

M I L I T A R Y T R I B U N A L N O. I V

CASE NO. 5

THE UNITED STATES OF AMERICA

-against-

FRIEDRICH FLICK et al

ANSWER AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION

TO DISMISS NO. IV AND MOTION TO STRIKE NO. I

Motion to Dismiss No. IV heretofore filed by the several defendants urges that (1) this Tribunal is without authority and jurisdiction to try and convict the defendants because Ordinance No. 7 permits the admission in evidence of depositions, affidavits, hearsay and opinion evidence in violation of the 25th and 38th Articles of War, the due process clause of the 5th Amendment of the Constitution, and Control Council Proclamation No. 3; (2) this Tribunal has no jurisdiction over the defendants; (3) this Tribunal has no jurisdiction over the subject matter of the indictment in that the charge and specifications fail to charge a violation of the law of war; (4), (5), (6) and (7) the members of this Tribunal are without authority to sit in judgment of the defendants because this Tribunal is a military commission and the members thereof are required by the laws of the United States to be military officers nominated by the President and approved by a two-third's vote of the Senate of the United States as alleged to be required by Article 2 of the Constitution, and the members of this Tribunal have been acting since 19 April 1947, whereas Executive Order No. 9858, by which they are alleged to have been appointed members of this Tribunal by the President of the United States is dated 31 May 1947; (8) Military Tribunal IV has not been legally established because the Military Governor of the United States Zone of Occupation is without power in law to establish the Tribunal and to designate the members thereof without their having been appointed judges or officers of the United States; and (9) through (28) various provisions of Military Government Ordinance No. 7, as amended by Military Government Ordinance No. 11, as well as the provisions of Regulation No. 1 thereunder, are in contravention of the laws of the United States and are null and void.¹ Motion to Strike No. I requests that all hearsay and exparte evidence submitted against the defendants to be stricken.

1. Under the provisions of Article II (a) of Ordinance No. 7 "Neither the Tribunals nor the members of the Tribunals or the alternates may be challenged by the prosecution or of the defendants or their counsel". Nor does Article V thereof empower this Tribunal to invalidate or disregard any provision of Ordinance No. 7, Control Council Law No. 10, or General Orders or executive orders issued pursuant thereto.

Since the grounds urged in support of these Motions are based upon a complete misconception of the background, legal status and jurisdiction of this Tribunal, it is necessary to consider these matters in some detail.

A. Military Tribunal IV Was Constituted Pursuant To
Lawful Authority

On 30 October 1943, President Roosevelt joined with Prime Minister Churchill and Premier Stalin in publishing a statement at Moscow that those German officers and men and members of the Nazi Party who were responsible for or took a consenting part in atrocities, massacres or executions would be sent back to the countries in which their deeds were done in order that they might be judged and punished according to the laws of the liberated countries and of free governments established therein, except with respect to those German criminals whose offenses had no particular geographical localization and who would be punished by joint decision of the Governments of the Allies. At Yalta, on 7 February 1945, the Allied chiefs again stated their determination to bring all war criminals to justice and swift punishment.

On 2 May 1945 by Executive Order No. 9547, President Truman appointed Mr. Justice Robert H. Jackson as the Representative of the United States and its Chief of Counsel for the preparation and prosecution of the case against major Axis war criminals. Acting in such representative capacity, Mr. Justice Jackson conferred with representatives of the United Kingdom, the Provisional Government of the French Republic, and the Union of Soviet Socialist Republics. These conferences led to the adoption of the London Agreement of 8 August 1945, signed by Mr. Justice Jackson for the United States, M. Francois de Menthon for France, Sir Hartley Shawcross for Britain, and General R. Rudenko for the Soviet Union. Provision was made for other nations to join the Agreement, and ultimately 23 Governments adhered to it.

This Agreement established the International Military Tribunal, the constitution, jurisdiction, and functions of which were set out in the Charter appended to and incorporated as a part of the Agreement. The International Military Tribunal was to consist of four members, each with an alternate, appointed by each of the original signatory powers. The Tribunal was given power to try and punish major war criminals who committed crimes against peace, war crimes, or crimes against humanity as defined in the Charter. Concerning the authority for the Charter, the International Military Tribunal said in its judgment of 30 September -

1 October 1946:

"The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."

The Moscow Conference of 30 October 1943 also set up the European Advisory Commission to draft surrender terms and to deal with other matters pertaining to enemy states. Certain agreements of the Commission were made public in the form of declarations and proclamations issued after the unconditional surrender of Germany signed at Rheims on 7 May 1945 by Jodl, and at Berlin on 8 May 1945 by Friedeberg, Keitel and Stumpf on behalf of the German High Command. These agreed declarations, founded on the previous agreements of the European Advisory Commission, constitute the legal basis for the quadripartite occupation government of Germany.

The Berlin Declaration of 5 June 1945 by the Allied Representatives of the United States, United Kingdom, Union of Soviet Socialist Republics, and the provisional Government of France, regarding the defeat of Germany made clear to the world that Germany had, by her unconditional surrender, forfeited, short of annexation, all authority and powers to the victorious nations. The first paragraph of this declaration states:

"The German armed forces on land, at sea and in the air have been completely defeated and have surrendered unconditionally, and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious powers. The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her."

The declaration further provides:

"The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume authority with respect to Germany, including all the powers possessed by the German Government ..."

The statement of 5 June 1945 of the governments of the United States, United Kingdom, Union of Soviet Socialist Republics, and the Provisional Government of France, on control machinery in Germany conferred supreme authority in Germany on the four commanders in chief, individually in their respective zones of occupation, and collectively in matters affecting Germany as a whole. The first two paragraphs of this statement provide:

"1. In the period when Germany is carrying out the basic requirements of unconditional surrender, supreme authority in Germany will be exercised, on instructions from their Governments, by the British, United States, Soviet and French Commanders in Chief, each in his own zone of occupation and also jointly, in matters affecting Germany as a whole. The four Commanders in Chief will together constitute the Control Council. Each Commander in Chief will be assisted by a Political Advisor.

