XI. JUDGMENT

A. Opinion and Judgment of Military Tribunal V

In the matter of the United States of America against Wilhelm List, et al., sitting at Nuernberg, Germany, on 19 February 1948, Justice Wennerstrum, presiding.

PRESIDING JUDGE WENNERSTRUM: Judge Carter will read the first portion of the opinion.

JUDGE CARTER: In this case, the United States of America prosecutes each of the defendants on one or more of four counts of an indictment charging that each and all of said defendants unlawfully, willfully, and knowingly committed war crimes and crimes against humanity as such crimes are defined in Article II of the Control Council Law No. 10. They are charged with being principals in and accessories to the murder of thousands of persons from the civilian population of Greece, Yugoslavia, Norway, and Albania between September 1939 and May 1945 by the use of troops of the German armed forces under the command of and acting pursuant to orders issued, distributed, and executed by the defendants at the bar. It is further charged that these defendants participated in a deliberate scheme of terrorism and intimidation, wholly unwarranted and unjustified by military necessity, by the murder, ill-treatment and deportation to slave labor of prisoners of war and members of the civilian populations in territories occupied by the German armed forces; by plundering and pillaging public and private property and wantonly destroying cities, towns, and villages for which there was no military necessity. Upon these charges, each of the defendants except the defendant Boehme has been formally arraigned and a plea of not guilty accepted.

The indictment alleges that the defendants committed the acts charged while occupying the positions hereafter shown during the periods of time indicated—

The defendant Wilhelm List was a Generalfeldmarschall [Field Marshal] (General of the Army) of the German armed forces, serving as commander in chief, 12th Army, from April 1941 to October 1941; Armed Forces Commander Southeast from June 1941 to October 1941; and as commander in chief, Army Group A, from July 1942 to September 1942.

The defendant Maximilian von Weichs was a Generalfeldmarschall [Field Marshal] (General of the Army) of the German armed forces, serving as commander in chief, 2d Army, from April 1941 to July 1942; commander in chief, Army Group B,

from July 1942 to February 1943; and commander in chief, Army Group F, and Supreme Commander Southeast from August 1943 to March 1945.

The defendant Lothar Rendulic was a Generaloberst (General) in the German armed forces, serving as commander in chief, 2d Panzer Army, from August 1943 to June 1944; commander in chief, 20th Mountain Army, from July 1944 to January 1945; Armed Forces Commander North from December 1944 to January 1945; commander in chief, Army Group North, from January 1945 to March 1945; commander in chief, Army Group Courland, from March 1945 to April 1945; and commander in chief, Army Group South, from April 1945 to May 1945.

The defendant Walter Kuntze was a General der Pioniere (Lieutenant General, Engineers) in the German armed forces, serving as acting commander in chief, 12th Army, from October 1941 to August 1942, and Deputy Armed Forces Commander Southeast during the same period.

The defendant Hermann Foertsch was a General der Infanterie (Lieutenant General, Infantry) in the German armed forces, serving as chief of staff, 12th Army, from May 1941 to August 1942; chief of staff, Army Group E, from August 1942 to August 1943; and chief of staff, Army Group F, from August 1943 to March 1944.

The defendant Franz Boehme was a General der Gebirgstruppen (Lieutenant General, Mountain Troops) in the German armed forces, serving as commander, XVIII Mountain Army Corps, from April 1941 to December 1941; Plenipotentiary Commanding General in Serbia from September 1941 to December 1941; and commander in chief, 2d Panzer Army, from June 1944 to July 1944.

The defendant Helmuth Felmy was a General der Flieger (Lieutenant General, Air Force) in the German armed forces, serving as commander, Southern Greece, from June 1941 to August 1942; and commander, LXVIII Army Corps, from June 1943 to October 1944.

The defendant Hubert Lanz was a General der Gebirgstruppen (Lieutenant General, Mountain Troops) in the German armed forces, serving as commander, 1st Mountain Division, from October 1940 to January 1943; and commander, XXII Mountain Army Corps, from August 1943 to October 1944.

The defendant Ernst Dehner was a General der Infanterie (Lieutenant General, Infantry) in the German armed forces, serving as commander, LXIX Army Reserve Corps, from August 1943 to March 1944.

The defendant Ernst von Leyser was a General der Infanterie (Lieutenant General, Infantry) in the German armed forces,

serving as commander, XV Mountain Army Corps, from November 1943 to July 1944; and commander, XXI Mountain Army Corps, from July 1944 to April 1945.

The defendant Wilhelm Speidel was a General der Flieger (Lieutenant General, Air Force) in the German armed forces, serving as commander, Southern Greece, from October 1942 to September 1943; and Military Commander Greece from September 1943 to June 1944.

The defendant Kurt von Geitner was a Generalmajor (Brigadier General) in the German armed forces, serving as chief of staff to the commanding general in Serbia from July 1942 to August 1943; and chief of staff to the Military Commander of Serbia and Military Commander Southeast from August 1943 to October 1944.

It is alleged in the indictment that the acts charged were violative of Control Council Law No. 10, duly enacted by the Allied Control Council on 20 December 1945. The portions of the law applicable to this case provide as follows [Article II]:

"1. ***

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

"(*c*) *Crimes against humanity.* Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

* * * * * * *

"2. 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***.

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

Pursuant to the provisions of Control Council Law No. 10, the pertinent parts of which are herein set out, the United States of America filed its indictment charging the defendants in four counts with war crimes and crimes against humanity in accordance with the definitions thereof contained. Reduced to a minimum of words, these four counts charge—

1. That defendants were principals or accessories to the murder of hundreds of thousands of persons from the civilian populations of Greece, Yugoslavia, and Albania by troops of the German armed forces; that attacks by lawfully constituted enemy military forces, and attacks by unknown persons, against German troops and installations, were followed by executions of large numbers of the civilian population by hanging or shooting without benefit of investigation or trial; that thousands of noncombatants, arbitrarily designated as "partisans," "Communists," "Communist suspects," "bandit suspects" were terrorized, tortured, and murdered in retaliation for such attacks by lawfully constituted enemy military forces and attacks by unknown persons; and that defendants issued, distributed, and executed orders for the execution of 100 "hostages" in retaliation for each German soldier killed and 50 "hostages" in retaliation for each German soldier wounded.

2. That defendants were principals or accessories to the plundering and looting of public and private property, the wanton destruction of cities, towns, and villages, frequently together with the murder of the inhabitants thereof, and the commission of other acts of devastation not warranted by military necessity in the occupied territories of Greece, Yugoslavia, Albania, and Norway by troops of the German armed forces acting at the direction and order of these defendants; that defendants ordered troops under their command to burn, level, and destroy entire villages and towns and thereby making thousands of peaceful noncombatants homeless and destitute; thereby causing untold suffering, misery, and death to large numbers of innocent civilians without any recognized military necessity for so doing.

3. That defendants were principals or accessories to the drafting, distribution, and execution of illegal orders to the troops of the German armed forces which commanded that enemy troops be refused quarters and be denied the status and rights of prisoners of war and surrendered members of enemy forces be summarily executed; that the defendants illegally ordered that

regular members of the national armies of Greece, Yugoslavia, and Italy be designated as "partisans," "rebels," "Communists," and "bandits," and that relatives of members of such national armies be held responsible for such members' acts of warfare, resulting in the murder and ill-treatment of thousands of soldiers, prisoners of war, and their noncombatant relatives.

4. That defendants were principals or accessories to the murder, torture, and systematic terrorization, imprisonment in concentration camps, forced labor on military installations, and deportation to slave labor of the civilian populations of Greece, Yugoslavia, and Albania by troops of the German armed forces acting pursuant to the orders of the defendants; that large numbers of citizens—democrats, Nationalists, Jews, and gypsies—were seized, thrown into concentration camps, beaten, tortured, ill-treated, and murdered while other citizens were forcibly conscripted for labor in the Reich and occupied territories.

The acts charged in each of the four counts are alleged to have been committed willfully, knowingly, and unlawfully and constitute violations of international conventions, the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and were declared, recognized, and defined as crimes by Article II of Control Council Law No. 10 adopted by the representatives of the United States of America, Great Britain, the Republic of France, and the Soviet Union.

The defendant Franz Boehme committed suicide prior to the arraignment of the defendants, and the Tribunal has ordered his name stricken from the list of defendants contained in the indictment. The defendant Maximilian von Weichs became ill during the course of the trial and it having been conclusively ascertained that he is physically unfit and unable to appear in Court before the conclusion of the trial, his motion that the proceedings be suspended as to him was sustained. This holding is without prejudice to a future trial of this defendant on the charges herein made against him if and when his physical condition permits.

Before venturing into a discussion of specific issues, it seems advisable to briefly state the general nature of international law and the sources from which its principles can be ascertained. No attempt will be made here to give an all inclusive definition of international law, in fact, there is justification for the assertion that it ought not to be circumscribed by strict definition in order that it may have ample room for growth. Any system of law that is obviously subject to growth by the crystalization of generally prevailing custom and practice into law under the impact of

common acceptance or consent must not be confined within the limits of formal pronouncement or complete unanimity. For our purposes it is sufficient to say that international law consists of the principles which control or govern relations between nations and their nationals. It is much more important to consider the sources from which these principles may be determined.

The sources of international law which are usually enumerated are (1) customs and practices accepted by civilized nations generally, (2) treaties, conventions, and other forms of interstate agreements, (3) the decisions of international tribunals, (4) the decisions of national tribunals dealing with international questions, (5) the opinions of qualified text writers, and (6) the diplomatic papers. These sources provide a frame upon which a system of international law can be built but they cannot be deemed a complete legal system in themselves. Any system of jurisprudence, if it is to be effective, must be given an opportunity to grow and expand to meet changed conditions. The codification of principles is a helpful means of simplification, but it must not be treated as adding rigidity where resiliency is essential. To place the principles of international law in a formalistic strait-jacket would ultimately destroy any effectiveness that it has acquired.

The tendency has been to apply the term "customs and practices accepted by civilized nations generally," as it is used in international law, to the laws of war only. But the principle has no such restricted meaning. It applies as well to fundamental principles of justice which have been accepted and adopted by civilized nations generally. In determining whether such a fundamental rule of justice is entitled to be declared a principle of international law, an examination of the municipal laws of states in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified. There is convincing evidence that this not only is, but has been the rule. The rules applied in criminal trials regarding burden of proof, presumption of innocence, and the right of a defendant to appear personally to defend himself are derived from this source. Can it be doubted that such a source of international law would be applied to an insane defendant? Obviously he would not be subjected to trial during his incompetency. Clearly, such a holding would be based upon a fundamental principle of criminal law accepted by nations generally. If the rights of nations and the rights of individuals who become involved in international relations are to be respected and preserved, fundamental rules of

justice and right which have become commonly accepted by nations must be applied. But the yardstick to be used must in all cases be a finding that the principle involved is a fundamental rule of justice which has been adopted or accepted by nations generally as such.

The defendants invoke the defensive plea that the acts charged as crimes were carried out pursuant to orders of superior officers whom they were obliged to obey. This brings into operation the rule just announced. The 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. It is not disputed that the municipal law of civilized nations generally sustained the principle at the time the alleged criminal acts were committed. This being true, it properly may be declared as an applicable rule of international law.

It cannot be questioned that acts done in time of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that 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 interior will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice. In the German War Trials (1921), the German Supreme Court of Leipzig in The Llandovery Castle case said:

> "Patzig's order does not free the accused from guilt. It is true that, according to paragraph 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. According to No. 2, however, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law."

It is true that the foregoing rule compels a commander to

make a choice between possible punishment by his lawless government for the disobedience of the illegal order of his superior officer, or that of lawful punishment for the crime under the law of nations. To choose the former in the hope that victory will cleanse the act of its criminal characteristics manifests only weakness of character and adds nothing to the defense.

We concede the serious consequences of the choice especially by an officer in the army of a dictator. But the rule becomes one of necessity, for otherwise the opposing army would in many cases have no protection at all against criminal excesses ordered by superiors.

The defense relies heavily upon the writings of Professor L. Oppenheim to sustain their position. It is true that he advocated this principle throughout his writings. As a co-author of the British "Manual of Military Law," he incorporated the principle there. It seems also to have found its way into the United States "Rules of Land Warfare" (1940). We think Professor Oppenheim espoused a decidedly minority view. It is based upon the following rationale: "The law cannot require an individual to be punished for an act which he was compelled by law to commit." The statement completely overlooks the fact that an illegal order is in no sense of the word a valid law which one is obliged to obey. The fact that the British and American Armies may have adopted it for the regulations of its own armies as a matter of policy does not have the effect of enthroning it as a rule of international law. We point out that army regulations are not a competent source of international law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilized nations generally. It is possible, however, that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions had been put into general practice. It will be observed that the determination, whether a custom or practice exists, is a question of fact. Whether a fundamental principle of justice has been accepted, is a question of judicial or legislative declaration. In determining the former, military regulations may play an important role but in the latter they do not constitute an authoritative precedent.

Those who hold to the view that superior order is a complete defense to an international law crime, base it largely on a conflict in the articles of war promulgated by several leading nations. While we are of the opinion that army regulations are not a competent source of international law, where a fundamental rule of justice is concerned, we submit that the conflict in any event

does not sustain the position claimed for it. If, for example, one be charged with an act recognized as criminal under applicable principles of international law and pleads superior orders as a defense thereto, the duty devolves upon the court to examine the sources of international law to determine the merits of such a plea. If the court finds that the army regulations of some members of the family of nations provide that superior order is a complete defense and that the army regulations of other nations express a contrary view, the court would be obliged to hold, assuming for the sake of argument only that such regulations constitute a competent source of international law, that general acceptation or consent was lacking among the family of nations. In as much as a substantial conflict exists among the nations whether superior order is a defense to a criminal charge, it could only result in a further finding that the basis does not exist for declaring superior order to be a defense to an international law crime. But, as we have already stated, army regulations are not a competent source of international law when a fundamental rule of justice is concerned. This leaves the way clear for the court to affirmatively declare that superior order is not a defense to an international law crime if it finds that the principle involved is a fundamental rule of justice and for that reason has found general acceptance.

International law has never approved the defensive plea of superior order as a mandatory bar to the prosecution of war criminals. This defensive plea is not available to the defendants in the present case, although, if the circumstances warrant, it may be considered in mitigation of punishment under the express provisions of Control Council Law No. 10.

It is urged that Control Council Law No. 10 is an *ex post facto* act and retroactive in nature as to the crime charged in the indictment. The act was adopted on 20 December 1945, a date subsequent to the dates of the acts charged to be crimes. It is a fundamental principle of criminal jurisprudence that one may not be charged with crime for the doing of an act which was not a crime at the time of its commission. We think it could be said with justification that Article 23h of the Hague Regulations of 1907 operates as a bar to retroactive action in criminal matters. In any event, we are of the opinion that a victorious nation may not lawfully enact legislation defining a new crime and make it effective as to acts previously occurring which were not at the time unlawful. It therefore becomes the duty of a tribunal trying a case charging a crime under the provisions of Control Council Law No. 10 to determine if the acts charged were crimes at the

time of their commission and that Control Council Law No. 10 is in fact declaratory of then existing international law.

This very question was passed upon by the International Military Tribunal in the case of the United States *vs.* Hermann Wilhelm Goering in its judgment entered on 1 October 1946.* Similar provisions appearing in the Charter creating the International Military Tribunal and defining the crimes over which it had jurisdiction were held to be devoid of retroactive features in the following language:

> "The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."

We adopt this conclusion. Any doubts in our mind concerning the rule thus announced go to its application rather than to the correctness of its statement. The crimes defined in Control Council Law No. 10 which we have quoted herein were crimes under pre-existing rules of international law, some by conventional law such as that exemplified by the Hague Regulations of 1907 clearly make the war crimes herein quoted crimes under the proceedings of that convention. In any event, the practices and usages of war which gradually ripened into recognized customs with which belligerents were bound to comply recognized the crimes specified herein as crimes subject to punishment. It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally. If the acts charged were in fact crimes under international law when committed, they cannot be said to be *ex post facto* acts or retroactive pronouncements.

The crimes specified in the London Charter and defined in Control Council Law No. 10 which have heretofore been set forth and with which these defendants are charged merely restate the rules declared by the Hague Regulations of 1907 in Articles 43, 46, 47, 50 and 23h of the regulations annexed thereto which provide [*Annex to Hague Convention No. IV*]—

> *Article 43.* "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

* Trial of the Major War Criminals, *op. cit. supra*, judgment of the IMT, vol. I, p. 171 *ff*.

Article 46. "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."

Article 47. "Pillage is formally forbidden."

Article 50. "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

Article 23. "In addition to the prohibitions provided by special Conventions, it is especially forbidden—.

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"h. To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party."

We conclude that pre-existing international law has declared the acts constituting the crimes herein charged and included in Control Council Law No. 10 to be unlawful, both under the conventional law and the practices and usages of land warfare that had ripened into recognized customs which belligerents were bound to obey. Anything in excess of existing international law therein contained is a utilization of power and not of law. It is true, of course, that courts authorized to hear such cases were not established nor the penalties to be imposed for violations set forth. But this is not fatal to their validity. The acts prohibited are without deterrent effect unless they are punishable as crimes. This subject was dealt with in the International Military Trial in the following language*:

"But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of

* Ibid., pp. 220–221.

violating the rules of land warfare laid down by this Convention. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."

It is true, of course, that customary international law is not static. It must be elastic enough to meet the new conditions that natural progress brings to the world. It might be argued that this requires a certain amount of retroactive application of new rules and that by conceding the existence of a customary international law, one thereby concedes the legality of retroactive pronouncements. To a limited extent the argument is sound, but when it comes in conflict with a rule of fundamental right and justice, the latter must prevail. The rule that one may not be charged with crime for committing an act which was not a crime at the time of its commission is such a right. The fact that it might be found in a constitution or bill of rights does not detract from its status as a fundamental principle of justice. It cannot properly be changed by retroactive action to the prejudice of one charged with a violation of the laws of war.

An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen.

Some war crimes, such as spying, are not common law crimes at all; they being pure war crimes punishable as such during the war and, in this particular case, only if the offender is captured before he rejoins his army. But some other crimes, such as mass murder, are punishable during and after the war. But such crimes are also war crimes because they were committed under the authority or orders of the belligerent who, in ordering or permitting them, violated the rules of warfare. Such crimes are punishable by the country where the crime was committed or by the belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent. There are many reasons why this must be so, not the least of which is that war is usually followed by political repercussions and upheavals which at times place

persons in power who are not, for one reason or another, inclined to punish the offenders. The captor belligerent is not required to surrender the alleged war criminal when such surrender is equivalent to a passport to freedom. The only adequate remedy is the concurrent jurisdictional principle to which we have heretofore adverted. The captor belligerent may therefore surrender the alleged criminal to the state where the offense was committed, or, on the other hand, it may retain the alleged criminal for trial under its own legal processes.

It cannot be doubted that the occupying powers have the right to set up special courts to try those charged with the commission of war crimes as they are defined by international law. *Ex Parte Quirin, 317 U.S. 1, In Re Yamashita, 327 U.S. 1.* Nor can it be said that the crimes herein charged are invalid as retroactive pronouncements, they being nothing more than restatements of the conventional and customary law of nations governing the rules of land warfare, restricted by charter provisions limiting the jurisdiction of the Tribunal by designating the class of cases it is authorized to hear. The elements of an *ex post facto* act or a retroactive pronouncement are not present insofar as the crimes charged in the instant case are concerned.

The argument that the defendants cannot be tried before this Tribunal is without force. It is urged they can only be properly tried in accordance with the international principles laid down in Article 63 of the Geneva Convention of 1929 relative to the treatment of prisoners of war. We submit that the provision applies only to crimes and offenses committed while occupying the status of a prisoner of war, and confers no jurisdiction over a violation of international law committed prior to the time of becoming such.

In the recent case of *In Re Yamashita, 327 U.S. I, 66 Sup. Ct. 348,* the Supreme Court of the United States arrived at this conclusion in the following language: "But we think examination of article 63 in its setting in the Convention plainly shows that it refers to sentence 'pronounced against a prisoner of war' for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant."

The defendants at bar are charged only with crimes alleged to have been committed as combatants before they became prisoners of war. We hold, therefore, that no rights under Article 63 of the Geneva Convention of 1929 can accrue to them in the present case. The jurisdictional question raised is without merit.

