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EUTHANASIA IN THE HADAMAR SANATORIUM AND INTERNATIONAL LAW

Maximilian Koessler

The author (Editorial Department, Bancroft-Whitney Co., San Francisco) is an Austrian Jur. D., member of the Vienna Bar until 1938 and of the New York Bar since 1946. The present article is part of a Ph.D. dissertation (Columbia University). The views expressed therein are personal to the writer, and not necessarily those of the official organizations to which he belonged in his successive capacities as Attorney of the War Crimes Group of the U.S. Army in Germany (1946-47), of the Office of the Chief of Counsel for War Crimes in Nurnberg (1947-48) and of the Legal Division of the Military Government for Bavaria (1948-49).—EDITOR.

I. INTRODUCTION

The World War II war crimes trials were first hailed as indication of great progress in the field of international law. Those who criticized them because of their shortcomings, real and alleged, were then a small minority in the victor countries. Meanwhile, the pendulum has swung in the opposite direction. Even writers of undeniable good faith and competence are indulging in one-sided appraisals of those trials, emphasizing their weak spots and ignoring or minimizing their merits.¹ We are not yet at sufficient distance from those historic developments to be able to pass a final judgment as to their value respecting the enforcement of international law.² They are, however, a fascinating topic for study, both as a matter of history and of law. Only a policy of the ostrich could suggest neglect of this fertile field of research.

The present paper is an attempt to analyze one of the most remarkable among the "non-Nuremberg" war crimes trials in Germany.³ It is the only one of which the original transcript has been published verbatim.⁴ Discussion of the Hadamar Trial will establish a liaison with pertinent evidence appearing from the records of related Nuremberg trials.

Before entering upon the subject-matter proper, a few words should be said about the origin of this case which is officially designated as *United States v. Alfons Klein et al.*⁵ Hadamar was occupied by American troops on March 26, 1945. Intelligence was received that the

1. For instance: LORD HANKEY, *POLITICS, TRIALS AND ERRORS*, Oxford, 1950.

2. "It is not given to human beings, happily for them, for otherwise life would be intolerable, to foresee or predict to any large extent the unfolding course of events. In one phase men seem to have been right, in another they seem to have been wrong. Then again, a few years later, when the perspective of time has lengthened, all stands in a different setting." CHURCHILL, *THEIR FINEST HOUR*, Boston, 1949, p. 550.

3. For a coverage of their general aspects, see: KOESSLER, *American War Crimes Trials in Europe*, *GEORGETOWN LAW JOURNAL*, 18-112. 39 (1950).

4. *WAR CRIMES TRIALS, VOL. IV: THE HADAMAR TRIAL*, London, 1949, consisting mainly of a verbatim print of the trial transcript.

5. Digested in: 1, *LAW REPORTS OF TRIALS OF WAR CRIMINALS*, London, 1947, pp. 46-54.

local insane asylum, a "sanatorium" operated by the provincial government, was one of the institutions in which euthanasia had been applied to incurably insane persons during the war,⁶ and that, subsequent to about June 5, 1944, more than 400 foreigners, Poles in part, and Russians, had been exterminated there on the alleged ground of being affected with incurable tuberculosis. After investigation, seven of those involved in the killings of foreigners were brought to account in a trial before an American Military Commission. The text of the accusation follows:⁷

CHARGE: VIOLATION OF INTERNATIONAL LAW

SPECIFICATION: In that Alfons Klein, Adolf Wahlmann, Heinrich Ruoff, Karl Willig, Adolf Merkle, Irmgard Huber, and Philip Blum, acting jointly and in pursuance of a common intent and acting for and on behalf of the then German Reich, did, from on or about 1 July, 1944, to on or about 1 April, 1945, at Hadamar, Germany, willfully, deliberately and wrongfully, aid, abet and participate in the killing of human beings of Polish and Russian nationality, their exact names and number being unknown but aggregating in excess of 400, and who were then and there confined by the then German Reich as an exercise of belligerent control.

Of the seven defendants, one, Adolf Klein, was the administrative chief of the Hadamar Sanatorium, another one, Adolf Wahlmann, its only doctor; Adolf Merkle was the institution's registrar; Heinrich Ruoff was the chief male nurse and Karl Willig the assistant male nurse; Irmgard Huber was the chief female nurse; Philip Blum acted as the undertaker.

II. HITLER'S EUTHANASIA ORDER

In that part of its judgment which is entitled "Slave Labor Policy," the International Military Tribunal in Nuremberg makes this historic statement:⁸

Reference should also be made to the policy which was in existence in Germany by the summer of 1940, under which old-aged, insane, and incurable people, "useless eaters," were transferred to special institutions where they were killed, and their relatives informed that they had died from natural causes. The victims were not confined to German citizens, but included foreign laborers, who were no longer able to work, and were therefore useless to the German war machine. It has been estimated that at least some 275,000 people were killed in this manner in nursing homes, hospitals, and asylums, which were under the jurisdiction of the defendant Frick, in his capacity as Minister of the Interior. How many foreign workers were included in this total it has been quite impossible to determine.

6. Not included in the charge in the war crimes trial, *infra*.

7. *Op. cit. supra* note 4, p. XXIII and *op. cit. supra* note 5, p. 47.

8. 1, TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, Nurnberg, 1947, p. 247. See also: *ibid.*, p. 301.

Much additional evidence on this so-called euthanasia policy is discussed in the judgment in one of the twelve subsequent Nuremberg trials, the so-called Medical Case, officially designated as *United States v. Karl Brandt et al.* Three of the defendants therein, Karl Brandt, Victor Brack and Waldemar Hoven, were found guilty on charges including their connection with the euthanasia policy.⁹ One of them, Brandt, who had been Hitler's personal physician, testified that he, himself, was a sincere believer in the propriety of administering euthanasia to persons hopelessly ill, whose lives were burdensome to themselves, their families, the nation. It should be mentioned that a similar proposition had, even prior to the Nazi regime, been made in Germany by the two learned authors of a pamphlet, consisting of a medical and a legal part, published under the significant title: "*Annihilation of Useless Lives to Be Licensed.*"¹⁰ Such radical ideas were, of course, bound to find a favorable reception in Hitler's eccentric mind.

