use of concentration-camp labor at his plant near Auschwitz on the ground that he was simply following Pohl’s orders. The Tribunal held that “[w]here outright criminality is involved, superior orders are in themselves no excuse, although they may be argued in mitigation of punishment.”²⁶

Two tribunals, by contrast, held that the mere existence of a superior order did not entitle a defendant to a sentence reduction. In their view, a defendant was entitled to rely on Article II(4)(b) only if the order was not clearly illegal – the conditional liability approach discussed in detail below. The *Einsatzgruppen* tribunal held that “[t]he subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a

²² High Command, XI TWC 508.

²³ Hostage, XI TWC 1236.

²⁴ Id. at 1236-37.

²⁵ Id. at 1238. The *Hostage* tribunal clearly distinguished here between rules of customary international law and fundamental principles of justice. It acknowledged that, had the military regulations been put into practice – acquitting soldiers who committed crimes pursuant to superior orders – they might have helped establish a *customary rule* permitting superior orders to serve as a complete defense. Id. at 1237.

²⁶ Pohl, V TWC 1058.

malice of his own, he may not plead superior orders in mitigation of his offense.”²⁷ The *Medical* tribunal reached a similar conclusion with regard to Gebhardt’s claim that Himmler had ordered him to participate in medical experimentation, holding that Gebhardt was not entitled to mitigation because he had not satisfied the requirements of the defense.²⁸

Finally, although the *Hostage* tribunal rejected the *respondeat superior* approach to the defense of superior orders, it also rejected the idea that legitimate reliance on a superior order was nothing more than a mitigating factor. On the contrary, it held that a defendant who relied on a superior order that was not clearly illegal was entitled to *acquittal*, not simply a sentence reduction: “if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, *no wrongful intent necessary to the commission of a crime exists* and the inferior will be protected.”²⁹ That position was clearly inconsistent with Article II(4)(b).

3. Conditional Liability

With the exception of the *Pohl* tribunal, then, all of the tribunals adopted a conditional liability approach to the defense of superior orders. That approach required a defendant to satisfy five requirements. First, a superior/subordinate relationship had to exist between the individual who gave the order and the defendant who relied on it.³⁰ Formal superiority, however, was not required: “[s]uperior means superior in capacity and power to force a certain act. It does not mean superiority only in rank. It could easily happen in an illegal enterprise that the captain guides the major, in which case the captain could not be heard to plead superior orders in defense of his crime.”³¹

Second, the order had to be binding on the defendant. As the *Medical* tribunal pointed out, the defense of superior orders “has never been held applicable to a case where the one to whom the order is given has free latitude of decision whether to accept the order or reject it.”³² That requirement doomed a number of superior-orders claims. In the *Medical* case, for example, Sievers argued that he was not criminally responsible for participating in the infamous murder of 112 Jews at Auschwitz whose skeletons were requested by the Reich University of Strasbourg because he had been ordered to participate by Brandt and Himmler. The Tribunal rejected his defense, pointing out that although “the basic policies or projects which he carried through were decided upon by his superiors... in the execution of the details Sievers had an unlimited power of discretion.”³³

Third, the order had to relate to “military duty.” An order to steal, for example, would not qualify for the defense of superior orders.³⁴

Fourth, the defendant must have honestly believed that the order was legal.³⁵ The *Medical* tribunal rejected Fischer’s superior-orders claim regarding his participation in sulfanilamide

²⁷ Einsatzgruppen, IV TWC 471.

²⁸ *Medical*, II TWC 227.

²⁹ *Hostage*, XI TWC 1236 (emphasis added).

³⁰ Einsatzgruppen, IV TWC 480.

³¹ *Id.*

³² *Medical*, II TWC 227; see also Einsatzgruppen, IV TWC 471.

³³ *Medical*, II TWC 262-63.

³⁴ Einsatzgruppen, IV TWC 470.