It is essential to a proper understanding of the issues involved in the present case, that the status of Yugoslavia, Greece, and Norway be determined during the periods that the alleged crim-

inal acts of these defendants were committed. The question of criminality in many cases may well hinge on whether an invasion was in progress or an occupation accomplished. Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.

The evidence shows that the invasion of Yugoslavia was commenced on 6 April 1941. Nine days later the Yugoslav Government capitulated and on 16 April 1941, large scale military operations had come to an end. The powers of government passed into the hands of the German armed forces and Yugoslavia became an occupied country. The invasion of Yugoslavia followed through into Greece. On 22 April 1941, the Greek armed forces in the north were forced to surrender and on 28 April 1941, Athens fell to the invader. On and after that date Greece became an occupied country within the meaning of existing international law.

The evidence shows that the population remained peaceful during the spring of 1941. In the early summer following, a resistance movement began to manifest itself. It increased progressively in intensity until it assumed the appearance of a military campaign. Partisan bands, composed of members of the population, roamed the territory doing much damage to transportation and communication lines. German soldiers were the victims of surprise attacks by an enemy which they could not engage in open combat. After a surprise attack, the bands would hastily retreat or conceal their arms and mingle with the population with the appearance of being harmless members thereof. Ambushing of German troops was a common practice. Captured German soldiers were often tortured and killed. The terrain was favorable to this type of warfare and the inhabitants most adept in carrying it on.

It is clear that the German armed forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German armed forces of its status of an occupant.

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These findings are consistent with Article 42 of the Hague Regulations of 1907 which provide—"Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

It is the contention of the defendants that after the respective capitulations a lawful belligerency never did exist in Yugoslavia or Greece during the period here involved. The prosecution contends just as emphatically that it did. The evidence on the subject is fragmentary and consists primarily of admission contained in the reports, orders, and diaries of the German Army units involved. There is convincing evidence in the record that certain band units in both Yugoslavia and Greece complied with the requirements of international law entitling them to the status of a lawful belligerent. But the greater portion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent. The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents.

The evidence shows that the bands were sometimes designated as units common to military organization. They, however, had no common uniform. They generally wore civilian clothes although parts of German, Italian, and Serbian uniforms were used to the extent they could be obtained. The Soviet star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. There is some evidence that various groups of the resistance forces were commanded by a centralized command, such as the partisans of Marshal Tito, the Chetniks of Draja Mihailovic and the Edes of General Zervas. It is evident also that a few partisan bands met the requirements of lawful belligerency. The bands, however, with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being *francs-tireurs*.

The status of an occupant of the territory of the enemy having been achieved, international law places the responsibility upon the commanding general of preserving order, punishing crime, and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsi-

bility. But he is definitely limited by recognized rules of international law, particularly the Hague Regulations of 1907. Article 43 thereof imposes a duty upon the occupant to respect the laws in force in the country. Article 46 protects family honor and rights, the lives of individuals and their private property as well as their religious convictions and the right of public worship. Article 47 prohibits pillage. Article 50 prohibits collective penalties. Article 51 regulates the appropriation of properties belonging to the state or private individuals which may be useful in military operations. There are other restrictive provisions not necessary to mention here. It is the alleged violation of these rights of the inhabitants thus protected that furnish the basis of the case against the defendants.

The evidence is clear that during the period of occupation in Yugoslavia and Greece, guerrilla warfare was carried on against the occupying power. Guerrilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities by harassing the enemy with unorganized forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured, may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applies to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured. The rule is based on the theory that the forces of two states are no longer in the field and that a contention between organized armed forces no longer exists. This implies that a resistance not supported by an organized government is criminal and deprives participants of belligerent status, an implication not justified since the adoption of chapter I, Article I of the Hague Regulations of 1907. In determining the guilt or innocence of an army commander when charged with a failure or refusal to accord a

belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and, if he willfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence.

We think the rule is established that a civilian who aids, abets, or participates in the fighting is liable to punishment as a war criminal under the laws of war. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.

It is contended by the prosecution that the so-called guerrillas were in fact irregular troops. A preliminary discussion of the subject is essential to a proper determination of the applicable law. Members of a militia or a volunteer corps, even though they are not a part of the regular army, are lawful combatants if (*a*) they are commanded by a responsible person, (*b*) if they possess some distinctive insignia which can be observed at a distance, (*c*) if they carry arms openly, and (*d*) if they observe the laws and customs of war. (See chapter I, Article I, Hague Regulations of 1907.) In considering the evidence adduced on this subject, the foregoing rules will be applied. The question whether a captured fighter is a guerrilla or an irregular is sometimes a close one that can be determined only by a careful evaluation of the evidence before the Court.

The question of the right of the population of an invaded and occupied country to resist has been the subject of many conventional debates. (Brussels Conference of 1874; Hague Peace Conference of 1899.) A review of the positions assumed by the various nations can serve no useful purpose here for the simple reason that a compromise (Hague Regulations, 1907) was reached which has remained the controlling authority in the fixing of a legal belligerency. If the requirements of the Hague Regulation, 1907, are met, a lawful belligerency exists; if they are not met, it is an unlawful one.

The prosecution advances the contention that since Germany's wars against Yugoslavia and Greece were aggressive wars, the German occupation troops were there unlawfully and gained no rights whatever as an occupant. It is further asserted as a cor-

ollary, that the duties owed by the populace to an occupying power which are normally imposed under the rules of international law, never became effective in the present case because of the criminal character of the invasion and occupation.

For the purposes of this discussion, we accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against person or property is a crime or that any and every act undertaken by the population of the occupied country against the German occupation forces thereby became legitimate defense. The prosecution attempts to simplify the issue by posing it in the following words:

> "The sole issue here is whether German forces can with impunity violate international law by initiating and waging wars of aggression and at the same time demand meticulous observance by the victims of these crimes of duties and obligations owed only to a lawful occupant."

At the outset, we desire to point out that international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.

It must not be overlooked that international law is prohibitive law. Where the nations have affirmatively acted, as in the case of the Hague Regulations, 1907, it prohibits conduct contradictory thereto. Its specific provisions control over general theories, however reasonable they may seem. We concur in the views expressed in the following text on the subject:* "Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral states. This is so, even if the declaration of war is *ipso facto* a violation of international law, as when a belligerent declares war upon a neutral state for refusing passage to its troops, or when a state goes to war in patent violation of its obligations under the Covenant of the

* Oppenheim, *op. cit. supra*, p. 79.

League or of the General Treaty for the Renunciation of War.* To say that, because such a declaration of war is *ipso facto* a violation of neutrality and international law, it is 'inoperative in law and without any judicial significance' is erroneous. The rules of international law apply to war *from whatever cause it originates.*"

The major issues involved in the present case gravitate around the claimed right of the German armed forces to take hostages from the innocent civilian population to guarantee the peaceful conduct of the whole of the civilian population and its claimed right to execute hostages, members of the civil population, and captured members of the resistance forces in reprisal for armed attacks by resistance forces, acts of sabotage and injuries committed by unknown persons.

We wholly exclude from the following discussion of the subject of hostages the right of one nation to take them, to compel the armed forces of another nation to comply with the rules of war or the right to execute them if the enemy ignores the warning. We limit our discussion to the right to take hostages from the innocent civilian population of occupied territory as a guaranty against attacks by unlawful resistance forces, acts of sabotage and the unlawful acts of unknown persons, and the further right to execute them if the unilateral guaranty is violated.

Neither the Hague Convention of 1907, nor any other conventional law for that matter, says a word about hostages in the sense that we are to use the term in the following discussion. But certain rules of customary law and certain inferences legitimately to be drawn from existing conventional law lay down the rules applicable to the subject of hostages. In former times prominent persons were accepted as hostages as a means of insuring observance of treaties, armistices, and other agreements, the performance of which depended on good faith. This practice is now obsolete. Hostages under the alleged modern practice of nations are taken (*a*) to protect individuals held by the enemy, (*b*) to force the payment of requisitions, contributions, and the like, and (*c*) to insure against unlawful acts by enemy forces or people. We are concerned here only with the last provision. That hostages may be taken for this purpose cannot be denied.

The question of hostages is closely integrated with that of reprisals. A reprisal is a response to an enemy's violation of the laws of war which would otherwise be a violation on one's own side. It is a fundamental rule that a reprisal may not exceed the degree of the criminal act it is designed to correct. Where an excess is knowingly indulged, it in turn is criminal and may

* Ibid.

be punished. Where innocent individuals are seized and punished for a violation of the laws of war which has already occurred, no question of hostages is involved. It is nothing more than the infliction of a reprisal. Throughout the evidence in the present case, we find the term hostage applied where a reprisal only was involved.

Under the ancient practice of taking hostages they were held responsible for the good faith of the persons who delivered them, even at the price of their lives. This barbarous practice was wholly abandoned by a more enlightened civilization. The idea that an innocent person may be killed for the criminal act of another is abhorrent to every natural law. We condemn the injustice of any such rule as a barbarous relic of ancient times. But it is not our province to write international law as we would have it; we must apply it as we find it.

For the purposes of this opinion the term "hostages" will be considered as those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken. The term "reprisal prisoners" will be considered as those individuals who are taken from the civilian population to be killed in retaliation for offenses committed by unknown persons within the occupied area.

An examination of the available evidence on the subject convinces us that hostages may be taken in order to guarantee the peaceful conduct of the populations of occupied territories and, when certain conditions exist and the necessary preliminaries have been taken, they may, as a last resort, be shot. The taking of hostages is based fundamentally on a theory of collective responsibility. The effect of an occupation is to confer upon the invading force the right of control for the period of the occupation within the limitations and prohibitions of international law. The inhabitants owe a duty to carry on their ordinary peaceful pursuits and to refrain from all injurious acts toward the troops or in respect to their military operations. The occupant may properly insist upon compliance with regulations necessary to the security of the occupying forces and for the maintenance of law and order. In the accomplishment of this objective, the occupant may only, as a last resort, take and execute hostages.

Hostages may not be taken or executed as a matter of military expediency. The occupant is required to use every available method to secure order and tranquility before resort may be had to the taking and execution of hostages. Regulations of all kinds must be imposed to secure peace and tranquility before the shooting of hostages may be indulged. These regulations may include

one or more of the following measures: (1) the registration of the inhabitants, (2) the possession of passes or identification certificates, (3) the establishment of restricted areas, (4) limitations of movement, (5) the adoption of curfew regulations, (6) the prohibition of assembly, (7) the detention of suspected persons, (8) restrictions on communication, (9) the imposition of restrictions on food supplies, (10) the evacuation of troublesome areas, (11) the levying of monetary contributions, (12) compulsory labor to repair damage from sabotage, (13) the destruction of property in proximity to the place of the crime, and any other regulation not prohibited by international law that would in all likelihood contribute to the desired result.

If attacks upon troops and military installations occur regardless of the foregoing precautionary measures and the perpetrators cannot be apprehended, hostages may be taken from the population to deter similar acts in the future provided it can be shown that the population generally is a party to the offense, either actively or passively. Nationality or geographic proximity may under certain circumstances afford a basis for hostage selection, depending upon the circumstances of the situation. This arbitrary basis of selection may be deplored but it cannot be condemned as a violation of international law, but there must be some connection between the population from whom the hostages are taken and the crime committed. If the act was committed by isolated persons or bands from distant localities without the knowledge or approval of the population or public authorities, and which, therefore, neither the authorities nor the population could have prevented, the basis for the taking of hostages, or the shooting of hostages already taken, does not exist.

It is essential to a lawful taking of hostages under customary law that proclamation be made, giving the names and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason the hostages will be shot. The number of hostages shot must not exceed in severity the offenses the shooting is designed to deter. Unless the foregoing requirements are met, the shooting of hostages is in contravention of international law and is a war crime in itself. Whether such fundamental requirements have been met is a question determinable by court martial proceedings. A military commander may not arbitrarily determine such facts. An order of a military commander for the killing of hostages must be based upon the finding of a competent court martial that necessary conditions exist and all preliminary steps have been taken which are essential to the issuance of a valid order. The taking of the lives of innocent persons arrested as hostages is a very serious step. The right

to kill hostages may be lawfully exercised only after a meticulous compliance with the foregoing safeguards against vindictive or whimsical orders of military commanders.

We are also concerned with the subject of reprisals and the detention of members of the civilian population for the purpose of using them as the victims of subsequent reprisal measures. The most common reason for holding them is for the general purpose of securing the good behavior and obedience of the civil population in occupied territory. The taking of reprisals against the civilian population by killing members thereof in retaliation for hostile acts against the armed forces or military operations of the occupant seems to have been originated by Germany in modern times. It has been invoked by Germany in the Franco-Prussian War, World War I, and in World War II. No other nation has resorted to the killing of members of the civilian population to secure peace and order insofar as our investigation has revealed. The evidence offered in this case on that point will be considered later in the opinion. While American, British, and French manuals for armies in the field seem to permit the taking of such reprisals as a last resort, the provisions do not appear to have been given effect. The American manual provides in part—[1]

> "The offending forces or populations generally may lawfully be subjected to appropriate reprisals. Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed."

The British field manual provides in part—[2]

> "Although collective punishment of the population is forbidden for the acts of individuals for which it cannot be regarded as collectively responsible, it may be necessary to resort to reprisals against a locality or community, for same act committed by its inhabitants, or members who cannot be identified."

In two major wars within the last 30 years, Germany has made extensive use of the practice of killing innocent members of the population as a deterrent to attacks upon its troops and acts of sabotage against installations essential to its military operations. The right to so do has been recognized by many nations including the United States, Great Britain, France, and the Soviet Union. There has been complete failure on the part of the nations of the world to limit or mitigate the practice by conventional rule. This requires us to apply customary law.

[1] Rules of Land Warfare, U. S. Army, Field Manual 27–10, *op. cit. supra*, par 358d, p. 89–90.
[2] British Manual of Military Law, par. 458.

That international agreement is badly needed in this field is self-evident.

International law is prohibitive law and no conventional prohibitions have been invoked to outlaw this barbarous practice. The extent to which the practice has been employed by the Germans exceeds the most elementary notions of humanity and justice. They invoke the plea of military necessity, a term which they confuse with convenience and strategical interests. Where legality and expediency have coincided, no fault can be found insofar as international law is concerned. But where legality of action is absent, the shooting of innocent members of the population as a measure of reprisal is not only criminal but it has the effect of destroying the basic relationship between the occupant and the population. Such a condition can progressively degenerate into a reign of terror. Unlawful reprisals may bring on counter reprisals and create an endless cycle productive of chaos and crime. To prevent a distortion of the right into a barbarous method of repression, international law provides a protective mantle against the abuse of the right.

Generally, it can be said that the taking of reprisal prisoners, as well as the taking of hostages, for the purpose of controlling the population involves a previous proclamation that if a certain type of act is committed, a certain number of reprisal prisoners will be shot if the perpetrators cannot be found. If the perpetrators are apprehended, there is no right to kill either hostages or reprisal prisoners.

As in the case of the taking of hostages, reprisal prisoners may not be shot unless it can be shown that the population as a whole is a party to the offense, either actively or passively. In other words, members of the population of one community cannot properly be shot in reprisal for an act against the occupation forces committed at some other place. To permit such a practice would conflict with the basic theory that sustains the practice in that there would be no deterrent effect upon the community where the offense was committed. Neither may the shooting of innocent members of the population as a reprisal measure exceed in severity the unlawful acts it is designed to correct. Excessive reprisals are in themselves criminal and guilt attaches to the persons responsible for their commission.

It is a fundamental rule of justice that the lives of persons may not be arbitrarily taken. A fair trial before a judicial body affords the surest protection against arbitrary, vindictive, or whimsical application of the right to shoot human beings in reprisal. It is a rule of international law, based on these fundamental concepts of justice and the rights of individuals, that the

lives of persons may not be taken in reprisal in the absence of a judicial finding that the necessary conditions exist and the essential steps have been taken to give validity to such action. The possibility is great, of course, that such judicial proceedings may become ritualistic and superficial when conducted in wartime but it appears to be the best available safeguard against cruelty and injustice. Judicial responsibility ordinarily restrains impetuous action and permits principles of justice and right to assert their humanitarian qualities. We have no hesitancy in holding that the killing of members of the population in reprisal without judicial sanction is itself unlawful. The only exception to this rule is where it appears that the necessity for the reprisal requires immediate reprisal action to accomplish the desired purpose and which would be otherwise defeated by the invocation of judicial inquiry. Unless the necessity for immediate action is affirmatively shown, the execution of hostages or reprisal prisoners without a judicial hearing is unlawful. The judicial proceeding not only affords a measure of protection to innocent members of the population, but it offers, if fairly and impartially conducted, a measure of protection to the military commander, charged with making the final decision.

It cannot be denied that the shooting of hostages or reprisal prisoners may under certain circumstances be justified as a last resort in procuring peace and tranquility in occupied territory and has the effect of strengthening the position of a law abiding occupant. The fact that the practice has been tortured beyond recognition by illegal and inhuman application cannot justify its prohibition by judicial fiat.

Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, 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. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection

between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone.

The issues in the present case raise grave questions of international law. Military men the world over debate both the law and the policy involved in the prosecution for war crimes of the high ranking commanders of defeated armies. This is partially brought about by the possibility of future wars and the further possibility that the victors of the present may be the vanquished of the future. This only serves to impress the Tribunal with the absolute necessity of affording the defendants a fair and impartial trial under the rules of international law as they were at the time the alleged offenses were committed. Unless this be done, the hand of injustice may fall upon those who so vindictively contend for more far reaching pronouncements, sustained by precedents which we would hereby establish.

Strict discipline is necessary in the organization of an army, and it becomes hard for many to believe that a violation of the orders of a superior may bring about criminal liability. Love of country and adherence to duty intervene to palliate unlawful conduct. The passage of time and the thankfulness for a return to peaceful pursuits tend to lessen the demand that war criminals answer for their crimes. In addition thereto, there is a general feeling that excesses occur in all armies, no matter how well disciplined, and that military trials are held to convict the war criminals of the vanquished while those of the victor are cleansed by victory. Unless civilization is to give way to barbarism in the conduct of war, crime must be punished. If international law as it applies to a given case is hopelessly inadequate, such inadequacy should be pointed out. If customary international law has become outmoded, it should be so stated. If conventional international law sets forth an unjust rule, its enforcement will secure its correction. If all war criminals are not brought to the bar of justice under present procedures, such procedures should be made more inclusive and more effective. If the laws of war are to have any beneficent effect, they must be enforced.

The evidence in this case recites a record of killing and destruction seldom exceeded in modern history. Thousands of innocent inhabitants lost their lives by means of a firing squad or hangman's noose, people who had the same inherent desire to live as do these defendants. Wherever the German armed forces were

found, there also were the SS (Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei), the SD (Der Sicherheitsdienst des Reichsfuehrer SS), the Gestapo (Die Geheime Staatspolizei), the SA (Die Sturmabteilungen der Nationalsozialistischen Deutschen Arbeiterpartei), the administrators of Goering's Four Year Plan, and the Einsatzstab Rosenberg, all participating in the administration of the occupied territories in varying degrees. Mass shootings of the innocent population, deportations for slave labor, and the indiscriminate destruction of public and private property, not only in Yugoslavia and Greece but in many other countries as well, lend credit to the assertion that terrorism and intimidation was the accepted solution to any and all opposition to the German will. It is clear, also, that this had become a general practice and a major weapon of warfare by the German Wehrmacht. The German attitude seems to be reflected in the introduction to the German War Book, as translated by J. H. Morgan [John Murray, London, 1915] on pages 53–55 wherein it is stated:

> "If therefore, in the following work the expression 'the law of war' is used, it must be understood that by it is meant not a *lex scripta* introduced by international agreements, but only a reciprocity of mutual agreement; a limitation of arbitrary behaviour, which custom and conventionality, human friendliness and a calculating egotism have erected, but for the observance of which there exists no express sanction, but only 'the fear of reprisals' decides. * * * Moreover the officer is a child of his time. He is subject to the intellectual tendencies which influence his own nation; the more educated he is the more will this be the case. The danger that, in this way, he will arrive at false views about the essential character of war must not be lost sight of. The danger can only be met by a thorough study of war itself. By steeping himself in military history an officer will be able to guard himself against excessive humanitarian notions, it will teach him that certain severities are indispensable to war, nay more, that the only true humanity very often lies in a ruthless application of them. It will also teach him how the rules of belligerent intercourse in war have developed, how in the course of time they have solidified into general usages of war, and finally it will teach him whether the governing usages of war are justified or not, whether they are to be modified or whether they are to be observed."