On September 1, 1939, the day of Germany's invasion of Poland, he gave the green light to their transformation from armchair speculations into grim reality. On that fateful date, he signed a secret order, typed on his personal letterhead, reading in the Nuremberg translation as follows:¹¹

Reichsleiter Bouhler and Dr. Brandt are charged with the responsibility of enlarging the authority of certain physicians, to be designated by name, in such a manner that persons who, according to human judgment, are incurable can, upon a most careful diagnosis of their condition of sickness, be accorded a mercy death.

It appears from this key directive that the euthanasia policy was originally not colored with discrimination on racial or similar grounds, but applicable to any person, irrespective of race or nationality. As a matter of fact, at least in the beginning, Germans were the overwhelming majority of those exterminated under this program.¹² To what extent certain later phases of the action deviated from this initial scheme, is not quite clear from the available material. For instance, when in 1941, in the course of the so-called "action 14 F 13," physically

9. *United States v. Karl Brandt et al.*, official trial transcript (mimeographed), pp. 11393-11395; 11442-11447; 11507, 11508; 11519. See also: 1, TRIALS OF WAR CRIMINALS BEFORE THE NURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NR. 10, Washington, 1949, p. 794 *et seq.* and MITSCHERLICH AND IVY, DOCTORS OF INFAMY: THE STORY OF THE NAZI MEDICAL CRIMES, New York, 1949, *passim*.

10. HOCHÉ AND BINDING, DIE FREIGABE DER VERNICHTUNG LEBENSUNWERTEN LEBENS, Leipzig, 1920; critically discussed by: KOESSLER, SELBSTMORD UND TOETUNG AUF VERLANGEN (Suicide and Mercy Killing), Vienna, 1925, pp. 27-29.

11. Quoted from: *United States v. Karl Brandt et al.*, official trial transcript, p. 11393. Bouhler, mentioned in this order along with Dr. Brandt, was a high ranking Nazi party official and also the incumbent of an important position in the Ministry of the Interior that had the administrative control of medical matters.

12. This is generally admitted.

and mentally deficient prisoners of the Buchenwald concentration camp, then in charge of Ilse Koch's husband, were sent to a euthanasia station for extermination, this did not affect Jewish inmates alone, even though Jews represented a considerable number of the victims.¹³ There are, however, certain indications that euthanasia was made to serve, incidentally, the policy of exterminating "inferior" races. For instance, on May 1, 1942, Greiser, Gauleiter (Party Chief) of a certain part of occupied Poland,¹⁴ wrote a letter to Himmler wherein he asked for permission to apply euthanasia to members of "the Polish race" in his Gau, suffering from incurable tuberculosis.¹⁵

Bouhler and Brandt, charged by Hitler with the implementation of his secret order, organized an elaborate administrative procedure for the selection of those to be exterminated. Appropriate questionnaires were distributed among those in charge of the various old age and mental institutions, to be filled out in detail with regard to each inmate, and to be returned to the Ministry of the Interior. Here, this material was studied by special experts who endorsed their opinions as to the incurable or curable character of the respective patients. Their opinions were reviewed by a bureaucratic body on a higher level, authorized to make the final determination. Those condemned as the result of this procedure, were first brought to collection points and from there to the various euthanasia stations, to be gassed to death. Throughout the whole proceeding, shrewd methods were applied in a sincere attempt to keep the victims unaware of the fate prepared for them; when they were finally led to their death, the gas chambers were represented to them—and camouflaged—as shower rooms. According to the obviously self-serving, but apparently unrefuted testimony of the wire pullers, the victims were given a death as painless as possible. A few moments after the poisonous gas had been let into the chamber, they became drowsy and finally lapsed into a deep sleep, without ever being conscious of dying.¹⁶

Obviously in anticipation of unfavorable public reaction, stirred up by the victims' relatives, the whole proceeding was clouded in a dense veil of secrecy. Those engaged in it, were required to sign a pledge under oath not to divulge any information or clue. They were per-

13. United States v. Karl Brandt *et al.*, official trial transcript, p. 11519 in connection with pp. 11507, 11508.

14. Subsequently tried for a series of atrocities by the Supreme Court of Poland (June-July, 1946); convicted, sentenced to death, executed. 13, LAW REPORTS OF TRIALS OF WAR CRIMINALS, London, 1949, pp. 70 *et seq.*

15. United States v. Karl Brandt *et al.*, official trial transcript, p. 11442. Greiser's suggestion was not accepted, at that time. *Ibid.*, p. 11447.

16. *Ibid.*, pp. 11393-11395, 11507, 11508.

emptorily warned that any violation of this oath would result in most serious consequences.¹⁷ The relatives of those selected for extermination were not given any opportunity to be heard before the final decision. Nor were they truthfully informed of the accomplished fact. They received short official notifications in terms of which their relatives had died from natural causes.¹⁸

It was nevertheless not possible to prevent the truth from gradually leaking through, especially in view of the great number of exterminations, carried out at about the same time, and the suspicious manner in which numerous people were suddenly notified of the alleged natural decease of their relatives. Vigorous protests were issued by high-ranking ecclesiastical personalities, including Cardinal Faulhaber, complaining about the flagrant violation of fundamental principles of religion and humanity.¹⁹ Various public prosecutors' offices received information of relatives of victims, requesting an investigation of the circumstances surrounding the mysterious passing away of their beloved ones.²⁰ Perhaps as the only instance of this kind throughout his dictatorship, Hitler finally yielded to the pressure of public opinion, though only to a certain extent, as the subsequent revival of the euthanasia policy shows. Upon his order, the policy was discontinued about August 1941. In some of the euthanasia stations, including Hadamar, the special gas chamber installations were dismantled.²¹ To the time of this reversal of the policy, about 10,000 persons had been gassed to death in Hadamar, which was only one of numerous euthanasia stations.²²

This was not the end, however. After a relatively short period of inaction, the euthanasia policy was resumed, though on a smaller scale and with the use of a new technique of killing—poisoning by the alternative use of injections or medications. In Hadamar this phase extended from about August 1942 to June 1944, and involved the extermination of 3,000-3,500 mentally sick persons, most probably of German nationality.²³

It thus appears that even prior to those occurrences which were the subject-matter of the charges in the Hadamar Trial, this "sanatorium" had, in Mr. Justice Jackson's words, "drifted from a hospital to a

17. *Ibid.*, pp. 11393-11395.