³⁵ *Hostage*, XI TWC 1236.

experiments, for example, because he “acted with most complete knowledge that what he was doing was fundamentally criminal, even though directed by a superior.”³⁶

Fifth, and finally, the order must not have been “manifestly”³⁷ or “patently”³⁸ illegal. That was, as the *Hostage* tribunal made clear, a simple negligence test: the defense of superior orders did not apply if the defendant “knew or should have known” of the order’s illegality.³⁹ The *Hostage* tribunal also suggested that the experience and rank of the defendant should be taken into account when determining whether a defendant “could reasonably have been expected to know” that an order was illegal.⁴⁰ List, for example, argued that he reasonably believed that the Commissar Order – which required the immediate execution of captured Soviet commissars – was legal. The Tribunal rejected that claim, noting simply that “a field marshal of the German Army with more than 40 years of experience as a professional soldier knew or ought to have known of its criminal nature.”⁴¹

C. Necessity

The defense of “necessity” – a term the tribunals used interchangeably with “duress” – played an important role in at least half of the NMT trials. That is not surprising, because the necessity defense had two important advantages over the defense of superior orders. First, it did not require the defendant to prove that he neither knew nor should have known that a particular order was illegal; the defense applied to even the most patently illegal order. Second, all of the tribunals agreed that a legitimate necessity defense required acquittal, not simply mitigation of sentence. Defendants thus had a powerful incentive to admit that they knew a particular order was illegal, but claim that the “dire consequences” of non-compliance forced them to execute it.

The tribunals imposed five conditions on the defense of necessity. First, the defendant’s criminal act had to have been a response to a “serious evil.”⁴² The tribunals did not specifically define that term, but it is clear that the evil had to involve the possibility of physical violence. A number of tribunals emphasized the possibility that non-compliance with superior orders could have led to death or serious bodily harm,⁴³ while the *Krupp* tribunal insisted – again citing Wharton – that “fear of the loss of property will not make the defense of duress available.”⁴⁴

Second, the serious evil had to be “imminent, real, and inevitable.”⁴⁵ The *Einsatzgruppen* tribunal emphasized, however, that the imminence requirement had to be applied reasonably; the defense of necessity did not require the criminal act to be committed with the proverbial gun to the head.⁴⁶

³⁶ Medical, II TWC 296.

³⁷ Einsatzgruppen, IV TWC 471.

³⁸ Pohl, Supplemental Judgment, V TWC 1250.

³⁹ Hostage, XI TWC 1271.

⁴⁰ Id. at 1236.

⁴¹ Id. at 1271.

⁴² Krupp, IX TWC 1436.

⁴³ See, e.g., Flick, VI TWC 1197; Einsatzgruppen, IV TWC 480.

⁴⁴ Krupp, IX TWC 1445.

⁴⁵ Einsatzgruppen, IV TWC 480.

⁴⁶ Id.

Third, the defendant must not have had any alternative to committing the criminal act – “no other adequate means of escape,” in the words of the *Krupp* tribunal.⁴⁷ That requirement, according to Tribunal II in *Pohl*, required the defendant to prove that he had actively resisted the order: “[a]nyone ordered to perform a patently illegal and inhuman act is charged by law to protest the order to the extent of his ability, short of endangering his own security. If he fails to do so he will be required to answer for the execution of the illegal act.”⁴⁸

Fourth, the harm caused by the criminal act had to be proportionate to the harm threatened by the serious evil.⁴⁹ The *Krupp* tribunal took a narrow approach to that requirement, stating that it would not have recognized a necessity defense for the use of slave labor even if it believed the defendants’ claim (which it did not) that the failure to comply with Nazi production quotas would have resulted in internment in a concentration camp, because “[t]he defendants in a concentration camp would not have been in a worse plight than the thousands of helpless victims whom they daily exposed to danger of death.”⁵⁰ The *Einsatzgruppen* tribunal, by contrast, took a much broader approach, specifically holding that necessity was available even as a defense to murder. “No court,” it said, “will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.”⁵¹