It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification of their acts. 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. We have hereinbefore pointed out that it is the duty of the commanding general in occupied territory to maintain peace and order, punish crime, and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territory, having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent, or approval of these defendants. But this cannot be a defense for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defense. The fact is that the reports of subordinate units almost without exception advised these defendants of the policy of terrorism and intimidation being carried out by units in the field. They requisitioned food supplies in excess of their local need and caused it to be shipped to Germany in direct violation of the laws of war. Innocent people were lodged in collection and concentration camps where they were mistreated to the everlasting shame of the German nation. Innocent inhabitants were forcibly taken to Germany and other points for use as slave labor. Jews, gypsies, and other racial groups were the victims of systematized murder or deportation for slave labor for no other reason than their race or religion, which is in violation of the express conventional rules of the Hague Regulations of 1907. The German theory that fear of reprisal is the only deterrent in the enforcement of the laws of war cannot be accepted here. That reprisals may be indulged to compel an enemy nation to comply with the rules of war must be conceded.

It is not, however, an exclusive remedy. If it were, the persons responsible would seldom, if ever, be brought to account. The only punishment would fall upon the reprisal victims who are usually innocent of wrongdoing. The prohibitions of the Hague

Regulations of 1907 contemplate no such system of retribution. Those responsible for such crimes by ordering or authorizing their commission, or by a failure to take effective steps to prevent their execution or recurrence, must be held to account if international law is to be anything more than an ethical code, barren of any practical coercive deterrent.

That the acts charged as crimes in the indictment occurred is amply established by the evidence. In fact, it is evident that they constitute only a portion of the large number of such acts which took place as a part of a general plan for subduing the countries of Yugoslavia and Greece. The guilt of the German occupation forces is not only proved beyond a reasonable doubt but it casts a pall of shame upon a once highly respected nation and its people. The defendants themselves recognize this situation when they decry the policies of Hitler and assert that they continually protested against orders of superiors issued in conformity with the plan of terrorism and intimidation.

It is the determination of the connection of the defendants with the acts charged and the responsibility which attaches to them therefor, rather than the commission of the acts, that poses the chief issue to be here decided.

Objection has been made that the documents offered in evidence by the prosecution are not the original instruments but photostatic copies only. No objection of this character was made at the time the exhibits were offered and received in evidence. In view of the fact that this objection was not timely made, it cannot receive the consideration of the Tribunal.

The record is replete with testimony and exhibits which have been offered and received in evidence without foundation as to their authenticity and, in many cases where it is secondary in character, without proof of the usual conditions precedent to the admission of such evidence. This is in accordance with the provisions of Article VII, Ordinance No. 7, Military Government, Germany, which provides—

> "The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming

authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require."

This Tribunal is of the opinion that this rule applies to the competency of evidence only, and does not have the effect of giving weight and credibility to such evidence as a matter of law. It is still within the province of the Tribunal to test it by the usual rules of law governing the evaluation of evidence. Any other interpretation would seriously affect the right of the defendants to a fair and impartial trial. The interpretation thus given and consistently announced throughout the trial by this Tribunal is not an idle gesture to be announced as a theory and ignored in practice; it is a substantive right composing one of the essential elements of a fair and impartial adjudication.

The trial was conducted in two languages, English and German, and consumed 117 trial days. The prosecution offered 678 exhibits and the defendants 1,025 that were received in evidence. The transcript of the evidence taken consists of 9,556 pages. A careful consideration of this mass of evidence and its subsequent reduction into concise conclusions of fact is one of the major tasks of the Tribunal.

The prosecution has produced oral and documentary evidence to sustain the charges of the indictment. The documents consist mostly of orders, reports, and war diaries which were captured by the Allied armies at the time of the German collapse. Some of it is fragmentary and consequently not complete. Where excerpts of such documents were received in evidence, we have consistently required the production of the whole document whenever the defense so demanded. The Tribunal and its administrative officials have made every effort to secure all known and available evidence. The prosecution has repeatedly assured the Tribunal that all available evidence, whether favorable or otherwise, has been produced pursuant to the Tribunal's orders.

The reports offered consist generally of those made or received by the defendants and unit commanders in their chain of command. By the general term "order" is meant primarily the orders, directives, and instructions received by them or sent by them by virtue of their position. By war diaries is meant the records of events of the various units which were commanded by these defendants, such war diaries being kept by the commanding

officer or under his direction. This evidence, together with the oral testimony of witnesses appearing at the trial provides the basis of the prosecution's case.

The defense produced much oral testimony including that of the defendants themselves. Hundreds of affidavits were received under the rules of the Tribunal. All affidavits were received subject to a motion to strike if the affiants were not produced for cross-examination in open court upon demand of the opposite party made in open court.

In weighing and evaluating this evidence, it was necessary to ascertain the nature of the chains of command and the general military structure in the involved territory. The correct subordination of military units as to time and place was sometimes important. Orders given and received had to be tested as to claimed literal or general meanings often made in accordance with the interest of the claimant. We have been confronted repeatedly with contentions that reports and orders sent to the defendants did not come to their attention. Responsibility for acts charged as crimes have been denied because of absence from headquarters at the time of their commission. These absences generally consisted of visitations to points within the command area, vacation leaves and leaves induced by illness. It is claimed also that many of the acts charged were committed by units not subordinated to them or by independent units subordinated to agencies other than the German Wehrmacht. It is contended generally by these defendants that they signed no orders for the performance of specific acts which are charged as war crimes, a fact which is undoubtedly due to their high rank and their indirect control only of troops in the field.

We desire to point out that the German Wehrmacht was a well equipped, well trained, and well disciplined army. Its efficiency was demonstrated on repeated occasions throughout the war.

There is some evidence that the troops in the Southeast were overage and not as well fitted for duty there as they might have been. The evidence shows, however, that they were led by competent commanders who had mail, telegraph, telephone, radio, and courier service for the handling of communications. Reports were made daily, sometimes morning and evening. Ten-day and monthly reports recapitulating past operations and stating future intentions were regularly made. They not only received their own information promptly but they appear to have secured that of the enemy as well. We are convinced that military information was received by these high ranking officers promptly, a conclusion prompted by the known efficiency of the German armed forces.

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An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such occurrences result occasionally because of unexpected contingencies, but they are the unusual. With reference to statements that responsibility is lacking where temporary absence from headquarters for any cause is shown, the general rule to be applied is dual in character. As to events occurring in his absence resulting from orders, directions, or a general prescribed policy formulated by him, a military commander will be held responsible in the absence of special circumstances. As to events, emergent in nature and presenting matters for original decision, such commander will not ordinarily be held responsible unless he approved of the action taken when it came to his knowledge.

The 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. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime, and protecting lives and property, subordination are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. Subordinate commanders in occupied territory are similarly responsible to the extent that executive authority has been delegated to them.

Much has been said about the participation of these defendants in a preconceived plan to decimate and destroy the populations of Yugoslavia and Greece. The evidence will not sustain such a charge and we so find. The only plan demonstrated by the evidence is one to suppress the bands by the use of severe and harsh measures. While these measures progressively increased as the situation became more chaotic, and appeared to have taken a more or less common course, we cannot say that there is any convincing evidence that these defendants participated in such measures for the preconceived purpose of exterminating the population generally.

Neither will the evidence sustain a finding that these defendants participated in a preconceived plan to destroy the economy of the Balkans. Naturally there was a disruption of the economy of these countries but such only as could be expected by a military occupation. There were unlawful acts that had the effect of

damaging the economy of Yugoslavia and Greece, possibly the result of a preconceived plan, but the evidence does not show the participation of these defendants therein.

There is evidence to the effect that certain reports and entries in the war diaries do not reflect the truth and were not intended to do so. The explanation is made that certain orders received from the High Command were so harsh and severe that resort was had to subterfuge to appease the insistent demands of superiors. It is asserted, for example, that the number of reprisals taken against the population was increased above the actual number for this purpose and that the number of killings was inflated for the same reason. In this connection we desire to point out that the records of the German Army are mute evidence of the events and occurrences which they themselves made. Statements contained therein which are adverse to the interests of the defendants approach the status of admission against interest. If the evidence and circumstances sustain such an assertion of falsity, we will of course give credence to it, but there are limitations beyond which the most credulous court cannot go.

In 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. Unless this be true, a crime could not be said to have been committed unlawfully, willfully, and knowingly as charged in the indictment.

In making our findings of fact, we shall give effect to these general statements except where a contrary application is specifically pointed out. We shall impose upon the prosecution the burden of proving its case beyond a reasonable doubt. We shall also adhere to the rule that the defendants will be presumed innocent until proven guilty by the required quantum of competent evidence. With these general statements in mind, we shall turn to a consideration of the charges against the individual defendants.

A brief historical background is helpful in dealing with issues here involved. The troubles of the German Wehrmacht in the Balkans began in October 1940 with the commencement of the war on Greece by Italy. Until that occurrence, Greece was a neutral nation and immune to invasion by the Allied powers without the violation of fundamental concepts of the rights of neutrals. The attack on Greece by Italy, an ally of Germany, transformed that country into an active belligerent which welcomed the aid of the Allied powers. The failure of the Italian forces to subjugate Greece opened the way to possible invasion of continental Europe by Allied forces. To prevent such a con-

tingency, Germany deemed it necessary to occupy Greece. Arrangements were made for the passage of troops through Bulgaria for the attack on Greece and a treaty was made with the then existing government of Yugoslavia which insured nonaction on its part. A few days after the making of the treaty with Yugoslavia, strong opposition developed in that country which resulted in the overthrow of the government and a disavowal of the treaty. The Germans, deeming it a military necessity to protect against the possibility of an attack from the rear and a disruption of its supply lines, determined to crush Yugoslavia as a part of the campaign against Greece. Once again international law gave way to military expediency on the part of the German Wehrmacht and neutral Yugoslavia was invaded. As we have heretofore shown, both countries were overrun and the German Wehrmacht became occupants within the meaning of international law.

The territory was particularly favorable to the guerrilla warfare which soon broke out. Local political, religious, and racial conflicts had provided a training ground for this sort of fighting. The various conflicting elements of the population, over a period of time, were gradually welded into a common partisan front. The guerrilla fighting methods of the partisans and the attempts of the German armed forces to eliminate them by a campaign of intimidation provides the basis for the prosecutions here brought.

A similar situation developed in Greece after the capitulation of the Greek armies. While it is true that the partisans of Greece were never able to organize a common front to the extent it was done in Yugoslavia, the methods of the various partisan organizations were very much the same. Guerrilla tactics were employed. German troops were ambushed; transportation and communication systems sabotaged. The capture of the perpetrators was next to impossible. Again draconic measures of terrorism and intimidation were indulged in in an attempt to subjugate the country. It was with this situation that List, Kuntze, Loehr, and von Weichs had to deal in their capacities as over-all commanders in the southeastern area.

PRESIDING JUDGE WENNERSTRUM: Judge Burke will continue reading the opinion.

JUDGE BURKE: The defendant Wilhelm List was the fifth ranking field marshal in the German Army. He was a thoroughly trained and experienced military commander. He was the commander in chief of the 12th Army during the invasion of Yugoslavia and Greece, and in addition thereto in June 1941 became the Armed Forces Commander Southeast, a position he retained until illness compelled his temporary retirement from active service on

15 October 1941. From July to September 1942, he was returned to active service as commander in chief of Army Group A, an army group operating on the Russian front. He stands charged on all four counts of the indictment.

On 9 June 1941, Hitler appointed the defendant List to be armed forces commander in the Southeast with headquarters in Salonika. His commission provided that the Armed Forces Commander Southeast is the supreme representative of the armed forces in the Balkans and exercises executive authority in the territories occupied by German troops. Directly subordinated to him were the "Commander Serbia," the "Commander Salonika-Aegean," and the "Commander of Southern Greece." Among the duties assigned was the safeguarding of the unified defense of those parts of Serbia and Greece, including the Greek Islands, which were occupied by German troops, against attacks and unrest. The defendant Foertsch, who had become chief of staff of the 12th Army on 10 May 1941, continued on as chief of staff to the defendant List in his new capacity as Armed Forces Commander Southeast.

The record shows that attacks on German troops and acts of sabotage against transportation and communication lines progressively increased throughout the summer of 1941. Even at this early date, the shooting of innocent members of the population was commenced as a means of suppressing resistance. Excerpts from the war diaries and orders of the participating units reveal, for example, that on 5 July 1941, 13 Communists and Jews were killed in reprisal; on 17 July 1941, 16 Communists were killed in reprisal in Belgrade; on 20 July 1941, 52 Communists, Jews, and members of families of band members were killed in reprisal for the attack on General Lontschar; on 25 July 1941, 100 Jews were killed in Belgrade because a 16-year-old Serbian girl threw a bottle of gasoline at a German motor vehicle at the alleged instigation of a Jew; on 29 July 1941, 122 Communists and Jews were killed in Belgrade in reprisal for acts of sabotage; and many other orders and reports showing the shooting of hundreds of the inhabitants in reprisal. On 5 September 1941, the resistance movement had developed to such a point that the defendant List put out an order on the subject of its suppression. In this order he said in part (*NOKW–084, Pros. Ex. 42*)*:

"In regard to the above the following aspects are to be taken into consideration:

* * * * * * *

* Document reproduced in section VB.

"Ruthless and immediate measures against the insurgents, against their accomplices and their families (hangings, burning down of villages involved, seizure of more hostages, deportation of relatives, etc., into concentration camps)."

On 16 September 1941, Hitler in a personally signed order (*NOKW–1492, Pros. Ex. 49*)[1] charged the defendant List with the task of suppressing the insurgent movement in the southeast. This resulted in the commissioning of General Franz Boehme with the handling of military affairs in Serbia and in the transfer of the entire executive power in Serbia to him. This delegation of authority was done on the recommendation and request of the defendant List to whom Boehme remained subordinate.

On 16 September 1941, Field Marshal Keitel, Chief of the High Command of the Armed Forces, issued a directive pertaining to the suppression of the insurgent movement in occupied territories. The pertinent parts of this order are (*NOKW–258, Pros. Ex. 53*)[2]—

"Measures taken up to now to counteract this general Communist insurgent movement have proved themselves to be inadequate. The Fuehrer now has ordered that severest means are to be employed in order to break down this movement in the shortest time possible. Only in this manner, which has always been applied successfully in the history of the extension of power of great peoples, can quiet be restored.

"The following directives are to be applied here:

"(*a*) Each incident of insurrection against the German Wehrmacht, regardless of individual circumstances, must be assumed to be of Communist origin.

"(*b*) In order to stop these intrigues at their inception, severest measures are to be applied immediately at the first appearance, in order to demonstrate the authority of the occupying power, and in order to prevent further progress. One must keep in mind that a human life frequently counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such a case the death penalty for 50 to 100 Communists must in general be deemed appropriate as retaliation for the life of a German soldier. The manner of execution must increase the deterrent effect. The reverse procedure—to proceed at first with relatively easy punishment and to be satisfied with the threat of measures of increased severity as a deterrent—does not correspond with these principles and is not to be applied."

[1] Ibid.
[2] Ibid.

This order was received by the defendant List and distributed to his subordinate units.

On 25 September 1941, General Boehme issued an order to his subordinate units in part as follows (*NOKW–1048, Pros. Ex. 63*):

"After dissemination, destroy!

"In March of this year, Serbia shamefully broke the friendship treaty with Germany, in order to strike in the back the German units marching against Greece.

"German revenge stormed across the country.

"We must turn to new, greater goals with all our forces at hand. For Serbia, this was the sign for a new uprising, to which hundreds of German soldiers have already fallen in sacrifice. If we do not proceed here with all means and the greatest ruthlessness, our losses will climb to immeasurable heights.

"Your mission lies in carrying out reconnaissance of the country in which German blood flowed in 1914 through the treachery of the Serbs, men and women.

"You are avengers of these dead. An intimidating example must be created for the whole of Serbia, which must hit the whole population most severely.

"Everyone who wishes to rule charitably sins against the lives of his comrades. He will be called to account without regard for his person and placed before a court martial."

On 28 September 1941, Field Marshal Keitel directed the following order to the defendant List (*NOKW–458, Pros. Ex. 69*)[1]:

"Because of the attacks on members of the armed forces which have taken place lately in the occupied territories, it is pointed out that it is opportune for the military commanders to have always at their disposal a number of hostages of the different political persuasions, i.e., (1) Nationalists, (2) democratic middle-class, and (3) Communists.

"It is of importance that among these are leading personalities or members of their families. Their names are to be published.

"In case of an attack, hostages of the group corresponding to that to which the culprit belongs are to be shot.

"It is requested that commanders be informed in this sense."

On 4 October 1941, the defendant List directed the following order to General Bader, the Plenipotentiary Commanding General in Serbia (*NOKW–203, Pros. Ex. 70*)[2]:

[1] Ibid.
[2] Ibid.

"The male population of the territories to be mopped up of bandits, is to be handled according to the following points of view:

"1. Men who take part in combat are to be judged by court martial.

"2. Men in the insurgent territories who were not encountered in battle are to be examined and—

"*a.* If a former participation in combat can be proved of them to be judged by court martial.

"*b.* If they are only suspected of having taken part in combat, of having offered the bandits support of any sort, or of having acted against the armed forces in any way, to be held in a special collecting camp. They are to serve as hostages in the event that bandits appear, or anything against the armed forces is undertaken in the territory mopped up or in their home localities, and in such cases they are to be shot."

On 10 October 1941, General Boehme issued an order to military units under his command relative to the crushing of the insurgent movement, the applicable parts of which are (*NOKW–557, Pros. Ex. 88*)*:

"2. In all garrison towns in Serbia all Communists, male residents suspicious as such, all Jews, a certain number of Nationalistic and democratically inclined residents are to be arrested as hostages, by means of sudden actions. It is to be explained to these hostages and to the population that the hostages will be shot in case of attacks on Germans or on ethnic Germans.

"3. If losses of German soldiers or ethnic Germans occur, the territorially competent commanders up to the regimental commanders are to decree the shooting of arrestees according to the following quotas:

"*a.* For each killed or murdered German soldier or ethnic German (man, woman, or child), 100 prisoners or hostages;

"*b.* For each wounded German soldier or ethnic German, 50 prisoners or hostages.

"The shootings are to be carried out by the troops.

"If possible, the execution is to be carried out by the part of the unit suffering the loss.

"In each individual case of losses a statement is to be made in the daily reports, whether and to what extent the reprisal measure is carried out or when this will be finished.

"4. In the burying of those shot, care is to be taken that no Serbian shrines arise. Placing of crosses on the graves,

* Ibid.

decorations, etc., is to be prevented. Burials are, accordingly, to be carried out best in distant localities.

"5. The Communists captured by the troops in combat actions are to be hanged or shot as a matter of principle at the place of crime [Tatort] as a frightening measure.

"6. Localities which have to be taken in combat are to be burned down, as well as farms from which troops were shot at."

After the issuance of the foregoing orders, the shooting of innocent members of the population was stepped up. Acts of sabotage increased and attacks on German military personnel continued unabated. The evidence is conclusive that a large number of reprisals against the population were carried out on the basis of the 100 to 1 order. Space will not permit a detailed account of each of these actions. We shall content ourselves with a recitation of the facts of one incident that bears similarity to many others shown by the record.

On 2 October 1941, at a small village near Topola, a troop unit of the 521st Army Signal Regiment consisting of 2 officers and 45 men was ambushed from the cornfields along the road on which they were traveling. A few dead and wounded were found at the scene of the attack. In a small valley nearby, other dead soldiers were found. A survivor who escaped being killed by feigning death gave information that these men had been lined up and killed by the partisans by machine gun fire. The total casualties consisted of 22 dead, 3 wounded, and 15 or 16 missing. The incident was reported through regular channels to higher commanding officers.

On 4 October 1941, General Boehme issued an order of reprisal for the killing near Topola which was in part as follows (*NOKW–192, Pros. Ex. 78*) :*

"Twenty-one soldiers were tortured to death in a bestial manner on the 2d of October in a surprise attack on units of the signal regiment between Belgrade and Obrenovac. As reprisal and retaliation, 100 Serbian prisoners are to be shot at once for each murdered German soldier. The Chief of the Military Administration is requested to pick out 2,100 inmates in the concentration camps Sabac and Belgrade (primarily Jews and Communists) and to fix the place and time as well as burial place. The detachments for the shooting are to be formed from the 342d Division (for the Sabac concentration camp) and from the 449th Corps Signal Battalion (for the Belgrade concentration camp). * * *"

* Ibid.