18. *See*; quotation from the judgment of the IMT, *supra*.

19. ROTHFELS, GERMAN OPPOSITION TO HITLER. Hinsdale, 1948, p. 32; MITSCHERLICH AND IVY, DOCTORS OF INFAMY, New York, 1949, pp. 106 *et seq.*

20. *Op. cit. supra* note 4, pp. 133, 134.

21. MITSCHERLICH AND IVY, DOCTORS OF INFAMY, New York, 1949, pp. 113, 114.

22. *Op. cit. supra* note 4, p. 87.

23. *Ibid.*, pp. 70, 75, 88.

human slaughter-house."²⁴ The personnel engaged in the poisoning to death of incurably insane Germans, could easily adjust themselves to their new assignment—the poisoning to death of foreigners, alleged to be affected with incurable tuberculosis.

III. EUTHANASIA APPLIED TO "EASTERN WORKERS"

It was proven in the trial beyond any doubt, that between about June 1944 and March 1945, upon arrangement by the German Labor Office, several transports of sick foreigners, Poles and Russians, men, women and a few children, altogether about 476, were channelled to the Hadamar sanatorium, where one or two days after the arrival of such a transport, all the patients belonging to it were killed either by hypodermic injections of morphine or scopolamine, or of derivatives thereof, or by pills containing sufficient doses of veronal or chloral. Euthanasia should convey the idea of a beautiful death. It is hard to believe that those who, with the cool routine of experts, administered to the patients the above described treatment, should not have seen the inconsistency of their practice with sincere euthanasia. Some of the eye witnesses gave descriptions of details not less gruesome than dramatic.²⁵ It could not be refuted, however, that the victims were unaware of their destiny. The injections or medications seem to have been applied under the alternative pretexts of being a cure applied to heal the patient or an inoculation necessary for protection against communicable diseases.

All those foreigners, condemned to euthanasia, were supposed to have been medically examined and diagnosed as suffering from incurable tuberculosis, before they were sent to Hadamar. The prosecution attempted to prove that this diagnosis may not have been correct at least in certain cases.²⁶ It seems that similar doubts were occasionally entertained and even expressed by the institution's physician, the defendant, Dr. Wahlmann.²⁷

The bodies of the victims were buried in mass graves in the institution's own cemetery, the defendant Blum being in charge of this part of the routine.²⁸

Efforts were made to camouflage the homicides as natural deaths. Upon their arrival at the institution, the patients were registered. At

24. *Ibid.*, p. XIV (Foreword by Mr. Justice Jackson).

25. *Ibid.*, pp. 17 *et seq.*; 45 *et seq.*; 41 *et seq.*; 174 *et seq.*

26. *Ibid.*, p. XXV and pp. 59-61.

27. *Ibid.*, pp. 172, 173; 185.

28. *Ibid.*, pp. 145 *et seq.*

this point, their personal data, name, sex, age, nationality, were truthfully recorded. However, certificates concerning causes of death contained fictitious entries. Usually, pneumonia was indicated. Also, the certified dates of decease were not correct, obviously to cover up the fact that so many patients died on the same day and almost immediately upon their arrival at the institution. This part of the team work was the particular responsibility of the defendant Merkle.²⁹

The more than 400 foreigners, Poles and Russians, to whom euthanasia was administered in Hadamar in the period covered by the charge-sheet, had obviously been employed at labor in Germany, before becoming unfit to work because of sickness. This appears sufficiently from the fact that they were sent to Hadamar by the Labor Office. The theory of the prosecution concerning their status went further than this. It was claimed that they had been members of civilian populations of territories belligerently occupied by the German Reich and that they had been conscripted for work in Germany by the forces of occupation.³⁰ No evidence to prove this allegation was introduced in the trial. It has been suggested subsequent to the trial that the Commission "was clearly entitled as a matter of judicial knowledge to find this fact to be true."³¹ While the technical correctness of the proposition would seem to be questionable, it is highly probable that those Poles and Russians really belonged to that category of foreign labor in Germany which is referred to as "slave labor" in the judgment of the International Military Tribunal in Nuremberg.³²

There is abundant evidence to the effect that ruthless exploitation was the keynote of the treatment of foreign workers employed in Germany,³³ and particularly of Poles and Russians, officially discriminated against as "Eastern workers."³⁴ The last mentioned group got the worst in every respect: food, housing, medical treatment, punishment. Those responsible for their miserable conditions of life were not influenced by any sentimental feelings. It is, therefore, hardly believable

29. *Ibid.*, pp. 25 *et seq.*

30. Intimated by the following passage in the charge sheet, quoted in I, *supra.*: "who were then and there confined by the then German Reich as an exercise of belligerent control."

31. *Op. cit. supra* note 4, p. XXIII (Kintner, editor). Cf.: KOESSLER, *op. cit. supra* note 3, pp. 79, 80.

32. 1. TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, Nurnberg, 1947, pp. 243 *et seq.*

33. THE EXPLOITATION OF FOREIGN LABOR BY GERMANY (International Labor Office publication), Montreal, 1945; 7, LAW REPORTS OF TRIALS OF WAR CRIMINALS, London, 1948, pp. 45-47; 10, *ibid.* 1949, pp. 141-145; 15, *ibid.* 1949, pp. 117-121.