"2. The Control Council, whose decisions shall be unanimous, will ensure appropriate uniformity of action by the Commanders in Chief in their respective zones of occupation and will reach agreed decisions on the chief questions affecting Germany as a whole."

Control Council Proclamation No. 1 of 30 August 1945 proclaimed the official creation of the Control Council for Germany and redefined its powers. Articles I and II of this Proclamation provide as follows:

"As announced on 5 June 1945, supreme authority with respect to Germany has been assumed by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic.

"In virtue of the supreme authority and powers thus assumed by the four Governments the Control Council has been established and supreme authority in matters affecting Germany as a whole has been conferred upon the Control Council."

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter appended thereto, and in order to establish a uniform basis in Germany for the prosecution of war criminals other than those indicted before the International Military Tribunal, the Control Council for Germany, on 20 December 1945, in the exercise of its supreme authority in Germany, enacted Control Council Law No. 10.

The Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945 were declared integral parts of Control Council Law No. 10 (Art. I), and the acts described as criminal in the Law (Art. II) were almost, although not entirely, identical to those set out in the London Agreement. The Law provided that each occupying power, within its Zone of Occupation, could arrest persons suspected of having committed a crime, report to the Legal Directorate of the Control Council the names of suspected criminals, and bring to trial before an appropriate tribunal, such persons arrested and not delivered to another authority for trial (Art. III). Provision was made for the trial of Germans in German courts for offenses committed against Germans and stateless persons

(Art. III, Sec. 1d). Any property declared forfeited was required to be delivered to the Control Council (Art. II, Sec. 3). The Zone Commanders were to determine for their respective zones the tribunals and rules of procedure in and under which persons charged with offenses under the Law would be tried (Art. III, Sec. 2).

For the purpose of implementing Control Council Law No. 10 in the United States Zone of Occupation, the Military Governor "pursuant to the powers of the Military Governor ... and further pursuant to the powers 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" (Art. II(a)), promulgated Military Government Ordinance No. 7 on 18 October 1946. The Ordinance was amended on 17 February 1947 by Military Government Ordinance No. 11. On 11 April 1947, Regulation No. 1 was issued pursuant to Military Government Ordinance No. 7, as so amended. Military Government Ordinance No. 7 provides for the establishment of Military Tribunals within the United States Zone of Occupation with 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. Article II (d) thereof states that the members of the Tribunal shall "be designated by the Military Governor." Ordinance No. 7 further provides for rules of procedure to be followed in such trials.

On 12 April 1947, by General Order No. 21, pursuant to Military Government Ordinance No. 7, the Military Governor constituted Military Tribunal IV and designated Charles B. Sears as Presiding Judge, Frank N. Richman, William C. Christianson, as Judges, and Richard D. Dixon, as Alternate Judge, with power to hear such cases as might be filed by the Chief of Counsel for War Crimes.

On 31 May 1947, by Executive Order 9858, the President of the United States designated Charles B. Sears, William C. Christianson, and Frank N. Richman as the members and Richard Dillard Dixon as the alternate member, of one of the several military tribunals established by the Military Governor for the United States Zone of Occupation within Germany, pursuant to the quadripartite agreement of the Control Council for Germany, published as Control Council Law No. 10, and pursuant to Articles 10 and 11

of the Charter of the International Military Tribunal. The Order provided that the members and alternate member might, at the direction of the Military Governor of the United States Zone of Occupation, serve on any of the several military tribunals mentioned in the Order.

The authority of the President to commit the United States to this international procedure for the trial of the major enemy war criminals of this war, and to take the necessary executive action to implement the international agreements referred to above, is derived from the following provisions of the Constitution: Article II, Section 1, Clause 1, which vests in the President the executive power of the United States; and Article II, Section 2, Clause 1, which appoints him Commander in Chief of the armed forces of the United States.

As stated in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320, 57 S. Ct. 216, 221 (1936):

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other government power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment - perhaps serious embarrassment - is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results".

In international relations, the President speaks as the sole organ of the United States Government. "The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, through treaty, agreement of arbitra-

tion, or otherwise".¹

On 21 July 1926, the Under Secretary of State Grew wrote to the Norwegian Minister Bryn characterizing executive agreements as distinct from treaties:

"In addition to the authority of the President under the Constitution to negotiate and sign treaties with foreign governments and by and with the advice and consent of the Senate to ratify them, the Executive is empowered without legislative sanction to conclude with foreign governments certain clauses of agreements which are not classified as treaties in the sense in which that term is used in the Constitution. These agreements are concluded by virtue of the authority inherent in the Chief Executive under the Constitution, and are confined to subjects, matter within the purview of his constitutional authority."²

In executing this plenary power, and the power to conduct a war declared by Congress, the President has great discretion in joining with other nations for the governing of the territory of a defeated belligerent.

The powers of such military administration are, and necessarily must be, as broad as required to accomplish the purposes and objectives of the occupation. As the Supreme Court stated in New Orleans v. Steamship Co., 20 Wall. 394 (cited in Wintrop, "Military Law and Precedents," Second Edition, p. 801) the governing authority "may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be executed in such cases save those which are found in the laws and usages of war. In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace."

These plenary powers of the governing authority clearly extend to the abolition of existing courts and the creation of new courts. In Leitensdorfer v. Webb, 20 Nov. 176, the Supreme Court held that a judicial system established by the military commander as a part of the provisional government of New Mexico was perfectly legal.