Fifth, the threat of the serious evil must have actually deprived the defendant of the ability not to commit the criminal act – the *mens rea* requirement. In the words of the *Krupp* tribunal, “[u]nder the rule of necessity, the contemplated compulsion must actually operate upon the will of the accused to the extent he is thereby compelled to do what otherwise he would not have done.”⁵² This is the well-known “moral choice”⁵³ requirement: if the defendant would have committed the criminal act even in the absence of the threat, he is not entitled to a defense of necessity.⁵⁴ Here, too, the defendant’s efforts to resist carrying out an illegal order were relevant: “[t]he failure to attempt disengagement from so catastrophic an assignment might well spell the conclusion that the defendant involved had no deep-seated desire to be released.”⁵⁵

Finally, it is important to note that the tribunals divided over whether the *mens rea* of necessity had an objective component. The *High Command* tribunal held that the defense required the defendant to show not only that the serious evil had actually deprived him of his moral choice, but also “that a reasonable man would apprehend that he is in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.”⁵⁶ The *Krupp* tribunal, by contrast, insisted that “[t]he effect of the alleged compulsion is to be determined not by objective but by subjective standards.”⁵⁷

Although all of the tribunals recognized the defense of necessity, actual invocations of the defense met with mixed results. The *Krupp* tribunal rejected the idea that the defendants had no choice but to use slave labor in its factories, concluding that “the guilty individuals were

⁴⁷ *Krupp*, IX TWC 1436.

⁴⁸ *Pohl*, Supplemental Judgment, V TWC 1250.

⁴⁹ See, e.g., *Einsatzgruppen*, IV TWC 471.

⁵⁰ *Krupp*, IX TWC 1446.

⁵¹ *Einsatzgruppen*, IV TWC 480.

⁵² *Krupp*, IX TWC 1439.

⁵³ See IMT JUDGMENT, 42; *Farben*, VIII TWC 1179.

⁵⁴ *Krupp*, IX TWC 1439.

⁵⁵ *Einsatzgruppen*, IV TWC 482.

⁵⁶ *High Command*, XI TWC 509.

⁵⁷ *Krupp*, IX TWC 1438.

not acting under compulsion or coercion exerted by the Reich authorities within the meaning of the law of necessity.”⁵⁸ The *Einsatzgruppen* tribunal was similarly hostile to the defendants’ claims that refusing to participate in the execution of Jews would have led to their own execution. The Tribunal noted that the proffered “serious evil” did not actually exist, because the defendants themselves had admitted on the stand that the punishment for refusing to kill Jews was *transfer*, not death.⁵⁹ That had been the result, for example, of Graf’s refusal to take command of a Subkommando group in 1942.⁶⁰

The necessity defense was relatively more successful in *Flick* and *Farben*. The *Flick* tribunal rejected Flick and Weiss’ claim that the Reich authorities compelled them to use Soviet POWs to construct freight cars for the Linke-Hofmann Works, concluding that their actions “were not taken as a result of compulsion or fear, but admittedly for the purpose of keeping the-plant as near capacity production as possible,”⁶¹ but it acquitted the other four defendants on the slave-labor charges. In its view, those defendants did not want to use slave-labor in Flick plants and did so only because they were aware that “[t]he Reich, through its hordes of enforcement officials and secret police, was always ‘present’, ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees.”⁶² That was a questionable assessment of the situation, to say the least. Bower has pointed out, for example, that when Friedrich Flick testified for the defense at the *Farben* trial, he was unable to name even one German industrialist who had been punished for refusing to use slave labor.⁶³

