VIII. SEPARATE OPINION BY JUDGE BLAIR

OPINION OF MALLORY B. BLAIR, JUDGE OF MILITARY TRIBUNAL III

I concur in the final judgment and verdict filed herein, which I have signed. A difference of view has arisen, however, with respect to certain findings and conclusions made in the judgment under the title "Source of Authority of Control Council Law No. 10". Under this title a lengthy and able discussion is made in the judgment concerning the effect and meaning of the term "unconditional surrender" of Germany to the Allied Powers. From the meaning given to the term of "unconditional surrender" of the armed forces of the Hitler regime and the collapse of his totalitarian government in Germany, the view is expressed that a distinction arises between measures taken by the Allied Powers prior to the destruction of the German Government and those taken afterwards; and that only the former may be tested by the Hague Regulations because they relate only to a belligerent occupation. To support this view, quotations are made from articles expressing views of certain text writers, which articles are published in the American Journal of International Law. The judgment then adopts the view expressed in the quoted texts, which is admittedly contrary to the views of the equally scholarly writers whose articles are also cited.

The foregoing decision is made to depend upon a determination of the present character or status of the occupation of Germany by the Allied Powers; that is, whether or not it is a belligerent occupation. This interesting but academic discussion of the question has no possible relation to or connection with the "source of authority of Control Council Law No. 10," which is the question posed in the judgment. No authority or jurisdiction to determine the question of the present status of belligerency of the occupation of Germany has been given this Tribunal. This question of present belligerency of occupation rests solely within the jurisdiction of the military occupants and the executives of the nations which the members of the Allied Control Council represent. The determination by this Tribunal that the present occupation of Germany by the Allied Powers is not belligerent may possibly involve serious complications with respect to matters solely within the jurisdiction of the military and executive departments of the governments of the Allied Powers.

If, however, any possible questions are here present for determination with respect to (1) the character of the present status of occupation of Germany; and (2) the present status of belligerency, such questions can only relate to the rights of the victorious belligerent to exercise control over Germany. Such matters as regard the American Zone are controlled by both the written and unwritten laws, rules, and customs of warfare and by the rights and obligations of a victorious occupant under international law. The determination of these matters has not been entrusted to this Tribunal. This Tribunal has not been given any jurisdiction to exercise any sovereign power of Germany; nor has it been given any jurisdiction to determine that because of the unconditional surrender Germany's sovereignty was thereby transferred to the victorious Allied Powers. These matters are controlled in the American Zone by the Basic Field Manual [27–10] on Rules of Land Warfare issued (1940) by The Judge Advocate General of the United States Army.

As concerns questions of transfer of sovereignty of a defeated belligerent to the victorious belligerent, the foregoing rules of land warfare provide—

> "*273. Does not transfer sovereignty.*—Being an incident of war, military occupation confers upon the invading force the right to exercise control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity for maintaining law and order, indispensable to both the inhabitants and to the occupying force.
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> "*274. Distinguished from invasion.*—The state of invasion corresponds with the period of resistance. Invasion is not necessarily occupation, although it precedes it and may frequently coincide with it. An invader may push rapidly through a large portion of enemy country without establishing that effective control which is essential to the status of occupation. He may send small raiding parties or flying columns, reconnoitering detachments, etc., into or through a district where they may be temporarily located and exercise control, yet when they pass on it cannot be said that such district is under his military occupation.
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> "*275. Distinguished from subjugation or conquest.*—Military occupation in a foreign war, being based upon the fact of possession of *enemy* territory, necessarily implies that the sovereignty of the occupied territory is not vested in the occupying power. The occupation is essentially provisional.

"On the other hand, subjugation or conquest implies a transfer of sovereignty. Ordinarily, however, such transfer is effected by a treaty of peace. When sovereignty passes, military occupation, as such, must of course cease; although the territory may, and usually does for a period at least, continue to be governed through military agencies which have such powers as the President or Congress may prescribe."

And as concerns the administration of occupied territory, the same rules of land warfare require—

"*285. The laws in force.*—The principal object of the occupant is to provide for the security of the invading army and to contribute to its support and efficiency and the success of its operations. In restoring public order and safety he will continue in force the ordinary civil and criminal laws of the occupied territory which do not conflict with this object. These laws will be administered by the local officials as far as practicable. All crimes not of a military nature and which do not affect the safety of the invading army are left to the jurisdiction of the local courts.

"*286. Power to suspend and promulgate laws.*—The military occupant may suspend existing laws and promulgate new ones when the exigencies of the military service demand such action."