The authority of the Commander of the United States Army of Occupation in Germany to enter into a quadripartite agreement for the establishment of tribunals to try war criminals, and to that end to set up such tribunals and to try such war criminals therein, may properly be

1. Principality of Monaco v. Mississippi, 292 U.S. 313, 331 (1934); United States v. Curtiss-Wright Export Corporation et al., 299

2. MS Department of State, file 711.00/149; 5 Hackworth, p. 402.

delegated by the President. Winthrop (op. cit., p. 801):

"In such government the President represents the sovereignty of the nation, but as he cannot administer all the details, he delegates, expressly or impliedly, to the commanders of armies under him the requisite authority for the purpose. Thus authorized, these commanders may legally do whatever the President might himself do if personally present, and in their proceedings and orders are presumed to act by the President's direction or sanction." ¹

It is beyond dispute that there was a complete and overwhelming conquest of Germany, unconditional surrender of her armed forces, a total disintegration and disappearance of her government, and an occupation of her entire territory by the armies of the four major powers, the United States, Great Britain, the Soviet Union, and France. By mutual agreement it was decided that, rather than dividing Germany among themselves, a condominium, or government by mutual participation, would be established as the government of Germany. Each of the four powers has been given a particular area within which the military commander of the occupying force has local supreme governmental authority, always subject to the ultimate authority of the quadripartite government in matters affecting Germany as a whole.

1. Military Law and Precedents, 2nd Ed., p. 801.

Upon occupation of Germany, a matter of first concern was the establishment of a judicial system competent to prosecute persons guilty of crimes prior to the occupation and during the occupation. Each Military Commander established military government courts within his respective zone of occupation for the purpose, primarily, of handling the latter type of cases.

By the promulgation of Control Council Law No. 10, however, the four Zone Commanders recognized that, with respect to offenses delineated therein which include crimes against peace, war crimes, and certain other crimes against civilian populations, the prosecution of Germans for offenses committed by them prior to such occupation was a matter affecting Germany as a whole, and therefore within the proper authority of the quadripartite governing body of occupied Germany. The courts established by each Zone Commander to give effect to this quadripartite legislation are, therefore, international courts established under international authority by quadripartite legislation, as part of the quadripartite condominium in occupied Germany.

This Tribunal is not a court martial, nor a military commission as contended by the defendants. It is an international court, established in a country under quadripartite military occupation, functioning within the framework of the occupation scheme of government, and deriving its jurisdictional basis from the legislation of the supreme quadripartite governing body of the occupied country. It is not concerned solely with offenses against the laws of war. Its jurisdiction extends to all types of crimes defined in the controlling quadripartite legislation, including "murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population" (Control Council Law No. 10, Article II, Section 1c). It is like the regularly constituted Military Government Courts, which apply both Military Government and German law, within the territorial jurisdiction of occupied Germany. The United States Zone of Occupation in Germany is not a territory of the United States, and neither the defendants nor this Tribunal are within the territorial jurisdiction of the courts of the United States.

The fact that the members of the Tribunal are citizens of the United

States appointed by the Military Governor and the President of the United States in no way divests this Tribunal of its character as an occupational tribunal deriving its jurisdictional basis from the legislation of the supreme quadripartite governing body. It is in no way a part of the judicial system of the United States. The Military Governor might, for reasons of security or efficiency, appoint United States citizens to serve on strictly German courts, trying Germans for offenses against German law. Such appointment would not convert German courts into United States courts. Moreover, the Military Tribunals can be further "internationalized" at any time by making the membership of the Tribunals and the prosecution staff multipartite. (Article II (c) and Article III (b) of Ordinance No. 7).

Similarly irrelevant is the fact that the case is brought in the name of the United States of America. The United States may bring suits in courts other than those under the jurisdiction of the United States. It may sue in the courts of any country by leave of the government concerned. It clearly could bring an action in the International Courts of Justice, or other international tribunals having jurisdiction of suits between nations.

It is clear, therefore, that this Tribunal was constituted pursuant to lawful authority, contrary to the assertion made by the defendants in Paragraph 8 of their Motion to Dismiss No. IV. But it is asserted in Paragraphs 4 to 7, inclusive, thereof that this Tribunal is a military commission and its members are required to be military officers nominated by the President and approved by a two-thirds vote of the Senate of the United States as alleged to be required by Article II of the Constitution.

That this Tribunal is not a military commission but an occupation tribunal has been amply demonstrated above. The history, jurisdiction and sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war was dealt with in Ex Parte Quirin, 317 U.S. 1 (1942). Military commissions have been frequently used in all the theatres of war to try enemy belligerents for war crimes. For example, the proceedings in Dachau are conducted before military commissions. Whatever may be the lawful scope of the jurisdiction of military commissions, the jurisdiction of this Tribunal extends not only to

violations of the law of war (War Crimes) but to all other crimes recognized by Control Council Law No. 10 from which this Tribunal derives its jurisdiction. This point will be dealt with more fully under Section C hereof.

Section 2 of Article II of the Constitution reads in part as follows:

".....he (the President) shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and counsuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

It is clear that this Tribunal was not "established by law" within the meaning of that Article. This Tribunal is not a part of the judicial system of the United States¹ and was not established by any law of the United States, but rather as a result of international agreement and the legislation of the supreme quadripartite authority in occupied Germany. Thus, the President, as the Chief Executive and Commander in Chief of the Army and Navy, and the Military Government, as his duly authorized agent, could lawfully appoint any person who complied with the provisions of Article II (b) of Ordinance No. 7 as a member of this Tribunal. There is no requirement of approval of such appointments by the Senate. The appointment of the two American members of the International Military Tribunal was not submitted to the Senate for approval. Moreover, even if this Tribunal were a military commission, there is no statutory or constitutional requirement that members of such commissions be approved by the Senate.