The scorecard was also mixed in *Farben*. As discussed in Chapter 9, the Tribunal rejected the necessity defense with regard to the use of slave labor at Auschwitz and Fuerstengrube, holding that “these were wholly private projects operated by Farben, with considerable freedom and opportunity for initiative on the part of Farben officials connected therewith.”⁶⁴ It nevertheless acquitted the eight members of the Technical Committee (TEA) for using slave labor in the plants they controlled, concluding that the defendants had not taken the initiative in obtaining the slaves and had used them only because they knew that “the defiant refusal of a Farben executive to carry out the Reich production schedule or to use slave labor to achieve that end would have been treated as treasonous sabotage and would have resulted in prompt and drastic retaliation.”⁶⁵

Judge Hebert dissented from the acquittals. To begin with, he simply disagreed with the majority’s insistence that the TEA defendants had no “moral choice” but to accept slave labor. In his view, the Farben Vorstand as a whole had willingly cooperated in the slave-labor program because “there was no other solution” to Farben’s “manpower problems.”⁶⁶ More importantly, though, he rejected the very idea that defendants in the NMT trials could rely on the defense of necessity. First, he argued that the defense was inconsistent with Law No. 10, which indicated “quite clearly that governmental compulsion is merely a matter to be considered in mitigation and does not establish a defense to the fact of guilt.” Second, he

⁵⁸ *Id.*

⁵⁹ *Einsatzgruppen*, IV TWC 481-82.

⁶⁰ *Id.* at 585.

⁶¹ *Flick*, VI TWC 1202.

⁶² *Id.* at 1201.

⁶³ BOWER, 356.

⁶⁴ *Farben*, VIII TWC 1186-87.

⁶⁵ *Id.* at 1175.

⁶⁶ *Id.* at 1204, Statement of Judge Hebert.

said that it made no sense to allow industrialist defendants to rely on the defense, given that the IMT had not recognized necessity “as applied to defendants who were subject to strict military discipline and subject to the most severe penalties for failure to carry out the criminal plans decreed and evolved by Hitler.” Third, and finally, he believed that *Flick*’s recognition of the defense represented “unbridled license for the commission of war crimes and crimes against humanity on the broadest possible scale through the simple expediency of the issuance of compulsory governmental regulations combined with the terrorism of the totalitarian or police state.”⁶⁷

Judge Hebert’s first argument is unconvincing. Not even the *Einsatzgruppen* tribunal, which was rarely sympathetic to defense claims, believed that there was no difference between the defense of superior orders and the defense of necessity. His second and third arguments, however, have considerable merit. The Nazis were far more dependent on German industrialists than they were on individual members of the German armed forces, even high-ranking ones; as Judge Hebert noted, for example, Farben “carried out activities indispensable to creating and equipping the Nazi war machine.”⁶⁸ It is thus difficult to believe that refusing to use slave labor would have met with more serious repercussions than refusing to execute Jews, even assuming the threat of punishment actually existed.

D. Self-Defense

In *Einsatzgruppen*, the defendants attempted to rely on two different versions of self-defense to justify their systematic slaughter of the Jews. They began by invoking *Staatshilfe*, defense of state, arguing that their crimes were necessary to defend Germany against the “Jews in the East,” who were – in the words of the defendant Braune – “the decisive bearers of Communism and its illegal manner of fighting.”⁶⁹ Tribunal II had little trouble rejecting that defense. First, it noted that threats to the security of a state did not justify violating the laws of war, which prohibited killing of civilians simply because they were viewed as “dangerous” – another example of a tribunal insisting on the strict separation of the *jus ad bellum* and the *jus in bello*. Second, it noted that none of the defendants had even attempted to show how, “assuming the Jews to be disposed towards bolshevism, this *per se* translated itself into an attack on Germany.” Third, it pointed out that the *Einsatzgruppen* had killed Jews indiscriminately, not simply those suspected of communism, which indicated that the *Staatshilfe* argument was nothing more than an *ex post* rationalization for cold-blooded murder.⁷⁰

Perhaps recognizing the absurdity of the *Staatshilfe* argument, the defendants also attempted to rely on *Putativnothilfe*, “presumed” self-defense, according to which they were entitled to acquittal as long as they honestly believed that they were acting in the defense of Germany.⁷¹ The *Einsatzgruppen* tribunal dismissed that argument as well, noting derisively that it did not

⁶⁷ Id. at 1309-10, Hebert Dissent.