On 9 October 1941, General Boehme informed the defendant List as follows [*NOKW-1211, Pros. Ex. 79*]:

> "Execution by shooting of about 2,000 Communists and Jews in reprisal for 22 murdered of the 2d Battalion of the 521st Army Signal Communication Regiment in progress."

Another report distributed to the 12th Army commanded by the defendant List stated 180 men were executed on 9 October 1941, and an additional 269 were executed on 11 October 1941. After the killing of the 449 men, the psychological effect upon the participating units was such that a transfer of the mission was made to another unit.

On 9 October 1941, the Chief of the Security Police and of the SD reports [*NO-3156, Pros. Ex. 81*]: "In reprisal for the 21 German soldiers shot to death near Topola a few days ago 2,100 Jews and gypsies are being executed. The execution is carried out by the German armed forces. The task of the Security Police is merely to make available the required number. Eight hundred and five Jews and gypsies are taken from the camp in Sabac, the rest from the Jewish transit camp Belgrade." On 20 October 1941, the Chief of the Security Police and of the SD in Berlin reported to the Armed Forces Commander Southeast as follows [*NO-3404, Pros. Ex. 82*]: "In reprisal for 21 dead German army soldiers 2,100 Jews from the Jewish camp were made available for execution by order of XVIII Corps Headquarters. The Wehrmacht is carrying out the execution."

On 21 October 1941, the Chief of the Security Police and the SD reported to the Armed Forces Commander Southeast in part as follows [*NO-3402, Pros. Ex. 83*]:

> "After ruthless action by the troops was bound to fail up to the time of the employment of the Plenipotentiary Commanding General in Serbia because of the lack of corresponding orders, Lieutenant General Boehme's order, according to which 100 Serbs will be executed for every soldier killed and 50 for every soldier wounded, has established a completely clear-cut line for action. On the strength of this order, for instance, 2,200 Serbs and Jews were shot in reply to an attack on a convoy near Topola, during which 22 members of the Wehrmacht perished, while in return for the soldiers killed in the fight for Kraljevo so far 1,736 inhabitants and 19 Communist women from Kraljevo have been executed."

The evidence shows that after the capitulation of the armies of Yugoslavia and Greece both countries were occupied within the meaning of international law. It shows further that they

remained occupied during the period that List was Armed Forces Commander Southeast. It is clear from the record also that the guerrillas participating in the incidents shown by the evidence during this period were not entitled to be classed as lawful belligerents within the rules hereinbefore announced. We agree, therefore, with the contention of the defendant List that the guerrilla fighters with which he contended were not lawful belligerents entitling them to prisoner of war status upon capture. We are obliged to hold that such guerrillas were *francs-tireurs* who, upon capture, could be subjected to the death penalty. Consequently, no criminal responsibility attaches to the defendant List because of the execution of captured partisans in Yugoslavia and Greece during the time he was Armed Forces Commander Southeast.

We find that the "Commissar Order" of 6 June 1941, (*NOKW–484, Pros. Ex. 13*) requiring the killing of all captured commissars was not issued, distributed or executed in the occupied territory under the command of List while he held the position of Armed Forces Commander Southeast. The charge that such order was issued, distributed, and executed by him while serving on the Russian front as commander in chief of Army Group A, is not established by the record. The evidence fails to show beyond a reasonable doubt that List was in any way responsible for the killing of commissars merely because they were such. Consequently, the defendant List is found to be not guilty of any crime in connection with the Commissar Order.

The defendant List contends that he never signed an order for the killing of hostages or other inhabitants, or fixed a ratio determining the number of persons to be put to death for each German soldier killed or wounded. The record sustains this contention. It will be observed, however, that as a high ranking commanding general no such act was ordinarily within the scope of his duties. It discloses, however, that List caused the Keitel order of 16 September 1941, (*NOKW–258, Pros. Ex. 53*)* containing the 100:1 ratio to be distributed to his subordinate commanders. This order provided, among other things, that 100 reprisal prisoners should be shot for each German soldier killed and 50 killed for each German soldier wounded. It is urged that the order was worded in such a way that literal compliance was not required. We do not deem it material whether the order was mandatory or directory. In either event, it authorized the killing of hostages and reprisal prisoners to an extent not permitted by international law. An order to take reprisals at an arbitrarily fixed ratio under any and all circumstances constitutes

* Ibid.

a violation of international law. Such an order appears to have been made more for purposes of revenge than as a deterrent to future illegal acts which would vary in degree in each particular instance. An order, directory or mandatory, which fixes a ratio for the killing of hostages or reprisal prisoners, or requires the killing of hostages or reprisal prisoners for every act committed against the occupation forces is unlawful. International law places no such unrestrained and unlimited power in the hands of the commanding general of occupied territory. The reprisals taken under the authority of this order were clearly excessive. The shooting of 100 innocent persons for each German soldier killed at Topola, for instance, cannot be justified on any theory by the record. There is no evidence that the population of Topola were in any manner responsible for the act. In fact, the record shows that the responsible persons were an armed and officered band of partisans. There is nothing to infer that the population of Topola supported or shielded the guilty persons. Neither does the record show that the population had previously conducted themselves in such a manner as to have been subjected to previous reprisal actions. An order to shoot 100 persons for each German soldier killed under such circumstances is not only excessive but wholly unwarranted. We conclude that the reprisal measure taken for the ambushing and killing of 22 German soldiers at Topola were excessive and therefore criminal. It is urged that only 449 persons were actually shot in reprisal for the Topola incident. The evidence does not conclusively establish the shooting of more than 449 persons although it indicates the killing of a much greater number. But the killing of 20 reprisal prisoners for each German soldier killed was not warranted under the circumstances shown. Whether the number of innocent persons killed was 2,200 or 449, the killing was wholly unjustified and unlawful.

The reprisal measures taken for the Topola incident were unlawful for another reason. The reprisal prisoners killed were not taken from the community where the attack on the German soldiers occurred. The record shows that 805 Jews and gypsies were taken from the collection camp at Sabac and the rest from the Jewish transit camp at Belgrade to be shot in reprisal for the Topola incident. There is no evidence of any connection whatever, geographical, racial, or otherwise between the persons shot and the attack at Topola. Nor does the record disclose that judicial proceedings were held. The order for the killing in reprisal appears to have been arbitrarily issued and under the circumstances shown is nothing less than plain murder.

It is further contended that the basic order for the taking of reprisals was issued by the High Command of the Armed Forces to whom the defendant List was subordinate and that this has the effect of relieving him of responsibility. Such a defense is not available to him. An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues, or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character. Certainly, 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. That he did know of it is evidenced by the fact that he opposed its issuance and, according to his own statement, did what he could to ameliorate its effect.

The defendant List also asserts that he had no knowledge of many of the unlawful killings of innocent inhabitants which took place because he was absent from his headquarters where the reports came in and that he gained no knowledge of the acts. A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command. His responsibility is coextensive with his area of command. He is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprize him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense. Absence from headquarters cannot and does not relieve one from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced. He may not, of course, be charged with acts committed on the order of someone else which is outside the basic orders which he has issued. If time permits he is required to rescind such illegal orders, otherwise he is required to take steps to prevent a recurrence of their issue.

Want of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.

The reports made to the defendant List as Armed Forces Commander Southeast charge him with notice of the unlawful killing of thousands of innocent people in reprisal for acts of unknown

members of the population who were not lawfully subject to such punishment. Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility. Instead of taking corrective measures, he complacently permitted thousands of innocent people to die before the execution squads of the Wehrmacht and other armed units operating in the territory. He contends further that 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. The evidence sustains this contention but 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, the protection of the lives and property of the population, and the punishment of crime. This not only implies a control of the inhabitants in the accomplishment of these purposes, but the control and regulation of all other lawless persons or groups. He cannot escape responsibility by a claim of a want of authority. The authority is inherent in his position as commanding general of occupied territory. The primary responsibility for the prevention and punishment of crime lies with the commanding general; a responsibility from which he cannot escape by denying his authority over the perpetrators.

The record shows that after the capitulation of Yugoslavia and Greece, the defendant List remained as the commanding general of the occupied territory. As the resistance movement developed, it became more and more apparent that the occupying forces were insufficient to deal with it. Repeated appeals to the High Command of the Armed Forces for additional forces were refused with the demand for a pacification of the occupied territory by more draconic measures. These orders were protested by List without avail. He contends that although such orders were in all respects lawful, he protested from a humanitarian viewpoint. It is quite evident that the High Command insisted upon a campaign of intimidation and terrorism as a substitute for additional troops. Here again the German theory of expediency and military necessity (Kriegsraeson geht vor Kriegsmanier) superseded established rules of international law. As we have previously stated in this opinion, the rules of international law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation. What then was the duty of the Armed Forces Commander Southeast? We think his duty was plain. He was

authorized to pacify the country with military force; he was entitled to punish those who attacked his troops or sabotaged his transportation and communication lines as *franc-tireurs*; he was entitled to take precautions against those suspected of participation in the resistance movement, such as registration, limitations of movement, curfew regulations, and other measures hereinbefore set forth in this opinion. As a last resort, hostages and reprisal prisoners may be shot in accordance with international custom and practice. If adequate troops were not available or if the lawful measures against the population failed in their purpose, the occupant could limit its operations or withdraw from the country in whole or in part, but no right existed to pursue a policy in violation of international law.

The record establishes that List was an officer of the "old school" which quite generally resented the control of the National Socialist Party over the Wehrmacht. That Adolf Hitler in his capacity as Commander in Chief of the Armed Forces was generally considered a rank amateur in military matters by this group seems to be quite well established. The subsequent retirement of List "by request" because of a difference of opinion with Hitler on tactical matters during the Russian campaign further sustains his claimed viewpoint with respect to his relations with Hitler and the National Socialist Party. List states that his views on political matters were not inconsistent with his subsequent military service. It was his opinion that Hitler came to power in a lawful manner and that his obligation as a soldier and his loyalty to his country required him to continue in military service. That he was not in accord with many of the orders of the High Command of the Armed Forces with reference to the pacification of Yugoslavia and Greece is shown by the record. That his appeals for more troops for the subjugation of the growing resistance movement were met with counterdirectives and orders by Hitler and Keitel to accomplish it by a campaign of terrorism and intimidation of the population is amply established. That his orders and directives were more moderate than those of his superiors cannot be questioned. It is clear also that he was continually plagued with the operations of organizations receiving orders direct from superiors in Berlin, such as the SS, the SD, the SA, and emissaries of Goering in the administration of his Four Year Plan.

That German prisoners captured by the resistance forces were tortured, mutilated, and killed is shown by the evidence. In this connection, we point out the extent to which unlawful reprisals and counterreprisals may lead. Excesses on the part of troops are bound to occur in any way but certainly they will be more

vicious and barbarous if cruelty and harshness constitute the policy of the commanding officers. It is almost inevitable that the murder of innocent members of the population, including the relatives and friends of the *francs-tireurs,* would generate a hatred that was bound to express itself in counterreprisals and acts of atrocity. As the severity of the draconic measures of the Wehrmacht were stepped up, so also were the reprisals in answer thereto. There could be but one result, a completely chaotic condition with an absolute disregard of the laws of war on the part of the fighters of both forces with acts of atrocity progressively increasing. The situation provides adequate proof for the necessity of enforcing the laws of war if torture and barbarity are to be restrained. The failure of the nations of the world to deal specifically with the problem of hostages and reprisals by convention, treaty, or otherwise, after the close of World War I, creates a situation that mitigates to some extent the seriousness of the offense. These facts may not be employed, however, to free the defendant from the responsibility for crimes committed. They are material only to the extent that they bear upon the question of mitigation of punishment.

We conclude therefore that the evidence establishes the guilt of the defendant List beyond a reasonable doubt on counts one and three.

On or about 24 October 1941, the defendant Kuntze was appointed Deputy Armed Forces Commander Southeast and commander in chief of the 12th Army. It is evident from the record that the appointment was intended as a temporary one for the period of the illness of Field Marshal List. He assumed the command on his arrival in the Balkans on 27 October 1941. He was superseded by General Alexander Loehr in June 1942, but remained in the position until the arrival of General Loehr on 8 August 1942.

The record shows that in June 1940, before coming to the Balkans, the defendant Kuntze became the commander of the XLII Army Corps. In June 1941, this corps was transferred to East Prussia where it was subordinated to the 9th Army in the fighting against the Russians. From the middle of July 1941 to October 1941, the corps was subordinated to the 18th Army. Pursuant to orders previously received, the corps, on or about 8 October 1941, commenced operations for its transfer to the Crimea which were concluded on 20 October 1941. It was upon the arrival of Kuntze in the Crimea that he received the order tc report to Hitler that resulted in his appointment as Deputy Armed Forces Commander Southeast.

The defendant Kuntze is charged with issuing, distributing, and executing the Commissar Order of 6 June 1941, wherein Hitler

ordered the killing of captured commissars. In this connection, evidence was offered that from 1 July 1942 to 4 July 1942 captured commissars were killed by the 217th Infantry Division. The evidence shows that this division was subordinated to the XLII Corps from August 1941 until the corps was transferred to the Crimea. Consequently, the defendant Kuntze is not chargeable with the acts of the 217th Infantry Division that occurred prior to August 1941. Evidence was also offered showing that units of the 61st Infantry Division killed a number of captured commissars between 26 September 1941 and 28 October 1941. It is evident that the killing of political commissars after 6 October 1941 cannot be charged to the defendant Kuntze for the reason that the XLII Corps was on that date moving to the Crimea. The 61st Infantry Division remained behind and in the very nature of things was no longer subordinate to the XLII Corps. There appears in the war diary of the 61st Infantry Division, however, under date of 26 September 1941, a recitation of the shooting to death of saboteurs and commissars by the Field Gendarme Squad 161a, a unit subordinate to the 61st Infantry Division. The defendant Kuntze admits that the 61st Infantry Division was subordinate to him from the middle of September 1941 to the first part of October, of the same year. He denies that he ordered any such action or authorized anyone to carry it out. He states that he had never heard of this incident and had no knowledge of the shooting of any commissar by any unit subordinate to him. He states further that the army commander to whom he was subordinate had specifically directed him to treat commissars as prisoners of war and that he complied in all respects with that order. We do not think the foregoing evidence is sufficient to hold the defendant criminally responsible for the issuance, distribution, or execution of the Commissar Order. Nor does the evidence establish that the Commissar Order was made effective in the Balkan area. It will not sustain a finding that this order was issued, distributed, or executed by the defendant Kuntze during the time he was Deputy Armed Forces Commander Southeast.

This defendant is also charged with issuing, distributing, and executing the Commando Order of 18 October 1942, (*C–81, Pros. Ex. 225*) during the period of his command in the Balkans. By this order, issued by Hitler in person, all sabotage troops generally referred to as commandos were to be shot immediately upon capture. The record shows that Kuntze was relieved of his command by General Loehr on 8 August 1942. Consequently, the order was not issued until after Kuntze had left the southeastern area. The prosecution has not attempted to disprove

this fact and it must be treated as established. The defendant Kuntze has not been shown to have violated any duty with reference to his treatment of commandos or other groups mentioned in the Commando Order.

We hold also that the resistance forces with which we are here concerned were not entitled to be classed as lawful belligerents during the period the defendant Kuntze was Deputy Armed Forces Commander Southeast. The reasons stated in the treatment of this subject in its relation to the defendant List apply as well to the defendant Kuntze and they will not be repeated here. No criminal responsibility can therefore attach to him because of the killing of captured members of the resistance forces, they being *francs-tireurs* subject to such punishment.

The defendant Kuntze contends that a right exists to take reprisals by killing hostages and reprisal prisoners in retaliation for the criminal acts of the resistance forces and other unknown persons. He asserts also that members of bands and those supporting them were used for reprisal purposes and that he knew of no instance where a contrary course was pursued. He denies that excessive and disproportionate reprisals were taken and claims to have had little or no knowledge of the harsh measures taken as shown by the war diaries, orders, and reports offered in evidence. He further contends that the measures taken were prescribed by superiors whose orders he was bound to follow. The legal questions thus raised have been dealt with in disposing of the case against the defendant List and will not for reasons of brevity be repeated here. The factual situation will however be examined.

The defendant Kuntze assumed command in the Southeast on 27 October 1941, a month which exceeded all previous monthly records in killing innocent members of the population in reprisal for the criminal acts of unknown persons. On 9 October 1941, 2,200 Communists and Jews were shot in reprisal for 22 German soldiers of the 521st Army Signal Communication Regiment murdered at Topola; on 18 October 1941, 1,736 men and 19 Communist women were shot in reprisal for German losses sustained in the fight for Kraljevo; on 19 October 1941, 182 men were shot to death in Meckovac and 1,600 men from Valjevo were shot to death in reprisal for 16 Germans killed and 24 wounded; on 21 October 1941, 2,300 Serbs of various ages and professions were shot to death; on 27 October 1941, 101 arrestees were shot to death with further killings to be carried out after more arrestees had been turned in; and on 28 October 1941, 2,200 Serbs were shot for 10 German soldiers killed and 24 wounded in action. It seems highly improbable that Kuntze could step into the command

in the Southeast in the midst of the carrying out and reporting of these reprisal actions without gaining knowledge and approval. Reports made to the defendant Kuntze, shown in the evidence, reveal that on 29 October 1941, 76 persons were shot in reprisal in Serbia; on 2 November 1941, 20 persons were shot to death near Loznica; on 2 November 1941, 125 persons were shot to death at Valjevo; and on 27 November 1941, 265 Communists were shot as a reprisal measure at Valjevo. Under date of 31 October 1941, the commanding general in Serbia, General Boehme, recapitulated the shootings in Serbia in a report to Kuntze as follows: "Shootings—405 hostages in Belgrade (total up to now in Belgrade 4,750), 90 Communists in Camp Sabac, 2,300 hostages in Kragujevac, 1,700 hostages in Kraljevo." In a similar report under date of 30 November 1941, General Boehme reported to Kuntze as follows: "Shot as hostages (total) 534 (500 of these by Serbian auxiliary police)." Many other similar shootings are shown by the record. Included was a report covering the whole period of the resistance movement up to and including 5 December 1841, wherein it is shown that 31,338 reprisal prisoners were to be shot on the basis of the 100 to 1 order, that 11,164 had been shot and that 20,174 remained to be shot in reprisal to fulfill the quota fixed on the 100 to 1 basis.

On 5 December 1941, the new commanding general in Serbia, General Bader, ordered the basic reprisal ration reduced to 50 reprisal prisoners for each German killed and 25 for each German wounded. The defendant Kuntze asserts that this reduction of ratio was in a large part due to his insistence and effort in that direction. Thereafter, the killing of hostages and reprisal prisoners continued. In a daily report to the defendant Kuntze, General Bader stated that 449 reprisal prisoners were shot to death in January 1942, and the 3,484 additional shootings had been ordered to commence immediately to balance the reprisal killings against the Germans killed and wounded on the fixed ratio. On 21 February 1942, General Bader reported the shooting of 570 Communists by the Serbian auxiliary Gendarmerie, on 23 February 1942, the shooting of 403 reprisal prisoners, and on 25 February 1942, the shooting of 110 Communists in reprisal.

On 19 March 1942, the defendant Kuntze issued an order regarding the combating of insurgents which stated in part (*NOKW-835, Pros. Ex. 184*):

> "I expect troop leaders of all ranks to show special energy and ruthless action as well as to commit fully their own person for the duty with which they are charged, which is to preserve quiet, order, and security by all means. All soldiers who do

not follow orders and who do not act decisively are to be called to account.

"By means of brutal police and secret police measures, the formation of insurgent bands is to be recognized in its inception and to be burnt out. Captured insurgents are to be hanged or to be shot to death as a matter of principle; if they are being used for reconnaissance purposes, it merely means a slight delay in their death."

In the directives accompanying the foregoing order, it was stated:

"The more unequivocal and the harder reprisal measures are applied from the beginning the less it will become necessary to apply them at a later date. No false sentimentalities! It is preferable that 50 suspects are liquidated than one German soldier lose his life * * *. Villages with Communist administration are to be destroyed and men are to be taken along as hostages. If it is not possible to produce the people who have participated in any way in the insurrection or to seize them, reprisal measures of a general kind may be deemed advisable, for instance the shooting to death of all male inhabitants from the nearest villages, according to a definite ratio (for instance, 1 German dead—100 Serbs; 1 German wounded—50 Serbs)."