34. 10, LAW REPORTS OF TRIALS OF WAR CRIMINALS, London, 1949, pp. 96-98 to be compared with pp. 99, 100.

that pity should have been the dominant motive for the application of euthanasia in these cases. Nevertheless, one of the defendants pretended that the action had been dictated by sympathy with the helpless physical condition of the patients and the desire to preserve their camp fellows from the danger of contagion.³⁵ It is more plausible that the desire to abate the nuisance of an unproductive burden, rather than any humanitarian idea, was instrumental in the application of euthanasia to Eastern workers who had become physically unfit for work. After all, this was the leading idea of Hitler's euthanasia policy even in its application to Germans.³⁶

IV. PARTICIPATION OF THE SEVERAL DEFENDANTS

Conspiracy, technically, is a peculiar Anglo-American legal conception, and its applicability in a trial under international law seems to be highly doubtful.³⁷ It was not this conception, however, but the more general one of a common design which was applied in certain non-Nuremberg war crimes trials, including the Hadamar case. The basic idea was that whoever joins in a scheme to commit an unlawful act, is responsible for the natural or probable consequences of that criminal design, even though he remains at a distance from the final phase of its execution. While in conspiracy, the agreement for an unlawful purpose is the core of the offense, the common design charge looks to the substantive offense in which a person may criminally participate by becoming a party to a scheme tending toward its perpetration. In a common design charge, the agreement is considered circumstantial evidence of participation in the crime, but not the crime itself. Such a doctrine appears to remain within the ambit of principles of criminal guilt, generally recognized by all civilized systems of law.³⁸ It is in this light that we must look at the charge in the Hadamar trial, that the defendants "acting jointly and in pursuance of a common intent did wilfully, deliberately and wrongfully, aid, abet and participate in the killing of human beings"³⁹

In its opening argument, the prosecution declared the Hadamar

35. *Op. cit. supra* note 4, pp. 199, 200.

36. *Id.*, *supra*.

37. *Cf.*, however, KEENAN AND BROWN, *CRIMES AGAINST INTERNATIONAL LAW*, Washington, 1945, pp. 88 *et seq.*

38. KOESSLER, *op. cit. supra* note 3 p. 82; 15, *LAW REPORTS OF TRIALS OF WAR CRIMINALS*, London, 1949, pp. 90, 94. A similar proposition seems to underly the opinion of the President of the International Military Tribunal in the Far East, quoted by HORWITZ, *THE TOKYO TRIAL (International Conciliation, November, 1950)*, p. 554. See also *ibid.*, pp. 554, 555.

39. *I.*, *supra*.

institution to have been a "murder factory" where "there was operated a production line of death." It was claimed that any person who participated in that operation, "no matter to what extent," was guilty of the crime charged.⁴⁰ The following was quoted from Wharton's Criminal law: "No matter how wide may be the separation of the confederates, if they are all engaged in a common plan for the execution of a felony, and all take part in furtherance of the common design, all are liable as principals."⁴¹ It was argued also "that this crime, as many others, is in a chain of events, that there were several links in the chain that produced the ultimate offense, and that each of the accused formed a link in that chain in his or her respective capacity."⁴²

Of the seven defendants, only two had their hands directly in the killing of the victims, namely the two male nurses, Ruoff and Willig. Both admitted their active participation in the administering of the poisonous injections or medications.⁴³ Ruoff was anxious to emphasize that medications in the form of tablets dispensed to the patients were the method normally applied, while injections were resorted to only under exceptional circumstances.⁴⁴ Their admissions were corroborated by eyewitnesses, called by the prosecution.⁴⁵

The female nurse, defendant Huber, was responsible for the drugs in the dispensary, and in that capacity she issued morphine and scopolamine to be used and actually employed in the euthanasia action. She denied this charge, but there was sufficient evidence to prove its correctness.⁴⁶

Defendant Klein admitted, though only on cross-examination, to have relayed to his subordinates the order to apply euthanasia to the foreigners involved. He claimed to have received this order from the provincial Nazi party chief or "Gauleiter" with the advice that they fell under the same law under which insane Germans had before been similarly exterminated in the institution.⁴⁷ It was obvious from overwhelming evidence that he was the top man in the institution and that nothing of any importance could have happened therein without his direction or at least consent. He attempted, however, to reduce his degree of guilt by claiming that this was a medical affair for which not

40. *Op. cit. supra* note 4, pp. 203, 204.

41. *Ibid.*, pp. 205, 206, referring to WHARTON'S CRIMINAL LAW, Volume 1, p. 256.

42. *Op. cit. supra* note 4, p. 206.

43. *Ibid.*, pp. 75-77, 81, 82, 174 *et seq.*, 181 *et seq.*

44. *Ibid.*, pp. 175, 176.

45. *Ibid.*, pp. 19, 20, 42, 43.

46. *Ibid.*, pp. 27, 28.

47. *Ibid.*, p. 106.

he as the chief of the institution's administration, but the defendant Wahlmann, as its doctor, was mainly responsible.

The latter, in turn, emphasized his position as a subordinate of Klein, but admitted his knowledge of the order to administer euthanasia to the Poles and Russians, and his participation as the top medical man in the carrying out of the scheme, in which the nurses obviously acted according to his instructions.⁴⁸

While the criminal connection of the above-mentioned five defendants with the charge was not difficult, rather a matter of course, the tying in of the defendants Blum and Merkle was less obvious. Blum, Klein's cousin and fully aware of what was going on, buried the bodies in mass graves in the institution's cemetery. According to the prosecution, he was an essential link in the common design and its execution, "one cog in the machinery of death."⁴⁹ Merkle disclaimed any contemporaneous knowledge of the euthanasia killings, and rather brazenly pleaded that he had never entertained any doubt in the natural decease of those patients. He energetically denied having intentionally or consciously made false entries in the respective death certificates. However, his role as the main actor in the last mentioned part of the scheme, was proven by the testimony of his former clerical assistant.⁵⁰ He appears also strongly implicated by statements of co-defendants. In a post-trial appraisal it is said that "he had been a faithful and necessary tool to the murders and their concealment."⁵¹ According to the prosecution's argument, his work was "a part and parcel of this scheme to cover up the killings at this institution" and

"an important part and parcel of it, because . . . one of the features of the illegal enterprise was to make it appear as though these poor people arrived there almost at death's doorstep as far as their physical condition was concerned, and that they lingered and suffered there for a few days, in some instances for a few weeks, and finally met their death from the ravages of the disease."⁵²

It is submitted that the criminal guilt of the defendants Blum and Merkle was close to if not beyond the borderline which separates the participation as a principal from that of an accessory after the fact. The severe sentences meted out to each of them,⁵³ do not seem to square with this proposition.

48. *Ibid.*, pp. 162 *et seq.*

49. *Ibid.*, p. 219.

