N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: *The United Nations War Crimes Commission, Law Reports of Trials of War Criminals*, vol. VIII, 1949, pp. 34-76]

THE HOSTAGES TRIAL

TRIAL OF WILHELM LIST AND OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG

8th JULY, 1947, TO 19th FEBRUARY, 1948

The accused were all former high ranking German army officers and they were charged with responsibility for offences committed by troops under their command during the occupation of Greece, Yugoslavia, Albania and Norway, these offences being mainly so-called reprisal killings, purportedly taken in an attempt to maintain order in the occupied territories in the face of guerrilla opposition, or wanton destruction of property not justified by military necessity. The accused were charged with having thus committed war crimes and crimes against humanity.

[...] In its judgment the Tribunal dealt with a number of legal issues, including [...] the extent of responsibility of commanders for offences committed by their troops and the degree of effectiveness of the plea of superior orders. [...]

3. JUDGMENT OF THE TRIBUNAL

[...]

(ii) The Plea of Superior Orders

The Judgment [states]:

“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. [...]

“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 it 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 inferior 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: ‘Patzigs order does not free the accused from guilt. It is true that according to para. 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 defence.

“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 defence 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 civilised 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 defence 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 recognised as criminal under applicable principles of International Law and pleads superior order as a defence thereto, the duty devolves upon the Court to examine the sources of International Law to determine the merits of such a plea. If the Courts finds that the army regulations of some members of the family of nations provide that superior order is a complete defence 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. Inasmuch as a substantial conflict exists among the nations whether superior order is a defence 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 defence 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 defence 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.” [...]

(v) The irrelevance to the Present Discussion of the Illegality of Agressive War

The Judgment states:

[...]

“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 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 troop, or when a state goes to war in patent violation of its obligations under the Covenant of the 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.” [...]

(x) The extent of Responsibility of the Commanding General of Occupied Territory

On this point the Tribunal expressed its opinion in these words:

“We have herein before 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 defence 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 defence. 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. [...]

“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, subordinations 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”.

Elsewhere the Judgment laid down that a commanding general “is charged with notice of occurrences taking place within the 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 apprise 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 defence. 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 defence. 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 Wehrmacht 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 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.” [...]

4. THE FINDINGS OF THE TRIBUNAL

[...]

Of Foertsch, the Tribunal concluded that

“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 lawful 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 organisations over which the Wehrmacht, 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.”