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The Nuremberg Military Tribunals and the origins of International Criminal Law

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CHAPTER 11: Modes of Participation

INTRODUCTION

The previous chapters focused on how the tribunals interpreted the war crimes and crimes against humanity enumerated in Article II(1) – the “special part” of Law No. 10. That was, of course, only half of the story; the tribunals had to determine not only “whether certain acts infringe[d] international law, but also whether criminal responsibility attache[d] to an individual for such infringement.”¹ The latter determination was governed by Article II(2), Law No. 10’s “general part”:

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.²

Chapter 8 noted that the tribunals discarded Article II(2)(f), because it implied strict liability for crimes against peace. They also devoted little attention to Article II(2)(a), because – to quote Taylor’s final trial program – “[m]ost of the defendants in these cases occupied very high positions in the government or economic structure of Germany. Very few of them ever committed a murder or crime with their own hands.”³ The critical modes of participation in the trials were thus those that involved secondary liability, Article II(2)(b)-(e): ordering, abetting, taking a consenting part, being connected to a criminal enterprise, and membership in a criminal organization.

This chapter and the next discuss the tribunals’ jurisprudence concerning the modes of participation in a war crime or a crime against humanity.⁴ This chapter focuses on the modes of participation in Article II(2)(a), (b), and (c). Section 1 examines a number of threshold issues concerning criminal responsibility, such as liability for omissions and the liability of corporations. Sections 2-4 discuss ordering, taking a consenting part, and command responsibility, respectively. Finally, Section 5 addresses two modes of participation referenced only in passing by the tribunals – perpetration by means and incitement – as well as the tribunals’ rejection of attempt.

I. GENERAL PRINCIPLES

A. Basic Structure of Criminal Responsibility

¹ High Command, XI TWC 510.

² Law No. 10, art. II(2).

³ Third Trial Program, 4.

⁴ Chapter 8 discussed the modes of participation in a crime against piece, which were *sui generis*.

Von Knieriem pointed out in his book on the NMT trials that reading the judgments with regard to individual responsibility is often an exercise in frustration:

[M]ost of the Nuremberg Tribunals did not even take the trouble to state clearly on which of the alternatives enumerated in [Article II(2)] their sentences were based in a particular case. Frequently it is impossible to ascertain whether a sentence is based on the fact that somebody was a principal or an accessory, or whether he was regarded as having participated in the crime only by consenting. In most of the cases where more than one person acted, the opinions say no more than that a certain defendant “took part in the act.” It is then left to the reader to ponder which of the various alternatives of CCL No. 10 may have been applicable.⁵

The *Medical* case is an excellent example. In convicting Karl Brandt for his role in the Nazis’ barbaric medical experiments, Tribunal I simply held that he “was responsible for, aided and abetted, took a consenting part in, and was connected with plans and enterprises involving medical experiments conducted on non-German nationals against their consent, and in other atrocities.”⁶

Despite the imprecision of many of the judgments, however, it is clear that individual criminal responsibility consists of three basic elements: (1) the commission of a crime specified in the indictment; (2) the defendant’s knowledge of the crime; and (3) the defendant’s participation in the crime in a manner proscribed by Article II(2).⁷ In *Farben*, for example, Tribunal VI began by establishing the corporation’s involvement in plundering private property in occupied territory and then held that, “[a]s the action of Farben in proceeding to acquire permanently property interests in the manner generally outlined is in violation of the Hague Regulations, any individual who knowingly participated in any such act of plunder or spoliation with the degree of connection outlined in Article II, paragraph 2 of Control Council Law No. 10, is criminally responsible therefore.”⁸

What it meant to “knowingly participate” in a crime differed, of course, depending on the particular mode of participation. Two considerations nevertheless applied to all of the modes. First, the tribunals insisted that the requisite knowledge could not be inferred from the defendant’s official position. The *Pohl* tribunal, for example, noted “the necessity of guarding against assuming criminality, or even culpable responsibility, solely from the official titles which the several defendants held.”⁹ Similarly, the *Krupp* tribunal specifically held that “guilt must be personal. The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient.”¹⁰

Second, the tribunals agreed that the participation requirement could be satisfied either by an act or by an omission. Tribunal V’s statement in the *Hostage* case was typical: “[i]n determining the guilt or innocence of these defendants, we shall require proof of a causative, overt act or omission from which a guilty intent can be inferred before a verdict of guilty will be pronounced.”¹¹ The tribunals emphasized, however, that an omission was “not sufficient

⁵ VON KNIERIEM, 211.

⁶ *Medical*, II TWC 198.

⁷ *Justice*, III TWC 1093.

⁸ *Farben*, VIII TWC 1141.

⁹ *Pohl*, V TWC 980.

¹⁰ *Krupp*, IX TWC 1448.

¹¹ *Hostage*, XI TWC 1261.

to warrant a conviction except in those instances where an affirmative duty exists to prevent or object to a course of action.”¹² Liability for omission was thus limited in practice – as discussed below – to taking a consenting part in a crime and command responsibility.

B. Corporate Criminal Responsibility

A number of scholars believe that the NMT trials provide precedent for the notion of corporate criminal responsibility. Anita Ramasastry, for example, has argued that “[a] parsing of the judgments rendered... involving industrialists and other commercial actors reveals an underlying implication that the corporations for which they worked had also committed international war crimes.”¹³ Such interpretations are misguided. First, and most obviously, none of the trials involved allegations that juristic persons had committed war crimes, crimes against humanity, or crimes against peace, even though neither Law No. 10 nor Ordinance No. 7 expressly limited the tribunals’ jurisdiction to natural persons.¹⁴ The *Farben* tribunal, for example, specifically pointed out that “the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings.”¹⁵ Judge Wilkins made a similar statement regarding Krupp in his concurring opinion.¹⁶

Second, the tribunals unequivocally rejected the idea that individual criminal responsibility was in any way derivative of a corporation’s collective responsibility for a crime. Ramasastry argues, for example, that “[b]ecause of Farben’s liability, individual directors could be convicted by virtue of their affiliation with Farben.”¹⁷ In fact, the *Farben* tribunal specifically noted that although it had “used the term ‘Farben’ as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed,” the prosecution was still required to prove “that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it. Responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant’s membership in the Vorstand.”¹⁸ Similarly, as noted in Chapter 8, the *Krupp* tribunal rejected the prosecution’s argument that the existence of a “Krupp conspiracy” meant that any member of the Vorstand or Aufsichtsrat was necessarily responsible for the crimes committed by his colleagues or predecessors.¹⁹

Third, and finally, nothing in the judgments supports the idea that a corporation’s “collective intent” – to use Ramasastry’s phrase – was in any way attributable to an individual official when determining the extent of his knowledge of the corporation’s criminal activity. In fact, according to Judge Hebert, nearly all of the *Farben* defendants had to be acquitted precisely because the Tribunal rejected any such attribution: “[i]f a single individual had combined the knowledge attributable to the corporate entity and had engaged in the course of action under

¹² Ministries, XIV TWC 625.