⁶⁸ Id. at 1297, Hebert Concurrence.

⁶⁹ EARL, 202.

⁷⁰ *Einsatzgruppen*, IV TWC 464. The last rationale emerged out of an exchange at trial between Judge Musmanno and Braune. Musmanno forced Braune to admit that he did not believe all of the Jews were Bolsheviks, just the “vast majority.” According to Earl, when Musmanno asked Braune why even the non-communist Jews were murdered, he had no response. EARL, 202.

⁷¹ *Einsatzgruppen*, IV TWC 463.

correspond “with any accepted tenets of international law” and would render the laws of war irrelevant.⁷²

Individual self-defense – as opposed to “self-defense” of state – played a minor role in *Krupp*. Although the defendants relied exclusively on the defense of necessity, Tribunal III strongly implied that it believed self-defense was available, at least in theory, with regard to a war crime or a crime against humanity.⁷³ It also made clear that the two defenses were closely related, the “principal distinction” between them being that “[s]elf-defense excuses the repulse of a wrong, whereas the rule of necessity justifies the invasion of a right” – the only example of a tribunal distinguishing between a justification and an excuse. More importantly, the Tribunal specifically held that, as with necessity, the *mens rea* of self-defense was purely subjective: whether the defendant’s act was necessary had to be determined “from the standpoint of the honest belief of the particular accused in question.”⁷⁴

E. Mistake of Law

The tribunals consistently emphasized that the defendants were fully aware that their actions were illegal. In the *Justice* case, for example, Tribunal III noted with regard to the crimes committed pursuant to the Night and Fog decree that “[a]ll of the defendants who entered into the plan or scheme, or who took part in enforcing or carrying it out, knew that its enforcement violated international law of war.”⁷⁵ Similarly, in *Einsatzgruppen*, Tribunal II said that it was “apparent” that all of the defendants involved in executing Heydrich’s Operational Order No. 8, which ordered the mass murder of POWs and civilians held in POW camps, “were aware of its illegality.”⁷⁶

The tribunals made clear, however, that the maxim *ignorantia legis nihil excusat* applied to both war crimes and crimes against humanity. Analogizing to domestic law, for example, the *Krupp* tribunal specifically held that the “criminal intent” required by such crimes did not include knowledge that a particular act was illegal:

We know of no system under which ignorance of the law excuses crime.... The rule that every man is presumed to know the law necessarily carries with it as a corollary the proposition that some persons may be found guilty of a crime who do not know the law and consequently that they may have imputed to them criminal intent in cases of which they have no realization of the wrongfulness of the act, much less an actual intent to commit the crime. A general criminal intent is sufficient in all cases in which a specific or other particular intent or mental element is not required by the law defining the crime.⁷⁷

The *Ministries*, *Pohl*, and *Justice* tribunals took similar positions. In *Ministries*, Tribunal IV held that “[h]e who knowingly joined or implemented, aided, or abetted” the commission of a war crime or crime against humanity “cannot be heard to say that he did not know the acts in question were criminal.”⁷⁸ In *Pohl*, Tribunal II noted that it had to be “conclusively

⁷² Id. at 463-64.

⁷³ *Krupp*, IX TWC 1438.

⁷⁴ Id.

⁷⁵ *Justice*, III TWC 1038.

⁷⁶ *Einsatzgruppen*, IV TWC 441.

⁷⁷ *Krupp*, IX TWC 1378.