Manifestly this Tribunal, created for the sole purpose of trying and punishing war criminals in the broadest sense of that term as used in Control Council Law No. 10, has not by such law been given any jurisdiction to determine matters relating to the far reaching power or authority which the foregoing rules authorize a military occupant to exercise provisionally. In consequence, the lengthy discussion of the far reaching power or authority which the Allied Powers are now exercising in Germany has no material relation to any question before us for determination, and particularly the question of the "source of the authority of Control Council Law No. 10". Certainly this Tribunal has no jurisdiction to determine whether or not the military or executive authorities have exceeded their authority or whether or not they are exercising in fact the sovereign authority of Germany, or whether by her unconditional surrender Germany has lost all sovereignty. The exercise of such powers has to do with provisional matters of occupation and operates presently and in future. Our jurisdiction extends to the trial of war criminals for crimes committed during the war and before the unconditional surrender of Germany. This jurisdiction is determined by entirely different laws.

Under the foregoing rules of military operation there is no rule which would, because of the unconditional surrender of the German armed forces, transfer the sovereignty of Germany to the

Allied occupants, or to either of them, in their respective zones of occupation. It may here be pointed out that the report of 1919 by the Commission on Responsibility of the Authors of War and Enforcement of Penalties lists among other war crimes in violation of international law or of the laws and customs of land warfare, "(10) the usurpation of sovereignty during military occupation." This rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant. As concerns this Military Tribunal in the American Zone of Occupation, the problem is dealt with and concluded by the above-quoted rules (285–286), relating to administration of occupied territory.

No attempt has been made by the Allied Powers, or either of them, to exercise the sovereign authority of Germany, except in the limited sense provided for by the foregoing rules of land warfare. On 30 January 1946 the Allied Control Council enacted Law No. 11 which repealed most of the enactments of the Nazi regime and continued in force in all of Germany the great body of criminal law contained in the German Criminal Code of 1871 with amendments thereto. This is in accord with the provisions of the above-quoted rule 285. Thus in the American Zone there has been continued in force the ordinary civil and criminal laws of the German states, each of which has been recognized as a sovereign power. These laws are being administered by German local and state officials as far as can practicably be done, with the avowed intention of the Allied Powers, and each of them, to surrender all powers now exercised as a military occupant, particularly when the all-Nazi militaristic influence in public, private, and cultured life of Germany has been destroyed, and when Nazi war criminals have been punished as they justly deserve to be punished.

Furthermore, as concerns the American Zone of Occupation, the punishment of war leaders or criminals is being and will be carried out by four separate procedures—

(1) Major German war leaders or criminals are tried by this and similar military tribunals set up under Control Council Law No. 10 and Military Government Ordinance No. 7, limited to the crimes or offenses therein defined or recognized.

(2) The trials of Germans for the commission of war crimes against American military personnel and for atrocities or crimes committed in concentration camps in the area captured or occupied by the American armed forces, are tried by special military courts set up at the direction of the zone commander, with the theater judge advocate in charge of the prosecution of the cases.

(3) Germans who are charged with committing crimes against humanity upon other Germans, in violation of German law, are tried by the ordinary German criminal courts.

(4) Other Germans who were actively responsible for the crimes of the Hitler or Nazi regime, or who actively participated in the Nazi plans or schemes, are tried by German tribunals under the Law for Liberation from National Socialism and Militarism of 5 March 1946.

The purpose of the foregoing program is to carry out the objectives of the Potsdam Agreement that "war criminals and those participating in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes, shall be arrested and brought to judgment."

The Potsdam Agreement related to punishment of all Axis war criminals. Control Council Law No. 10 sets up the machinery to apply the Potsdam Agreement to European Axis war criminals and particularly to German war criminals.

The judgment further declares, however, that "in the case of Germany, subjugation has occurred by virtue of military conquest." This holding is based upon the previous declarations that at the time of the unconditional surrender of the German armed forces the Nazi government had completely disintegrated, requiring the victorious belligerent to take over the complete exercise and control of governmental affairs of Germany, and thereby resulting in the transfer of her sovereignty to the victorious Allied Powers. In this holding, the judgment simply attempts to apply the provisions of rule 275 that "subjugation or conquest implies a transfer of sovereignty." Obviously this rule implies that the question of subjugation is one of fact or intention to be determined by the successful belligerent. There has been no act or declaration of the Allied Powers, either before or since their occupation of Germany under the terms of the unconditional surrender, which could possibly be construed as showing that they intend by the subjugation and occupation of Germany to transfer her sovereignty to themselves. To the contrary every declaration that has been made by the Allied Powers with respect to their occupancy of Germany and the enactment of laws for her control during the occupation has emphasized the fact that the ultimate purpose of such occupancy is to destroy the Nazi form of government and militarism in Germany so that as thus extirpated from these influences she may take her place in the comity of the nations of the world.

The declaration made in the judgment that Germany has been subjugated by military conquest and that therefore her sover-

eignty has been transferred to the successful belligerent Allied Powers cannot be sustained either as a matter of fact or under any construction of the foregoing rules of land warfare. The control and operation of Germany under the Allied Powers' occupation is provisional. It does not transfer any sovereign power of Germany other than for the limited purpose of keeping the peace during occupancy, and for the ultimate rectification of the evils brought about by the Nazi regime and militarism, and in order to destroy such influences and to aid in the establishment of a government in and for Germany under which she may in the future earn her place in the comity of nations. In any event this Tribunal has no power or jurisdiction to determine such questions.