¹³ Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon*, 20 BERKELEY J. INT’L L. 91, 105 (2002); see also Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 140 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

¹⁴ See Bush, *Conspiracy*, 1223.

¹⁵ *Farben*, VIII TWC 1153. Strangely, the corporation itself was represented by an attorney during the trial. That attorney even gave a closing argument on behalf of *Farben*. See Bush, *Conspiracy*, 1224.

¹⁶ *Krupp*, Wilkins Concurrence, IX TWC 455.

¹⁷ Ramasastry, 107.

¹⁸ *Farben*, VIII TWC 1153.

¹⁹ *Krupp*, Wilkins Concurrence, IX TWC 457.

the same circumstances as that attributable to the corporate entity, it is extremely doubtful that a judgment of acquittal could properly be entered.”²⁰

C. Principals and Accessories

As von Knieriem noted, the tribunals never systematically distinguished between principals and accessories to a crime. That is perhaps not surprising: although Article II(2) implied that principal liability was limited to those who personally committed the *actus reus* of a crime, it specifically provided that any defendant whose actions fell within the parameters of Article II(2) was “deemed to have committed” a war crime, crime against humanity, or crime against peace. The principal/accessory distinction was thus generally irrelevant, although one tribunal held that the modes of participation enumerated in Article II(2) were listed in descending order of culpability, an issue discussed in Chapter 14.

II. ORDERING

Because crimes committed pursuant to notorious Nazi orders were at the heart of a number of NMT trials – the Commando Order, the Commissar Order, the Night and Fog Decree – the tribunals devoted considerable attention to ordering as a mode of participation. According to the tribunals, a defendant was responsible for ordering a crime if three requirements were satisfied: (1) an illegal order had been issued by a superior to a subordinate; (2) the defendant was responsible in some way for that order; and (3) the defendant knew or should have known that the order was illegal.

A. Illegal Order

Responsibility for ordering a crime depended on the existence of an illegal order. The tribunals generally considered the idea of an “order” to be self-evident, perhaps because most of the orders considered in the trials were issued by individuals whose authority to require obedience from their subordinates was unquestioned, such as Hitler, high-ranking SS officials, and military officers. Two tribunals, however, addressed the nature of the ordering relationship. In *Pohl*, Tribunal II emphasized that a superior/subordinate relationship was a necessary element of ordering – the orderer had to have the right to demand the orderee comply with his instructions.²¹ And in *High Command*, Tribunal V held that the requisite superior/subordinate relationship could exist either *de jure* or *de facto*: as long as the defendant’s orders were “binding upon subordinate units to whom they were directed,” it was irrelevant whether the subordinates were under the defendant’s “direct command authority.”²² Reinecke argued, for example, that he could not give orders to civilian concentration-camp personnel because they were not formally subordinate to him. The Tribunal rejected that claim, pointing out that the concentration-camp personnel felt “compelled to comply” with his directives.²³

Ordering also required the order in question to be either “criminal on its face”²⁴ or capable of being applied in a criminal manner.²⁵ The Commando Order was an example of the former, because it was nothing more than “an order to commit murder.”²⁶ The two-part Barbarossa

²⁰ Farben, Hebert Concurrence, VIII TWC 1214.

²¹ Pohl, V TWC 983.

²² High Command, XI TWC 651.

²³ Id.

²⁴ Id. at 512.

²⁵ Id. at 560-61.

²⁶ Id. at 481.

Jurisdiction Order, by contrast, was an example of the latter. The order had two parts: the first permitted the execution of civilians without adequate process; the second relieved field commanders of the obligation to prosecute crimes committed by their subordinates against civilians. The first part of the order was facially criminal, but the criminality of the second part depended on its implementation, because a field commander could satisfy his obligation to protect the civilian population by disciplining his subordinates instead of by prosecuting them. The criminality of the Barbarossa Jurisdiction Order, therefore, depended upon how a field commander implemented it.²⁷

B. Actus Reus

To be responsible for “ordering” a crime, a defendant also had to be involved in issuing, drafting, or transmitting an illegal order – the mode of participation’s *actus reus*. The nature of those activities differed, however, depending on whether the order was military or civilian.

1. Military Orders

a. Issuing

Defendants who used their authority to issue illegal orders were obviously responsible for the crimes committed pursuant to them. In *High Command*, for example, von Roques was convicted for ordering his soldiers to collectively punish – through mass executions and the destruction of villages – civilians in occupied territory who were suspected of supporting partisans.²⁸ Similarly, in the *Hostage* case, Kuntze was convicted for issuing an order that established a fixed ratio for reprisal killings of 100 Serbian civilians for every German soldier killed.²⁹

b. Drafting

Military commanders, however, rarely drafted written orders themselves. Instead, they relied on staff officers to translate their “ideas and general directives” into “properly prepared orders.”³⁰ According to the *High Command* tribunal, that function was criminal if the order was illegal: “[i]f the basic idea is criminal under international law, the staff officer who puts that idea into the form of a military order, either himself or through subordinates under him... commits a criminal act under international law.”³¹ The Tribunal did, however, impose a substantive limit on the responsibility of staff officers for drafting an illegal order: if the staff officer functioned solely as a stenographer, “merely transcribing” his superior’s order, he was not responsible for it.³² In other words, preparing an unlawful order qualified as ordering only if the staff officer exercised “personal initiative” during the drafting process, using his intelligence and skills to translate an amorphous (but illegal) directive from his superior into a written order specific enough that subordinate officers would be able to carry it out.³³

A number of *High Command* defendants were held responsible for drafting illegal orders issued by their superiors. Warlimont, for example, was convicted for participating in the

²⁷ Id. at 525.

²⁸ Id. at 645.

²⁹ Hostage, XI TWC 1277-78.

³⁰ High Command, XI TWC 513.

³¹ Id.

³² See, e.g., id. at 515, 651.

³³ Id. at 683.