50. *Ibid.*, pp. 25 *et seq.*

51. *Ibid.*, p. XXXIII (Kintner, editor).

52. *Ibid.*, p. 216.

53. *V, infra.*

V. TRIAL AND JUDGMENT

The case was tried in Wiesbaden, Germany, October 8-15, 1945, before an American Military Commission, consisting of six field grade officers (five Colonels, one Lieutenant Colonel), assigned to this special duty by the Commanding General of the Seventh United States Army. The appointing order provided:⁵⁴

The Commission shall have power, as required, to make such rules for the conduct of its proceedings, consistent with the powers of such commission, as deemed necessary for a full and fair trial of the accused. The Commission shall have regard for, but shall not be bound by, rules of procedure and evidence prescribed for general courts martial. Such evidence shall be admitted as has, in the opinion of the President of the Commission, probative value to a reasonable man. Peremptory challenges shall not be allowed. The concurrence of at least two-thirds of the members present at the time of voting shall be necessary for a conviction or sentence.

There is a striking similarity between these terms—with those set forth in the order dated July 7, 1942 whereby President Franklin D. Roosevelt appointed a Military Commission to try Ernest Peter Burger and seven others, including Hans Haupt and Richard Quirin (so-called Saboteurs case).⁵⁵

The trial transcript of the Hadamar case, published verbatim,⁵⁶ would seem to demonstrate that the special rules of procedure and evidence, applied by the Commission,⁵⁷ did not deprive the defendants of a fair trial in an international sense of this phrase.⁵⁸

The prosecution, in charge of an American lawyer who happened to be a Reserve Colonel in the Judge Advocate's Department, pressed the case against the defendants very energetically, even where doubtful legal points were involved, but remained strictly within the bounds of professional propriety.⁵⁹

In asserting the jurisdiction of the Military Commission in spite

54. 1, LAW REPORTS OF TRIALS OF WAR CRIMINALS, London, 1947, p. 46.

55. FEDERAL REGISTER, July 7, 1942, Nos. 5101, 5103. *Ex parte Quirin* (1942) 317 U. S. 1 does not discuss the terms of reference of the Commission.

56. Note 4, *supra*.

57. For a general discussion, see: KOESSLER, *op. cit. supra* note 3, pp. 54, 55, 69-76, 77, 105. The Regulation on Military Commissions of Headquarters, U. S. Forces, European Theater, is printed *ibid.*, pp. 106-109. On the distinctive features of Military Commissions, see *ibid.*, pp. 41-44. Leading cases: *Ex parte Quirin* (1942) 317 U. S. 1 and *In re Yamashita* (1946) 327 U. S. 1. See also: GREEN, *The Military Commission*, 42 (1948) AM. J. I. L., 832.

58. WRIGHT, *Due Process and International Law*, 40 (1946) AM. J. I. L., 398; SCHWARZENBERGER, *The Problem of an International Criminal Law*, CURRENT LEGAL PROBLEMS, London, 1950, pp. 263 *et seq.* at 269, 270; HORWITZ, *The Tokyo Trial*, INTERNATIONAL CONCILIATION, November, 1950, p. 565.

59. The applicable standard is defined by the Supreme Court of the United States in *Berger v. United States* 295 U. S. 78, 88, quoted with approval in *Viereck v. United States* (1942) 318 U. S. 236.

of the absence of any American victim, reference was made to the principle of universality of war crimes jurisdiction, as announced in a learned paper,⁶⁰ the conclusion of which has become the generally accepted view. In substance according to this theory, the vindication of international law is a concern of any government, and an offender against international law may therefore be tried by any government which has physical control of him, irrespective of any direct national interest involved.

It is perhaps not quite consistent with the highest ideals of criminal justice that part of those involved in the euthanasia practice, charged by the prosecution, did not appear in the dock but as witnesses for the prosecution.⁶¹ However, this shortcoming occurs "in the best families," as it were. It occurs without any unfavorable public reaction in sensational trials in the United States. As a pragmatic necessity it seems to be unavoidable where otherwise the case against the perpetrators of most shocking crimes could not be proved beyond a reasonable doubt. Moreover, such a policy of the prosecution, even if it should be reprehensible, has obviously nothing to do with the fairness of the trial which may nevertheless come up to the highest judicial standard.

The defense was in the hands of two American lawyers, officially assigned by the Army, one of them with the military rank of Lieutenant Colonel in the Reserve, and of four German attorneys at law, chosen by their clients themselves. This defense team made conscientious efforts to adduce whatever evidence in favor of the defendants was within the realm of practical possibility, and the Commission gave them full co-operation. The atmosphere of the trial, as it appears from the transcript, was a judicial one, free from any element of oppression. Each defendant was allowed, by the Commission, to choose between testifying in his own behalf or refusing to testify, and in the first case, to choose between testifying under oath or making an unsworn statement.⁶² It was contrary to the continental practice, but in accordance with the general American one, that the prosecution had the benefit of the closing argument.

The defense challenged the jurisdiction of the Commission. But it seems not to have raised the particular point that the status of the victims as members of civilian populations of countries belligerently

60. COWLES, *Universality of Jurisdiction Over War Crimes*, 33 (1945) CALIF. L. REV. 177. See also: KOESSLER, *op. cit. supra* note 3, pp. 37 *et seq.*

61. *Op. cit. supra* note 4, pp. 34 and 204.

62. On the respective general practice, see: KOESSLER, *op. cit. supra* note 3, pp. 64-66.

occupied by Germany, was taken for granted by the prosecution without effort to prove this proposition by evidence tending to support it.⁶³

Two particular pleas will be discussed hereinafter.⁶⁴

All seven defendants were found guilty. Three (Klein, Ruoff and Willig) were sentenced to death; one (Wahlmann), to imprisonment for life; one (Merkle), was sentenced to imprisonment for 35 years; one (Blum), for 30 years, and one (Huber) for 25 years.