The judgment further declares that Control Council Law No. 10 has a dual aspect. The judgment states:

> "In its first aspect and on its face it purports to be a statute defining crimes and providing for the punishment of persons who violate its provisions. It is the legislative product of the only body in existence having and exercising general lawmaking power throughout the Reich."

Obviously this aspect or theory of reasoning is predicated upon the previous declarations that since at the time of the unconditional surrender the Nazi government had completely collapsed, and that, since the Allied Powers assumed the entire control of the governmental function of Germany, her sovereignty was thereby transferred to the Allied Powers. It is then declared that Control Council Law No. 10 was enacted by the Allied Control Council in and for Germany in the exercise of this transferred German sovereignty. Under this reasoning Control Council Law No. 10 merely became a local law in and for Germany because Germany, in the exercise of her national governmental sovereignty, could not enact the law as international law. Nor can the Allied Control Council in the exercise of the transferred sovereignty of Germany enact international law.

The judgment further declares that the same and only supreme legislative authority in and for Germany, the Allied Control Council, gave this Tribunal jurisdiction and authority to enforce the local German law so enacted by it and to punish crimes in violation of it, including crimes by German nationals against German nationals as authorized by Control Council Law No. 10. From the foregoing premise the conclusion is inescapable that the Allied Control Council in the exercise of the sovereign power of Germany has enacted the law in and for Germany and has authorized this Tribunal to punish criminals who violated the law in the manner of a German police court.

The foregoing conclusion is based upon the articles by Freeman and Fried, from which quotations are made in the judgment. This same theory by Fried has been expressed in a subsequent statement wherein he states, after reviewing the foregoing facts with respect to the unconditional surrender of the armed forces and the disintegration of the Nazi government, that—

> "This Tribunal (III) has the double quality of being an international court and, owing to the special situation of Germany at the present time, also a German court."

This is the only possible conclusion that can be reached in the premises stated.

The second aspect of Control Council Law No. 10 is declared by the judgment to be as follows:

> "We have discussed C. C. Law 10 in its first aspect as substantive legislation. We now consider its other aspect. Entirely aside from its character as substantive legislation, C. C. Law 10, together with Ordinance No. 7, provides procedural means previously lacking for the enforcement within Germany of certain rules of international law which exist throughout the civilized world independently of any new substantive legislation."

There can be no serious disagreement as regards this aspect or theory of Control Council Law No. 10, but it is contrary to the first aspect or theory of the law. The two aspects are diametrically opposed to each other as to the "source of authority for Control Council No. 10." They are so conflicting with respect to the claims that the law is both local law and international law that either one or the other aspect cannot exist. The legislature of a national state cannot by a legislative act make international law binding upon other nations. Only an international legislative body may so legislate and no such body has ever existed.

With regard to the premises supporting the view that Control Council Law No. 10 has two aspects, the judgment apparently contains other conflicting statements with respect to the "source of authority for Control Council Law No. 10" and also with respect to the basis of the authority of the legislative body to enact the law. The judgment states at one place—

> "International law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorized to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law, it has grown to meet the exigencies of changing conditions."

The judgment recites at another point—

"Since the Charter IMT and C. C. Law 10 are the product of legislative action by an international authority, it follows of necessity that there is no national constitution of any one state which could be invoked to invalidate the substantive provisions of such international legislation."

At still another place the judgment recites—

"In its aspect as a statute defining crime and providing punishment the limited purpose of C. C. Law 10 is clearly set forth. It is an exercise of supreme legislative power in and for Germany. It does not purport to establish by legislative act any new crimes of international applicability."

Still at another place in the judgment it is declared that—

"Only by giving consideration to the extraordinary and temporary situation in Germany can the procedure here be harmonized with established principles of national sovereignty. In Germany an international body (the Control Council) has assumed and exercised the power to establish judicial machinery for the punishment of those who have violated the rules of the common international law, a power which no international authority without consent could assume or exercise within a state having a national government presently in the exercise of its sovereign powers."

Thus, in the first quotation, the judgment states that there has never been an international legislature and that, therefore, international law is not the product of statute; whereas, in the second quotation, it is contended that Control Council Law No. 10 is "the product of legislative action by an international authority." The third recitation is that Control Council Law No. 10 "is an exercise of supreme legislative power in and for Germany."

The fourth quotation doubts the legality of our procedure unless the international body in Germany (the Allied Control Council) has assumed and exercised the power to establish judicial machinery for punishment of crimes in violation of international law. The source of the authority to set up courts and machinery for punishment of German war criminals does not depend in any manner upon the exercise of any sovereign power of Germany. This matter will be later discussed.