Commissar Order because “he contributed his part to moulding it into its final form.”³⁴ Similarly, Lehmann – a civilian who was the chief legal advisor to the OKW – was convicted for participating in the Barbarossa Jurisdiction Order because he “became the main factor in determining the final form into which the criminal ideas of Hitler were put” and “modified those ideas within his own sphere up to a certain point and placed the whole into an effective military order.”³⁵ By contrast, the *Hostage* tribunal acquitted von Geitner for preparing an order to commit illegal reprisals because he was simply carrying out his superior’s instructions.³⁶

The *High Command* tribunal’s emphasis on personal initiative, it is worth noting, created a Catch-22 for defendants accused of drafting an illegal order. From a sentencing perspective, it was important for defendants to emphasize that they had done everything in their power to ameliorate the order’s unlawfulness. Arguing that they had done so, however, required them to admit that they had not functioned simply as stenographers. As the Tribunal noted, “if defendants were able to modify the specific desires of their superiors in the interests of legality and humanity... the same power could be exercised for other ends and purposes and they were not mere transcribers of orders.”³⁷ Warlimont learned that lesson when the Tribunal rejected his claim to have softened the Commissar Order and then used his admission of initiative to convict him for drafting it.³⁸

c. Transmitting

Finally, the *High Command* tribunal held that a commander was responsible for ordering a crime if he transmitted an unlawful order issued by one of his superiors to officers subordinate to himself. “The transmittal through the chain of command constitutes an implementation of an order. Such orders carry the authoritative weight of the superior who issues them and of the subordinate commanders who pass them on for compliance.”³⁹

Transmission was criminal for two different kinds of orders. When an order was criminal on its face, the mere act of transmission qualified as ordering. Van Salmuth, for example, was convicted for passing an obviously illegal order down the chain of command that required the execution of any civilian found in the vicinity of partisan activity.⁴⁰

The issue was more complicated when an order (or part of an order) was not criminal on its face, but was capable of being applied in a criminal manner. The *High Command* tribunal held that, in such situations, it was criminal for a commander to transmit the order “without proper safeguards as to its application.”⁴¹ Von Leeb was thus convicted for participating in the Barbarossa Jurisdiction Order because there was no evidence that “it was in any way clarified or that instructions were given in any way to prevent its illegal application.”⁴²

Although the *High Command* tribunal took a broad approach to transmission, it insisted that a commander could not be held responsible for transmitting an illegal order if he was outside the chain of command. The rationale for criminalizing transmission was, as noted, that the

³⁴ Id. at 665.

³⁵ Id. at 693.

³⁶ *Hostage*, XI TWC 1288.

³⁷ *High Command*, XI TWC 515.

³⁸ Id. at 665.

³⁹ Id. at 510.

⁴⁰ Id. at 617.

⁴¹ Id. at 525.

⁴² Id. at 560-61.

subordinate commander lent his authority to an unlawful order by passing it along. That rationale did not apply when a superior authority simply used a subordinate commander's headquarters to distribute an illegal order to military units in the field. In such a situation, the transmission was a "mere intermediate administrative function" for which the commander could not be held responsible.⁴³

2. Civilian Orders

The tribunals also held that civilians could be criminally responsible for ordering war crimes and crimes against humanity. As in the military context, issuing was the least problematic form of ordering. In *RuSHA*, for example, Rudolf Creutz, Greifelt's deputy in the RKFDV, was convicted for issuing binding instructions to his subordinates to Germanize children in Polish orphanages who were considered to be Aryan.⁴⁴ And in the *Justice* case, Schlegelberger was convicted for ordering the execution of a Jew who had been sentenced to 2.5 years for stealing eggs.⁴⁵

Civilian defendants were also convicted for transmitting illegal orders. In *Ministries*, for example, Lammers, Reich Minister and Chief of the Reich Chancellory, was convicted for transmitting a secret circular issued by Thierack that prohibited the prosecution of Germans civilians who participated in lynching downed Allied flyers.⁴⁶ As with military transmission, however, "personal initiative" was required. The *Ministries* tribunal emphasized that "Lammers was not a mere postman, but acted freely and without objection as a responsible Reich Minister carrying out the functions of his office."⁴⁷

C. Mens Rea

Finally, a defendant had to have participated in issuing, drafting, or transmitting an illegal order with the necessary *mens rea*. According to *High Command* tribunal, that requirement was satisfied if the defendant knew that the order was illegal or, because the order was "criminal on its face," should have known that it was:

Military commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law.... He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions. It is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal.⁴⁸

⁴³ Id. at 510.

⁴⁴ *RuSHA*, V TWC 106.

⁴⁵ *Justice*, III TWC 1085.

⁴⁶ *Ministries*, XIV TWC 462.

⁴⁷ Id. at 463.

⁴⁸ *High Command*, XI TWC 511.

That statement of ordering's *mens rea* applied specifically to transmitting an order that was illegal on its face or was capable of being illegally applied. The Tribunal made clear, however, that the same *mens rea* applied to issuing and drafting such orders, as well.⁴⁹

D. A Substantive Crime?

Article II(2)(b) considered ordering a mode of participation in a crime, not a substantive crime in itself. The tribunals uniformly followed that approach when an illegal order was executed, holding a defendant responsible for the crimes committed pursuant to the order.⁵⁰ They split, however, over whether a defendant could be held criminally responsible for participating in an illegal order that was never executed.

Two tribunals took a conservative approach to that issue. In *Einsatzgruppen*, Tribunal II held that an order was criminal only if it was executed, contrasting Law No. 10 with Article 47 of the German Military Penal Code, according to which it was "sufficient if the order aims at the commission of a crime or offense."⁵¹ Similarly, in *RuSHA*, Tribunal I acquitted Brueckner of submitting a draft of an illegal order involving the forced conscription of civilians because there was no evidence that the order was adopted or carried out.⁵²

The *Hostage* tribunal, by contrast, specifically held that a defendant could be held responsible for participating in an illegal order even if it was not executed. Rendulic, for example, was convicted of transmitting the Commissar Order even though, as he contended, there was no evidence that "captured commissars were shot by troops under his command." That fact, according to the Tribunal, was "a mitigating circumstance but [did] not free him of the crime of knowingly and intentionally passing on a criminal order."⁵³

The *High Command* tribunal took the most unusual position. It held that a defendant could not be convicted for participating in an order that was not executed, as illustrated by Reinhardt's acquittal for distributing the Commissar Order.⁵⁴ But it also held that a defendant who issued an executed order was not only responsible for the crimes committed pursuant to it, but was also guilty of issuing the illegal order itself, thus treating ordering as a substantive crime. With regard to Reinhardt's involvement in deportations, plunder, and forced labor, for example, the Tribunal held that "[t]he orders to do those things were criminal orders, and they were fully implemented by him. He is criminally responsible for issuing the orders *and* for the acts done in implementation of them."⁵⁵

III. CONSENTING PART

Article II(2)(c) established criminal responsibility for taking a "consenting part" (TCP) in a war crime or crime against humanity. TCP was first mentioned in the Moscow Declaration, which promised punishment for Nazis who "have been responsible for or have taken a consenting part in... atrocities, massacres and executions." It also appeared in Article 3(b) of JCS 1023/10 and in the Preamble to the London Agreement, although it was not included in the London Charter itself.