The shooting of large numbers of reprisal prisoners and hostages was reported to Kuntze after the issuance of the foregoing order and directive.

Although he was advised of all these killings of innocent persons in reprisal for the actions of bands or unknown members of the population, Kuntze not only failed to take steps to prevent their recurrence but he urged more severe action upon his subordinate commanders. Not once did he attempt to halt these disproportionate reprisals. He directed the burning down of all villages having a Communist administration and the taking of all the male inhabitants as hostages. He directed the taking of reprisal measures against the population generally such as the shooting to death of all the male inhabitants of the nearest village on the basis of 100 for each German killed and 50 for each German wounded. In many cases persons were shot in reprisal who were being held in collecting camps without there being any connection whatever with the crime committed, actual, geographical, or otherwise. Reprisal orders were not grounded on judicial findings. The order and directives which brought about the killing of these innocent members of the population constitute violations of international law which are punishable as crimes.

The orders he issued and his subsequent failure to take steps to end these unlawful killings after they had been reported to him makes him criminally responsible under the law previously announced and applied in this opinion to the defendant List.

With reference to the alleged mistreatment of Jews and other racial groups within the area commanded by the defendant Kuntze during the time he was Deputy Armed Forces Commander Southeast, the record shows the following: On 3 November 1941, the chief of the administrative staff, an official subordinate to General Boehme, who was in turn subordinate to the defendant Kuntze, ordered the immediate arrest of all Jews and gypsies as hostages and the deportation of their wives and children to an assembly camp near Belgrade. On 4 November 1941, a detailed report concerning the shooting of Jews and gypsies between 27 and 30 October 1941, is shown in the war diary of the 433d Infantry Regiment [704th Infantry Division]. (*NOKW–905, Pros. Ex. 143.*)* The lurid details of the shooting of these 2,200 persons is graphically recited in this report. A report under date of 5 December 1941 containing the notes of the Armed Forces Commander Southeast (Kuntze) made on a tour of inspection says in part: "All Jews and gypsies are to be transferred into a concentration camp at Semlin (at present there are about 16,000 people there). They were proved to be the bearers of the communication service of the insurgents." On 4 February 1942, the 704th Infantry Division reported to General Bader that it had delivered 161 partisans, 17 Jews, and 2 Jewesses to the SD—Belgrade. On 19 March 1942, General Bader reported to the defendant Kuntze that 500 Jews had been transported from Metrovica to Semlin. On 10 March 1942, General Bader reported to Kuntze that in the Jewish camp of Semlin there were 5,780 persons, mostly women and children. On 20 April 1942, General Bader reported to the defendant Kuntze that in the concentration camps there were 182 hostages, 3,266 reprisal prisoners, and 4,005 Jews.

The foregoing evidence shows the collection of Jews in concentration camps and the killing of one large group of Jews and gypsies shortly after the defendant assumed command in the Southeast by units that were subordinate to him. The record does not show that the defendant Kuntze ordered the shooting of Jews or their transfer to a collecting camp. The evidence does show that he had notice from the reports that units subordinate to him did carry out the shooting of a large group of Jews and gypsies as hereinbefore mentioned. He did have knowledge that troops subordinate to him were collecting and trans-

* Ibid.

porting Jews to collecting camps. Nowhere in the reports is it shown that the defendant Kuntze acted to stop such unlawful practices. It is quite evident that he acquiesced in their performance when his duty was to intervene to prevent their recurrence. We think his responsibility for these unlawful acts is amply established by the record.

There is some evidence in the record that portions of the population were being deported for labor service in Germany, Norway, and other territories subjected to German influence. We are of the opinion that Kuntze's responsibility therefor, if such deportations were in fact carried out, has not been established beyond a reasonable doubt.

There is also some evidence concerning an improper use of the population in labor service in clearing mines and building military establishments. In this respect, the language of the reports is not definite and the testimony offered is not clear that such alleged acts were unlawful ones for which this defendant could be held responsible.

The defendant Kuntze denies that he was in any way responsible for the commission of unlawful acts by troops subordinate to him. While the record does not show that he ever ordered a ratio to be applied in the execution of reprisal measures, the record does show that he urged more severe measures and a direction that a ratio of 100:1 for each German killed and 50:1 for each German wounded be applied where the perpetrators could not be found. Reports made to him show that he was not without knowledge of the reprisals being taken and the ratios being applied. His claim of a lack of knowledge of the crimes being committed cannot be sustained.

It is true, as shown by the record, that the acts complained of were ordered by his superiors. While this is not a defense, it is a matter for consideration in mitigation of punishment. He says, and it is not disputed, that he objected to the high command because of the harshness of orders received. That he was not in high favor with Hitler and the Nazi Party is borne out by the record. That he was continually pressed by his superiors to invoke more severe measures is clearly shown. He was plagued with the operations of organizations receiving their orders direct from Berlin in the same manner as was the defendant List. He was faced with a type of unlawful warfare that presented many difficult problems for solution by the commanding general. While many extenuating circumstances are shown by the record, his guilt in permitting the killing of innocent members of the population and the transportation of Jews to concentration camps is amply shown.

The defendant Kuntze, at the time of the commission of the acts charged, was a professional soldier with forty years experience. He knew or ought to have known that the killing of thousands of the population under the guise of carrying out reprisal measures when such reprisal measures were legitimate in no sense of the word made them crimes no matter what name was applied to them.

The defendant says that order and security was the objective sought by him in the Southeast and that reprisal measures were taken for the purpose of deterring attacks upon German soldiers and the sabotaging of communication lines and military installations. But this is only a partial explanation. It appears from the record that the High Command was endeavoring to secure order and security in the Southeast without adequate troops and equipment. It is evident that order and security was sought by applying intimidating measures against the population in lieu of adequate troop commitments. This led to the barbarous abuses of the law of hostages and reprisals which we have set forth. The contention that military expediency or necessity justifies the acts cannot be accepted as valid. There are certain acts otherwise unlawful which are proper when military necessity requires their doing, but the killing of great numbers of the population in the manner here shown is not one of them. The collection of Jews and gypsies in collection or concentration camps merely because they are such is likewise criminal. The defendant says that he never heard of any such action against Jews or gypsies in the Southeast. The reports in the record which were sent to him in his capacity as Armed Forces Commander Southeast charge him with knowledge of these acts. He cannot close his eyes to what is going on around him and claim immunity from punishment because he did not know that which he is obliged to know. We conclude therefore that the guilt of the defendant Kuntze is shown by the evidence beyond a reasonable doubt on counts one, three, and four.

The defendant Foertsch participated in the invasion of Yugoslavia and Greece as liaison officer with the 12th Army for OKH, the High Command of the Army. On 9 May 1941, he was made chief of staff of the 12th Army, then commanded by Field Marshal List. With the appointment of Field Marshal List as Armed Forces Commander Southeast, he became chief of staff to the Armed Forces Commander Southeast and served in this position during the tenures of Field Marshal List and Lieutenant General Kuntze. In August 1942, he became chief of staff, Army Group E, then commanded by General Alexander Loehr. In August 1943, he became chief of staff, Army Group F, then com-

manded by Field Marshal von Weichs, a position he held until 4 March 1944 at which time his service in the Southeast came to an end. It will be observed that the whole period of his stay in the Southeast was in the capacity of chief of staff of the army group commanding the territory.

The chief of staff was in charge of the various departments of the staff and was the first adviser of the commander in chief. It was his duty to provide all basic information for decisions by the commander in chief and was responsible for the channeling of all reports and orders. He had no troop command authority. Neither did he have any control over the legal department which was directly subordinate to the commander in chief. As chief of staff he was authorized to sign orders on behalf of the commander in chief when they did not contain any fundamental decision and which did not require the exercise of judgment by the subordinate to whom it was directed.

From the time Foertsch became chief of staff to the Armed Forces Commander Southeast until late August 1941, the population remained comparatively quiet. Signs of insurrection began to appear during the latter part of August which caused considerable concern. It was the opinion of Field Marshal List that additional troops were needed to cope with the situation. His requests along this line were refused by the High Command [of the Armed Forces]. About 20 September 1941, Foertsch called upon Field Marshal Keitel, Chief of the High Command [of the Armed Forces], and set forth the views of Field Marshal List concerning the situation in the Balkans. The views advanced by Foertsch were unequivocally rejected by Keitel who asserted that List's responsibility was to obey that which had been ordered. It appears therefore that the High Command [of the Armed Forces] had fixed upon a campaign of severity and intimidation as a substitute for an adequate number of troops. The contention had been advanced that with adequate troops, the shootings of hostages and reprisal prisoners would not have been necessary from any standpoint. The defendant Foertsch asserts, however, that with adequate troops, reprisals against the population would still have been necessary. This view is based on the fact that reprisal measures are dependent upon the attitude of the population which, in any event would have been incited to commit acts of sabotage and other senseless actions by certain hostile influences within and without the country. It is the opinion of this defendant that reprisal measures against the population were unavoidable under such circumstances.

On 5 September 1941, (*NOKW-084, Pros. Ex. 42*)* Field Mar-

* Ibid.

shal List's order on the suppression of the Serbian insurrection movement, which was quoted in part in the portion of the opinion dealing with the defendant List, was issued. On 16 September 1941, the Keitel order fixing reprisal ratios of 50 up to 100 to 1 (*NOKW–258, Pros. Ex. 53*)[1] was issued and distributed. Also on 16 September 1941, Lieutenant General Boehme was placed in charge of military operations in Serbia. During the occurrence of these events, the defendant Foertsch was on leave and became familiar with them upon his return in the latter part of September 1941.

It is the testimony of Foertsch that the Keitel order of 16 September 1941 fixing reprisal ratios from 50 up to 100 to 1 was the basic order under which reprisal measures were carried out in the Southeast. The evidence shows the following reprisal measures which were executed prior to the Keitel order and on the reports of which the signature or initials of the defendant Foertsch appear: On 16 July 1941, for sabotage in Obrenovac, 10 Communists shot to death. In Palanka, Communists were caught while putting up posters, one was shot and two arrested. On 25 July 1941, two attempts to destroy German motor vehicles with bottles filled with gasoline were reported in reprisal for which 100 Jews were to be shot. On 28 July 1941, 80 were shot to death in reprisal for an attack on a police patrol, and 122 Communists and Jews were shot in Belgrade for previously reported sabotage acts. On 1 August 1941, as reprisal for previously reported unrest near Petrovgrad, 90 Communists were shot there. On 6 August 1941, 4 plotters and 90 Communists and Jewish hostages were shot in Zagreb. On 7 August 1941, the shooting of an additional 87 Communists and Jewish hostages was reported. Other similar reports appear in the record. These occurrences came to the attention of Foertsch as chief of staff before the High Command [of the Armed Forces] had issued any orders to the Armed Forces Commander Southeast pertaining thereto. In other words, these killings took place before any basic order had been issued by any officer superior to Field Marshal List.

On 28 September 1941, Keitel's order (*NOKW–458, Pros. Ex. 69*)[2] on the taking of hostages was distributed. Parts of this order are quoted in the portion of the opinion dealing with the defendant List. This order was passed on to subordinate commanders at the direction of his commanding general. The signature of Foertsch appears on the order in his capacity as chief of staff.

[1] Ibid.
[2] Ibid.

The evidence clearly shows that the reports of units subordinate to the Armed Forces Commander Southeast invariably came to the attention of the defendant Foertsch if they had strategic or operational importance. It was only when he was on leave or absent on outside assignments that such reports did not come to his notice. For all practical purposes, he had the same information as the defendants List and Kuntze during their tenures as Armed Forces Commanders Southeast. He knew of the incidents held to be crimes that are recited in the portions of the opinion dealing with the defendants List and Kuntze. He was informed of the killing of hostages and reprisal prisoners. He was familiar with the illegal orders of Hitler and Keitel prescribing reprisal ratios of 50 up to 100 to 1. He gained information through reports that such ratios were being applied against the innocent members of the population. He had information that concentration or collection camps were established. He gained information through reports that Jews were transported to concentration camps for no other reason than that they were Jews, although he did not know by whose order this was done. He knew of the burning down of villages as reprisal measures. It is not necessary that all these specific acts be recapitulated here. The defendant Foertsch did not participate in any of them. He gave no orders and had no power to do so had he so desired. He did distribute some of the orders of the OKW, the OKH, and of his commanding generals. These orders will be reviewed as to their content and legality.

The order of 16 September 1941, generally referred to as the Keitel order of that date, which directed the killing of 50 to 100 members of the population for each German soldier killed was received by the Armed Forces Commander Southeast at a time when the defendant Foertsch was on leave. On his return he became acquainted with the order but the evidence is clear that he had no connection with its issuance or distribution.

The defendant Foertsch admits that he distributed Field Marshal Keitel's order of 28 September 1941, wherein it is ordered that hostages of different political persuasions such as Nationalists, Democrats, and Communists be kept available for reprisal purposes and shot in case of an attack. He contends that this order was a legal one and that his distribution of it invokes no criminal responsibility.

The order of General Boehme under date of 10 October 1941 providing for the killing of 100 prisoners or hostages for each German killed and 50 for each German wounded was known to Foertsch through the reports made to the Armed Forces Com-

mander Southeast. That it was repeatedly applied was also evident to him from General Boehme's reports to List and Kuntze.

The defendant Foertsch admits that he distributed General Kuntze's order of 19 March 1942 (*NOKW-835, Pros. Ex. 184*) wherein it was ordered that more severe reprisal measures be taken and directed that reprisals be taken in accordance with a definite ratio "for instance, 1 German dead—100 Serbs; 1 German wounded—50 Serbs." It is the contention of Foertsch that this order which is more fully set forth in the portion of the opinion dealing with the defendant Kuntze was advisory only because of the use of the words "for instance" and "might" in connection with the figure 100. He contends that this order was consistent with his position that reprisals were lawful although he personally did not approve of the high ratios to be uniformly applied.

The Commando Order of 18 October 1942 (*C-81, Pros. Ex. 225*) was distributed by Army Group E, commanded by General Alexander Loehr and of which Foertsch was then chief of staff. As to this order Foertsch states that he considered this order unlawful in that it called for the commission of offenses and crimes under international law but that he assumed that the issuance of the order was in answer to similar actions by the enemy in contravention of international law. It has not been shown that the defendant knew this order was in fact carried out in the territory in which he served.

The record further shows that in July 1943, the defendant distributed a Hitler order providing that partisans should no longer be killed but treated as prisoners of war and sent to the Reich for forced labor in mines. The defendant states that as such persons were subject to the death penalty, it was not unlawful to deport them for labor service. He closes his comments on this order with the statement that he had no power to rescind, modify, or palliate this order in his capacity as chief of staff.

The prosecution contends that Foertsch as chief of staff of the various army groups successively in command in the Southeast, was a powerful and influential figure. It is insisted that he exercised this power and influence upon his various commanders in chief in such a manner as to incriminate himself irrespective of the fact that he had no command responsibility. The charge that a conspiracy existed which had for its purpose the decimation and annihilation of various racial and religious groups finds support in the record but it fails utterly to establish that the defendant Foertsch, or any of the armed forces officers jointly charged with him, ever became a party to any such

preconceived plan. We think the evidence shows that insofar as the defandant is concerned the actions in the Southeast were motivated by a desire to attain peace and order among the civilian population—a matter that was essential to an adequate program of defense against an Allied invasion.

The nature of the position of the defendant Foertsch as chief of staff, his entire want of command authority in the field, his attempts to procure the rescission of certain unlawful orders and the mitigation of others, as well as the want of direct evidence placing responsibility upon him, leads us to conclude that the prosecution has failed to make a case against the defendant. No overt act from which a criminal intent could be inferred, has been established.

That he had knowledge of the doing of acts which we have herein held to be unlawful under international law cannot be doubted. It is not enough to say that he must have been a guilty participant. It must be shown by some responsible act that he was. Many of these acts were committed by organizations over which the armed forces, with the exception of the commanding general, had no control at all. Many others were carried out through regular channels over his voiced objection or passive resistance. The evidence fails to show the commission of an unlawful act which was the result of any action, affirmative or passive, on the part of this defendant. His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be one who orders, abets, or takes a consenting part in the crime. We cannot say that the defendant met the foregoing requirements as to participation. We are required to say therefore that the evidence does not show beyond a reasonable doubt that the defendant Foertsch is guilty on any of the counts charged.

The defendant von Geitner became chief of staff to the commanding general in Serbia (General Paul Bader) on 10 July 1942. He continued in this position until August 1943. He thereupon became chief of the general staff to the Military Commander Serbia and Military Commander Southeast (General Hans Felber), a newly established position. He continued in this position until October 1944. During the entire period of his service in the Balkans, the defendant von Geitner served only as chief of staff. His duties generally had to do with operations, supplies, training, and organization of troops. In addition to this staff, there existed an administrative staff which dealt directly with matters pertaining to the administration of Serbia and a third staff headed by the Plenipotentiary for Economy. While the persons in charge of the latter two staffs were per-

sonally subordinate to the military commander, the first received orders direct from superiors in Berlin and the second received orders from the administrators of the Goering Four Year Plan. In addition, there was a Higher SS and Police Leader in the territory who had charge of police units and the police security program. He, too, was subordinate to the military commander personally, but received his general orders from the Reich Leader SS directly. The police troops were subordinate to the commanding general only when needed for tactical commitment. These devious command channels with their overlapping powers were a constant source of trouble to the commanding general. A complete understanding of the nature of the subordination of each to the armed forces commander is necessary to the fixing of the responsibility, if any, that may be charged to the officers of the Wehrmacht. The burden rests upon the prosecution to establish the responsibility of the defendant von Geitner in ordering, aiding, abetting, or taking a consenting part in the crimes charged against him.

The general allegations against the defendant von Geitner follow the pattern of those charged against the defendant Foertsch and insofar as identical situations are concerned, the discussion will not be repeated here. There is one situation here involved that was not discussed at length in the case against the defendant Foertsch. The evidence shows that defendant von Geitner initialed or signed orders issued by his commanding general for the shooting of hostages and reprisal prisoners which were unlawful when viewed in the light of the applicable international law. We shall therefore determine the effect of such actions and the criminal responsibility that may grow out of it.

The evidence shows that General Bader reserved unto himself the authority to issue orders for the arrest of hostages and the execution of all reprisal measures. It appears that the commanding general handled these matters with the aid of a special officer who had been trained in the law. It was the duty of this officer to examine the particular problem with regard to the correctness of the description of events and submit his conclusion to the military commander who made the decision. The defendant von Geitner was necessarily informed of the order made by virtue of his position. It became his duty to prepare the order and approve its form which he usually did by placing his signature or initials on it. This he contends is the extent of his participation in the issuing and distributing of reprisal orders.

The applications for reprisal actions were generally made by (1) the administrative area headquarters, (2) by troop com-

manders, or (3) the Higher SS and Police Leader. They were then referred to the special legal officer who worked on them and submitted the result to the commander. The commander then made the decision and delivered it to the defendant von Geitner for preparation and approval as to form. The latter was generally indicated by his initials or signature. The order then was sent on its way through regular channels by von Geitner. No doubt exists that the order was that of the military commander and that the defendant von Geitner lacked the authority to issue such an order on his own initiative. He contends that he was opposed to the reprisal policy carried out in this area, a statement sustained by the record. He does not say that reprisal killings against the population were not necessary or that he considered it unlawful to carry out such measures under certain conditions. The question posed is whether the stated participation of the defendant von Geitner in his capacity as chief of staff is sufficient to establish criminal liability.

The evidence fails to show beyond a reasonable doubt that he aided, abetted, or took a consenting part in acts which were crimes under international law. No responsible act is shown to have been committed by him from which a guilty intent can be inferred. The charge that a conspiracy existed which had for its purpose the decimation and annihilation of racial and religious groups is not established by sufficient evidence insofar as this defendant is concerned. The record does not show his participation in slave labor programs or concentration camp activities, although he knew of them. His testimony that he opposed all such measures is not effectively disputed. These things, coupled with the nature and responsibilities of his position and the want of authority on his part to prevent the execution of the unlawful acts charged, serve to relieve him of criminal responsibility. We find the defendant von Geitner not guilty.