With these conflicting conclusions as to the source of authority of Control Council Law No. 10, I must respectfully disagree. But the judgment saves itself from them by finally waiving them aside and holding as follows:

"For our purposes, however, it is unnecessary to determine the present situs of 'residual sovereignty'. It is sufficient to hold

that, by virtue of the situation at the time of unconditional surrender, the Allied Powers were provisionally in the exercise of supreme authority, valid and effective until such time as, by treaty or otherwise, Germany shall be permitted to exercise the full powers of sovereignty. We hold that the legal right of the Four Powers to enact C. C. Law 10 is established and that the jurisdiction of this Tribunal to try persons charged as major war criminals of the European Axis must be conceded."

The judgment makes the further and additional declaration that—

"The fact that the Four Powers are exercising supreme legislative authority in governing Germany and for the punishment of German criminals does not mean that the jurisdiction of this Tribunal rests in the slightest degree upon any German law, prerogative, or sovereignty. We sit as a Tribunal drawing its sole power and jurisdiction from the will and command of the victor states. The power and right exerted is that of victors, not of the vanquished."

With these declarations there is no disagreement. They waive and completely nullify the foregoing conflicting declarations of the judgment with regard to the "source of authority of Control Council Law No. 10" and that its enactment was the exercise of German sovereignty by the four Allied Powers.

It is my view that the jurisdiction of this Tribunal is limited to the area or field of international law which relates to the punishment of war criminals in the fullest sense of that term. The source of its Charter and jurisdiction to try and punish European Axis war criminals is as follows:

Charter and Jurisdiction of this Tribunal

The charter and jurisdiction of this Military Tribunal are found within the framework of four instruments or documents: (1) Allied Control Council Law No. 10; (2) Military Government Ordinance No. 7; (3) the Charter of the International Military Tribunal; and (4) the judgment of the International Military Tribunal. These instruments and documents confer power or jurisdiction upon this Tribunal to try and punish certain European Axis war criminals. The source of Control Council Law No. 10 and Ordinance 7 and the authority to enact or issue them are found in certain unilateral agreements, instruments, and documents of the Allied Powers to which brief reference will be here made.

By the Moscow Declaration of 30 October 1943 on German war atrocities and crimes, the three Allied Powers (the United Kingdom, the United States, and the Soviet Union) declared that at

the time of granting any armistice to Germany, "those German officers and men and the members of the Nazi Party who have been responsible for or have taken a consenting part in" committing such atrocities or crimes will be adjudged and punished for their abominable deeds. By the Yalta Conference of 11 February 1945 the same three Powers declared that only "the unconditional surrender" of the Axis powers will be accepted. The plan for enforcing the unconditional surrender terms was agreed upon and provides that the Allied Powers will each occupy a separate zone of Germany with coordinated administration and control through a Central Control Council composed of the supreme commanders at Berlin. France was to be invited to take over a zone of occupation and to participate as a fourth member of the Control Council for Germany. Among other things, the Allied Powers declared that they intended to "bring all war criminals to just and swift punishment." They further declared that they intended "to destroy German militarism and nazism and to insure that Germany will never again be able to disturb the peace of the world." With these provisional matters we are not concerned here.

The German armed forces unconditionally surrendered on 8 May 1945. France accepted the invitation to become a fourth member of the Allied Control Council and later took over a zone of occupation.

By the Potsdam Agreement of 5 June 1945 and the declaration of the Joint Chiefs of Staff of 2 August 1945 at Berlin, the then Four Allied Powers expressly declared and provided that the punishment of European Axis war criminals "was made a primary task of the military occupation of Germany." They further declared that certain far reaching provisional measures would be undertaken in Germany to rid her people of nazism and of militarism and to insure the peace and safety of the world, and so that the German people thus extirpated will in the future take their place in the comity of nations. With these latter provisions we are not here concerned. The Allied Control Council for Germany is composed of the Joint Chiefs of Staff of the Four Allied Powers.

By the London Agreement of 8 August 1945, the Four Allied Powers referred to the Moscow Declaration and authorized, after consultation with the Allied Control Council for Germany, the establishment of an International Military Tribunal to try certain of the European Axis war criminals. The Charter of the Tribunal was attached to and made a part of the London Agreement. This Charter described the power and jurisdiction of the Tribunal and defined or recognized the crimes for which the European Axis war criminals were to be tried.

The foregoing avowed policy of the Allied Powers for the punishment of European war criminals or enemy persons was thereafter approved and sanctioned by 19 of the United Nations in accordance with the provisions of article V of the London Agreement.

The International Military Tribunal was duly created and held its first session on 18 October 1945. The actual trial began on 20 November 1945 of 22 alleged major war criminals; and by the judgment of 1 October 1946 some of them were given death sentences; some of them were given life imprisonment; some were given lesser prison terms; and others of them were acquitted.

After the foregoing trial began, the Allied Control Council for Occupied Germany met and on 20 December 1945 enacted Control Council Law No. 10, which defined the jurisdiction of this and similar military tribunals and recognized as crimes to be tried by them—

1. Crimes against peace;
2. War crimes;
3. Crimes against humanity; and
4. Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

Control Council Law No. 10 recognizes as a crime, membership in any organization declared to be criminal by the International Military Tribunal.