In retrospect it would seem that these sentences were too severe in view of the fact that the defendants had committed the acts, charged as crimes against international law, in their own country and in reliance upon their immunity under the regime prevailing then and there,⁶⁵ and also in consideration of the enormous pressure inherent in the system of government represented by Hitler's Third Reich.⁶⁶ It would seem that no credit was given, by the Commission, to the mitigating effect of these extraordinary circumstances. The tribunal was obviously more influenced by the great number of innocent persons actually killed by the instrumentality of the defendants. Two of the death sentences were meted out to the defendants (Ruoff and Willig) who had been directly engaged in the administering of the euthanasia to the persons involved as victims. The third death sentence was given to the defendant (Klein) who had been the head of the institution while it degenerated from an insane asylum into an operation murder.⁶⁷ Wahlmann, who was seventy years old at the time of the trial, was not sentenced to death, perhaps because of his age, or because of a certain disagreement with the action in which he, nevertheless, participated.⁶⁸ It was also obvious that Klein definitely overshadowed him in responsibility for the action of those defendants who were in subordinate positions. The only female defendant (Huber) was probably, therefore, given a more lenient treatment than any of the other defendants, because there was credible character evidence in her favor,⁶⁹ and because her attitude during the trial was that of apparently sincere repentance. It would seem that the stiff sentences meted out to the defendants Merkle and Blum were not commensurate to their secondary, though most ugly roles in the criminal undertaking.

63. III, *supra*.

64. VI and VII, *infra*.

65. VI, *infra*.

66. VII, *infra*.

67. Shortly before the American occupation of Hadamar, he had asked the Labor Office to stop sending tuberculosis patients to Hadamar "because of lack of space" there. This letter, dated March 6, 1945, is printed in *op. cit. supra* note 4, p. 33.

68. His letter, dated November 28, 1944, in *op. cit. supra* note 4, pp. 172, 173.

69. *Op. cit. supra* note 4, pp. 158 *et seq.*

In accordance with the usual procedure in the non-Nuremberg trials, the judgment was not accompanied by a reasoned opinion, but consisted merely in the finding of guilty and the announcement of the sentences.⁷⁰ However, likewise in accordance with established routine, the whole record was submitted for review to two levels of command: with regard to all the defendants to the Commanding General of the Seventh Army as the appointing officer, and regarding those sentenced to death, it was submitted, also, to the European Theater Commander.⁷¹ As a result of this double review, all the findings were approved and the sentences, including the capital ones, confirmed and executed.

It is to the credit of the American sense of justice that a clemency action in grand style has recently been carried out with regard to certain war crimes inmates of the Landsberg prison.⁷² Whether any of the persons convicted and sentenced in the Hadamar trial is among those benefited by this action, or has prior to it received an executive pardon, is beyond the writer's information.

VI. THE PLEA OF IMMUNITY UNDER HITLER'S LAW

Through the testimonies of all defendants, save one, it runs like a red thread that at the time when euthanasia was applied to the Poles and Russians suffering from incurable tuberculosis, those working in the institution were officially advised and honestly believed that to this new group of patients the same law was applicable under which theretofore insane Germans had received a similar treatment. Klein and Wahlmann had been informed so by the chief of the provincial government administration and by the provincial Nazi party chief when they received from them the order pursuant to which the action was started.⁷³ The other defendants, directly or indirectly, learned it from Klein and Wahlmann. Only Merkle could not use this plea since he claimed that at the time involved in the charge, he had never had any doubt in the natural death of the victims, entered as cause of death in the certificates concerning their decease. He adamantly denied any fictitious character of those entries.

Hitler's order, dated September 1, 1939, quoted above,⁷⁴ introduced in evidence in the Nuremberg Medical case, was not precisely known

70. KOESSLER, *op. cit. supra* note 3, p. 29.

71. On the respective general procedure, see: *ibid.* pp. 67-69.

72. LANDSBERG: A DOCUMENTARY REPORT, Office of the U. S. High Commissioner for Germany (Department of State), 1951.

73. Neither of these superiors of the defendants was alive at the time when the investigation of the Hadamar atrocities began, one of them having committed suicide.

74. II and footnote 11, *supra*.

and only vaguely proven in the earlier Hadamar trial. The only pertinent evidence which defense counsel were able to present, was the testimony of a highly credible witness, the former chief prosecutor of Wiesbaden. His statements were based on hearsay, namely on information he had received from his then superior, the chief prosecutor of Frankfurt. The latter, as he related to the witness, participated at an official meeting of top justice officials who were called for this purpose to the Ministry of Justice in Berlin. On this occasion they were shown a secret order by Hitler, authorizing the application of euthanasia to incurably insane persons.⁷⁵ This order was construed by the prosecution, and probably believed by the Commission, to have covered only the application of euthanasia to incurably insane Germans, not to foreigners, and not to persons suffering from incurable tuberculosis.⁷⁶

We have now, from the document produced in the later Medical Case in Nuremberg, the hindsight knowledge that Hitler's euthanasia order contained no such limitation. The question therefore arises whether proof of the real contents of Hitler's order would have given a different legal aspect to the incriminated action of the defendants. For the purpose of this inquiry, we shall consider separately the legal effect of Hitler's order under German law, on the one hand, and international law on the other hand.

(a) UNDER GERMAN LAW

In view of the notorious nature of Hitler's dictatorship, especially as exercised during the war, it would be highly unrealistic to distinguish, in so far as German law was concerned, between the effect of a law officially published as such and a secret order by Hitler. His will was, under Nazi ideology and the then prevailing official government theory, the supreme law of the land. From the top to the bottom of the hierarchy of the Third Reich, nobody was able to challenge the proposition that Hitler's whim and will could legalize and immunize what otherwise would be criminal homicide.

It follows that, under the German law, as in force under the Third Reich, the defendants could not be held criminally responsible for the killing of either Germans or foreigners, if their action was covered by Hitler's order.

However, the Military Commission in the Hadamar trial was not supposed to apply Nazi law but international law, and under inter-

75. *Op. cit. supra* note 4, pp. 133-137.

76. *Ibid.*, p. XXIV (Introduction).

national law, the legal situation is completely different, as will be discussed presently.