⁷⁸ *Ministries*, XIV TWC 339.

presumed” that a defendant who was aware of the Nazis’ slave-labor program also knew that “slavery constituted a crime against humanity.”⁷⁹ And in the *Justice* case, Tribunal III stated that Joel was “chargeable with knowledge that the Night and Fog program from its inception to its final conclusion constituted a violation of the laws and customs of war.”⁸⁰

By contrast, as noted in Chapter 8, the *Ministries* tribunal held that crimes against peace required the prosecution to prove that a defendant knew a particular war or invasion qualified as aggressive. “One can be guilty only where knowledge of aggression in fact exists,” the Tribunal wrote, which meant that “it is not sufficient that he have suspicions that the war is aggressive.”⁸¹

It is also possible that the tribunals would have allowed legal advisers to argue mistake of law. As discussed in the previous chapter, the *Ministries* tribunal convicted von Weizsaecker and Woermann of war crimes and crimes against humanity for approving the deportation of thousands of French Jews to Auschwitz. In reaching that conclusion, the Tribunal emphasized that “when an official inquiry was made as to whether or not the Foreign Office had any objection to these deportations they answered in the negative, in face of the fact that *they both knew and realized that the proposal was a clear violation of international law.*”⁸² That emphasis is not itself dispositive, of course, given the tribunals’ continual insistence that defendants knew that their actions were illegal. But there are two reasons to believe – or at least suspect – that the *Ministries* tribunal would not have convicted von Weizsaecker and Woermann had they honestly believed that they were providing the Foreign Office with accurate legal advice. To begin with, Judge Powers’ dissent implies that the majority convicted them because they knew their advice violated international law. His basic objection to their conviction was that, in his view, they had not given the Foreign Office inaccurate legal advice. But he emphasized that, “whether it was or not, there is nothing to indicate that it was not given in good faith, and honestly. A mistake in the interpretation or application of the law, fortunately, is not a crime.”⁸³ Judge Powers might have been speaking only for himself, but the categorical phrasing of the statement implies that the absence of good faith was critical to the majority’s decision to convict von Weizsaecker and Woermann.

That interpretation of *Ministries* is also consistent with *Justice* tribunal’s condemnation of the notorious “Judges’ Letters” – letters written by Otto Thierack, the Reich Minister of Justice, that provided judges with guidance concerning the “administration of justice” under the Nazis. The Tribunal held that “the evidence satisfies us beyond reasonable doubt that the purpose of the judicial guidance was sinister and was known to be such by the Ministry of Justice and by the judges who received the directions.”⁸⁴ That conclusion depended, however, on the Tribunal’s belief that Thierack had written the letters knowing that he was encouraging the judiciary to engage in illegal acts: it specifically noted that “[i]f the letters... had been written in good faith, with the honest purpose of aiding independent judges in the performance of their duties, there would have been no occasion for the carefully guarded secrecy with which the letters were distributed.”⁸⁵ The Tribunal’s statement strongly suggests that it believed providing legal advice in “good faith” was not criminal, even if the advice itself was incorrect.

⁷⁹ Pohl, V TWC 9945.

⁸⁰ *Justice*, III TWC 1138.

⁸¹ *Ministries*, XIV TWC 337.

⁸² *Id.* at 956-57, Motion for Correction (emphasis added).

⁸³ *Id.* at 913, Powers Dissent.

⁸⁴ *Justice*, III TWC 1018.

⁸⁵ *Id.* at 1019.

III. MILITARY NECESSITY

Defendants claimed in more than half of the trials that their actions were justified by the principle *Kriegsraison geht vor Kriegsrecht* – “military necessity in war overrides the law of war.”⁸⁶ That argument took two basic forms. Most radically, they claimed in *Krupp* that World War II was a “total war” to which the Hague Convention IV of 1907 simply did not apply. The *Krupp* tribunal “emphatically rejected” that idea, holding – as had the IMT – that the Convention was binding on Germany as both conventional and customary law.⁸⁷