Article 9 of the London Charter provides that the IMT may declare any group or organization of which an individual was a member to be a criminal organization. Article 10 provides that the IMT may also declare membership in an organization found by it to be criminal to be a crime. This the IMT did and further declared that its Charter makes the declaration of criminality against an accused organization final. The IMT then fixed the character of membership which would be regarded as criminal, and expressly limited its declaration of group criminality to persons who became or remained members of the organization with knowledge that it was being used for criminal acts or who were personally implicated as members of the organization in the commission of such crimes. These findings and conclusions of the IMT are binding upon this Tribunal.

The Control Council declared that this law or procedure was intended to reach the German war criminals to be tried by the occupying powers of Germany in their respective zones of occupation. The preamble stated that the law was enacted by the authority of and to give effect to the Moscow Declaration, the London

Agreement, and the Charter of the International Military Tribunal. Thus, the avowed purpose of the Allied Powers to punish German war criminals was given quadripartite agreement and application under Control Council Law No. 10.

Military Government Ordinance No. 7 was issued on 26 October 1946 "pursuant to the powers of the Military Governor of the United States Zone of Occupation within Germany, and further pursuant to the power conferred upon the Zone Commander by Control Council Law No. 10, and articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945," authorizing the establishment of certain "tribunals to be known as Military Tribunals". Accordingly, Military Tribunal III was established on 13 February 1947, by virtue of the provisions of said Military Government Ordinance No. 7, "with powers to try and punish persons charged with offenses recognized as crimes in article II of Control Council Law No. 10, including conspiracies to commit such crimes." And article X of Ordinance No. 7 provides that—

> "The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof of any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 shall constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."

As so created and established this and other similar military tribunals are international in character and jurisdiction. They are authorized and empowered to try and punish the "major war criminals of the European Axis"; to try and punish "those German officers and men and members of the Nazi Party who have been responsible for, and have taken a consenting part in," and have aided, abetted, ordered, or have been connected with plans or enterprises involving the commission of any offense recognized in Control Council Law No. 10 as a crime.

The jurisdiction and power of this and similar tribunals to try and punish war criminals find full support in established international law relating to warfare. This law is that during hostilities and before their formal termination belligerents have concurrent jurisdiction over war crimes committed by the captured enemy persons in their territory or against their nationals in time of war. Accordingly, it has been generally recognized that belliger-

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ents during the war may legitimately try and punish enemy persons charged with infractions of the rules of war, if the accused is a prisoner of war and if the act charged has been made a penal offense by the generally accepted laws and customs of war. In such cases the accused usually is tried before the court, commission, or tribunal set up by and adjudged in accordance with the laws and procedure of the victor. After armistice or peace agreement the matter of punishment of war crimes is determined by the terms thereof.

The foregoing law was applied by the judgment of the International Military Tribunal, which after referring to the Charter creating it, declared that—

> "The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the 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.
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> "The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law." *

Even prior to the foregoing IMT judgment, Lord Chief Justice Wright had so construed the London Charter in an article appearing in volume 62 of the Law Quarterly Review, January 1946, page 41. He limits the discussion to the punishment of war criminals. He there states that—

> "All I am here concerned with is a limited area of international law, that relating to the trial and punishment of war criminals in the full sense of that term, as adopted in the Agreement of 8 August 1945, made in London between the Governments of the United Kingdom, of the United States, of the French Republic, and of the Union of Soviet Socialist Republics, which established a Tribunal for the trial and punishment of the major war criminals of the European Axis countries. The Agreement includes as falling within the jurisdiction of the Tribunal persons who committed the following crimes: (a) crimes against peace, which means in effect planning, preparation, initiation, or waging of a war of aggression; (b) war crimes, by which term is meant mainly violation of the laws

*Ibid., p. 218.

and customs of war; (c) crimes against humanity, in particular murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population.

"The Tribunal so established is described in the Agreement as an International Military Tribunal. Such an International Tribunal is intended to act under international law. It is clearly to be a judicial tribunal constituted to apply and enforce the appropriate rules of international law. I understand the Agreement to import that the three classes of persons which it specifies are war criminals, that the acts mentioned in classes (a), (b), and (c) are crimes for which there is properly individual responsibility; that they are not crimes because of the agreement of the four governments, but that the governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law. On any other assumption the court would not be a court of law but a manifestation of power. The principles which are declared in the Agreement are not laid down as an arbitrary direction to the court but are intended to define and do, in my opinion, accurately define what is the existing international law on these matters."