PRESIDING JUDGE WENNERSTRUM: The defendant Rendulic became commander in chief of the 2d Panzer Army on 26 August 1943, and remained in the position until June 1944. In July 1944, he became the commander in chief of the 20th Mountain Army, a position which he held until January 1945. In December 1944, he became the Armed Forces Commander North in addition to that of commander in chief of the 20th Mountain Army. In January 1945, he became commander in chief of Army Group North, a position which he held until March, 1945. These are the assignments during which the crimes set forth in the indictment are alleged to have occurred. At the time he assumed command of the 2d Panzer Army, the LXIX Corps, the XV Corps, the XXI Corps, the V SS Corps, and two Croation corps

constituted the greater portion of the 2d Panzer Army. The headquarters of the army was in Croatia and its principal task was the guarding of the coast against enemy attacks and the suppression of band warfare in the occupied area. The Italians also had several army corps stationed in the immediate territory. The danger of the collapse of the Italian Government and the possibility that the Italians might thereafter fight on the side of the Allies was a constant threat at the time of his assumption of the command of the 2d Panzer Army.

The Hitler order of 15 September 1941 providing for the killing of 100 reprisal prisoners for each German soldier shot and 50 for each German soldier wounded had been distributed to the troops in the Southeast and, in many instances, carried out before the defendant Rendulic assumed command of the 2d Panzer Army. The order was invalid and one who executed an order to kill reprisal prisoners under all circumstances at the ratio therein set forth performed a criminal act. The reasons for this have hereinbefore been set out in this opinion. It is claimed, however, that the order was never carried out by troops of the 2d Panzer Army and that consequently no duty arose on the part of this defendant to take measures to prevent the enforcement of the order. It appears, however, that on 18 August 1943, Keitel issued an order containing the following [*NOKW–509, Pros. Ex. 340*]: "Commanders having the rank of at least that of divisional commander are empowered in cases of particularly malicious procedure on the part of bandits or their accomplices to issue precautionary directives not to take any prisoners or, respectively, that prisoners and the population captured in the combat area may be shot. Without adequate orders, local commanders will act according to their own responsibility." On 15 September 1943, this defendant issued an order which in part stated:

> "Attacks on German members of the Wehrmacht and damages to war important installations are to be answered in every case by the shooting or hanging of hostages and the destruction of surrounding villages, which is to take place, if possible, after the arrest of the male population which is capable of bearing arms. Only then will the population inform the German authorities if bandits collect, so as to avoid reprisal measures.
>
> "Unless in individual cases different orders are issued the rule for reprisal measure is: 1 German killed, 50 hostages, 1 German wounded, 25 hostages shot or hanged. Kidnapping of a German will be considered equal to killing a German unless the kidnapped person does not return within a definite period. According to the severity of the attack 100 hostages will be

hanged or shot for each attack against war essential installations. These reprisal measures are to be executed if the culprit is not caught within 40 hours."

The reports of corps commanders subordinate to the defendant reveal that reprisals were taken against the population for attacks upon troops and military installations. On 11 November 1943, the 173d Reserve Division reported the hanging of 20 hostages and the shooting of 20 hostages for railroad sabotage. On 21 September 1943, 10 hostages were hanged by the 187th Reserve Division for an attack on a truck. On 4 October 1943, the 173d Reserve Division reports the execution of 40 hostages in reprisal for railroad sabotage. On 10 October 1943, the 187th Reserve Division reported the killing of 20 people suspected of belonging to the bands. On 31 October 1943, the 187th Reserve Division reports the killing of 9 people suspected of being bandits. On 7 November 1943, the 173d Reserve Division hanged 19 Communists at scene of an explosion on a railroad in reprisal. On 8 November 1943, the 173d Reserve Division shot 21 hostages as reprisal for an attack on a freight train. On 30 November 1943, the 187th Reserve Division reports killing 15 people suspected of belonging to bands in reprisal, the offense for which the reprisal was taken not being stated. The foregoing constitute a partial list of reprisal and hostage killings as shown by the reports of the LXIX Reserve Corps, commanded by the defendant Dehner, and to whom the 173d and 187th Reserve Divisions were subordinate. These reports were made to the 2d Panzer Army, commanded by the defendant Rendulic and to whom the LXIX Reserve Corps was subordinate.

They carried little or no information in addition to that which we have stated. The defendant made no attempt to secure additional details. All attempts to apprehend the guilty persons were abandoned. Public proclamations upon the taking of hostages were not made. Previous notice was not given the public that reprisals by shooting would be taken if unlawful acts were repeated. Court martial proceedings were not held as required. Hostages, reprisal prisoners, and partisans were killed without even the semblance of a judicial hearing.

On occasion interrogations were held but these were primarily to gain information rather than an attempt to give the persons interrogated a fair and impartial hearing. It is evident that the taking of reprisal measures by shooting members of the population became so common that the German commanders became indifferent to the seriousness of the acts. They appear to have been accepted as legitimate acts of war with the extent of their use limited only by the whim or judgment of divisional com-

manders. The records further indicate that arrested persons whose guilt could not be established were generally held as reprisal prisoners. This resulted, of course, in the death of the arrestee in any event. There was no requirement that hostages or reprisal prisoners killed should be connected with the offense committed, either passively, actively, or by proximity. The practice employed in the killing of hostages and reprisal prisoners was not one of last resort. The general notion seems to have been expressed by General Alexander Loehr in an order bearing the date 22 December 1943, while acting as Commander in Chief Southeast for Field Marshal von Weichs, wherein he said. (*NOKW-172, Pros. Ex. 379*) :

> "The reprisal, penal, and retaliation measures practiced up to now must in the future take into account the new political objectives. The first principle has to be, in cases of attacks, acts of sabotage, etc., to seize the perpetrator himself and to take reprisal measures only as a second course, if through reprisal measures the prevention of future attacks is to be expected."

The order of 15 September 1943, signed and issued by the defendant Rendulic indicates his advocacy of these excessive and irregular hostage and reprisal measures. It is true, as he contends, that they were consistent with and directed by his superiors. It is also true that the record does not indicate that he ever issued an order directing the killing of a specific number of hostages or reprisal prisoners as retaliation for any particular offense. The issuance of such orders was delegated to divisional commanders. Their activities were known to him through reports. He acquiesced in them and took no steps to shape the hostage and reprisal practices in conformity with the usages and practices of war. While mitigating circumstances exist which must receive the careful consideration of the Tribunal, the defendant must be held guilty of ordering, furthering, and acquiescing in the unlawful killing of innocent inhabitants of occupied territory.

The evidence further shows that on 3 September 1943, Italy surrendered unconditionally to the Allies. The surrender was announced publicly on 8 September 1943. The defendant testifies that this event was anticipated by him as well as the possibility that Italy would become an enemy of the Germans. His testimony is to the effect that the German Army in performing its task of guarding the coast to prevent an Allied landing, could not tolerate the presence of hostile Italians in these coastal areas. Holding these definite views of the necessities of the situation,

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the defendant set about removing the Italians from the coastal areas by making them prisoners of war.

It appears that the Italian troops stationed in Greece, Yugoslavia, and Albania were subordinated to Army Group Este, commanded by General of the Army Rossi. The Italian troops within the area occupied by the 2d Panzer Army, with the exception of one army corps, were subordinated to the Italian 9th Army under the command of General Dalmazzo. The defendant, knowing General Rossi to be hostile to the desires of the German command, caused him to be taken into custody. General Dalmazzo was thereupon taken to Belgrade by the Germans and "assigned" to the command of Army Group Este in the place of General Rossi. It was with the latter general that the defendant negotiated for the surrender of the Italian troops within the area of the 2d Panzer Army. Even though outnumbering the Germans at least 20 to 1 and without orders to so do, General Dalmazzo entered into an agreement with the defendant for the surrender of the 9th Italian Army. The defendant thereupon caused Italian commanders to be notified that they would be shot as francs-tireurs if they continued to resist and failed to order their troops to surrender to the Germans. In case of destruction or looting of arms, ammunition, fuel, and supply depots, it was ordered by defendant that one staff officer and 50 men from each division concerned would be shot. Death was threatened to all Italian soldiers who failed to turn in their guns, for selling or giving away or destroying their arms, and many similar acts too numerous to mention here. The defendant Rendulic states that no Italians were shot pursuant to these sanctions.

On 11 and 13 September 1943, and subsequent to the issuance of the preceding sanctions, the defendant received Fuehrer orders directing that the officers of all Italian units who had cooperated with insurgents or permitted their arms to fall into the hands of insurgents, were to be shot and that the officers of resisting units who continued their resistance after receipt of a short ultimatum also were to be shot. The record discloses that the defendant Rendulic was insistent that his corps commanders carry out these orders "without any scruples." In this connection it is shown that troops subordinated to the XV Mountain Corps captured 300 Italian officers and 9,000 men who resisted capture at Split. On 6 October 1943, it was reported to the 2d Panzer Army by the XV Mountain Corps that three generals and 45 officers had been sentenced to death by a general court martial and executed. The report further states that nine additional Italian officers had been found guilty of treason and shot. Under date

of 9 October 1943, the XXI Mountain Corps reported to the 2d Panzer Army that reprisal measures were carried out against 18 Italian officers.

It is the contention of the defendant Rendulic that the surrender of the 9th Italian Army, commanded by General Dalmazzo, brought about *ipso facto* the surrender of the Bergamo Division in Split, and that elements of this division by continuing to resist the German troops became *francs-tireurs* and thereby subject to the death penalty upon capture. An analysis of the situation is required for clarification.

The evidence shows that the 9th Italian Army was occupying the coastal area jointly with the German Armed Forces as an ally until the collapse of Italy. That danger existed in the possibility of the area becoming an enemy bridgehead cannot be denied. Even though the German troops were outnumbered as much as 20 to 1, the defendant Rendulic saw the necessity of controlling the area. By cleverly maneuvering his numerically inferior troops and taking advantage of the uncertainties of the situation in which the Italian commanders found themselves, the defendant Rendulic was able to coerce a surrender of the 9th Italian Army by its commander, General Dalmazzo. Most of the troops of the 9th Army complied with the terms of the surrender. Among those which refused to comply was the Bergamo Division of the 9th Army stationed at Split, a seaport on the Adriatic Sea. The defendant was able to marshal forces sufficient to capture the troops of the Bergamo Division. Thereafter, the order to shoot the guilty officers of the Bergamo Division after summary court martial proceedings was carried out.

It must be observed that Italy was not at war with Germany, at least insofar as the Italian commanders were informed, and that the Germans were the aggressors in seeking the disarmament and surrender of the Italian forces. The Italian forces which continued to resist met all the requirements of the Hague Regulations as to belligerent status. They were not *francs-tireurs* in any sense of the word. Assuming the correctness of the position taken by the defendant that they became prisoners of war of the Germans upon the signing of the surrender terms, then the terms of the Geneva Convention of 1929, regulating the treatment of prisoners of war were violated. No representative neutral power was notified nor was a 3-month period allowed to elapse before the execution of the death sentences. Other provisions of the Geneva Convention were also violated. The coercion employed in securing the surrender, the unsettled status of the Italians after their unconditional surrender to the Allied forces, and the lack of a declaration of war by Germany

upon Italy creates grave doubts whether the members of the Bergamo Division became prisoners of war by virtue of the surrender negotiated by General Dalmazzo. Adopting either view advanced by the defense, the execution of the Italian officers of the Bergamo Division was unlawful and wholly unjustified. It represents another instance of the German practice of killing as the exclusive remedy or redress for alleged wrongs. The execution of these Italian officers after the tense military situation had righted itself and the danger had passed cannot be described as anything but an act of vengeance.

The defendant is charged also with passing on to troops subordinate to him the Fuehrer order of 6 June 1941, providing that all commissars captured must be shot. Defendant admits the receiving and passing on of this order in July 1941 when he was in command of the 52d Infantry Division on the Russian front. He admits that the legality and correctness of this order was discussed and that it was generally considered illegal. He testifies that he considered the order as a reprisal measure, the purpose of which was unknown to him. But a mere assertion of this nature, unaccompanied by evidence which might justify such an assumption, is not a defense. Such an assertion could be made as an excuse for the issuance of any unlawful order or the committing of any war crime, if it were available as a defense *ipso facto*. We do not question that circumstances might arise in such a case that would require a court to find that no criminal intent existed but it must be based upon something more than a bare assertion of the defendant, unsupported by facts and circumstances upon which a reasonable person might act. The order was clearly unlawful and so recognized by the defendant. He contends, however, that no captured commissars were shot by troops under his command. This is, of course, a mitigating circumstance but it does not free him of the crime of knowingly and intentionally passing on a criminal order.

The defendant is also charged with issuing, distributing, and putting into execution the Commando Order of 18 October 1942. The record discloses, however, that this order had been issued and distributed prior to his assignment in the Balkans. The Hitler order of 30 July 1944 (*537–PS, Pros. Ex. 488*) making the Commando Order applicable to members of foreign military missions, was not in existence during his assignment in the Balkans. It is evident that defendant Rendulic did not issue or pass on the Commando Order while commander in chief of the 2d Panzer Army.

Proof of any acts connecting him with this criminal order has not been produced. We hold, therefore, that the evidence is insufficient to sustain a finding of guilt as to this charge.

The defendant is 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. The defendant contends that military necessity required that he do as he did in view of the military situation as it then appeared to him.

The evidence shows that in the spring of 1944, Finland had attempted to negotiate a peace treaty with Russia without success. This furnished a warning to Germany that Finland might at any time remove itself as an ally of the Germans. In June 1944, the Russians commenced an offensive on the southern Finnish frontier that produced a number of successes and depressed Finnish morale. On 24 June 1944, the defendant Rendulic was appointed commander in chief of the 20th Mountain Army in Lapland. This army was committed from the Arctic Ocean south to the middle of Finland along its eastern frontier. Two army corps were stationed in central Finland and one on the coast of the Arctic Ocean. The two groups were separated by 400 kilometers of terrain that was impassable for all practicable purposes.

On 3 September 1944, Finland negotiated a separate peace with Russia and demanded that the German troops withdraw from Finland within 14 days, a demand with which it was impossible to comply. The result was that the two army corps to the South were obliged to fight their way out of Finland. This took 3 months time. The distance to the Norwegian border required about 1,000 kilometers of travel over very poor roads at a very inopportune time of year. The Russians attacked almost immediately and caused the Germans much trouble in extricating these troops. The XIX Corps located on the Arctic coast was also attacked in its position about 150 kilometers east of Kirkenes, Norway. The retreat into Norway was successful in that all three army corps with their transport and equipment arrived there as planned. The difficulties were increased in middle October when the four best mountain divisions were recalled to Germany, thereby reducing the strength of the army by approximately one-half.

The evidence shows that the Russians had very excellent troops in pursuit of the Germans. Two or three land routes were open to them as well as landings by sea behind the German lines. The defendant knew that ships were available to the Russians to make these landings and that the land routes were available to them. The information obtained concerning the intentions of the Russians was limited. The extreme cold and the short days made air reconnaissance almost impossible. It was with this

situation confronting him that he carried out the "scorched earth" policy in the Norwegian province of Finmark which provided the basis for this charge of the indictment.

The record shows that the Germans removed the population from Finmark, at least all except those who evaded the measures taken for their evacuation. The evidence does not indicate any loss of life directly due to the evacuation. Villages were destroyed. Isolated habitations met a similar fate. Bridges and highways were blasted. Communication lines were destroyed. Port installations were wrecked. A complete destruction of all housing, communication, and transport facilities took place. This was not only true along the coast and highways but in the interior sections as well. The destruction was as complete as an efficient army could do it. Three years after the completion of the operation, the extent of the devastation was discernable to the eye. While the Russians did not follow up the retreat to the extent anticipated, there are physical evidences that they were expected to do so. Gun emplacements, fox holes, and other defense installations are still perceptible in the territory. In other words there are mute evidences that an attack was anticipated.

There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in restrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist.

The Hague regulations prohibited:* "To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." The Hague Regulations are mandatory provisions of international law. The prohibitions therein contained, control, and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destruction of public and private property by retreating military forces which would give aid and comfort to the enemy may constitute a situation coming within the exceptions contained in Article

* Annex to Hague Convention No. IV, 1907, Article 23g. (Treaties Governing Land Warfare, United States Army Technical Manual 27-251, 1944, p. 25.)

23g. We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered with his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision to carry out the "scorched earth" policy in Finmark as a precautionary measure against an attack by superior forces. It is our considered opinion 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. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act. We find the defendant not guilty on this portion of the charge.

The evidence establishes the guilt of the defendant Rendulic on counts one, three, and four.

The defendant Dehner was assigned as the commander of the LXIX Reserve Corps in the last days of August 1943. He held this command until 15 March 1944. The corps was stationed in northern Croatia and occupied about one-third of that country. The corps consisted of the 187th Reserve Division, the 173d Reserve Division, and other units which were subordinate to it for varying periods of time. The chief task of this corps was to suppress the guerrilla bands operating in the territory and particularly to guard the Zagreb-Belgrade railroad and the communication lines in the assigned area. There was no coastline to guard in the area of this corps.

The defendant is charged primarily with the unlawful killing of hostages and reprisal prisoners, and with the wanton destruction of towns and villages contrary to international law. With reference to the alleged unlawful killing of hostages and reprisal prisoners, we point out that all the incidents set forth in the portion of the opinion dealing with the defendant Rendulic were committed by troops of the 173d and 187th Reserve Divisions both of which were directly subordinated to this defendant. No necessity exists to reiterate these incidents here. They will be incorporated as a part of the case against the defendant Dehner

by reference. Numerous occurrences took place in addition to the foregoing.

In the daily report of the LXIX Reserve Corps to the 2d Panzer Army for 5 November 1943, it is shown that the 173d Reserve Division hanged 100 bandits for an attack on railroad installations and on certain police forces. This action from the language used appears to have been a retaliation measure and not a shooting of *francs-tireurs*. That is was excessive as such is self evident. In a similar report dated 7 November 1943, it shows that the 173d Reserve Division hanged 19 Communists at the scene of a railroad explosion in reprisal for the act. On 8 November 1943, this same division shot 21 hostages as a reprisal for railroad sabotage. A similar report shows that the 187th Reserve Division on 21 December 1943, shot 25 people "suspected of being bandits" and hostages as a reprisal for band attacks.

The reports made are hopelessly inadequate. The defendant appears to have made no effort to require reports showing that hostages and reprisal prisoners were shot in accordance with international law. Killings by shooting and hanging took place for railroad sabotage out of all proportion to the nature of the offense. Retaliation was taken against special groups such as Communists and bandit suspects. The population does not appear to have been warned of the intention to kill hostages and innocent members of the population in the event of the recurrence of offenses against the occupying power. The reprisals appear to have been taken without regard to any possible connection of the population with the offense committed. Hostages were shot and reprisal prisoners killed when it was well known that the offenses for which retaliations were ordered, were committed by organized bands having no connection whatever with the immediate population. Innocent members of the population were shot in reprisal for German losses sustained in combat after the Fuehrer order of 18 August 1943, [*NOKW–509, Pros. Ex. 340*] authorizing the treatment of band members as prisoners of war. No more glaring injustice can be pointed to, it being a case where the guilty escape and the innocent are put to death. Court martial proceedings do not appear to have been held. The defendant excuses his indifference to all these killings by saying that it was the responsibility of the division commanders. We agree that the divisional commanders are responsible for ordering the commission of criminal acts. But the superior commander is also responsible if he orders, permits, or acquiesces in such criminal conduct. His duty and obligation is to prevent such acts, or if they have been already executed, to take steps to prevent their recurrence.

The records show that this defendant had full knowledge of these acts. On 24 December 1943, his corps headquarters called attention to the fact that the order of the commander in chief of the 2d Panzer Army of 15 September 1943, was in force. This order was described in the portion of the opinion dealing with the defendant Rendulic and will not be reiterated here. It appears to us from an examination of the evidence that the practice of killing hostages and reprisal prisoners got completely out of hand, legality was ignored, and arbitrary action became the accepted policy. The defendant is criminally responsible for permitting or tolerating such conduct on the part of his subordinate commanders.

There is much that can be said, however, in mitigation of the punishment to be assessed from the standpoint of the defendant. Superior orders existed which directed the policy to be pursued in dealing with the killing of hostages and reprisal prisoners. Such superior orders were known by his subordinate commanders, a situation that made it difficult for him to act. That the defendant recognized certain injustices and irregularities and attempted to correct them is evident from the record. As an example, in an order of 19 December 1943, his corps headquarters stated (*NOKW-657, Pros. Ex. 376*):

> "Measures of the unit have repeatedly frustrated propaganda for the enemy as planned by the unit leadership. It must not happen that bandits who arrive at the unit with leaflets asking them to desert and which should be valid as passes, are shot out of hand. This makes any propaganda effort in this direction nonsensical. Even our own confidential agents bringing important news from band territory and notwithstanding their repeated assurances that they are in the service of the German Armed Forces have been shot down 'to simplify matters', i.e., without any investigation."