Nor is there any requirement that the members of this Tribunal be military officers of the United States. Even if we assume arguendo that this Tribunal is a military commission, which it is not, there is still no law requiring that its members be military officers. Indeed, defendants cite no such law but rather argue that the Congress, in recognizing the jurisdiction of military commissions as they had previously existed in the United States by Article 15 of the Articles of War (10 U.S.C. sections 1471-1593), must have incorporated by reference a limitation (said to be customary) that the members thereof be military officers. To reason from so-called customary practice to a statutory limitation is

¹ Cf. Ex Parte Quirin, 317 U.S. 1, 39, 63 Sup. Ct. 2, 16

certainly a novel legal concept. But the short answer is that there is no inviolable custom, let alone a statutory limitation, restricting members of military commissions to military officers. On 21 January 1946, regulations governing the trial of war criminals in the China Theatre were issued by competent U. S. command providing in Section 8 thereof that the commission might be composed of Army and other service personnel or of both service personnel and civilians.¹ On 24 September 1945, General MacArthur for the United States Armed Forces, Pacific, issued similar regulations which, in Section 2, provided for "international military commissions consisting of representatives of several nations or of each nation concerned, appointed to try cases involving offenses against two or more nations or any other offenses....."¹ These regulations were superseded by the "Regulations Governing the Trial of Accused War Criminals" of 5 December 1945 which contained a similar provision in Paragraph 1 (b). Thus, these regulations governing military commissions permit the appointment of civilians to such commissions. It must be concluded, therefore, that there is no customary practice or statutory provision requiring members of military commissions to be military officers.

Moreover, due process of law requires no more than a hearing before a court or other tribunal having jurisdiction of the cause, appointed by law, and governed by established rules of law. Dem ex dem. Murray v. Hobken Land and Improvement Co., 18 How. 272, 15 L. Ed. 372; Blackmer v. United States, 284 U.S. 421, 52 S. Ct. 252, 76 L. Ed. 375. Due process does not require any particular type of tribunal so long as the proceedings of the tribunal afford the accused an impartial hearing and adequate safeguards for the protection of his individual rights. Crowell v. Benson, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598; Yamataya v. Fisher, 189 U.S. 86, 23, S. Ct. 611, 47 L. Ed. 721.

The contention made by defendants that the Tribunal was not lawfully constituted because the members thereof have been acting as such since 19 April 1947 whereas Executive Order 9858 is dated 31 May 1947 is equally without merit. As has heretofore been pointed out, the constitution of this Tribunal and the appointment of its members became fully effective

¹ Law Reports of Trials of War Criminals, Vol. I, pp. 115-16 - UNWCC (1947)

on 12 April 1947 when General Order No. 21 was issued by the Military Governor pursuant to Ordinance No. 7 and the powers conferred on him as Zone Commander by Control Council Law No. 10. Executive Order No. 9858 of 31 May 1947 "designating" the members of the Tribunal is nothing more than an approval, endorsement, and ratification of the earlier and completely effective appointment by the Military Governor. The Order is only an approval by the superior of an authorized act of the subordinate, which is in no way required by Control Council Law No. 10.

It is concluded, therefore, that Military Tribunal IV was constituted pursuant to lawful authority.

B. This Tribunal Has Jurisdiction Over the Defendants

In Paragraph 2 of Motion to Dismiss No. IV the defendants assert that this Tribunal has no jurisdiction over their persons. No reason to support this contention is cited save the statement "that no extra-territorial jurisdiction is vested in one sovereign to try the citizens of another sovereign....." Defendants say in effect that there is no forum in which alleged German war criminals may be tried unless it be the courts of Germany itself.

In Duncan v. Kahanamoku, 327 U. S. 304, 313, the Supreme Court referred to "the well-established power of the military to exercise jurisdiction over.....enemy belligerents, prisoners of war, or others charged with violating the laws of war", and "the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function".

In In re Yamashita, 66 Sup. Ct. 340 (1946), the Supreme Court said:

"An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. Ex parte Quirin, supra, 28. 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 violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the 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. See United States v. Anderson, 9 Wall. 56, 70; The Protector, 12 Wall. 700, 702; McElrath v. United States, 102 U.S. 426, 438; Kahn v. Anderson, 255 U.S. 1, 9-10. The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced. See Stewart v. Kahn, 11 Wall. 493, 507".

Suffice it to say that Article I of Ordinance No. 7 vests in this Tribunal jurisdiction "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." The defendants herein, having been so charged, are thus under the jurisdiction of this Tribunal.

C. This Tribunal Has Jurisdiction Over The
Offenses For Which Defendants Were
Indicted

The defendants contend in Paragraph 3 of their Motion to Dismiss No. IV that this Tribunal has no jurisdiction over the subject matter of the indictment.

The Charter of the International Military Tribunal recognized in Article 6 certain acts as Crimes Against Peace, War Crimes, and Crimes Against Humanity, such crimes coming within the jurisdiction of the Tribunal for which there should be individual responsibility. Control Council Law No. 10, which implemented the Charter of the International Military Tribunal, specified in Article II thereof almost, although in certain important respects not entirely, identical acts as criminal.¹

The International Military Tribunal, invested with the authority to try the major war criminals of this war, considered and applied what it found to be the international law of crimes as it had developed to this period of history, as limited by the scope of the Charter. The International Military Tribunal was bound by the Charter from which it derived its existence:

"The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal....."

"The Tribunal is of course bound by the Charter in the definition which it gives both of war crimes and crimes against humanity."²

So also is this Tribunal bound by Control Council Law No. 10 and the definition it gives in Article II to the crimes over which this Tribunal has jurisdiction. The Indictment upon which the defendants have been tried described in five counts offences declared indictable under Control Council Law No. 10.