(b) UNDER INTERNATIONAL LAW

The International Military Tribunal which decided the so-called RUSHA case in Nuremberg, expressed the view "that euthanasia, when carried out under state legislation against citizens of the state only, does not constitute a crime against humanity."⁷⁷ It is not necessary, for the present purpose, to examine the soundness of this proposition, since the novel theory of crimes against humanity was not applied in the "non-Nuremberg" trials, conducted by the U. S. Army in Germany,⁷⁸ and since the charge in the Hadamar case, though generally phrased as "Violation of International Law,"⁷⁹ was obviously intended and understood as the charge of a war crime. This appears from its specification. It is also inherent in the nature of a Military Commission⁸⁰ that its jurisdiction extends only to war crimes.

It seems to be fundamental that no state has the right to deprive a foreigner of his life on any other ground than upon conviction under due process of law of a crime subject to capital punishment. This is particularly so in the case of foreigners who are subject to the state's territorial jurisdiction in consequence of its belligerent occupation of their home country.⁸¹ The ill-treatment of inhabitants of occupied countries is recognized as a war crime.⁸² It does not seem to make any difference, in this respect, whether such ill-treatment takes place in the occupied territory itself, or in the zone of the interior of the occupant.⁸³

The prosecution in the Hadamar trial claimed that the Poles and Russians involved as victims were foreigners put to work in Germany in

77. United States v. Ulrich Greif *et al.*, official trial transcript (mimeographed), pp. 5397, 5398. The problem involved in Mr. Justice Holmes famous opinion in *Buck v. Bell* (1927) 274 U. S. 200, namely of sterilization, was of course a completely different one, and was, moreover, covered there as a matter of American constitutional law and not of international law.

78. KOESSLER, *op. cit. supra* note 3, pp. 31, 77, 79, 80.

79. I and footnote 7, *supra*.

80. KOESSLER, *op. cit. supra* note 3, pp. 41 *et seq.* and authorities cited there, including *Ex parte Quirin* (1942) 317 U.S.1; *In re Yamashita* (1946) 327 U.S.1. See also: GREEN, *The Military Commission*, 42 (1948) AM.J. INT.L. 832.

81. The prosecution in the Hadamar trial quoted article 46 of the Regulations attached to the Hague Convention Nr. IV of 1907, providing as part of the duties of a belligerent occupant: "Family honor and rights, individual life, and private property, as well as religious convictions and worship, must be respected." *Op. cit. supra* note 4, pp. 6, 7.

82. 15, LAW REPORTS OF TRIALS OF WAR CRIMINALS, London, 1949, p. 114.

83. *Ibid.*, p. 85 (editorially): "On a narrow interpretation, the Hague Convention does not protect civilians outside of occupied territory since the heading of Section II of the Hague Convention is 'Military authority over the territory of the Hostile State,' but this has not in fact prevented courts from extending the protection of the laws and usages of war not only to Allied civilians on enemy soil but also to their children born on enemy soil."

consequence of the belligerent occupation of their home countries by German armed forces.⁸⁴ This proposition was not challenged by the defense which contested the jurisdiction of the Commission on other, more general grounds.⁸⁵

If those Poles and Russians had this particular status, claimed by the prosecution, and most probably assumed by the Military Commission,⁸⁶ it can hardly be doubted that their extermination because of their affliction with incurable tuberculosis constituted not only a flagrant violation of international law in general, but a war crime.

The law of nations, by its very nature, overrides any inconsistent domestic law. In one of the so called subsequent Nuremberg judgments it is said:⁸⁷

As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognized that tribunals may be established and punishment imposed by the State into whose hands the perpetrators fall. Those rules of international law were recognized as paramount, and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the State or in occupied territory, has been unquestioned.

Hitler's euthanasia order, therefore, under international law, could not immunize the action of the defendants. It could not divest it of its otherwise existing character of war crime. In the above-quoted Nuremberg judgment, it is also said:⁸⁸

The very essence of the prosecution case is that the laws, the Hitler decrees and the draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime.

Nor would it, under international law, have availed the defendants to claim that what they did, pursuant to Hitler's euthanasia order, was to execute an act of state for which only their government as such could be held accountable. This act of state theory has been completely discredited, and the criminal responsibility of individuals under international law is well established.⁸⁹

84. III and footnotes 30-32, *supra*.

85. KOESSLER, *op. cit. supra* note 3, pp. 79, 80 stating: "It was a technical defect rather than going to substantial justice that the requirement of proof of this particular status of the civilian victims involved was not sufficiently complied with in those trials."

86. *Op. cit. supra* note 4, p. XXIII, quoted at III, footnote 31, *supra*.

87. So-called JUSTICE CASE (United States v. Josef Altstoetter et al.), 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS, London, 1949, p. 23.

88. 6, LAW REPORTS OF TRIALS OF WAR CRIMINALS, London, 1948, p. 49. This proposition would seem to be of general import even though it was, in that particular judgment, applied to a system of justice thus characterized by the tribunal: "The dagger of the assassin was concealed behind the robe of the jurist." *Ibid.*, p. 50.

89. 1, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, Nurnberg, 1947, 220, 221; JESSUP, A MODERN LAW OF NATIONS, 15. The contrary view, expressed, for instance, by MANNER, *The Legal Nature and Punishment of*

A *bona fide* belief of the defendants that they acted legitimately under German law, at the time concerned, could therefore not have absolved them from the charge of a crime under international law, more specifically, of a war crime. Nevertheless it is submitted that the Military Commission would have been justified in considering this mental approach of the perpetrators as a mitigating circumstance. The Commission seems to have taken a different position, as apparently revealed by the sentences meted out.⁹⁰

VII. THE PLEA OF NECESSITY

The theory of the plea of necessity,⁹¹ broadly stated, is that criminal law cannot require an attitude which is practically impossible because it is inconsistent with human nature. If it were required, then, under certain conditions, a justifying privilege may arise from an emergency situation in which serious harm for the person involved can be avoided only by his infliction of a serious harm upon another person. In a leading textbook⁹² it is said:

Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil.

The particular problem as to whether necessity may ever serve as a justification for otherwise criminal homicide was raised in two classical cases involving shipwrecked persons who killed their companions in the emergency to promote their own chances of survival. In each one of these two cases, the ruling of the court was not squarely based on principle, but on attending specific circumstances.⁹³ There seems to be some American authority to the effect that the homicidal taking of an innocent life may be justified when the perpetrator, in an emergency, has to choose between the preservation of the victim's life or of his own.⁹⁴ Section 52 of the German Criminal Code, in effect at the time of the euthanasia killings in Hadamar, provided:⁹⁵

An offense is not punishable if the offender was compelled to do it by irresistible

Criminal Acts of Violence Contrary to the Laws of War, 37 (1943) 37 AM. J. INT. L. 407, 408, would seem to have become obsolete.