The order goes on to say that under such circumstances it is not surprising that notwithstanding the discomforts of living in the woods in winter that the band nuisance increases steadily and that the fight increases in severity and stubbornness. The same order further states:

> "It must be absolutely avoided that innocent people are kept in hostage camps and that they possibly atone with their lives for an affair with which they had no connection. With the exception of case [paragraph] 1a hostages are to be made responsible for the misdeeds of bands only in the neighborhood nearest to their own villages. It is not permitted, for instance, that hostages from Karlovci be used

for retaliation measures in case a surprise attack by bands or a demolition occurs near Ruma."

The order further says:

"It is impossible to make use of hostages for the execution of reprisal measures for the German soldiers killed in the fight against bands. It would be contradictory on the one hand to treat active members of bands, captured during battle, as prisoners of war (Fuehrer Order, 18 August 1943), that is, to let them live; and on the other hand, to hang hostages from the next hostage camp for our own losses in the fight against bands."

The foregoing approaches closely the correct course to be pursued insofar as it bears upon the subject of hostages and reprisals. It indicates an attempt to correctly apply the rules of warfare as they apply to guerrilla warfare in occupied territory. Such examples of conscientious efforts to comply with correct procedure warrant mitigation of the punishment.

The defendant is charged, also, with responsibility for the destruction of numerous towns and villages by troops subordinate to him without military necessity existing for their so doing. The record establishes that on 16 October 1943 the 187th Reserve Division arrested the majority of the populations of the villages of Paklonica and Vocarica as hostages and then burned down the villages. The record further shows that on 24 September 1943 the 173d Reserve Division burned down the villages of Grgeteg and Bukavac. It shows also that on 26 November 1943 [*NOKW-049, Pros. Ex. 356*] the village of Grgurevci was burned down by troops of the 173d Reserve Division in reprisal for an attack on police from the village. Other cases of a similar character are shown by the record. Under some circumstances, the destruction of villages is a legitimate reprisal measure. The reports of these incidents are very fragmentary and give little or no details surrounding the actions. They do indicate that the acts were taken as reprisal measures and not from military necessity as that term is ordinarily used. We are obliged to say that the evidence is not sufficient to sustain a finding that these destructions were in violation of the laws of war.

We find the defendant guilty under count one of the indictment.

The defendant von Leyser was appointed to command the XXI Mountain Corps on 1 August 1944, and continued in the position until April 1945. Immediately previous thereto he had been in command of the XV Mountain Corps, a position he had held since 1 November 1943. Other assignments involved in the

present case are in regard to his command of the 269th Infantry Division in Russia in 1941 and his command of the XXVI Corps in Russia in 1942.

The XXI Corps was committed in Albania and assigned the task of guarding the coast against Allied invasion and the suppression of the resistance movement. Directly subordinate to him as commander of the XXI Corps were the 297th Infantry Division, the 100th Light Division, and other units assigned for particular operations. The XV Corps was committed in Croatia and was likewise assigned the task of guarding the coast and suppressing band activities. Directly subordinate to the corps were the 114th Light Division which was subsequently replaced with the 264th Infantry Division, the 373d Infantry Division, and the 392d Infantry Division. Other units appear to have been subordinated to the corps for specific operations.

The defendant is charged with responsibility for the unlawful killing of hostages and reprisal prisoners, with ordering and carrying out the evacuation of the male population of Croatian towns for deportation to Germany for forced labor, and the killing of commissars pursuant to the Commissar Order of 6 June 1941.

The reprisal practice as carried out in this corps area and the alleged deportation of inhabitants for slave labor is so interwoven with the powers of the alleged independent state of Croatia that its status and relationship to the German armed forces must be examined. Prior to the invasion of Yugoslavia by Germany on 6 April 1941, Croatia was a part of the sovereign state of Yugoslavia and recognized as such by the nations of the world. Immediately after the occupation and on 10 April 1941, Croatia was proclaimed an independent state and formally recognized as such by Germany on 15 April 1941. In setting up the Croatian Government, the Germans, instead of employing the services of the Farmers' Party which was predominant in the country, established an administration with Dr. Ante Pavelic at its head. Dr. Pavelic was brought in from Italy along with others of his group and established as the governmental head of the state of Croatia even though his group represented only an estimated 5 percent of the population of the country. This government, on 15 June 1941, joined the Three Power Pact and, on 25 November 1941, joined the Anti-Comintern Pact. On 2 July 1941, Croatia entered the war actively against the Soviet Union and on 14 December 1941, against the Allies. The military attaché became the German Plenipotentiary General in Croatia and was subordinated as such to the chief of the High Command of the Armed Forces. The territorial boundaries of the

new Croatia were arbitrarily established and included areas that were occupied by Serbians who were confirmed enemies of the Croats.

The Croatian Government, thus established, proceeded to organize a national army, the troops of which are referred to in the record as Domobrans. Certain Ustasha units were also trained and used. The Ustasha in Croatia was a political party similar to the Nazi Party of Germany. Similar to the Waffen SS, divisions of the Ustasha were trained and used. In addition, by an alleged agreement between Germany and Croatia, the Croatian Government conscripted men from its population for compulsory labor and military service. Many of these men were used in German organized Croat divisions and became a part of the German Armed Forces under the command of German officers.

It is further shown by the evidence that all matters of liaison were handled through the German Plenipotentiary General. It is evident that requests of the Germans were invariably acceded to by the Croatian Government. It is quite evident that the answers to such requests were dictated by the German Plenipotentiary General. Whatever the form or the name given, the Croatian Government during the German war time occupation was a satellite under the control of the occupying power. It dissolved as quickly after the withdrawal of the Germans as it had arisen upon their occupation. Under such circumstances, the acts of the Croatian Government were the acts of the occupation power. Logic and reason dictate that the occupant could not lawfully do indirectly that which it could not do directly. The true facts must control irrespective of the form with which they may have been camouflaged. Even international law will cut through form to find the facts to which its rules will be applied. The conclusion reached is in accord with previous pronouncements of international law that an occupying power is not the sovereign power although it is entitled to perform some acts of sovereignty. The Croatian Government could exist only at the sufferance of the occupant. During the occupation, the German military government was supreme or its status as a military occupant of a belligerent enemy nation did not exist. Other than the rights of occupation conferred by international law, no lawful authority could be exercised by the Germans. Hence, they had no legal right to create an independent sovereign state during the progress of the war. They could set up such a provisional government as was necessary to accomplish the purposes of the occupation but further than that they could not legally go. We are of the view that Croatia was at all times here involved an occupied country and that all acts performed by it

were those for which the occupying power was responsible. With the expression of these views, we pass to the consideration of the charges made against the defendant von Leyser.

There is evidence in the record that innocent members of the population were killed in reprisal for attacks on troops and acts of sabotage committed by unknown persons by troops subordinate to the defendant von Leyser. That the defendant knew of many such killings, he admits. He denies that he ever issued an order to carry out any specific reprisal measure. He contends that this was the responsibility of divisional commanders in conjunction with Croatian Government authorities. The record discloses, however, that on 10 August 1944 the defendant issued an order containing the following:

> "In case of repeated attacks in a certain road sector, Communist hostages are to be taken from the villages of the immediate vicinity, who are to be sentenced in case of new attacks. A connection between these Communists and the bandits may be assumed to exist in every case."

This order is, of course, not lawful. Reprisals taken against a certain race, class, or group irrespective of the circumstances of each case sounds more like vengeance than an attempt to deter further criminal acts by the population. An assumption of guilt on the part of a particular race, class, or group of people in all cases also contravenes established rules. This is a matter which a judicial proceeding should determine from available evidence. We must assert again, in view of the defendant's statement that the responsibility for the taking of reprisal measures rested with the divisional commanders and the Croatian Government, 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.

The evidence concerning the killing of hostages and reprisal prisoners within the corps area is so fragmentary that we cannot say that the evidence is sufficient to support a finding that the measures taken were unlawful. The killing of hostages and reprisal prisoners is entirely lawful under certain circumstances. The evidence does not satisfactorily show in what respect, if any, the law was violated. This is a burden cast upon the prosecution which it has failed to sustain.

The more serious charge is that pertaining to the evacuation of large areas within the corps command for the purpose of conscripting the physically fit into the Croatian military units and of conscripting others for compulsory labor service.

On 8 March 1944, the XV Mountain Corps reported to the 2d Panzer Army in part as follows: "Operation 'Bergwiese' terminated. Final report not yet available. Another 74 able-bodied men taken into custody." On 9 March 1944, the same division reported 332 able-bodied men in custody from the same operation. On 20 March 1944, the XV Mountain Corps reported in part as follows: "Operation 'Illusion' carried out after refusal by German Navy. No contact with enemy, 100 able-bodied persons brought to Fiume." On 21 March 1844, the XV Mountain Corps reported as follows: "Intention: Harehunt code name 'Lagerleben' (taking into custody of 200 compulsory recruits 6 kilometers east-southeast of Brinje)." This whole question can be disposed of by a consideration of the operation "Panther."

Shortly after taking command of the XV Corps, the defendant formulated a plan for the evacuation of the male population between the ages of 15 and 55 from the area between Una and Korana. This territory was supposed to contain about 7,000 to 8,000 men who were partly equipped with arms procured from the Italians. The area had been under the temporary control of the bands to such an extent that the Croat Government had complained of its inability to conscript men for military service from the area. It was planned to crush the bands and evacuate the men and turn them over to the Croatian Government for use as soldiers and compulsory labor. The operation was designated as operation "Panther" and is so carried in the German army reports. On 6 December 1943, the 2d Panzer Army approved operation "Panther." The order of approval provided that the estimated 6,000 persons fit for military service should be held in camps at Sisak and Karlovac.

The evacuation of persons fit for military service was to be known by the code name "Silberstreifen" (silver stripes). On 2 December 1943, the 2d Panzer Army ordered the operation to commence on 6 December 1943. The last sentence of the order states: "Sending the evacuated population fit for military service to Germany for labor service is considered expedient."

The operation was carried out, but only 96 men fit for military service were captured. It is evident that the inhabitants had been warned before the operation was commenced and had left to escape capture. The defendant attempts to justify his action by asserting that the primary purpose of the operation "Panther" was the suppression of the bands, that the operation was purely a tactical one so far as he was concerned, and that the disposition of the captured population fit for military service was for the decision of the Croatian Government and not his concern.

We point out that the Croatian Government was a satellite government and whatever was done by them was done for the Germans. The captured men fit for military service were turned over to the Croat administration and were undoubtedly conscripted into the Domobrans, the Waffen Ustasha, the Croat units of the Wehrmacht, or shipped to Germany for compulsory labor just as the defendant well knew that they would be. The occupation forces have no authority to conscript military forces from the inhabitants of occupied territory. They cannot do it directly, nor can they do it indirectly. When the defendant as commanding general of the corps area participated in such an activity, he did so in violation of international law. The result is identical if these captured inhabitants were sent to Germany for compulsory labor service. Such action is also plainly prohibited by international law as the evidence shows. See Articles 6, 23, 46 of the Hague Regulations. We find the defendant von Leyser guilty on this charge.

The defendant is also charged with issuing the Commissar Order of 6 June 1941 and causing the same to be carried out while he was in command of the 269th Infantry Division in Russia in 1941. The record shows a report of the 269th Infantry Division under date of 28 September 1941 wherein it is stated: "Special occurrences—one female commissar shot. One woman who was in contact with partisans, likewise shot." Under date of 20 November 1941, this same division reports as follows: "Two Russian prisoners of the 1st Battery were shot upon the order of the battalion commander. These were one commissar and one Russian high ranking officer." On 9 July 1941, the 269th Infantry Division reported to the XLI Infantry Corps to which it was subordinated as follows: "34 Politruks (commissars) liquidated."

This evidence clearly shows that the 269th Infantry Division, commanded by the defendant von Leyser killed commissars pursuant to the Commissar Order. This was a criminal order and all killings committed pursuant to it were likewise criminal. We find the defendant guilty on this charge.

We find the defendant von Leyser guilty on counts three and four.

The defendant Felmy had two assignments in Greece. He was appointed Commander Southern Greece about the middle of June 1941, and continued in the position until August 1942. During this period he had only three battalions of security and police troops subordinate to him. On 10 May 1943, the defendant became commander of the LXVIII Corps and continued in that position until the corps withdrew from Greece, an operation

which was completed on 22 October 1944. In addition thereto on 9 September 1943, he assumed command of Army Group Southern Greece. He had subordinate to him the 1st Panzer Division, 117th Light Division, and a number of fortress battalions. Until the collapse of Italy, two Italian divisions were subordinate to him.

The defendant is charged with responsibility for the unlawful killing of innocent members of the population and the wanton destruction of villages and towns without military necessity existing therefor.

The defendant admits ordering reprisal measures but denies that they were unlawful. A brief review of some of these acts for which the defendant is responsible is therefore necessary. To begin with the defendant admits receiving the basic order of 16 September 1941 relative to reprisal measures up to 100 to 1 which has been often referred to in this opinion. He also received the Keitel order of 28 September 1941, relative to the taking of hostages from all sections of the population which has likewise been quoted herein. He also received and passed on the order of General Loehr, Commander in Chief Southeast, dated 10 August 1943, which states in part (*NOKW–155, Pros. Ex. 306*):

> "In territories infested by the bandits, in which surprise attacks have been carried out, the arrest of hostages from *all* strata of the population remains a successful means of intimidation. Furthermore, it may be necessary to seize the entire male population, insofar as it does not have to be shot or hung on account of participation in or support of the bandits, and insofar as it is incapable of work, and bring it to the prisoner collecting points for further transport into the Reich. Surprise attacks on German soldiers and damage to German property must be retaliated in every case with shooting or hanging of hostages, destruction of the surrounding localities, etc. Only then will the population announce to the German offices the collections of the bandits, in order to remain protected from reprisal measures."

The defendant also received and passed on the order regarding reprisal measures issued by General Loehr, deputizing for Field Marshal von Weichs as Commander in Chief Southeast, under date of 22 December 1943, an order which has been previously quoted in this opinion. It says in part (*NOKW–172, Pros. Ex. 379*):

> "Reprisal quotas are not fixed. The orders previously decreed concerning them are to be rescinded. The extent of

the reprisal measures is to be established in advance in each individual case. * * * The procedure of carrying out reprisal measures after a surprise attack or an act of sabotage at random on persons and dwellings in the vicinity, close to the scene of the deed, shakes the confidence in the justice of the occupying power and also drives the loyal part of the population into the woods. This form of execution of reprisal measures is accordingly forbidden. If, however, the investigation on the spot reveals concealed collaboration or a conscientiously passive attitude of certain persons concerning the perpetrators, then these persons above all are to be shot as bandit helpers and their dwellings destroyed * * * . Such persons are coresponsible first of all who recognize communism."

The records show the following actions by troops subordinate to this defendant: On 9 September 1943, during mopping up operations of Levadeia "as reprisal measures for one murdered German soldier, 10 Greeks hanged." On 7 November 1943, the LXVIII Corps reports: "18 Communists were shot in Tripolis as reprisal for railroad sabotage committed lately." On 29 November 1943, the LXVIII Corps reports: "As reprisal for band attack on Tripolis-Sparta road, 100 hostages shot at the place of attack." On 5 December 1943, the LXVIII Corps reported "50 hostages were shot in Aighion for attacks committed lately", and on 6 December 1943, "for attack on railroad strong hold east of Tripolis, 50 hostages were hanged." On 6 December 1943, operation "Kalavritha" was commenced. In reprisal for the killing of 78 German soldiers, the 117th Division under the command of General von Le Suire carried out this attack. More than 25 villages were destroyed, and 696 Greeks are admitted to have been shot in reprisal. There is evidence of an eyewitness that approximately 1,300 Greeks were killed in reprisal. The defendant admits that this reprisal measure was excessive and says that he orally reprimanded General von Le Suire for the severity of this reprisal measure. No reprimand or complaint as to Le Suire's conduct appears in the documentary evidence before the Tribunal.

The diary of the LXVIII Corps reports the following reprisal measures: on 17 January 1944, "In retaliation for an attack on one officer in the Rhizaes area, 20 Communists executed"; on 22 April 1944, "In Tripolis 12 well known Communists were shot as a retaliation measure for the murder of a rural police officer"; on 23 February 1944, "Shooting of 200 hostages from the Tripolis hostage camp at the place of attack." This reprisal was for two truck convoy attacks resulting in 33 German dead and nine wounded. On 11 March 1944, for an attack on an armed German

convoy, General Le Suire asked and was granted permission by this defendant to shoot "200 hostages (Communists) to be taken out of all hostage camps." Defendant contends that only 141 hostages were actually shot. The extent of the reprisals taken in the area of the LXVIII Corps is shown by the testimony of the defendant who says that between July and December 1943, 91 acts of sabotage occurred and 60 reprisals taken, and from January to June 1944 there was a monthly average of 55 acts of sabotage and engagements with bands.

It hardly seems necessary for us to point out that many of these reprisal killings were excessive and many were unlawful because there was no connection between the inhabitants shot and the offense committed. Reprisals were taken against special groups, such as "Communists" and "bandit suspects" without any relationship to the offense being established. The Kalavritha Operation can only be described as plain murder and a wanton destruction of property. The assertion of the defendant that he orally reprimanded General von Le Suire for the severity of this operation does not appear too convincing in view of the recommendations later made by defendant for the advancement of Le Suire to a higher command. Reprisal measures were carried out in the corps area without rhyme or reason. They became a part of the tactical campaign for the suppression of the bands in the first instance rather than as a last resort. It is plain that deterring the local population at the scene of the offense was not the primary objective. Reprisal prisoners were taken from hostage camps generally and at points distant from the place where the offenses occurred. It was more the case of an eye for an eye than an honest attempt to restrain the population by a use of hostage and reprisal measures as a last resort.

On 5 April 1944, the notorious "blood bath" at Klissura occurred. (*NOKW-469, Pros. Ex. 482.*)* The facts are: On the date in question an engagement between bands and German troops occurred about 2½ kilometers outside the village of Klissura. After the retreat of the bands, the troops moved into the village and began searching for evidence of band support. None was found. Later in the afternoon, units of the 7th SS Panzer Grenadier Regiment entered the village and began almost immediately to kill the inhabitants. At least 215 persons, and undoubtedly more, were killed. Among these killed were 9 children less than 1 year old, 6 between 1 and 2 years of age, 8 between 2 and 3 years, 11 between 3 and 4 years, and 4 between 4 and 5 years. There were 72 massacred who were less

* Part of this document is reproduced in section VB.

than 15 years of age, and 7 people in excess of 80 years. No justification existed for this outrage. It was plain murder.

On 10 June 1944, troops of this same regiment carried out a reprisal measure against the inhabitants of the village of Distomon. (*NOKW-467, Pros. Ex. 484.*) It seems that bands were first engaged near Stiri, 5 kilometers southeast of Distomon. After the defeat of the bands, the troops returned to Distomon and shot approximately 300 of the population, including men, women, and children. It also was plain calculated murder.

A complaint was voiced by the Plenipotentiary of the Foreign Office and an investigation demanded. The defendant Felmy was charged with the duty of having the investigation made. He denies that this regiment was subordinate to him or that he had any disciplinary control over it. For the purpose of this discussion, we will accept his statement as true even though the order to investigate and report through Wehrmacht channels indicates the contrary. The point that is material here is that the investigation was made, the battle report of the commanding officer was found to be false, and the action of the regimental commander found to be in excess of existing orders. Upon the discovery of these facts the defendant Felmy recommended that disciplinary action (the method of trying minor offenses) be taken against the officer in charge in consideration of the sacrifices of the regiment in the combat area at the time. The defendant testified that he never knew what punishment, if any, was assessed against this guilty officer. He seems to have had no interest in bringing the guilty officer to justice. Two of the most vicious massacres of helpless men, women, and children appear to have met with complete indifference on his part. The falsification of the battle report by the regimental commander seems to have been deemed the major offense.