¹ The definition of Crimes against Humanity in Law No. 10 does not require that they have been committed "in execution of or in connection with any crimes within the jurisdiction of the tribunal" as did the Charter. Article II (d) of Law No. 10 also recognizes as a crime "Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal."

² "Trial of the Major War Criminals", Vol. I, p. 218, 253 48-62

The defendants assert that the indictment fails to charge them with a violation of the law of war. Military Tribunal IV is not required to apply the law of the United States in the trial of these defendants, nor even the law of nations as heretofore recognized by the courts of the United States. As an international court and a court of occupied Germany it is required to apply the laws of the quadripartite governing body for occupied Germany. The crimes specified in Control Council Law No. 10 have their basis in international conventions and other sources of customary international law. Military Tribunal IV was created for the purpose of bringing to trial persons indicted for these crimes.

The defendants contend that "unless the charge against the defendants alleges an offense against the laws of war, this Tribunal is entirely without jurisdiction in the premises". This argument is based on the proposition, heretofore refuted, that this Tribunal is a military commission. But in any event the jurisdiction of military commissions heretofore established has customarily been considerably broader than violations of the "laws of war" and in at least one instance broader than the jurisdiction of this Tribunal.

By command of General Eisenhower, a directive regarding Military Commissions in the European Theatre of operations was made by an order of 25 August 1945. Under Paragraph 1 (a) thereof, Military Commissions are appointed for the trial of persons who are charged with the violations of the laws or customs of war, of the law of nations or of the laws of occupied territory or any part thereof. In Paragraph 5 of the regulations for the Pacific Theatre, issued 24 September 1945, the offenses falling under the jurisdiction of military commissions are specified in language substantially identical with that of Section 6 of the Charter of the International Military Tribunal. These regulations formed the basis of the trial of the Japanese General Yamashita. On 5 December 1945 they were superseded by the so-called "SCAP Regulations", Paragraph 2 (b) of which reads as follows:

"(1) Military commissions established hereunder shall have jurisdiction over all offenses including, not limited to, the following:

"(a) The planning, preparation, initiation or waging of a war of aggression or a war in violation of

international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

- "(b) Violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or internees or persons on the seas or elsewhere; improper treatment of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; or devastation not justified by military necessity.
- "(c) Murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime defined herein, whether or not in violation of the domestic laws of the country where perpetrated."¹

This provision governing military commissions is almost word for word identical to Article II (save Section (d) thereof) of Control Council Law No. 10 except that the jurisdiction of such military commissions is not limited to those crimes as is the jurisdiction of this Tribunal.

The contention of the defendants that the jurisdiction of the Tribunal is limited to crimes committed after 7 December 1941 is equally without merit. The jurisdiction of the Tribunal is established by Control Council Law No. 10 and no such limitation is imposed. Indeed, Article II, Section 5 states that ".....the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945....." In U.S. v. Karl Brandt et al (Case No. 1), U.S. v Erhard Milch (Case No. 2), and U.S. v. Oswald Pohl et al (Case No. 4), the Military Tribunals exercised jurisdiction over crimes as early as September 1939. The same is true with respect to the International Military Tribunal.²

Nor does defendants' position receive any support from this practice before military commissions. Section 2 (b) (2) of the SCAP Regulations provides that:

¹ Law Reports of Trials of War Criminals, Vol. I, p. 114, UFWCC, 1947

² The Prosecution position with respect to the period prior to September 1939 is set forth in its opening statement herein, pp. 60-5

"(2) The offense need not have been committed after a particular date to render the responsible party or parties subject to arrest, but in general should have been committed since or in the period immediately proceeding the Mukden incident of September 18th, 1931."¹

Defendants' argument that the jurisdiction of this Tribunal is limited to crimes committed within the field of command of the appointing authority (U. S. Zone of Occupation in Germany), as well as the temporal limitation discussed above, completely overlooks the very purpose of Control Council Law No. 10 and these Tribunals. Law No. 10 was promulgated by the supreme quadripartite authority to give effect to the Moscow Declaration of 30 October 1943 and the London Agreement and Charter whose very purpose was the prosecution of "major criminals whose offenses have no particular geographic location and who will be punished by the joint decision of the Allies". Moreover, it was the object of Law No. 10 to "establish a uniform legal basis in Germany for the prosecution of war criminals". Thus, the very object of the law would be frustrated by a limitation on jurisdiction as urged by defendants. Articles III and IV of Law No. 10 provide for the extradition of suspected war criminals from zone to zone and country to country, which obviously shows that there is no limitation of jurisdiction to crimes committed in a particular zone. These Tribunals were created, in large measure, for the very purpose of trying persons whose alleged offenses were not so limited.

Here again the defendants' argument finds no support in the jurisdiction of military commissions. For example, in the so-called Mauthausen Concentration Camp case conducted before a military commission in Dachau, the offenses were all committed in Austria, and in the Buchenwald and Nordhausen cases, the offenses were committed in the Russian Zone of Germany.

It is submitted, therefore, that this Tribunal has jurisdiction over the crimes alleged in the indictment.