Similar holdings may be made with respect to Control Council Law No. 10 which recognizes the same basic crimes to be tried by this Tribunal as were recognized by the London Charter. Each such law is an expression of the treaties, rules, and customs of international law on crimes against peace, war crimes, and crimes against humanity; each is in effect and purpose a listing of crimes in violation of preexisting international law and each "to that extent is itself a contribution to international law." (IMT judgment, *supra.*) But IMT did not rest its declaration of authority and its procedure upon the Charter which created it, but on the contrary, discussed at length the matters before it from the standpoint of preexisting international law. No defendant was convicted by the International Military Tribunal except for crimes in violation of preexisting international law which they held to exist even as to crimes against peace. It supported its judgment that each crime was based upon preexisting international law or custom of war, discussing at length the matter of violation of international treaties and agreements, particularly the Hague Conventions of 1899 and 1907, the Peace Conference of 1919, the violation of the Versailles Treaty, the various treaties of mutual guarantee, arbitration, and nonaggression, and the Kellog-Briand Pact.*

Under American law (National Defense Act of 4 June 1920) a military court or commission may be set up to try persons in the

* Ibid., pp. 216–218.

custody of the United States Government or its armed forces for crimes in violation of international law. The right to punish such war criminals is not dependent upon any question of unconditional surrender or of whether hostilities have ceased. As regards these matters, in the recent case of Yamashita, the United States Supreme Court makes several pronouncements applicable here, as follows:

> "The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violation, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by law of war, that sanction is without qualification as to the exercise of this authority so long as a state of war exists, from its declaration until peace is proclaimed. Articles of War, articles 2, 15.
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> "The mere fact that hostilities have ceased does not preclude the trial of offenders against the law of war before a military commission, at least until peace has been officially recognized by treaty or proclamation of the political branch of the government. Articles of War, article 15.
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> "The extent to which power to prosecute violations of the laws of war shall be exercised before peace is declared rests, not with courts, but with the political branch of the government, and may itself be governed by terms of an armistice or a treaty of peace." *

The importance of the Yamashita decision is apparent. The International Military Tribunal was established by the London Agreement, 8 August 1945, with its Charter annexed thereto. On entirely similar principles the Charter of the International Military Tribunal, or other tribunals or commissions, for the trial of major war criminals in the Far East was proclaimed on 19 January 1946. These tribunals or commissions of similar principles were all established in accordance with the Berlin Agreement of 2 August 1945, which defined the meaning of the unconditional surrender of the armed forces of the Axis Powers, and declared that the Allied Powers intended to punish captured war criminals of the European Axis Powers. All such commissions or tribunals are deemed to exercise military powers and therefore are described as "Military Tribunals." This includes the tribunals created under the provisions of Control Council Law No. 10 and Ordinance 7.

* Supreme Court decision re Yamashita; 66 S. Ct. 340.

The judges of these Tribunals set up under Law No. 10 and Ordinance 7 are appointed by the War Department, by the acts of the Secretary of War, by the President of the United States as Commander-in-Chief of the Armed Forces, and by the Commanding General of the American Zone of Occupation in Germany. These judges take an oath to faithfully perform the task thus assigned to them to the best of their ability.

The Supreme Court of the United States had previously applied the rule announced in the Yamashita case in the case of Quirin and six others (*317 U. S. 1*). The court declared that:

> "The 'law of war' includes that part of the law of nations which prescribes for the conduct of war the status, rights, and duties of enemy nations as well as of enemy individuals.
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> "Under the 'law of war' lawful combatants are subject to capture and detention as prisoners of war by opposing military forces and unlawful combatants are likewise subject to capture and detention but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."

This authority is expressly conferred by article 15 of the Articles of War enacted by Congress on 4 June 1920.

It may be here again observed that international law is an unwritten law. There has never been an international legislative authority. The law of nations is founded upon various international rules and customs, which gradually obtain universal recognition and thus become international law. Likewise the law of war is built upon treaties and upon the usages, customs, and practices of warfare by civilized nations, which gradually obtain universal recognition, and also become established by the general principles of justice as applied by jurists and military courts, tribunals, or commissions. And as held by the IMT:

> "The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law."*

After the unconditional surrender, the Allied Powers have obtained the actual custody of many of the leaders of the German Government, and the German armies, and many of those who were active participants in nameless atrocities against prisoners of

* Trial of the Major War Criminals, op. cit., volume I, page 218.

war, other persons alleged in the indictment, and civilians of invaded countries, and the power to try such Axis war criminals must be conceded. This power to try these crimes could have been exercised as an entirely military one, but such a method would not accord with Anglo-Saxon or United States ideology. It has been planned to conduct orderly trials, and fair trials, in accordance with the American concepts of due process, giving the accused the benefit of indictment, notice, counsel of their own choosing, witnesses in their behalf, proof beyond a reasonable doubt, and judgment by experienced jurists who are under the obligations of a solemn oath to render even and exact justice. Surely this is giving to the accused rights which they denied to their helpless victims.

It may be here observed that each of the defendants in this case has been captured or arrested and is now in the custody and jurisdiction of this Tribunal. Each of them has been charged by the indictment in this case with having committed two or more of the offenses recognized as crimes by the foregoing instruments which define and limit the Charter and jurisdiction of this Tribunal and which authorize this Tribunal to try and punish any individual found guilty of having committed such crimes or offenses. There has been no formal declaration of peace and officially a state of war still exists between the Allied Powers and Germany.