90. *V. supra*.

91. The corresponding German term is "Notstand."

92. 1, WHARTON, CRIMINAL LAW (12th ed.), p. 177.

93. *Reg. v. Dudley* (1884) 15 Cox C.C. 624, 14 Q.B.D. 273; *U.S. v. Holmes* (1842) 26 Fed. Cas. 360 No. 15, 383 (C.C.E.D., Pa.).

94. WHARTON, *op. cit. supra* note 92.

95. Quoted from the translation in: THE STATUTORY CRIMINAL LAW OF GERMANY, Military Government Information Guide, War Department Pamphlet No. 31-122 (1946), p. 45.

force or under threat to himself or a relative, coupled with imminent danger to life or limb which could not otherwise be averted.

The plea of necessity is of course different from the plea of self-defense. "Self-defense excuses the repulse of a wrong whereas the rule of necessity justifies the invasion of a right."⁹⁶ The plea of self-defense attempts to justify an otherwise criminal act as apparently necessary to protect the perpetrator against an actual or reasonably believed attack; the plea of necessity purports to excuse an admitted attack upon an innocent person.⁹⁷

The plea of superior order, though frequently raised concurrently with the plea of necessity, is also different from the latter with which it is sometimes confused. The plea of superior order emphasizes the overriding effect of a duty to obey an order, incumbent upon a soldier or a person with a similar special status; the plea of necessity, if raised in a situation where the perpetrator acted pursuant to a superior order, considers his duty to obey only insofar as the risk involved in failure to obey is concerned.⁹⁸

The plea of necessity was elaborately discussed in some of the subsequent Nuremberg trials. In the so-called Flick case, one of the "Industrial Cases," several defendants were acquitted from the charge of slave labor on the ground that they had acted in a situation of necessity.⁹⁹ A very lucid elaboration of the theory of necessity in criminal law and its applicability in war crimes trials is contained in the judgment in the Krupp case where the tribunal, however, denied that this plea was available to the defendants in the light of the evidence.¹⁰⁰ Finally, in the so-called Hostages case, the judgment announced:¹⁰¹

But it is stated that in military law even if the subordinate realizes that the act he is called upon to perform is a crime, he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes duress. Let it be said at once that there is no law which requires that an innocent man must for-

96. Judgment in the Krupp Trial (United States v. Alfried Krupp et al.), 10, LAW REPORTS OF TRIALS OF WAR CRIMINALS, London, 1949, p. 148.

97. KOESSLER, *op. cit. supra* note 3, p. 93.

98. *Ibid.*

99. It was said in the pertinent part of the judgment:

"This Tribunal might be reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defense of necessity here urged in their behalf. This principle has had wide acceptance in American and English courts and is recognized elsewhere."

9, LAW REPORTS OF TRIALS OF WAR CRIMINALS, London, . . . , p. 19.

100. 10, LAW REPORTS OF TRIALS OF WAR CRIMINALS, London, 1949, pp. 146 *et seq.*

101. United States v. Wilhelm List et al., 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS, London, 1949, p. 91. For a general analysis of the plea, as discussed in various Nuremberg judgments, see: 15, LAW REPORTS OF TRIALS OF WAR CRIMINALS, London, 1949, pp. 170 *et. seq.*

feit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever. Nor need the peril be that imminent in order to escape punishment.

In the "non-Nuremberg" war crimes trials, the plea of necessity was not always recognized as something different from the plea of superior order. In the Hadamar trial the defendants raised in substance the plea of necessity when they claimed that their participation in the euthanasia action, charged as criminal, had been forced upon them by orders from superior sides, and that under the general conditions in the Third Reich and especially during the war, any attempt to withdraw from the job would have been construed as sabotage and would have exposed those attempting to resign to serious danger, perhaps capital punishment, but at least internment in a concentration camp.¹⁰² From the fact that all of the defendants were found guilty, it appears that the Commission was not impressed by this line of defense. Whether the allegations made in support of the plea were disbelieved, as a matter of fact, or whether the Commission was persuaded by the argument of the prosecution, discrediting the plea as a matter of law, cannot be established from the record since, as mentioned hereinbefore, no reasoned opinion accompanies the findings.¹⁰³ Upon a realistic appraisal of the situation prevailing under Hitler's dictatorship in Germany, especially during the war, it would seem obvious that the defendants might have made themselves suspicious and exposed themselves to serious harm should they have shown any lack of full co-operation with the policy of those in power, to avoid their personal participation in the atrocities involved. The record shows, however, a complete failure of proof that by an attempt of resignation, either granted or denied, they would have jeopardized their lives and thus exposed themselves to the danger of an evil commensurate to the one inflicted upon the victims of the action charged as criminal. Nor is there evidence or even a mere showing to the effect that such a withdrawal from the job was attempted by any of them. While under these circumstances, an absolute effect of the plea of necessity was rightly denied, by implication, the question would seem to be arguable whether the Commission should not have considered the factual situation, urged in support of the plea, as a mitigating circumstance.¹⁰⁴

102. *Op. cit. supra* note 4, Introduction, pp. XXX-XXXIII and numerous pages in transcript, covering the pleas of the individual defendants.

103. In accordance with the general practice in the "non-Nuremberg" trials.

104. It is also arguable, however, that no mitigation was proper in view of the great number of victims involved.

VIII. CONCLUSION

The attempt has been made to submit an unbiased historical and legal profile of the Hadamar Trial. There are points, it has been shown, where the result reached in that case may be vulnerable in the light of hindsight knowledge of the facts involved and the present day approach to the problem of war crimes trials. There may be disagreement, in certain legal quarters, with some of the convictions and with the severity of the sentences. Nobody, however, who intelligently reads the trial transcript, can ignore the fact that if errors were made in the adjudication of this case, they were made by a tribunal whose members honestly strived at the achievement of justice.