¹ Law Reports of Trials of War Criminals, Vol. I, p. 115, UNWCC

D. Depositions, Affidavits, Hearsay and Opinion
Evidence was Properly Admitted In This
Proceeding

In Paragraphs 1 and 9 to 28, inclusive, of Motion to Dismiss No. IV, the defendants assert that this Tribunal is without authority and jurisdiction to try and convict the defendants because Ordinance No. 7 in permitting the admission in evidence of depositions, affidavits, hearsay and opinion evidence violates the Constitution of the United States, the Articles of War, and Control Proclamation No. 3. The defendants further contend that Article VII of Ordinance No. 7, which establishes certain rules of evidence, as well as numerous other sections of the Ordinance are invalid because it was not issued pursuant to lawful authority. It has already been demonstrated under Section A, supra, that Ordinance No. 7 was issued pursuant to lawful authority. Moreover, Section 2 of Article III of Control Council Law No. 10 specifically authorizes the Zone Commander to determine "The Tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof..." Consequently, we will here deal only with the objections raised on the basis of the Articles of War, the Constitution, and Control Council Proclamation No. 3. The same basic issues are raised by defendants' motion to strike "all hearsay and ex parte evidence" (designated as Motion No. 1) and this section constitutes the Prosecution's answer in opposition to that motion as well as Paragraphs 1 and 9 to 28, inclusive of Motion to Dismiss No. IV.

It should be noted at the outset that this Tribunal is in fact without power to entertain the objections raised by the defendants to the rules of procedure laid down by Ordinance No. 7. In Article V thereof the powers of the Tribunal are defined and there is a complete lack of right to question the authority under which this Tribunal was created or to invalidate or disregard any provision of Ordinance No. 7. Article V (f) only gives the Tribunal power "to adopt rules of procedure not inconsistent with this Ordinance". (Emphasis supplied). The provisions of Article VII which state that "The tribunals shall not be bound by technical rules of evidence ... and shall admit any evidence which they deem to have probative value ... including affidavits, depositions, interrogations, and other statements..." are

binding on this Tribunal and may not be invalidated by its action.

But, even so, the defendants' position is without any foundation whatever. Defendants assert that this Tribunal is a military commission, "an inferior Federal Court of special and limited jurisdiction...subject to the limitations that the American Constitution places upon all Federal Tribunals". It has already been pointed out that this Tribunal is not a United States military commission nor a part of the judicial system of the United States, but rather an international and occupational tribunal established under international authority by quadripartite legislation, as part of the quadripartite condominium in occupied Germany. The rules of evidence in United States courts are in no way binding on this Tribunal nor do the 5th and 6th Amendments have any applicability to these proceedings.

In In re Yamashita, 66 Sup. Ct. 340 (1946), which curiously enough is cited by the defendant, the Supreme Court of the United States had before it the very issues here presented. There the Japanese General Yamashita had been tried and convicted by a United States military commission, which the Court found to have been lawfully established, on a charge of having violated the laws of war. In his application for leave to file writs of habeas corpus and prohibition in the Supreme Court, petitioner contended, as the defendants here do, that the Commission was without authority and jurisdiction to try and convict petitioner because the Order governing the procedure of the Commission permitted the admission in evidence of depositions, affidavits, and hearsay and opinion evidence, and because the Commission's rulings admitting such evidence were in violation of the 25th and 38th Articles of War (10 U. S. C. Sections 1496, 1509), and deprived petitioner of a fair trial in violation of the due process clause of the 5th Amendment. The Regulations prescribed by General MacArthur governing the procedure of the trial of Yamashita by the Commission directed that the Commission should admit such evidence "as in its opinion would be of assistance in proving or disproving the charge, or such as in the Commission's opinion would have probative value in the mind of a reasonable man", and that in particular it might admit affidavits, depositions, or other statements. It appeared from the petition that during

the course of the trial the Commission received, over an objection of defense counsel, a deposition as well as certain hearsay and opinion evidence. The 25th and 38th Articles of War prohibit the reception in evidence by courts-martial of depositions on behalf of the Prosecution in a capital case, and the reception of hearsay and opinion evidence. The Court held that, while the 15th Article of War recognized the jurisdiction of military commissions, the Articles of War were not applicable to proceedings against enemy belligerents before such Commissions and were restricted to trials of the classes of persons enumerated in the 2nd Article. The Court said that:

"It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command".

The Court further held, in stating that "the Commission had authority to proceed with the trial, and in so doing did not violate any military, statutory or Constitutional command", (emphasis added) that the Commission was not without authority and jurisdiction to proceed because the rules of procedure permitted the admission in evidence of depositions, affidavits, and hearsay and opinion evidence. While it is true that the Court seems to say that the Commission's rulings on evidence and the mode of conducting the proceedings were not reviewable by the Court and, hence, it was "unnecessary to consider what, in other situations, the 5th Amendment might require...", nonetheless it is clear that the holding in effect was that the Constitution did not apply in any way to the proceeding itself, except insofar as the Constitution might affect the power of the authority establishing the commission. That power, of course, had to find its basis either in a statute or in the Constitution (our Section A, supra) and thus, as the Tribunal said, the right of the accused "to contend that the Constitution or laws of the United States withheld authority to proceed with the trial" was not foreclosed. It is quite another thing to say that the Constitution applies to the proceeding itself, and the Yanashita case in fact holds that it does not. This view of the holding formed in large part the basis of the dissents filed by Mr. Justices

Rutledge and Murphy. Thus, Mr. Justice Rutledge said: "I think the effect of what it does is in substance to deny him (Yamashita) all such (Constitutional) safeguards". (Parenthesis added).

Thus, the Prosecution submits that since the Constitution has no applicability to proceedings before a lawfully constituted United States military commission,¹ a fortiori it has no applicability to proceedings before this Tribunal, which was constituted pursuant to lawful international authority. This Tribunal is not a United States military commission nor a part of the judicial system of the United States. The provisions of the 5th and 6th Amendments to the Constitution can no more be applied to the proceedings before this Tribunal than to those before the International Military Tribunal which, by Article 19 of the Charter, was governed by the same general rules of evidence. It could hardly be contended that the various anomalies of the American, British, French and Russian rules of evidence and procedure in any way restricted or invalidated the proceedings before the International Military Tribunal. As Mr. Justice Jackson said:

"As an International Tribunal, it is not bound by the procedural and substantive refinements of our respective judicial or constitutional systems, nor will its rulings introduce precedents into any country's internal system of civil justice".²

This Tribunal is an international court with its own rules of procedure just as was the International Military Tribunal.