Under the doctrine of the Quirin and Yamashita cases, the Allied Powers, or either of them, have the right to try and punish individual defendants in this case. These cases hold that where individual offenders are charged with offenses against the laws of nations, and particularly the laws of war, they may be tried by military tribunals or courts set up by the offended government or belligerent power. In such cases no question as to the character of military occupation nor as to the character of belligerency is involved, or whether or not hostilities have ceased. These cases recognize the right to try and punish individuals who are in the custody and jurisdiction of such military court or commission so long as peace has not been officially declared by the authorities competent to conclude such matters.

After armistice or peace agreement, the matter of punishing war criminals is a question for the parties making the peace agreement to determine. In consequence, the question of whether hostilities have ceased is not material. And as is so ably said in the Yamashita case (*66 S. Ct. 340*)—

> "The extent to which power to prosecute violations of the laws of war shall be exercised before peace is declared rests, not with courts, but with the political branch of the Government

and may itself be governed by terms of an armistice or a treaty of peace."

Conspiracy

Count one of the indictment charged the defendants with having, pursuant to a common design, conspired and agreed together and with each other and with divers other persons to commit war crimes and crimes against humanity, as defined in article II of Control Council Law No. 10, in that each of the defendants participated either as a principal, or an accessory, or ordered and abetted, or took a consenting part in, or was connected with plans or enterprises involving the commission of the war crimes and crimes against humanity as set forth in the indictment; and that each defendant so participating was therefore responsible for his own acts and for the acts of all other defendants in the commission of the crimes.

This Tribunal has ruled that under no provision of Law No. 10 was conspiracy made a separate substantive and punishable crime. But the defendants may be punished for having committed war crimes or crimes against humanity by acts constituting a conspiracy to commit them.

Under the foregoing allegations of count one, the defendants are charged with having committed war crimes and crimes against humanity by acts constituting a conspiracy to commit them. This Tribunal has not applied or convicted any defendant under the conspiracy charge of the indictment. All defendants convicted, save one, have been convicted under a plan or scheme to commit the alleged war crimes or crimes against humanity. The same facts are alleged and proved as constituting a conspiracy to commit the same war crimes and crimes against humanity. The same facts under which certain defendants were convicted of having committed war crimes and crimes against humanity by carrying out the Night and Fog decree were alleged and, by the same evidence, proved to be a common design or conspiracy to commit such crimes. The same is true of the plan or scheme to persecute and exterminate Poles and Jews upon racial grounds.

There is no material difference between a plan or scheme to commit a particular crime and a common design or conspiracy to commit the same crime. In legal concept there can be no material difference to plan, scheme, or conspire to commit a crime. But of them all, the conspiracy to commit the crimes charged in the indictment is the most realistic because the Nazi crimes are in reality indivisible and each plan, scheme, or conspiracy proved in the instant case was in reality an interlocking part of the whole criminal undertaking or enterprise.

That Control Council Law No. 10 and Ordinance 7 authorize a conviction for committing war crimes and crimes against humanity by conspiracy to commit certain acts, which are defined or recognized as war crimes or crimes against humanity by international law and by Control Council Law No. 10, is clear.

In paragraph I (*a*) of article II of Control Council Law No. 10, as in article 6 (*a*) of the London Charter, it is provided that a conspiracy to initiate or wage an aggressive war is a crime against peace. The defendants are not charged with having committed or conspired to commit a crime against the peace but were so charged in the first international trial.

In discussing the issue of conspiracy the International Military Tribunal limited the scope of its inquiry to consideration of conspiracy to initiate or wage an aggressive war. It did not determine whether a conspiracy could be recognized as a crime under international law relating to war, or whether a conspiracy to commit such a crime had in fact been proved. It merely held that the concept of conspiracy under its Charter was more restricted than that set forth in the indictment which the prosecution sought to prove. That Tribunal did not construe article II of Control Council Law No. 10 to determine whether it authorized the punishment of a separate crime of conspiracy. Neither did it determine whether the offenses of war crimes or crimes against humanity could be committed by the acts which in fact constitute a conspiracy to commit such crimes.

The Charter of the International Tribunal provided in article 6 (*c*) that:

* * * * * * *

"Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

This provision of the International Charter is not found in Control Council Law No. 10. In lieu thereof the following pertinent and significant language was used [Article II]:

"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 or (*e*) was a member of any organization or group connected with the commission of any such crime or (*f*) with

reference to paragraph 1 (*a*), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites, or held high position in the financial, industrial or economic life of any such country."

This language in detail defines the acts which constitute aiding and abetting and is so specific and so comprehensive that it has defined conspiracy without employing the word. The language omits no element of the crime of conspiracy. As a rule there can be no such thing as aiding and abetting without some previous agreement or understanding or common design in the execution of which the aider and abetter promoting that common design has made himself guilty as a principal.