War at its best is a business but under no circumstances can cold-blooded mass murder such as these two cases establish be considered as related remotely even to the exigencies of war. The defendant's attitude toward the innocent population is reflected in his indifference to these unjustified and brutal murders which took place within the area of his command. It is a matter that goes to the question of the defendant's character, intent, and purpose in carrying out the acts for which he is charged. The responsibility of the defendant for the killing of innocent members of the population by the exercise of unlawful hostage and reprisal practices is clearly established. We find the defendant Felmy guilty on counts one and two.

The defendant Lanz was appointed to command the XXII Mountain Corps on 25 August 1943 and actually assumed the

position on 9 September 1943. The corps command was, generally speaking, the Epirus area of Greece. This consisted of the area between the Gulf of Corinth and Albania lying west of the Pindus Mountains. The corps headquarters was in Ioannina. The defendant is charged with the responsibility for killing hostages and reprisal prisoners in violation of international law and with the unlawful killing of Italian officers after the Italian capitulation.

A brief summarization of the evidence against the defendant is required. On 13 September 1943, General Stettner, commander of the 1st Mountain Division, a unit subordinate to the defendant and whose headquarters was at the time also in Ioannina, issued an order in part as follows (*NOKW-1104, Pros. Ex. 451*): "In order to oppose energetically the continued raids on convoys and members of the Wehrmacht, it is ordered that from 20 September 1943 onward for every German soldier wounded or killed by insurgents or civilians, 10 Greeks from all classes of the population are to be shot to death. This order must be carried out consistently in order to achieve a deterrent effect." On 29 September 1943, the XXII Corps reported: "Telephone sabotage in the area of Arta. Poles sawed off at two places. Thirty male civilian suspects arrested and shot." On 3 October 1943, the defendant issued an order reading in part as follows: "On account of the repeated cable sabotage in the area of Arta 30 distinguished citizens (Greeks) from Arta and 10 distinguished citizens (Greeks) from Filipias are to be arrested and kept as hostages. The population is to be notified that for every further cable sabotage 10 of these 40 hostages will be shot to death." The defendant denies that any of these hostages were shot and there is no evidence in the record to the contrary. On 4 October 1943, the 1st Mountain Division reported to the XXII Corps as follows: "Mopping up operations Eisl continue beyond Alomotros. Villages destroyed as reprisal measure. All civilians shot to death." On 18 October 1943, the 1st Mountain Division reported to the XXII Corps as follows: "Shot to death: Paramythia—reprisal measure for 6 murdered German soldiers, 58. Thereakision—reprisal measure for murder of Lieutenant Colonel Salminger, 14. Arta, Klissura—Suspicious elements near the localities where attacks had occurred (about), 30. Ioannina City—4." On 25 October 1943, the 1st Mountain Division issued a special directive to its subordinate units which stated in part: "If a member of the German Wehrmacht is killed by either attack or murder in a territory considered pacified, 50 Greeks (male) are to be shot for one murdered German. * * * The decision regarding executions for losses in band combat

is made by the competent troop commander. Here also the ratio is 1:50. The prerequisite for the order of execution is indubitable proof that the population of a village has participated in hostile action against the German armed forces. In addition, the villages are to be destroyed." This order supersedes that of 13 September 1943. Numerous killings of hostages and reprisal prisoners, in addition to those enumerated, appear in the record. There are reports to the effect that "all the inhabitants" of named villages and "all men capable of bearing arms" were shot to death. Persons designated as "civilians" were shot on numerous occasions.

The orders for the taking of reprisal measures were clearly unlawful. An order to shoot 50 Greeks for each German killed regardless of circumstances meets the legal objections hereinbefore stated in this opinion. Instead of reprisals against innocent inhabitants being taken as a last resort, they were more often taken in the first instance. Reprisal killings were often carried out against the inmates of hostage camps and not against the population having some relationship with the crime committed. Attacks by armed bands having no connection with the local population were avenged by killing innocent inhabitants who had no possible association with the guilty. Many villages were destroyed and the civilian inhabitants shot without any logical reason at all except to wreak vengeance upon the population generally. According to the reports in evidence, court martial proceedings were not held. The killings were had on the order of the competent field commander, the evidence showing that battalion commanders sometimes gave such orders. The defendant says that as a tactical commander he was too busy to give attention to the matter of reprisals. This is a very lame excuse. The unlawful killing of innocent people is a matter that demands prompt and efficient handling by the highest officer of any army. This defendant, with full knowledge of what was going on, 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. The defendant does not even contend that he did. As commander of the XXII Corps it was his duty to act and when he failed to so do and permitted these inhumane and unlawful killings to continue, he is criminally responsible.

The defendant Lanz is also charged as commander of the XXII Mountain Corps with having ordered or permitted the unlawful execution of Italian officers and soldiers of the surrendered Italian army. He is also specifically charged with ordering troops under his command to execute the captured

Italian General Gandin and all officers of his staff. The general situation regarding the collapse of Italy and the surrender of its armies has been set forth in the portion of the opinion dealing with the defendant Rendulic and it will not be repeated here except as necessity requires.

The record discloses that the defendant Lanz knew when he assumed command of the XXII Mountain Corps that Field Marshal Badoglio had succeeded Mussolini as head of the Italian Government and Commander in Chief of the Italian Army. On 8 September 1943, he heard of the armistice which the Italians had signed with the Allies. On the same day, due to the absence of senior officers from Athens, General Alexander Loehr, commander in chief of Army Group E, commissioned the defendant Lanz to negotiate with General Vecchiarelli, the commander in chief of the 11th Italian Army. After much negotiating, General Vecchiarelli surrendered the 11th Army to the Germans on 9 September 1943. The surrender terms were carried out during the following 14 days, without difficulty insofar as troops stationed on the Greek mainland were concerned. On the islands of Corfu and Cephalonia, however, difficulties arose. These two islands were occupied by one Italian division under the command of General Gandin. The defendant Lanz as commanding general of the XXII Corps demanded that General Gandin surrender his troops and the demand was refused even though General Vecchiarelli had directed him to do so. General Gandin vacillated, contending that his orders were not clear and that he had no right to surrender the division. The situation resulted in fighting between the German and Italian troops on the island of Cephalonia and the eventual surrender of the Italian forces, including General Gandin and his staff, on 21 September 1943.

During this stage of the proceedings, a Fuehrer order arrived directing that the 6,000 or 7,000 Italians of General Gandin's division were to be shot for mutiny. The defendant Lanz refused to carry out this order for the reason that it was neither feasible nor lawful to do so. The Fuehrer order was then modified providing only that the officers were to be shot for mutiny. The defendant objected to the shooting of all officers and advocated that the order apply only to the guilty. The evidence indicates that the defendant Lanz ordered the German commandant of the islands to determine the guilty officers by court martial proceedings. This was done and on 24 September 1943, General Gandin and his staff officers were shot.

A similar situation developed on the island of Corfu. Fighting ensued, the Italians surrendered, and the officers shot after a sum-

mary court martial. The record shows that a large number of Italian officers were shot in this manner. One instance shows that on 5 October 1943, 58 Italian officers were shot by troops subordinate to the XXII Corps.

The killing of these Italian officers was clearly unlawful. The evidence of the defendant shows that he believed that their killing was unlawful. While his protests to Army Group E, based on the illegality of the Fuehrer order, were successful in reducing the number of Italians to be subjected to the unlawful order, the fact remains that the killing of the reduced number was just as much a criminal act. That he gave the order to the commandant of Cepholonia to execute the guilty officers only, he readily admits. The Italian soldiers were not *francs-tireurs*. They were still allies of Germany, insofar as their commanding officers then knew, although they had notice that an armistice had been signed with the Allied Powers. If they were prisoners of war by virtue of the surrender of the 11th Italian Army by General Vecchiarelli, it is clear that they were entitled to the protection of the Geneva Convention, 1929, regulating the treatment to be afforded prisoners of war. This was not done in any material respect. The reasoning set forth on the same subject in this opinion as it pertains to the defendant Rendulic applies here and is adopted by reference to the present situation. We are obliged to hold that the killing of the Italian officers was a war crime for which the defendant is responsible.

We find the defendant Lanz guilty on counts one and three.

The defendant Speidel assumed the position of Military Commander Southern Greece in early October 1942, and remained in the position until September 1943. From September 1943, until May 1944, he occupied the position of Military Commander Greece. His first assignment extended to a portion of the harbor Pyraeus and the adjoining coastal strip, a small section northeast of Athens and the Islands Salamis and Aegina. The balance of the area, including Athens, was controlled by the Italians. Under the second assignment his authority extended over the whole of Greece although such authority was limited to certain functions. He had no tactical or operational tasks in this position, they being in the hands of Army Group E.

As Military Commander Southern Greece, his chief tasks were the maintenance of public peace and order within the area occupied by German forces, the security of German troops and installations, and jurisdiction over crimes committed against the Germans by the population. As Military Commander Greece, his principal tasks were the maintenance of peace and order, the administration of the judicial authority over the population as

to crimes and offenses committed against the Germans and their military installations and the handling of negotiations with the Greek Government. As in the case of his previous assignment, all tactical and operational matters were in the hands of Army Group E in Salonika.

Subordinated to the defendant were 7 subarea headquarters [administrative area headquarters] units. On and after 22 December 1943, reprisal measures could be ordered only by divisional commanders after agreement with the competent subarea headquarters. This order, promulgated by General Loehr as Acting Commander in Chief Southeast, provided in part: "The revenge for attacks which are directed against the unit and its installation may be ordered only by a German commander with the disciplinary authority to punish of at least a division commander in accord with the competent administrative subarea headquarters. If an agreement is not reached, the competent territorial commander is to decide. Reprisal measures for losses in the air corps, navy, police, and the OT [Organization Todt] are to be ordered principally by the territorial commanders."

That the Military Commander Greece could control the reprisal and hostage practice through the various subarea headquarters which were subordinate to him cannot be questioned. This conclusion is borne out by the testimony of the defendant and charts prepared by him. It is plainly established that all administrative subarea headquarters [administrative area headquarters] and local headquarters of his area of command were subordinated to the Military Commander Greece by the Keitel order of 21 December 1943.

The defendant contends that many of the acts charged against him were committed by or under the direction of the Higher SS and Police Leader, General Schimana. Whether General Schimana was subordinate to the Military Commander Greece insofar as the ordering of reprisal and hostage measures was concerned is directly disputed. We are convinced that the record shows that he was. In this respect the record quite conclusively shows that General Schimana was directly subordinate to Himmler as to matters of discipline, promotions, and matters of similar import. Ordinarily, Himmler insisted that all SS units remain wholly subordinate to him, a matter of which he was very jealous. But in the present instance, the matter is controlled by regulations issued by Fuehrer headquarters under date of 7 September 1943 which in part says [*NOKW-1438, Pros. Ex. 419*]:

"By agreement with the Chief of OKW, the Reich Fuehrer SS and Chief of the German Police appoints a Senior [Higher] SS

and Police Leader for the area of Military Commander Greece. The Senior SS and Police Leader is an office of the Reich Fuehrer SS and Chief of the German Police, which is subordinate to Military Commander Greece for the period of its employment in Greece. * * * The military commander is authorized to issue directives to the Senior SS and Police Leader which are necessary to avoid interference with Wehrmacht operations and duties. They take precedence over any other directives. The Senior SS and Police Leader will receive policies and directives for the execution of these duties from the Reich Fuehrer SS and Chief of the German Police. He will carry them out independently, currently, and opportunely, informing the Military Commander Greece in as far as he does not receive any restrictive directives from the latter."

The defendant admits that General Schimana considered himself subordinate to the Military Commander Greece as to the ordering and carrying out of hostages and reprisal killings. That the Senior SS and Police Leader was a member of the staff of Military Commander Greece is shown by the Keitel order of 21 December 1943. The evidence is clear that the defendant is responsible for the execution of these measures except when they were taken during tactical operations on which occasions, of course, the responsibility rests with the tactical superior.

A review of some of the hostage and reprisal measures taken within area of the defendant's command and for which responsibility attaches, will be necessary. On 3 December 1943, the following report was made: "Nineteen Communist reprisal prisoners shot, as revenge for the murder and wounding of Greek police, by the Senior SS and Police Leader in Athens." On 31 December 1943, the defendant reported: "In December on the Peloponnesus 758 people were shot to death, including reprisal operation 'Kalavritha'. In the remaining areas hostages were seized, and to a small extent executions have taken place." On 9 January 1944, it was reported: "By (order of) Senior SS and Police Leader, 30 Communists were shot to death in reprisal for the murder of Greek policeman and for 36 attacks." On 10 January 1944, the Military Commander Greece reported: "50 Communists shot as reprisal measure for murdering two German police." On 13 March 1944, it was reported: "On the highway Sparta-Tripolis, truck convoy attacked. Eighteen Wehrmacht members dead, 25 heavily wounded, 19 slightly wounded, and 6 Greeks wounded. As reprisal, state of emergency for southern Peloponnesus. Shooting of 200 Communist hostages." On 18 March 1944, the defendant reported in part as follows: "Tend-

ency to strikes and partial strikes at the railroad and several plants at the beginning of March were suppressed by energetic military measures; 50 Communists were shot immediately while others who were arrested are awaiting their sentence." While the defendant was absent from his command for almost 2 months prior to 17 March 1944, he appears to have known of and approved the action taken by his deputy as shown by the foregoing report. On 22 March 1944, the Military Commander Greece reported: "On the Peloponnesus, five Greeks hanged in reprisal for attack on railroad." On 22 March 1944, the defendant reported: "administrative subarea headquarters [administrative area headquarters] Corinth report 52 hostages in Tripolis and 44 hostages in Sparta were shot as reprisal measure on 21 March." On 1 April 1944, defendant reported: "Up to now—Wehrmacht one dead, 14 wounded. Tracks blocked only for a short while. The execution of 70 Greeks at the locality of the incident has been ordered." On 2 April 1944, defendant reported: "65 Communists in reprisal for railroad sabotage, 10 south La Rissa shot to death at the scene of the incident." On 6 April 1944, defendant reports: "In Verria [Veroia] (60 southeast West Solonika). Fire attack by bandits during roll call of the battalion. Losses of our own—four dead, eleven wounded of which eight are heavily wounded. One hundred and fifty people suspected of belonging to bands shot in Verria as reprisal measures." On 8 April 1944, the defendant reported: "50 Communists shot to death for attack on German soldiers (three dead) North Athens." On 25 April 1944, the defendant reported: "In Tripoli, 12 known Communists shot in reprisal for a murdered Gendarmerie officer." On 26 April 1944, the defendant reported: "Officers of the commander of the Ordnungspolizei [order police] attacked by about 70 bandits while on duty trip on the road Arachova-Amphissa (15 west Levadeia). Major Schulz and Major Krueger dead, Captain Unger and four men missing. Two passenger automobiles and two motorcycles were burned out. Three men found their way to Levadeia. Fifty Communists from Levadeia were shot as reprisal measures. Additional reprisal measures are intended."

That the foregoing killings were excessive in most instances is readily apparent. That no connection existed between the population and the offense committed in many cases is shown. That the reprisal and hostage practice here employed was not one of last resort but one of the first instance in most cases can be seen. The incidents cited show cases where the hostages were taken and killed at a distance from the place of the offense. Court martial proceedings are not mentioned. That the incidents recited, indicating the practice followed, were not in accord with

international law is beyond question. The responsibility of the defendant therefore has been established beyond a reasonable doubt.

We find the defendant Speidel guilty on count one of the indictment.

Evidence has been produced in an attempt to show that the Allied armies, or units thereof, engaged in the practice of taking and killing hostages and reprisal prisoners. There is but one instance cited that even resembles a case of shooting in reprisal. As to this, the evidence shows that four persons were shot by Allied forces in Reutlingen, Germany, during the invasion. The official announcement proclaimed, however, that those responsible for the killing of a French soldier had been apprehended and shot. There is no convincing evidence that it was a hostage or reprisal shooting. It is not shown that a single hostage or reprisal prisoner had been killed by Allied forces throughout the course of the late war. It also has been stated in the evidence and argued to the Tribunal that the rules of war have changed and that war has assumed a totalitarian aspect. It is argued that the atom bombings of Hiroshima and Nagasaki in Japan and the aerial raids upon Dresden, Germany in the final stages of the conflict afford a pattern for the conduct of modern war and a possible justification for the criminal acts of these defendants. We do not think the argument is sound. The unfortunate pattern adopted in the Second World War was set by Germany and its allies when hostilities were commenced. The methods of warfare employed at Rotterdam, Warsaw, Belgrade, Coventry, and Pearl Harbor can aptly be said to provide the sources of the alleged modern theory of total war. It is not our purpose to discuss the lawfulness of any of these events. We content ourselves with the statement that they can give no comfort to these defendants as recriminatory evidence.

Throughout the course of this opinion we have had occasion to refer to matters properly to be considered in mitigation of punishment. The degree of mitigation depends upon many factors including the nature of the crime, the age and experience of the person to whom it applies, the motives for the criminal act, the circumstances under which the crime was committed, and the provocation, if any, that contributed to its commission. It must be observed, however, that mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defense. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings of the Court with reference to the degree of magnitude of the crime.

It has been suggested in the course of the trial that an element of unfairness exists from the inherent nature of the organizational character of the Tribunal. It is true, of course, that the defendants are required to submit their case to a panel of judges from a victor nation. It is unfortunate that the nations of the world have taken no steps to remove the basis of this criticism. The lethargy of the world's statesmen in dealing with this matter, and many other problems of international relations, is well known. It is a reproach upon the initiative and intelligence of the civilized nations of the world that international law remains in many respects primitive in character. But it is a matter with which this Tribunal cannot deal, other than in justifying the confidence reposed in its members by insuring to the defendants a fair, dispassionate, and impartial determination of the law and the facts. A tribunal of this character should through its deliberations and judgment disclose that it represents all mankind in an effort to make contribution to a system of international law and procedure, devoid of nationalistic prejudices. This we have endeavored to do. To some this may not appear to be sufficient protection against bias and prejudice. Any improvement, however, is dependent upon affirmative action by the nations of the world. It does not rest within the scope of the functions of this Tribunal.

B. Sentences

The reading of the opinion and judgment having been concluded, the Tribunal will now impose sentence upon those defendants who have been adjudged guilty in these proceedings. As the name of each defendant is called, he will arise, proceed to the center of the dock and put on the earphones.

The defendant Wilhelm List will arise.

WILHELM LIST, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to life imprisonment. You will retire with the guards.

WALTER KUNTZE. Walter Kuntze, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to life imprisonment. You will retire with the guards.

LOTHAR RENDULIC. Lothar Rendulic, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to 20 years of imprisonment. It is the order of the Tribunal that you will receive credit upon your sentence for the time already spent in confinement and pending trial, namely, from 13 September 1946. You will retire with the guards.

ERNST DEHNER. Ernst Dehner, on the count of the indictment on which you have been convicted, the Tribunal sentences you to 7 years of imprisonment. It is the order of the Tribunal that you receive credit upon your sentence for the time already spent in confinement and pending trial, namely, from 29 December 1946. You will retire with the guards.

ERNST VON LEYSER. Ernst von Leyser, on the counts of the indictment on which you have been convicted the Tribunal sentences you to 10 years of imprisonment. It is the order of the Tribunal that you receive credit upon your sentence for the time already spent in confinement and pending trial, namely, from 18 December 1946. You will retire with the guards.

HUBERT LANZ. Hubert Lanz, on the counts of the indictment on which you have been convicted the Tribunal sentences you to 12 years of imprisonment. It is the order of the Tribunal that you receive credit upon your sentence for the time already spent in confinement and pending trial, namely, from 17 January 1947. You will retire with the guards.

HELMUTH FELMY. Helmuth Felmy, on the counts of the indictment on which you have been convicted the Tribunal sentences you to 15 years of imprisonment. It is the order of the Tribunal that you receive credit upon your sentence for the time already spent in confinement and pending trial, namely, from 4 January 1947. You will retire with the guards.

WILHELM SPEIDEL. Wilhelm Speidel, on the count of the indictment on which you have been convicted the Tribunal sentences you to 20 years of imprisonment. It is the order of the Tribunal that you receive credit upon your sentence for the time already spent in confinement and pending trial, namely, from 13 December 1946. You will retire with the guards.

The defendants HERMANN FOERTSCH and KURT VON GEITNER having been acquitted, shall be discharged from custody by the Marshal when the Tribunal presently adjourns. They will retire with the guards.

The Tribunal now stands adjourned without day.