The defendants also urge that the provisions of Ordinance No. 7 permitting the introduction in evidence of depositions, affidavits, and hearsay and opinion evidence violate Control Council proclamation No. 3, Article II (4) of which states that "In any criminal prosecution the accused shall have ... the right to be confronted with witnesses against him...."³

1. Cf. The Jaluit Atoll Case, Law Reports of Trials of War Criminals, Vol. I, pp. 76-80, UNWCC; Ex Parte Quirin, 317, U.S. 1, 63 Sup. Ct. 2 (1941)

2. IMT Record, p. 14333.

3. Title 23, Military Government Legislation, 103.

But whatever may be the proper interpretation of the quoted language, Control Council Proclamation No. 3 has nothing whatever to do with the proceedings before the Military Tribunals in Nurnberg, but is in fact a statement of fundamental principles to be henceforth applied in the German judicial system.¹

The principles enunciated in Control Council Proclamation No. 3 are, indeed, recognized in the American and English system of civil justice. But these principles have never been applied in proceedings before military commissions for the trial of enemy belligerents, either in England or the United States² or, so far as we know, in any country. The practice and procedure before military tribunals have always been separate and distinct from that in civil courts. Thus, Control Council Proclamation No. 3 has no more applicability to these international military proceedings than does the Constitution of the United States.

There is no contention by defendants, nor is it possible to contend under accepted rules of statutory construction, that any limitation is imposed on the admissibility of affidavits, depositions, and interrogatories under Ordinance No. 7 except that they have probative value. Article IV (e) thereof provides that a defendant shall have the right "to cross-examine any witness called by the prosecution", but this is no limitation on the admissibility of affidavits since in such cases there is no "witness called by the prosecution".

1. On 30 October 1945, ten days after Control Council Proclamation No. 3 was issued, the Control Council promulgated Law No. 4 dealing with the reorganization of the German judicial system, the preamble of which reads as follows:

"The Control Council, in accordance with its proclamation to the German people, dated 20 October 1945, deciding that the German people, dated 20 October 1945, deciding that the German judicial system must be reorganized on the basis of the principles of democracy, legality and equality before the law of the citizens, without distinction of race, nationality or religion, enacts as follows:..."(Title 23, Military Government Legislation, 121.4.)

2. Ex parte Quirin, supra; In re Yamashita, supra.

The rule of evidence laid down by Article VII of Ordinance No. 7 that "the tribunals shall not be bound by technical rules of evidence... and shall admit any evidence which they deem to have probative value" is new neither in practice nor in theory. For example, the President's order of 2 July 1942, appointing a military commission for the trial of the alleged saboteurs, which was in issue in the Quirin case, include the provision that "Such evidence shall be admitted as would in the opinion of the President of the Commission, have probative value to a reasonable man".¹

By command of General McNarney, regulations for the trial of war criminals in the Mediterranean Theatre of operations were made on 23 September 1945 by Circular No. 114. These regulations provided inter alia that

"a. If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the president of the commission, unable to attend without undue delay, the commission may receive secondary evidence of statements made by, or attributed to, such witness".

By command of General Eisenhower, a directive regarding military commissions in the European Theatre of operations was made by an order of 25 August 1945. In Paragraph 3 thereof provision is made that technical rules of evidence shall not be applied but any evidence shall be admitted which, in the opinion of the president of the commission, has any probative value to a reasonable man. Similar provisions are contained in the regulations governing the trial of war criminals made by General MacArthur on 24 September 1945 for the United States Armed Forces, Pacific, and by the "Regulations Governing the Trials of Accused War Criminals" of 5 December 1945 which superseded those of 24 September 1945, same being found in Regulation 16 of the earlier, and Regulation 5 (d) of the later regulations.¹ The regulations of 24 September 1945 formed the basis of the trial of the Japanese General Yamashita.

Non-technical rules of evidence have also been followed by British military commissions for the trial of war criminals, based on the Royal Warrant dated 14 June 1945, Army Order 81/45, with amendments. The Royal

1. Law Reports of Trials of War Criminals, Vol. 1, p. 117, UNWCC

2. *ibid*, pp. 117-8

Warrant, by Regulation 8, has relaxed rules of evidence otherwise applied in English courts. Under Regulation 8 (i) a military court "may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement of document appears to the Court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a Field General Court Martial".¹ Pursuant to this provision, military courts have frequently admitted affidavits where the affiant was never subjected to cross-examination.²

Article 19 of the Charter of the International Military Tribunal provides that:

"The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value."

1. *ibid*, p. 85

2. The Pelius Trial, the Scuttled U-Boats Case, the Greierwalde Case, the Byklon B Case, Law Reports of Trials of War Criminals, Vol. I, pp. 14, 59, 85, 96, UNWCC.

Pursuant to that Article, approximately 200,000 affidavits¹ were admitted into evidence. The overwhelming bulk of these affidavits, as in this case, was presented on behalf of the Defense; as some were also offered by the Prosecution. It would have been impossible to have brought a considerable amount of evidence before the International Military Tribunal without the use of affidavits, depositions, and interrogatories. A number of affidavits were relied upon by the Tribunal in reaching its judgment,² although such affiants were not cross-examined. The same thing is true with respect to other cases concluded in Nurnberg,³ and in at least two judgments affidavits⁴ were specifically cited.