The foregoing provisions of paragraph 2 were intended to serve some useful purpose. War crimes and crimes against humanity had been defined or recognized and illustrated in paragraph 1 of Law No. 10 and did not need further explanation. Obviously, the provisions of paragraph 2 were intended to provide that if the act of one person did not complete the crime charged, but the acts of two or more persons did, then each person "connected with the plans or enterprises involving its commission" is guilty of the crime. This is the gravamen of the law of conspiracy. Conspiracy is universally known as a plan, scheme, or combination of two or more persons to commit a certain unlawful act or crime.

The conspiracies charged in the indictment and defined by Law No. 10 are conspiracies or plans to commit war crimes or crimes against humanity, which are established crimes under international laws or customs of war. In the very nature of such crimes their commission is usually by more than one person. Therefore the purpose of showing the conspiracy to commit such crimes was to establish the participation of each defendant and the degree of his connection with such crimes.

Since the language of paragraph 2 of Law No. 10 expressly provides that any person connected with plans involving the commission of a war crime or crime against humanity is deemed to have committed such crimes, it is equivalent to providing that the crime is committed by acts constituting a conspiracy under the ordinary meaning of the term. Manifestly it was not necessary to place the label "conspiracy" upon acts which themselves define and constitute in fact and in law a conspiracy. Paragraph 2 was so interpreted by the Zone Commander when he issued Military Government Ordinance No. 7, which authorized the creation of this and similar military tribunals, and which provides in article I that—

"The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in article II of Control Council Law No. 10, including conspiracies to commit any such crimes. * * *."

The prosecution also placed the same interpretation upon paragraph 2, because paragraph 2 of count one of the indictment charges that the "defendants herein * * * were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of war crimes and crimes against humanity." Evidently the drawer of the indictment had before him paragraph 2 of Control Council Law No. 10 and made its language the basis of the charging of a conspiracy to commit war crimes or crimes against humanity.

Furthermore, it is apparent that the declared purpose of Ordinance No. 7, as set forth in article I thereof, is part and parcel of the entire ordinance as much as any other article thereof and the other articles of the ordinance, as well as Law No. 10, must be construed and applied in the light of article I. In fact article I is distinctly that portion of Ordinance No. 7 which defines the jurisdiction of the military tribunals authorized by it.

The Tribunal should therefore declare that military tribunals as created by Ordinance No. 7 have jurisdiction over "conspiracy to commit" any and all crimes defined in article II of Law No. 10. After all, from a practical standpoint, it can make little difference to any defendant whether the Tribunal finds that such defendant is a member of a conspiracy to commit crimes on the one hand, this being the language of article I of Ordinance No. 7, or on the other hand whether the Tribunal should find he was (a) a principal or (b) an accessory or that he abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving commission of crimes, these latter descriptions being the language of paragraph 2 of article II of Law No. 10.

In most modern English and American jurisprudence, conspiracy pure and simple is not recognized as a separate crime. The only legal importance of finding that any accused person is a party to a conspiracy is to hold the conspirator responsible as an aider and abetter of criminal acts committed by other parties to the conspiracy. If the party knowingly aided and abetted in the execution of the plan and became connected with plans or enterprises involving the commission of war crimes and crimes against humanity, he thereby became a co-conspirator with those who conceived the plan. It makes no difference whether the plan or

enterprise was that of only one of the conspirators. Upon this point we quote from the judgment of the International Tribunal—

> "The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it." [1]

This holding answers the further contention that one connected with execution of such a plan of Hitler could not be guilty of conspiracy, or punishable for helping carry out the plan or scheme as a co-conspirator. It is undoubtedly true that not all of the defendants had any part in the formulation of the plan, scheme, or conspiracy of the Nazi regime's Ministry of Justice to carry out the NN decree, but they did know of its illegality and inhumane purpose and helped to carry it out. The facts show beyond a reasonable doubt that they did knowingly aid, abet, and become connected with the plan, scheme, or conspiracy in aid of waging the war and committed those war crimes [and crimes] against humanity as charged in the indictment. A more perfect plan or scheme to show a conspiracy to commit crimes could hardly be written than was the agreement entered into by the OKW, Ministry of Justice, and the Gestapo to execute and carry out the Hitler Night and Fog decree. All the defendants who took a part in the execution and carrying out of the NN Decree knew of its illegality and of its cruel and inhumane purposes.

[Signed] MALLORY B. BLAIR
Judge of Military Tribunal III

SENTENCES[2]

THE MARSHAL: The Tribunal is again in session.

PRESIDING JUDGE BRAND: The Tribunal is informed that the defendant Schlegelberger is in a condition of illness rendering it impossible for his attendance and that his counsel desires that sentence be pronounced in his absence; in other words, that he waive the presence of the defendant Schlegelberger at the time of sentence.

Is our understanding correct, Dr. Kubuschok?

DR. KUBUSCHOK: Yes, Your Honor.

[1] Trial of the Major War Criminals, op. cit., volume I, page 226.
[2] Session of the Tribunal on 4 December 1947, Transcript pages 10934–10936.