⁴⁹ Id. at 512.

⁵⁰ See, e.g., id. at 531.

⁵¹ *Einsatzgruppen*, IV TWC 487.

⁵² *RuSHA*, V TWC 147.

⁵³ *Hostage*, XI TWC 1294.

⁵⁴ *High Command*, XI TWC 615-16.

⁵⁵ Id. at 614 (emphasis added).

The Joint Chiefs of Staff apparently considered TCP to be functionally equivalent to command responsibility. A 21 October 1944 draft of JCS 1023/10 provided that the term “war criminals” specifically included “persons who have taken a consenting part in war crimes” and then gave the example of “a superior officer who has failed to take action to prevent a war crime when he had knowledge of its contemplated commission and was in a position to prevent it.”⁵⁶ By contrast, the tribunals considered TCP either as another name for participating in a criminal enterprise or – more interestingly – as a *sui generis* mode of participation in a crime similar to, but not equivalent with, command responsibility.

The critical difference was whether TCP required a positive act or could be satisfied by an omission. The *Pohl* tribunal took the first position, holding that “[t]here is an element of positive conduct implicit in the word ‘consent’”. Certainly, as used in the ordinance, it means something more than ‘not dissenting’.”⁵⁷ The requirement of a positive act then determined which defendants were convicted for taking a consenting part in a crime. Volk was convicted of mistreating concentration-camp inmates, for example, even though he had not personally committed the mistreatment and “did not have the power” to prevent it. The Tribunal held that “[i]f Volk was part of an organization actively engaged in crimes against humanity, was aware of those crimes and yet voluntarily remained a part of that organization, lending his own professional efforts to the continuance and furtherance of those crimes, he is responsible under the law.”⁵⁸ By contrast, the Tribunal acquitted Vogt of taking a consenting part in similar charges because “[t]he only consent claimed arises from imputed knowledge – nothing more. But the phrase, ‘being connected with’ a crime means something more than having knowledge of it... There is an element of positive conduct implicit in the word ‘consent’.”⁵⁹ That formulation drew an explicit parallel between TCP and enterprise liability.

Unlike the *Pohl* tribunal, the *Einsatzgruppen*, *Farben*, and *Ministries* tribunals specifically viewed TCP as an omission-based mode of participation. In their view, a defendant had taken a consenting part in a crime if three conditions were satisfied: (1) he knew that a crime had been or was going to be committed; (2) because of his authority, he was in a position to object to the criminal activity; and (3) he nevertheless failed to object to it. TCP was thus similar to, but broader than, command responsibility.

A. Knowledge

The tribunals emphasized that a defendant accused of TCP must have known that a crime had been or was going to be committed. The *Einsatzgruppen* tribunal, for example, noted that von Radetzky “knew that Jews were executed by Sonderkommando 4a because they were Jews” when it convicted him of taking a consenting part in those executions.⁶⁰ Similarly, the *Farben* tribunal relied on the fact that Schmitz “knew of Farben's program to take part in the spoliation of the French dyestuffs industry” to convict him of taking a consenting part in that spoliation.⁶¹ There is no indication in any of the judgments that the tribunals would have applied a negligence standard to TCP, which – as we will see – partially distinguishes TCP from command responsibility. That distinction makes sense: because effective control over the perpetrators of the crime was not an essential element of TCP, it would have been

⁵⁶ Draft Directive on Apprehension of War Criminals, in TAYLOR, FINAL REPORT, 247 (Appendix C).

⁵⁷ Pohl, V TWC 1002.

⁵⁸ Id. at 1048.

⁵⁹ Id. at 1002.

⁶⁰ Einsatzgruppen, IV TWC 577.

⁶¹ Farben, VIII TWC 1155.

manifestly unfair to convict a defendant for failing to object to a crime of which he was unaware. The defendant's duty was to object to the crime, not to prevent it.

B. Authority

According to the tribunals, failing to object to a crime qualified as TCP only if the defendant had been in a position to influence the organization or individuals responsible for its commission. In *Einsatzgruppen*, for example, Fendler was convicted for failing to object to executions because, "as the second highest ranking officer in the Kommando, his views could have been heard in complaint or protest against what he now says was a too summary procedure, but he chose to let the injustice go uncorrected."⁶² Similarly, in *Farben*, Schmitz's conviction depended on the fact that he failed to object to the company's spoliation activities even though "[h]e was in a position to influence policy and effectively to alter the course of events."⁶³ By contrast, the *Einsatzgruppen* tribunal refused to convict Ruehl for taking a consenting part in Sonderkommando 10b's executions because, although he knew about them, the prosecution had failed to prove "that he was in a position to control, prevent, or modify the severity of [the] program."⁶⁴

The "authority" requirement of TCP, it is important to note, differed from the superior/subordinate requirement of command responsibility. None of the defendants convicted of taking a consenting part in a crime had either de jure or de facto effective control over the individuals who committed that crime, which is what makes TCP a unique mode of participation. Schmitz might have been *primus inter pares* as the Chairman of Farben's Vorstand, but he did not have the power to approve or disapprove the activities of his colleagues. Fendler was an SD officer in Division III of Sonderkommando 4b, while the executions themselves were committed by units subordinate to the Gestapo officers in Division IV.⁶⁵ Von Radetzky was in the same position in Sonderkommando 4a – and the *Einsatzgruppen* tribunal specifically declined to find that he had taken de facto control of Sonderkommando 4a when Blobel was absent because of illness.⁶⁶ Most revealing of all, however, is the *Einsatzgruppen* tribunal's explanation of why it convicted Ott for executions committed by Sonderkommando 7b:

In view of the fact that Ott arrived in Bryansk on 19 February for the specific purpose of taking over control of Sonderkommando 7b, it is not clear why he should have waited until 15 March to assume leadership of the unit. But even if this unexplained delay in the technical assumption of command were a fact, this would not of itself exculpate Ott from responsibility for the operation involved. Under Control Council Law No. 10 one may be convicted for taking a "consenting part in the perpetration of crimes" and it would be difficult to maintain that Ott, while actually with the Kommando, did not (*even though technically not its commanding officer*) consent to these executions.⁶⁷

This interpretation of the difference between TCP and command responsibility is confirmed by Judge Powers' dissent in *Ministries*. Judge Powers derisively described TCP as convicting

⁶² *Einsatzgruppen*, IV TWC 572.

⁶³ *Farben*, VIII TWC 1155.

⁶⁴ *Einsatzgruppen*, IV TWC 581.

⁶⁵ *Id.* at 571-72.

⁶⁶ *Id.* at 577.