Defendants also claimed that *Kriegsraison* justified violating specific provisions of the Hague Regulations. In *High Command*, they argued that military necessity justified forcibly recruiting labor from occupied territory either for use in military operations or for deportation to Germany, despite Article 45 of the Regulations.⁸⁸ In *Krupp*, they argued that their plunder of the occupied territories was “justified by the great emergency in which the German war economy found itself,” despite Articles 46, 47, and 52.⁸⁹ And in *Einsatzgruppen* and the *Hostage* case they argued that military necessity justified the extermination of the Jews, despite Articles 46, 47, and 50.⁹⁰

The tribunals’ response to such claims depended on the nature of the Hague Regulation in question. When the text of a Regulation did not specifically take military necessity into account, the tribunals uniformly held that defendants could not invoke *Kriegsraison* as a defense to a criminal act. The *Hostage* tribunal’s rejection of military necessity as a defense to murder was typical:

We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules. International law is prohibitive law. Articles 46, 47, and 50 of the Hague Regulations of 1907 make no such exceptions to its enforcement. The rights of the innocent population therein set forth must be respected even if military necessity or expediency decree otherwise.⁹¹

The *Krupp* and *High Command* tribunals took the same position,⁹² the former pointing out that the drafters of the Hague Regulations were fully aware that they were limiting the effectiveness of belligerents by adopting Regulations that did not acknowledge military necessity. “It is an essence of war that one or the other side must lose,” the *Krupp* tribunal wrote, “and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency.”⁹³

The tribunals were more sympathetic to defense claims when the Hague Regulation in question *did* specifically make exception for military necessity. Regulation 23(g), for example, provided that it was forbidden “[t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” In *High Command*, the defendant Hollidt was charged with the equivalent war crime in Article

⁸⁶ See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 265 (2010).

⁸⁷ *Krupp*, IX TWC 1340.

⁸⁸ *High Command*, XI TWC 541.

⁸⁹ *Id.* at 1345-47.

⁹⁰ *Hostage*, XI TWC 1255-56.

⁹¹ *Id.*

⁹² *Krupp*, IX TWC 1347; *High Command*, XI TWC 541.

⁹³ *Krupp*, IX TWC 1347.

II(1)(b), “devastation not justified by military necessity,” for ordering his Sixth Army to remove or destroy “everything which could be usable to the enemy in the area” during its retreat from the Soviet Union. That order led to vast amounts of cattle, poultry, and agricultural machinery being seized and more than 4,000 tons of corn being dumped into the Dnepr River, significantly harming the civilian population. Tribunal V nevertheless acquitted Hollidt, because it could not conclude “that the measures applied were not warranted by military necessity under the conditions of war in the area under the command of the defendant.”⁹⁴

The tribunals also permitted defendants to argue military necessity when defendants were charged with war crimes or crimes against humanity involving methods of warfare that did not were not specifically regulated by the Hague Regulations. In such situations, the tribunals held, “[m]ilitary necessity permits a belligerent... to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.”⁹⁵ The siege of Leningrad by von Leeb’s Army Group North, considered in *High Command*, is a striking example. The goal of the siege was to starve the civilian population of the city into surrendering, which von Leeb accomplished by, *inter alia*, ordering his artillery units to drive civilians who attempted to flee through German lines back into the city. The siege lasted more than two years and led to hundreds of thousands of civilian deaths. The *High Command* tribunal nevertheless acquitted von Leeb of the siege-related charges on the ground of military necessity, citing Hyde for the proposition that nothing in the Hague Regulations prohibited using starvation as a weapon of war. “We might wish the law were otherwise,” the Tribunal said, “but we must administer it as we find it.”⁹⁶

Equally striking is the *Einsatzgruppen* tribunal’s rather defensive discussion of the U.S. decision to drop atomic bombs on Hiroshima and Nagasaki. As noted earlier, both the *Einsatzgruppen* and *Hostage* tribunals held that the defendants could not argue *tu quoque* with regard to the Nazis’ extermination program *even if* those bombings were illegal. The *Einsatzgruppen* tribunal nevertheless went to great lengths to show that, because so-called “morale bombing” was not prohibited by the laws of war – a position that was generally accepted at the time by both belligerents and scholars⁹⁷ – the bombings of Hiroshima and Nagasaki were fully justified by military necessity:

It was argued in behalf of the defendants that there was no normal distinction between shooting civilians with rifles and killing them by means of atomic bombs. There is no doubt that the invention of the atomic bomb, when used, was not aimed at noncombatants. Like any other aerial bomb employed during the war, it was dropped to overcome military resistance. Thus, as grave a military action as is an air bombardment, whether with the usual bombs or by atomic bomb, the one and only purpose of the bombing is to effect the surrender of the bombed nation. The people of that nation,

⁹⁴ *High Command*, XI TWC 628.

⁹⁵ *Hostage*, XI TWC 1253.

⁹⁶ *High Command*, XI TWC 563. Hyde’s view was widely accepted at the time. See, e.g., Lester Nurick, *The Distinction Between Combatant and Noncombatant in the Law of War*, 39 AM. J. INT’L L. 680, 686 (1945).

⁹⁷ See, e.g. Nurick, 695; C. P. Philips, *Air Warfare and Law: An Analysis of the Legal Doctrines, Practices and Policies*, 21 GEO. WASH. L. REV. 311, 327-28 (1953). Taylor took the same position in his Final Report. TAYLOR, FINAL REPORT, 65. Years later, however, Taylor conceded that the bombings of Nagasaki and Dresden were war crimes, “tolerable in retrospect only because their malignancy pales in comparison to Dachau, Auschwitz, and Treblinka.” TAYLOR, ANATOMY, 143.

through their representatives, may surrender and, with the surrender, the bombing ceases, the killing is ended.⁹⁸

Depending on the circumstances, in short, military necessity functioned as either a failure of proof defense (when a Hague Regulation incorporated necessity) or as a justification (when the Hague Regulations were silent concerning necessity). In both cases, however, the tribunals imposed some objective limits on what military necessity would justify. First, they were very sensitive to pretextual invocations of the defense. In *RuSHA*, for example, Tribunal I convicted Greifelt for his role in the systematic plunder of personal and real property in Poland because it concluded that “[t]hese confiscations were not carried out by reason of military necessity, but mainly were a part of a preconceived plan to strip the Polish population of the Eastern territories of all their property and in turn to make the property available to resettlers.”⁹⁹ Second, with regard to non-pretextual uses of the defense, they insisted that there had to be some objective relationship between a defendant’s acts and military necessity – a “reasonable connection,” in the words of the *Hostage* tribunal.¹⁰⁰

That said, the tribunals also made clear that the existence of the requisite “reasonable connection” had to be determined from the perspective of the defendant – a rule that effectively transformed military necessity into a purely subjective test. In the *Hostage* case, for example, General Rendulic was charged with “the wanton destruction of private and public property in the province of Finmark, Norway, during the retreat of the 20th Mountain Army commanded by him.” Tribunal V acknowledged that the evidence indicated that, objectively, there was no military necessity for Rendulic’s “scorched earth” policy. It nevertheless acquitted Rendulic, concluding that “the conditions as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made.”¹⁰¹

CONCLUSION

The NMTs provided comprehensive analyses of a number of defenses that are now routinely applied by modern tribunals. Two of those analyses have proven particularly important. First, the tribunals systematically distinguished between the defense of superior orders and the defense of necessity. Second, the tribunals limited the defense of military necessity to violations of the laws of war that specifically took such necessity into account. The tribunals’ jurisprudence was far from perfect; a number of tribunals suggested, for example, that the *mens reas* of necessity and military necessity were purely subjective. But there is no question that the judgments significantly furthered the development of a particularly important area of international criminal law.

⁹⁸ Einsatzgruppen, IV TWC 467.

⁹⁹ *RuSHA*, V TWC 147-48.

¹⁰⁰ *Hostage*, XI TWC 1254.

¹⁰¹ *Id.* at 1296-97.