The exclusionary rules of evidence find their roots in ancient Anglo-American common law and arose in substantial measure because of the jury system. There can be no doubt that where the evidence is being weighed by judges skilled in the law, no objection whatever exists to the use of liberal rules of evidence. It is in the sound discretion of this Tribunal to determine what weight the evidence is entitled under all the circumstances and it would be the height of folly to obfuscate the search for truth by slavish adherence to technical exclusionary rules. The defendants themselves should be the last to object to the non-technical rules of evidence which govern this proceeding; their defense rests in great measure upon the very type of evidence they now seek to have stricken.

¹ Trial of the Major War Criminals, Vol. I, Judgment, p. 172.

² Ibid., pp. 230, 236.

³ Case No. 1 (Medical), R. 1090-3, 5387; Case No. 2 (Milch), R. 134, 280; Case No. 3 (Justice), R. 970, 977; Case No. 4 (Pohl), R. 131, 575.

⁴ Case No. 1 (Medical), R. 11517, 11465; Case No. 4 (Pohl), R. 8069.

Moreover, it is interesting to note that there is no rule in the German law of evidence which excludes hearsay proof. The German law of evidence in criminal as well as civil cases is controlled by what is called "the principle of free proof" (*Freie Beweiswürdigung*). Hearsay evidence is therefore admissible, and the weight to be given to it is in the Court's discretion. This is proved, e.g., through a "case celebre", the Bullerjahn case, Bullerjahn had been convicted of treason by the German Supreme Court,, exclusively on hearsay evidence where the identity of the third person was not even disclosed (*Juristische Wochenschrift* 1929, p. 2996). A new trial was not ordered until perjury of the witness had been proved. While this is an extreme and much criticized case, the general law in Germany is clearly to the effect that hearsay evidence is admissible and not forbidden by Section 250 Code of Criminal Procedure which required that the witness be heard if proof of a fact is based on the observation by a person. The leading Commentary on the law of evidence and procedure (Loewe Rosenberg, annotation 6 to Section 250) has this to say, quoting many authorities: "Hearsay testimony is not prohibited by Section 250."

To speak in broad terms of "hearsay" and "opinion" evidence being inadmissible, even under the most rigid Anglo-American practice, means nothing. Large volumes have been written on the so-called exceptions to the hearsay and opinion rule and it is quite safe to say that much more hearsay and opinion evidence is admitted under the exceptions than is excluded under the "rule". It is equally meaningless to speak in outraged terms of the loss of the right to cross-examine. Hearsay proof by definition is the use of an extra-judicial declaration to prove that what the declarant said to be the case is the case. If the declarant is subjected to cross-examination in court, his declarations are no longer extra-judicial and the proof is not hearsay. Ex parte affidavits, depositions, and interrogatories are only a few examples of hearsay proof and so far as the Prosecution's case is concerned, their use has been almost negligible compared to that of the Defense. The use of captured German documents is hearsay proof although in most instances

their use is within so-called exceptions. These exceptions are based upon the right to cross-examine -- since by definition no so "right" can be practiced in the use of hearsay proof -- but upon a recognition that under the circumstances surrounding the extra-judicial declaration it can be reasonably expected that the declaration is entitled to weight.¹ Thus, in final analysis, it is a determination of what waight shall be given hearsay proof rather than its admissibility as such. Probative value (the rule of admissibility herein) is determined by such familiar concepts as relevance and materiality. Proof which meets that test is admissible under Ordinance No. 7. The weight of the proof or, to put it differently, the amount of probative value is left to the sound discretion of the judges. It has never been contended that affidavits and similar evidence should be regarded as conclusive proof of the facts stated. Weight is determined by all the circumstances, among them being opportunity and capacity for observation of the facts stated, the nature of the declarations, motive, and the like. It is absurd to contend that such evidence may not be considered by expert triers of fact and law who are eminently qualified to reach a sound judgment as to weight.

Such is the logic and unimpeachable fairness of the non-technical rule of evidence laid down for this proceeding. Indeed, the defendants do not seem to contend that this rule of evidence is unfair. They rather ask blind adherence to a highly technical rule which has no applicability to these proceedings. Not one instance of unfairness with respect to hearsay proof is cited by them. In view of their own much greater reliance on such proof, they are hardly in a position to make an argument

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Nothing could be clearer than that the test under Anglo-American practice is neither the right to cross-examination nor the necessity of a statement under oath. Adoption of the former test would automatically exclude all hearsay. Adoption of the latter would admit inter alia affidavits, depositions, and interrogatories and exclude dying declarations and certain types of writings which have long been admissible as exceptions to the rule.

of unfairness. The very limited use of affidavits by the Prosecution has been carefully qualified in practice to insure every substantial right of the Defense. The Defense has been afforded the right of cross-examination of affiants subject to request and the physical possibility of producing the affiant. In some instances, use has been made of cross-interrogatories and cross-affidavits.

It cannot be denied that every reasonable step has been taken to guarantee a trial of strict impartiality and fairness. As has been said so well before, "They have been given the kind of a trial which¹ they, in the days of their pomp and power, never gave to any man".

Conclusion

WHEREFORE, the Prosecution submits that Military Tribunal IV was constituted pursuant to lawful authority, that it has jurisdiction over the defendants and the offenses for which they were indicted, and that depositions, affidavits, hearsay and opinion evidence were lawfully admitted in this proceeding and it is respectfully requested that Motion to Dismiss No. IV and Motion to Strike No. 1, heretofore filed by the defendants, be denied.

For: TILFORD TAYLOR,
Brigadier General, USA,
Chief of Counsel for War Crimes

By: James M. McHaney
JAMES M. McHANEY,
Deputy Chief Counsel

Nurnberg,
24 November 1947

¹ Closing Statement of Mr. Justice Jackson, LIT Record, p. 14333.