⁶⁷ *Id.* at 560 (emphasis added).

a defendant for the “failure to either openly protest or go on a sit-down strike in time of war, after receiving knowledge that somebody somewhere in the government committed a crime.”⁶⁸ That was a mischaracterization of TCP even as endorsed by *Ministries* itself; the majority had acquitted von Weizsaecker of taking a knowing and consenting part in Einsatzgruppen atrocities precisely because it concluded that “the Foreign Office had no jurisdiction or power to intervene” in the program.⁶⁹ Judge Powers’ statement nevertheless indicates that he did not view TCP as equivalent to command responsibility. Indeed, he insisted in the next paragraph that he believed that the two were synonymous: “[a]ny person who can order a crime committed can consent to its commission with equal effect and with equal responsibility. To take a consenting part means no more than that.”⁷⁰

C. Failure to Object

If a defendant had knowledge of a crime and the authority to influence it, the tribunals agreed that he had a duty to use his authority to try to “control, prevent, or modify the severity” of the crime.⁷¹ It was the existence of that duty that justified holding the defendant responsible for an omission.⁷² Fendler was thus convicted because, as noted earlier, he did nothing even though “his views could have been heard in complaint or protest.”⁷³

IV. COMMAND RESPONSIBILITY

Six tribunals relied on the doctrine of command responsibility to convict military and civilian defendants of crimes committed by their subordinates. Article II(2) of Law No. 10 did not expressly include command responsibility as a mode of participation; the tribunals derived the availability of that mode from international law. In the *Medical* case, for example, Tribunal I held that “[t]he law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war.”⁷⁴ None of the tribunals, however, identified the precise “law of war” – conventional or customary – that justified imposing criminal responsibility on a military commander who failed to properly supervise his subordinates, much less on a civilian superior. Instead, they simply cited *Yamashita*, decided by the United States Supreme Court in 1946, for the existence of the mode of participation.⁷⁵

The tribunals’ failure to discuss the conventional or customary basis for command responsibility is surprising, given how often they stressed the need to take a conservative approach to international law. It is also troubling, because a number of scholars have convincingly argued that – in the words of Bing Bing Jia – “there had existed nothing like a custom of command responsibility prior to the *Yamashita* case.”⁷⁶ A vague notion of command responsibility existed in Articles 1 and 43 of the Hague Regulations, in Article 10 of the 1907 Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, and in Article 26 of the 1929 Convention for the Amelioration of

⁶⁸ *Ministries*, Powers Dissent, XIV TWC 874-75.

⁶⁹ *Id.* at 472-73.

⁷⁰ *Id.* at 875, Powers Dissent.

⁷¹ *Einsatzgruppen*, IV TWC 580.

⁷² See, e.g., *Ministries*, XIV TWC 625.

⁷³ *Einsatzgruppen*, IV TWC 572; see also Pohl, V TWC 1011; High Command, XI TWC 543-44.

⁷⁴ *Medical*, II TWC 207.

⁷⁵ See, e.g., Pohl, V TWC 1011.

⁷⁶ Bing Bing Jia, *The Doctrine of Command Responsibility Revisited*, 3 CHINESE J. INT’L L. 1, 12 (2004).

the Condition of the Wounded and Sick in Armed Forces in the Field. None of those Conventions, however, imposed criminal liability for breaches of those provisions. Moreover, although the Commission on the Responsibility of the Authors of the War endorsed such criminal liability after World War I, that endorsement – even when combined with scattered references to command responsibility in the Leipzig Trials – hardly amounted to a customary rule.⁷⁷

Nor did *Yamashita* help the tribunals' cause. The tribunals relied on the Supreme Court's analysis of the state of international law on the eve of World War II; they did not view the decision as establishing a new rule of international law or as binding precedent.⁷⁸ But as Bing Bing Jia has pointed out, "[l]ooking at the *Yamashita* case, it is plain that there was no reference to a clear basis in international law that required that a commander be held personally responsible in such a case."⁷⁹ His conclusion is sound: the Supreme Court simply cited the three Conventions mentioned above and the practice of American military tribunals for the idea that a military commander was criminally liable for failing to properly supervise his troops.⁸⁰

Because there is little support for the idea that command responsibility existed as a mode of participation under international law during World War II, the convictions obtained via command responsibility during the NMT trials at least arguably violated the principle of non-retroactivity. The tribunals' jurisprudence nevertheless remains an important contribution to the development of the doctrine. According to the tribunals, command responsibility for a war crime or crime against humanity had three elements: (1) the defendant and the perpetrators of the crime were in a superior/subordinate relationship; (2) the defendant either knew or should have known that the crime was being committed; and (3) the defendant failed to take the necessary steps to prevent or punish the crime.

A. Superior/Subordinate Relationship

1. Military Superiors

In discussing the nature of the superior/subordinate relationship in the military context, the tribunals distinguished between commanding generals, tactical commanders, and Chiefs of Staff.

a. Commanding Generals

According to the tribunals, the superior responsibility of a commanding general in occupied territory had two aspects. Like all commanders, he was responsible for the actions of the military units directly subordinate to him. But he also exercised "executive authority" over the territory under his command, charging him – in the words of the *Hostage* tribunal – "with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command. His responsibility [was] coextensive with his area of command."⁸¹ The latter duty was particularly important, because it meant that a commanding

⁷⁷ Id. at 11-12.

⁷⁸ See, e.g., High Command, XI TWC 544.

⁷⁹ Bing Bing Jia, 8.

⁸⁰ In re Yamashita, 327 U.S. 1, 15-16 (1946).

⁸¹ Hostage, XI TWC 1271.

general was responsible for the actions of *any* military unit that operated within his area of command, even those that were not directly subordinate to him.⁸²

Nor was the commanding general's superior responsibility limited to military units. Because of his executive authority, he also had an obligation to control the actions of civilian organizations operating in his area of command.⁸³ In the *Hostage* case, for example, List argued that he could not be held responsible for the execution of thousands of civilians in reprisal because "many of these executions were carried out by units of the SS, the SD, and local police units which were not tactically subordinated to him." Tribunal V convicted List despite accepting his factual claim, pointing out that "it must be borne in mind that in his capacity as commanding general of occupied territory, he was charged with the duty and responsibility of maintaining order and safety."⁸⁴

b. Tactical Commanders

The tribunals agreed that, unlike commanding generals, tactical commanders were responsible only for the actions of military units directly subordinate to them. As the *Hostage* tribunal put it, "[t]he matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command."⁸⁵ The tribunals nevertheless interpreted the idea of "subordination" very expansively. First, a tactical commander was responsible not only for the actions of combat units under his command, but also for the actions of his subordinate commanders.⁸⁶ A tactical commander could thus be criminally responsible for failing to prevent his subordinate commanders from unlawfully applying an order that was not criminal on its face.⁸⁷

Second, subordination could exist either *de jure* or *de facto*: as long as a tactical commander exercised effective control over a military unit or civilian organization, he was superior to it for purposes of command responsibility. In *High Command*, for example, Reinicke argued that he was not responsible for the mistreatment of POWs because he did not have "direct command authority" over the soldiers who had committed the mistreatment. Tribunal V rejected that argument:

This Tribunal is not concerned with fine formalities or divisions of authority. The evidence establishes overwhelmingly the over-all control and supervision of the defendant Reinecke as to prisoners of war under the supreme authority of the OKW and his power over prisoner of war camps and prisoner of war affairs. The evidence shows that he exercised that authority by issuing orders; that he had the right of inspection both in himself and his subordinate; that such inspection was a duty entrusted to him and carried out by him; that he had the sources of knowledge and the duty was placed upon him to know and supervise what took place in these camps, and that he

⁸² Id. at 1257.

⁸³ *High Command*, XI TWC 546.

⁸⁴ *Hostage*, XI TWC 1272.

⁸⁵ *Hostage*, XI TWC 1260.

⁸⁶ Id. at 1303.

⁸⁷ Id.

did know and supervise what took place therein and directed certain operations in such camps.⁸⁸

As noted earlier, the *High Command* tribunal used the same reasoning to reject Reinecke's related claim that he could not be held responsible for ordering mistreatment. Reinecke's conviction thus suggests that the Tribunal believed that same test of "effective control" applied to both ordering and command responsibility. The *Hostage* tribunal appears to have taken the same position. In acquitting von Leyser of responsibility for reprisal executions, it noted that "[a] corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about," implying that the ability to order implies the obligation to properly supervise.⁸⁹

C. Chiefs of Staff

As discussed above, a Chief of Staff could be convicted for participating in the drafting or issuing of an illegal order. By contrast, the *High Command* tribunal specifically held that a Chief of Staff could not be held responsible for the acts of military units subordinate to his commanding general, because he "has no command authority over subordinate units nor is he a bearer of executive power."⁹⁰

2. Civilian Superiors

The tribunals had little difficulty extending command responsibility to civilians who exercised effective control over subordinates. The easiest cases were those involving paramilitary organizations like the SS, which had clearly demarcated chains of command. Pohl, for example, attempted to disclaim responsibility for the mistreatment of slave labor in concentration camps by arguing that his office, the WVHA, had exercised "formal," not "actual," control over Amtsgruppe D (which had engaged in the mistreatment) because the office had continued to take orders from Himmler. Tribunal II rejected Pohl's argument, noting simply that "[t]he fact remains... that Pohl as head of the WVHA was the superior of Gluecks and Maurer and was in a position to exercise and did exercise substantial supervision and control over Amtsgruppe D."⁹¹ Similarly, the *Pohl* tribunal convicted Mummmenthey for the mistreatment of slave labor because it concluded – despite his self-description as a "private business man" – that he "was a definite integral and important figure in the whole concentration camp set-up, and, as an SS officer, wielded military power of command. If excesses occurred in the industries under his control he was in a position not only to know about them, but to do something."⁹²

Government officials could also qualify as superiors for purposes of command responsibility. In the *Medical* case, for example, Karl Brandt was held responsible for the sulfanilamide experiments conducted at Ravensbrueck because "[i]n the medical field [he] held a position of the highest rank directly under Hitler. He was in a position to intervene with authority on all medical matters; indeed, it appears that such was his positive duty."⁹³ And in the *Justice*

⁸⁸ High Command, XI TWC 653-54.

⁸⁹ Hostage, XI TWC 1303.

⁹⁰ High Command, XI TWC 684.

⁹¹ Pohl, V TWC 981-82.

⁹² Id. at 1052.

⁹³ Medical, II TWC 193.

case, Joel was held responsible for the illegal sentences imposed in the Night and Fog trials because “[i]t was his task to supervise the work of all prosecutors assigned to his office.”⁹⁴

The ability of government officials to qualify as superiors was, however, subject to an important qualification: the official in question had to have exercised actual control over the subordinates who committed a crime; de jure authority was not enough. That restriction emerges clearly in the *Ministries* tribunal’s analysis of Berger’s responsibility for racial examinations conducted by RuSHA. The Tribunal acknowledged that Berger was formally superior to the examiners, but it nevertheless acquitted him because, “[i]n making the so-called racial examination, these men were not subject to Berger’s control, but to that of the bureau from which they were detailed.”⁹⁵ Similarly, the *Ministries* tribunal acquitted Steengracht von Moyland for failing to prevent his subordinate in the Foreign Office, Best, from forcibly deporting Jews from Denmark – a flagrant violation of international law – because it could not rule out the possibility that “Best was acting on orders from Hitler and Himmler which Steengracht von Moyland could not overcome.”⁹⁶

B. Mens Rea

The tribunals did not take a consistent approach to the *mens rea* of command responsibility. Some held that a superior had to have actually known that his subordinates had committed or were going to commit crimes. Others held that negligence sufficed. And one – the *High Command* tribunal – held that different standards applied depending on the nature of the underlying crimes.

1. Knowledge

Two tribunals required knowledge. In *Milch*, Tribunal II stated that the “controlling legal question” concerning the defendant’s responsibility for failing to prevent or stop illegal medical experiments conducted by his subordinates was whether the experiments were “conducted with prior knowledge on his part that they might be excessive or inhuman.”⁹⁷ The Tribunal then acquitted Milch on the ground that, although he knew that experiments were planned, the evidence failed to show “any knowledge on his part that unwilling subjects would be forced to submit to them or that the experiments would be painful and dangerous to human life.”⁹⁸ Similarly, the *Pohl* tribunal acquitted Tschentscher of responsibility for murders of Polish and Ukrainian Jews committed by members of his supply column because “[t]here is some evidence that he had constructive knowledge of the participation of members of his command, but absolutely no evidence that he had actual knowledge of such facts.”⁹⁹

Tribunals that adopted a *mens rea* of knowledge were, however, willing to infer the requisite knowledge from the nature of subordinates’ criminal activity. The *High Command* tribunal, for example, convicted Reinhardt for tolerating the forcible deportation of civilian workers from occupied territory under his control because the deportations were “of such long continued and general practice, that even were there no orders signed by the defendant authorizing it, he must be held to have had knowledge of the practice and of its extent.”¹⁰⁰

⁹⁴ Justice, III TWC 1137.

⁹⁵ Ministries, XIV TWC 546-47.

⁹⁶ Id. at 518.

⁹⁷ Milch, II TWC 774.

⁹⁸ Id. at 776.

⁹⁹ Pohl, V TWC 1011.

¹⁰⁰ High Command, XI TWC 609.

Conversely, the *Pohl* tribunal justified its unwillingness to infer that Tschentscher knew about the execution of Jews by pointing out that the participation of his subordinates in those executions “was not of sufficient magnitude or duration to constitute notice to the defendant, and thus give him an opportunity to control their actions.”¹⁰¹

2. Negligence

Two tribunals specifically held that negligence sufficed for criminal responsibility. The *Hostage* tribunal held simply that “[a] corps commander must be held responsible... for acts which the corps commander knew or ought to have known about.”¹⁰² And the *Medical* tribunal convicted Genzken for illegal typhus experiments conducted by his subordinates because he should have known that the experiments were illegal: “[h]ad he made the slightest inquiry, he would have discovered that many of the human subjects used were non-German nationals who had not given their consent to the experiments.”¹⁰³

The *Ministries* tribunal also implicitly adopted a negligence standard, as indicated by Schellenberg’s conviction for permitting the execution of more than 200 Soviet POWs who had participated in Operation Zeppelin, which he commanded. The Tribunal was deeply suspicious of Schellenberg’s claim that he had not ordered the executions and had been unaware of them. But it held that he was responsible for the executions even if he was telling the truth, because they would still have been attributable to his negligent supervision of his subordinates: “[i]f Weissgerber and Grafe ordered these executions, their action can only be accounted for if the defendant had permitted an utterly callous attitude toward human life to grow up and become established in his division.”¹⁰⁴

It is not completely clear why some tribunals adopted a knowledge standard for command responsibility while others adopted negligence. The best explanation seems to be that tribunals in the latter category believed that a superior not only had a general duty to properly supervise his subordinates, but also had a positive duty to obtain information about their activities. If such a duty existed, a superior’s negligent failure to discover that his subordinates were committing or were about to commit crimes was obviously criminal.

The *Medical* tribunal explicitly relied on the duty to discover. It convicted Karl Brandt for failing to prevent his subordinates from conducting the illegal sulfanilamide experiments, for example, because “the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps.”¹⁰⁵ Even more dramatically, the *Hostage* tribunal held that a commanding general was not only obliged to “require adequate reports of all occurrences that come within the scope of his power,” he also had a duty, “if such reports are incomplete or otherwise inadequate... to require supplementary reports to apprise him of all the pertinent facts.”¹⁰⁶

3. High Command

¹⁰¹ Pohl, V TWC 1011.

¹⁰² Hostage, XI TWC 1303.

¹⁰³ Medical, II TWC 222.

¹⁰⁴ Ministries, XIV TWC 669.

¹⁰⁵ Medical, II TWC 194.

¹⁰⁶ Hostage, XI TWC 1271.

In an article after the war, Judge Brand – a member of Tribunal III in the *Justice* case –noted that the *High Command* judgment oscillated between knowledge and negligence when addressing issues of command responsibility.¹⁰⁷ Judge Brand could not explain the inconsistency, but a close reading of the judgment reveals that the *High Command* tribunal actually took a principled approach to command responsibility’s *mens rea*, determining whether negligence or knowledge applied by reference to the nature of the underlying crimes.

In the first category were crimes committed pursuant to illegal orders that a defendant knew had been issued by his superiors. The defendant was obviously responsible for ordering those crimes if he had personally transmitted the illegal order. But even if he had not transmitted the order, he was still obligated to prevent his subordinates from carrying it out and to discover if they were. Negligence with regard to those obligations was thus criminal, as the Tribunal made clear in its discussion of command responsibility for the Commissar Order:

Can these defendants escape liability because this criminal order originated from a higher level? They knew it was directed to units subordinate to them. Reports coming in from time to time from these subordinate units showed the execution of these political functionaries. It is true in many cases they said they had no knowledge of these reports. They should have had such knowledge.¹⁰⁸

Knowledge then applied to crimes committed by a defendant’s subordinates either spontaneously or pursuant to superior orders that the defendant did not know existed. The latter was the case, for example, with regard to executions committed by the Einsatzgruppen in the areas under the defendants’ control. The *High Command* tribunal acknowledged that, with regard to the Einsatzgruppen (as opposed to the Wehrmacht), “no superior orders transmitted to the defendant field commanders show the mass murder program of the Third Reich.”¹⁰⁹ It thus held that the “sole question” for those defendants was “whether or not they knew of the criminal activities of the Einsatzgruppen... and neglected to suppress them.”¹¹⁰

C. Efforts to Prevent or Punish

The tribunals agreed that superiors had a non-derogable duty to properly supervise their subordinates. A superior was thus criminally liable for his subordinates’ crimes if he failed to prevent them, failed to prevent their recurrence, or failed to punish those responsible for them.

1. Failure to Prevent

The *Hostage* tribunal held that a superior was obligated to take “effective steps” to prevent his subordinates from committing crimes.¹¹¹ In practice, the failure to prevent was an issue in the first *High Command* scenario mentioned above: when a superior became aware that his superiors had issued illegal orders that his subordinates were likely to execute. According to

¹⁰⁷ G. Brand, *The War Crimes Trials and the Laws of War*, 26 BRIT. Y.B. INT’L L. 414, 425 (1949).

¹⁰⁸ *High Command*, XI TWC 520.

¹⁰⁹ *Id.* at 548.

¹¹⁰ *Id.* at 547.

¹¹¹ *Hostage*, XI TWC 1257.

the *Hostage* tribunal, a superior in such a situation was “required to rescind [the] illegal orders” as long as time permitted it.¹¹²

2. Failure to Prevent Recurrence

A superior was also required to take effective steps to prevent his subordinates from continuing to commit crimes once he became aware that crimes had been committed.¹¹³ If a superior knew those crimes had been committed pursuant to illegal orders, the superior was obligated to rescind those orders as soon as possible. In *Einsatzgruppen*, for example, Jost was held responsible for failing to revoke the Fuhrer Order when he learned upon taking command of Einsatzgruppe A that it was leading to illegal executions.¹¹⁴ The superior was also required to issue new orders to ensure that, in the future, his subordinates would act lawfully. In the *Hostage* case, for example, Lanz was convicted for failing to prevent his subordinates from continuing to engage in illegal executions because, “with full knowledge of what was going on,” he “did absolutely nothing about it. Nowhere does an order appear which has for its purpose the bringing of the hostage and reprisal practice within the rules of war.”¹¹⁵

A superior had a similar obligation if his subordinates were committing crimes either spontaneously or pursuant to illegal orders of which he was unaware. In such a situation, the superior was required to take affirmative steps to ensure that his subordinates acted lawfully in the future. Genzken was held responsible for the typhus experiments, for example, because “he did nothing to insure that such research would be conducted with permissible legal limits.”¹¹⁶

3. Failure to Punish

Finally, as part of his obligation to prevent the recurrence of crimes, a superior was required to punish the subordinates who had committed them. In the *Hostage* case, for example, Tribunal V held List responsible for illegal reprisal executions because “[n]ot once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts.”¹¹⁷ The *High Command* tribunal emphasized, however, that the form of punishment was irrelevant as long as the punishment itself protected civilians against the commission of further crimes. As it said, “[w]hether this protection be assured by the prosecution of soldiers charged with offenses against the civilian population, or whether it be assured by disciplinary measures or otherwise, is immaterial from an international standpoint.”¹¹⁸

D. Causation

In two places in its judgment, the *Medical* tribunal emphasized that a defendant’s failure to properly supervise his subordinates had played a causal role in their commission of crimes. First, it concluded that Karl Brandt’s “dereliction” with regard to the Nazis’ euthanasia program had “contributed” to the extermination of non-German nationals.¹¹⁹ Second, it

¹¹² Id. at 1271.

¹¹³ See, e.g., *High Command*, XI TWC 632; *Einsatzgruppen*, IV TWC 513; *Medical*, II TWC 206.

¹¹⁴ *Einsatzgruppen*, IV TWC 513.

¹¹⁵ *Hostage*, XI TWC 1311.

¹¹⁶ *Medical*, II TWC 222.

¹¹⁷ *Hostage*, XI TWC 1272.

¹¹⁸ *High Command*, XI TWC 524.

¹¹⁹ *Medical*, II TWC 198.

pointed out that if Handloser had exercised his authority over the typhus experiments at Buchenwald, “later deaths would have been prevented.”¹²⁰ Neither the *Medical* tribunal nor any other tribunal, however, ever suggested that a causal relationship was a necessary condition of a defendant’s responsibility for the failure to prevent the occurrence or recurrence of crimes.

E. Independent Crime or Complicity?

The tribunals occasionally referred to a superior’s failure to properly supervise his subordinates as a “dereliction of duty.”¹²¹ There is no question, however, that they viewed command responsibility as a mode of participation, not as an independent crime. Once the *Medical* tribunal concluded that Karl Brandt had failed to prevent the euthanasia program, for example, it held that he was “criminally responsible in the program.”¹²² Similarly, the *Ministries* tribunal held Schellenberg responsible for the Operation Zeppelin executions after finding that he had permitted them to occur.¹²³

V. OTHER MODES

Although devoting comparatively little attention to them, the tribunals also discussed two other modes of participation, incitement and indirect perpetration, as well as the inchoate crime of attempt.

A. Incitement

Article II(2) did not specify incitement as a mode of participation in a crime. The *Ministries* tribunal nevertheless convicted Dietrich, the Reich press chief, for orchestrating “a well thought-out, oft-repeated, persistent campaign to arouse the hatred of the German people against Jews.” Through that campaign, the Tribunal held, “Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews.”¹²⁴

B. Perpetration by Means

Article 25(3)(a) of the Rome Statute adopts the German concept of “perpetration by means,” whereby an individual commits an international crime through another by means of his “control over an organized apparatus of power.”¹²⁵ That mode of participation has four elements: a superior/subordinate relationship; sufficient “authority and control” by the defendant – normally because of his capacity to “hire, train, impose discipline, [or] provide resources” – to ensure that his orders will be carried out; the defendant’s use of the apparatus to actually commit a crime; and the defendant’s awareness of his control over the apparatus.¹²⁶

¹²⁰ Id. at 206.

¹²¹ See, e.g., Hostage, XI TWC 1271.

¹²² Medical, II TWC 198.

¹²³ Ministries, XIV TWC 671.

¹²⁴ Id. at 576.

¹²⁵ See Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, para. 510 (30 Sept. 2008).

¹²⁶ Id. at paras. 512-14.

Scholars have argued that the Rome Statute's reliance on perpetration by means is a novelty in international criminal law.¹²⁷ It is thus interesting to note that the *Ministries* tribunal relied on an analogous concept to hold Berger responsible for the crimes against humanity committed by the notorious Dirlewanger Brigade:

While in the field the unit was not under his tactical direction, it was organized by him, trained by the man whom he selected, the idea was his, he kept it and its commander under his protection, he was repeatedly informed of its savage and uncivilized behavior, which he not only permitted to continue, but attempted to justify... That one of the purposes for which the brigade was organized was to commit crimes against humanity, and that it did so to an extent which horrified and shocked even Nazi commissioners and Rosenberg's Ministry for the Eastern Territories.¹²⁸

The similarity between the tribunal's explanation of Berger's conviction and perpetration by means is striking.

C. Attempt

Outside of the context of issuing an illegal order, the tribunals rarely discussed whether attempting to commit a crime was itself criminal. That is not surprising; after all, given the Nazis' systematic criminality, the OCC had no reason to pursue inchoate crimes other than conspiracy. The primary exception involved plunder: the prosecution charged the *Flick* and *Farben* defendants with attempting to illegally obtain title to factories in occupied territory. Those efforts failed, however, because both tribunals held that an attempt to plunder public or private property was not criminal, even if the defendants had intended to complete the criminal act.¹²⁹ As the *Flick* tribunal colorfully put it, "[t]o covet is a sin under the Decalogue but not a violation of the Hague Regulations nor a war crime."¹³⁰

CONCLUSION

The NMTs were the first tribunals to systematically identify the essential elements of ordering and command responsibility, two modes that are at the heart of modern international criminal law. Their definition of command responsibility has had a profound effect on modern tribunals, an issue discussed in Chapter 16. Their definition of ordering, by contrast, has been largely ignored. That is unfortunate, because the NMTs took a very innovative approach to the concept. First, the tribunals held that de facto authority to command established the necessary superior/subordinate relationship, making it clear that civilians could be held responsible for ordering international crimes. Second, the tribunals extended ordering to include not only orders that were illegal on their face, but also orders that were capable of being criminally applied. Third, the tribunals defined the *actus reus* of ordering very broadly, prohibiting drafting and transmitting illegal orders as well as issuing them. Fourth, and perhaps most interesting of all, the *Hostage* tribunal held that issuing an illegal

¹²⁷ See, e.g., Florian Jessberger & Julian Geneuss, *On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at the Hague?*, 6 J. INT'L CRIM. JUST. 853, 867 (2008).

¹²⁸ *Ministries*, XIV TWC 545-46.

¹²⁹ *Flick*, VI TWC 1210; *Farben*, VIII TWC 1147.

¹³⁰ *Flick*, VI TWC 1210.

order was an inchoate crime, not simply a mode of participation – an idea that a number of scholars have endorsed.¹³¹

¹³¹ See, e.g., Robert Cryer, *General Principles of Liability in International Criminal Law*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 242-47 (McGoldrick et al., eds., 2004).